

JANUARY 1993

COMMISSION DECISIONS AND ORDERS

01-14-93	Ramblin Coal Company, Inc.	KENT 90-429	Pg. 1
01-25-93	Aloe Coal Company	PENN 91-40	Pg. 4
01-25-93	Cyprus Empire Corporation	WEST 91-454-R	Pg. 10

ADMINISTRATIVE LAW JUDGE DECISIONS

01-04-93	McElroy Coal Company	WEVA 92-749	Pg. 17
01-05-93	Homestake Mining Company (Amended)	CENT 91-217-RM	Pg. 26
01-28-93	Homestake Mining Company (Amended)	CENT 91-217-RM	Pg. 30
01-05-93	Consolidation Coal Company	WEVA 92-884	Pg. 34
01-06-93	Dotson & Rife Coal Company	KENT 91-670-R	Pg. 46
01-07-93	Pontiki Coal Corporation	KENT 91-97-R	Pg. 48
01-07-93	Raven Mining Company	KENT 92-434	Pg. 56
01-07-93	Consolidation Coal Company	WEVA 92-1043	Pg. 58
01-08-93	Jewell Smokeless Coal Corp.	VA 92-82	Pg. 60
01-11-93	Consolidation Coal Company	PENN 91-147-R	Pg. 82
01-13-93	Arch of Kentucky Inc.	KENT 92-350	Pg. 90
01-15-93	Little Rock Quarry Company	CENT 92-202-M	Pg. 97
01-19-93	Martinka Coal Company	WEVA 93-45-R	Pg. 99
01-21-93	Price Construction Inc.	CENT 92-33-M	Pg. 109
01-21-93	Young Brothers Incorporated	CENT 92-46-M	Pg. 111
01-21-93	Peabody Coal Company	KENT 92-223	Pg. 113
01-21-93	Ford Construction Company	WEST 90-346-M	Pg. 125
01-21-93	Magma Copper Company	WEST 92-98-M	Pg. 128
01-21-93	Consolidation Coal Company	WEVA 92-793	Pg. 130
01-25-93	Asarco, Incorporated	SE 88-82-RM	Pg. 141
01-25-93	Harman Mining Corp. (not final)	VA 92-132	Pg. 143
01-27-93	Mid-Continent Resources, Inc.	WEST 91-168	Pg. 149
01-28-93	Consolidation Coal Company	PENN 92-502-R	Pg. 172
01-28-93	Sec.Labor for Daniel Baker v. Newmont Gold Company	WEST 92-665-DM	Pg. 177
01-28-93	C.W. Mining Company	WEST 92-210	Pg. 178

ADMINISTRATIVE LAW JUDGE ORDERS

12-21-92	Laurel Coal Corporation	WEVA 92-1282	Pg. 189
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JANUARY 1993

The following cases were GRANTED review in the month of January:

Secretary of Labor, MSHA v. Pittsburg & Midway Coal Mining Company, Docket Nos. CENT 91-196, CENT 91-197, CENT 91-202. (Judge Morris, November 27, 1992)

Vincent Braithwaite v. Tri-Star Mining Company, Docket No. WEVA 91-2050-D. (Judge Fauver, December 1, 1992)

Keystone Coal Mining Company v. Secretary of Labor, MSHA, Docket Nos. PENN 91-1480-R, PENN 91-1454-R, PENN 92-54-R. (Judge Weisberger, December 7, 1992)

There were no cases filed in which review was DENIED.

COMMISSION DECISIONS AND ORDERS

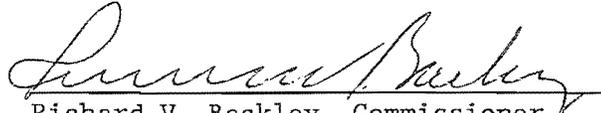
petition for discretionary review. See, e.g., Transit Mixed Concrete Co., 13 FMSHRC 175, 176 (February 1991). Relief from a final judgment or order of the Commission is available to a party under Fed. R. Civ. P. 60(b)(1) & (6) on the basis of inadvertence, mistake, surprise, excusable neglect, or any other reason justifying relief. See 29 C.F.R. § 2700.1 (Federal Rules of Civil Procedure apply, "so far as practicable" and "as appropriate," in the absence of applicable Commission rules). See, e.g., Klamath Pacific Corp., 14 FMSHRC 535, 536 (April 1992).

In both Drummond, 14 FMSHRC at 692, and Hobet, 14 FMSHRC 717, 721 (May 1992), the Commission remanded to the Secretary for recalculation civil penalties that had been initially proposed in accordance with the PPL. It appears that the judge may have erred in failing to remand the subject civil penalties to the Secretary for recalculation. The judge did not set forth a rationale for his dismissal of "the citations charging excessive history violations." 14 FMSHRC at 1032. Accordingly, we conclude that this case should be reopened and remanded to the judge for his determination of whether final relief from the decision to dismiss the citations is warranted. If the citations were dismissed solely because the penalty proposals were made in accordance with the excessive history program set forth in the PPL, the judge is directed to remand the penalty proposals to the Secretary for recalculation in accordance with Drummond.

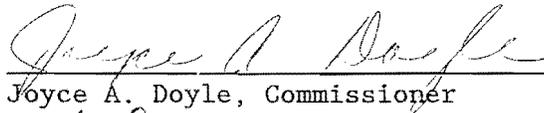
For the foregoing reasons, we grant the Secretary's petition for discretionary review, reopen this matter, vacate the judge's dismissal of the previously stayed citations, and remand this matter to the judge for further consideration.



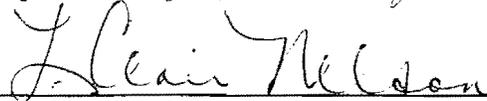
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1730 K Street NW, 6th Floor
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January 25, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 91-40
	:	PENN 91-41
ALOE COAL COMPANY	:	

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

DECISION

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" or "Act"). The issue presented is whether citations issued by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") to Aloe Coal Company ("Aloe"), pursuant to an inspection requested under section 103(g)(1) of the Mine Act,¹ are invalid because the inspection was requested by a

¹ Section 103(g)(1) states:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a

(continued...)

representative of striking employees of Aloe. Commission Administrative Law Judge Roy J. Maurer concluded that the citations were valid and assessed the civil penalties proposed by the Secretary. 13 FMSHRC 1181 (July 1991)(ALJ). We granted Aloe's petition for discretionary review. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

The salient facts of this case were stipulated by the parties. Aloe operates a surface coal mine located in Allegheny and Washington Counties, Pennsylvania. On July 10, 1989, Aloe's miners, represented by the United Mine Workers of America ("UMWA") for collective bargaining purposes, went on strike. Aloe continued mining operations with 13 replacement workers and six union employees who crossed the picket line to return to work. Stip. 3.

Two of the strikers attempted to designate the UMWA as their miners' representative on August 17, 1990, and filed their designation with the local MSHA district manager in accordance with 30 C.F.R. § 40.2(a).² Stip. 4. Following receipt of a request submitted by UMWA representative Ken Horcicak, pursuant to section 103(g)(1) of the Mine Act, an MSHA inspector conducted an inspection of the mine. Stips. 5 & 8. The request for an inspection stated that employees at the mine were not wearing required safety equipment, inadequate berms were present along haulage roads, and electrical equipment was not being properly maintained and inspected. Id. Five citations were issued alleging violations of safety standards, including citations relating to the conditions described in the inspection request. Stip. 1.

Horcicak's identity as the individual who requested the inspection was not known to Aloe at the time of the inspection.³ Aloe discovered at another

¹(...continued)

special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. § 813(g)(1).

² Section 40.2(a) provides:

A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by § 40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

³ Under 30 C.F.R. § 43.4(c), the name of the person making the inspection request is not to be given to the operator.

Commission hearing on September 28, 1990, that it was Horcicak who had requested the section 103(g) inspection. See Aloe Coal Co., 12 FMSHRC 2113 (October 1990)(ALJ). Stips. 7 & 8.

Aloe contended, in this proceeding before the judge, that Horcicak did not have the authority to request the inspection because he was neither a miner nor a representative of miners under the Mine Act. It argued that the inspection was outside MSHA's authority and that, as a consequence, the citations should be vacated.

Judge Maurer affirmed the citations and assessed the civil penalties proposed by the Secretary. 13 FMSHRC at 1183. The judge determined that the Mine Act grants the Secretary broad authority to inspect and investigate mines under section 103(a) of the Mine Act, 30 U.S.C. § 813(a),⁴ and to issue, pursuant to section 104 of the Act, 30 U.S.C. § 814, citations and orders relating to violative conditions existing at a mine. Id. He reasoned that section 103(g)(1) is "a subset of the broader substantive provision of section 103(a) that merely provides a procedure for the representative of miners to

⁴ Section 103(a) states:

Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this [Act].... In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this [Act], and his experience under this [Act] and other health and safety laws. For the purpose of making any inspection or investigation under this [Act], the Secretary ... with respect to fulfilling his responsibilities under this [Act] ... shall have a right of entry to, upon, or through any coal or other mine.

obtain an 'immediate inspection' by giving notice to the Secretary of the occurrence of a violation or imminent danger." Id. Judge Maurer concluded that section 103(g)(1) does not limit the MSHA inspector's broader authority granted under section 103(a) to conduct inspections or issue citations where violative conditions are found. Id. Judge Maurer agreed with the Secretary that mine operators historically have been subject to extensive government regulation and therefore have no reasonable expectation of privacy under the Fourth Amendment. 13 FMSHRC at 1182-83.

II.

Disposition of Issues

Aloe argues that, because the inspection was requested under section 103(g)(1) by an individual who was not a miner's representative or a miner, the MSHA inspector had no right under the Mine Act to conduct the inspection or issue the citations. Aloe further characterizes the inspection as an unreasonable search in violation of its Fourth Amendment rights.

Under section 103(g)(1), a representative of miners has "a right to obtain an immediate inspection of a mine" if such individual has reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists or an imminent danger exists. Section 103(g)(1) was included in the Mine Act because Congress determined that the safety and health of miners would be improved "to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 181, 95th Cong., 1st Sess. 29-30 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 617-18 (1978).

We first address whether striking employees of a mine operator or a representative of these individuals may request an inspection under section 103(g)(1). In Cyprus Empire Corporation, 15 FMSHRC _____, No. WEST 91-454-R, et al. (January 1993), we concluded that striking employees of a mine operator are not miners entitled to have their previously designated walkaround representative accompany an MSHA inspector, pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f), during the inspection of the mine. Slip. op. at 6. We stated that the term "miner" is defined in section 3(g) of the Act, 30 U.S.C. § 802(g), as "any individual working in a coal or other mine" and held that individuals on strike are not working in a mine. We emphasized that an individual's status as a miner is determined by whether he works in a mine and not by whether he is employed by a mine operator. Slip op. at 4. We also noted that the Commission has already determined who is a "miner" entitled to the training rights under section 115 of the Act, 30 U.S.C. § 825. Id. The Commission has previously held that job applicants and former miners on layoff do not qualify as "miners" under the Act and, hence, are not entitled to training rights. Slip op. at 4-5. (case citations omitted). Finally, we noted that the safety purposes of section 103(f) are not diminished because striking employees are not exposed to the hazards of mining, and thus do not require a walkaround representative. Slip. op. at 6.

Our reasoning set forth in Cyprus Empire applies with equal force with

respect to requests for an inspection under section 103(g)(1). Individuals on strike at a mine are not working in the mine. Accordingly, we hold that striking individuals are not miners for purposes of section 103(g)(1). Indeed, the Secretary does not dispute Aloe's position that a representative of striking individuals is not a representative of miners under section 103(g)(1). See S. Br. at 1, 4. We therefore agree with Aloe that Horcicak was not a representative of miners and consequently did not have a right to obtain an immediate inspection of Aloe's mine under section 103(g)(1).

We do not conclude, however, that the five citations issued during the inspection and the resulting civil penalties are invalid. We agree with the judge that the inspection was proper under section 103(a) of the Act and affirm the judge's finding sustaining the citations and his assessment of civil penalties.

Section 103(a) of the Mine Act expressly grants authorized representatives of the Secretary a right to enter all mines for the purpose of performing inspections under the Act. E.g., United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984). As a general proposition, all inspections of mines under section 103 are conducted pursuant to the basic authority of section 103(a). Tracey & Partners, Randy Rothermal, Tracey Partners, 11 FMSHRC 1457, 1464 (August 1989). Section 103(a) specifically authorizes "frequent inspections and investigations" for the purpose of "determining whether an imminent danger exists and . . . whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under [the Act]." The Secretary has the authority under section 103(a) to conduct "spot" inspections of Aloe's surface coal mine as well as the required semi-annual inspections. See United Mine Workers v. FMSHRC, 671 F.2d 615, 623-24 (D.C. Cir. 1982); Consol. Coal Co. v. FMSHRC, 740 F.2d 271, 273 (3rd Cir. 1984); Monterey Coal v. FMSHRC, 743 F.2d 589, 593 (7th Cir. 1984). The Supreme Court has affirmed the Mine Act's broad grant of authority to the Secretary under section 103(a) by upholding the constitutionality of warrantless inspections. Donovan v. Dewey, 452 U.S. 594, 598-608 (1981).

The Secretary possessed the authority to conduct the inspection at issue under section 103(a), even though that inspection ensued from a request from an individual who did not have the right to obtain an immediate inspection. An inspector has broad discretion to gain entry and to inspect a mine. An inspector also may inspect a mine based on information he receives from others that leads him to believe there may be safety or health violations at the mine. The fact that the information that prompted the inspection was provided to MSHA by someone who did not "have a right to obtain an immediate inspection" under section 103(g)(1) does not invalidate the inspection or the citations and orders issued during the inspection.

Section 103(g)(1) is intended to encourage miners to become involved in identifying hazards, and to afford them an active role in correcting those hazards by providing the right to request an inspection whenever miners reasonably believe that a violation or a danger exists. Nowhere in section 103(g)(1) or the legislative history is there any indication that the section was meant to limit the Secretary's broad authority to inspect mines under section 103(a). Although Horcicak did not have a "right to obtain an

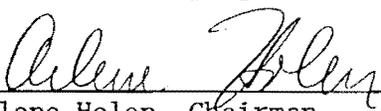
immediate inspection" under section 103(g)(1), the MSHA inspector did have the authority to inspect Aloe's mine under section 103(a) of the Act. Because the inspector had the right under section 103(a) of the Act to enter the mine to conduct the inspection, Aloe's argument that the inspection was unreasonable and in violation of Aloe's Fourth Amendment rights is without merit. See Donovan v. Dewey, supra.

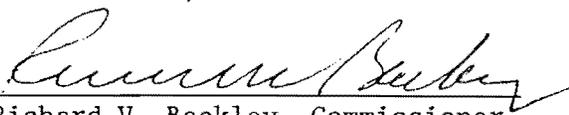
Aloe stipulated that the violations existed as alleged and that the penalty assessments proposed by the Secretary were reasonable. We therefore affirm the judge's finding that the citations and civil penalties are valid.

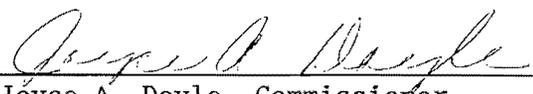
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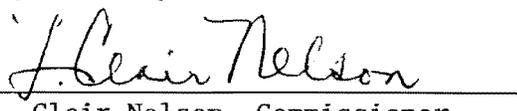
Conclusion

Based on the foregoing conclusions, we affirm the judge's decision.


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January 25, 1993

CYPRUS EMPIRE CORPORATION	:	
	:	
v.	:	Docket Nos. WEST 91-454-R
	:	WEST 91-455-R
SECRETARY OF LABOR, MINE SAFETY	:	WEST 91-456-R
& HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The sole issue is whether the striking employees of Cyprus Empire Corporation ("Cyprus") were "miners" within the meaning of the Mine Act, for purposes of being entitled to have their previously designated walkaround representative accompany an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") during a mine inspection. Commission Administrative Law Judge John J. Morris concluded that Cyprus' striking employees were not miners because they were not working in the mine at the time of the inspection. Consequently, he vacated two citations and an order of withdrawal alleging violations of section 103(f) of the Mine Act, 30 U.S.C. § 813(f), which authorizes designated walkaround representatives to accompany inspectors. Cyprus Empire Corp., 13 FMSHRC 1040 (June 1991)(ALJ). For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

The collective bargaining agreement between Cyprus and the United Mine Workers of America ("UMWA") at Cyprus' Eagle No. 5 Mine expired on May 12, 1991. The parties failed to reach a new agreement and the miners, represented by the UMWA, went on strike the next day. Cyprus halted the production of coal but continued to operate the mine on a standby basis with management employees. Cyprus did not hire replacement workers.

On May 30, 1991, while the strike was ongoing, MSHA Inspector Ervin St. Louis arrived at the mine to conduct a regular inspection under section 103(a)

of the Mine Act, 30 U.S.C. § 813(a). None of the miners' representatives previously designated by the striking employees were at the mine or in the picket line on that day and Inspector St. Louis conducted his inspection without a miners' representative. At that time, he asked the mine manager whether Cyprus would permit one of the previously designated miners' representatives to act as a walkaround representative if such a request were made. Cyprus subsequently informed the MSHA district office that it would object to a UMWA walkaround representative. Thereafter, the miners then working at the mine, who were all management employees, selected James A. Shubin, a company safety inspector, to act as their representative for walkaround purposes.

Inspector St. Louis returned to the mine on June 3, 1991, for the second day of his inspection, accompanied by Dean Carey, a striking employee who had previously been designated as a miners' representative under 30 C.F.R Part 40, and informed mine management that Carey wished to accompany him during his inspection.¹ Carey was a bargaining representative of the UMWA local and chairman of its safety committee, and had been a walkaround representative at the mine for nine years. All of the employees he represented were also on strike.

Mine Manager William Ivy discussed the matter with Inspector St. Louis and informed him that Cyprus refused to permit Carey or any other UMWA-designated representative to act as a walkaround representative. Ivy told the inspector that Shubin had been selected as the representative of the miners currently working at the mine and that Cyprus would challenge any citations issued to it as a result of its refusal to allow Carey to act as a walkaround representative.

Inspector St. Louis issued to Cyprus a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 103(f) of the Act.² Section 103(f), entitled "Participation of representatives of operators and miners in inspections," states, in pertinent part:

¹ 30 C.F.R. Part 40 contains the Secretary's regulations implementing section 103(f) of the Act.

² The "condition or practice" section of the citation states:

The representative of the miners requested at the mine office the right to accompany an MSHA authorized representative of the Secretary during an MSHA AAA inspection. Mine management refused entry to mine property. The miners are on strike and have pickets on the road to the mine outside of mine property. Mine management denied the representative of the miners entry on mine property to accompany the authorized representative during pre-inspection conference.

Exh. S-1.

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given the opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine.

30 U.S.C. § 813(f).

Within an hour after issuance of this citation, Inspector St. Louis issued to Cyprus an order of withdrawal under section 104(b) of the Mine Act, 30 U.S.C. § 814(b), for failure to abate the citation.³ After issuing this order, St. Louis inspected the mine accompanied only by Shubin.

The inspection continued the next day. When Cyprus again refused to admit Carey, the inspector issued another section 104(a) citation for a violation of section 104(b) of the Act. Inspector St. Louis completed his inspection accompanied only by Shubin.

Cyprus filed notices of contest of the citations and order and an expedited hearing was held before Judge Morris on June 11, 1991. The UMWA intervened in the proceeding. Following an evidentiary hearing, the judge found that Cyprus had not violated section 103(f) of the Mine Act and vacated the citations and the order of withdrawal. 13 FMSHRC at 1049. The judge noted that the term "miner" is defined in section 3(g) of the Mine Act, 30 U.S.C. § 802(g), as "any individual working in a coal or other mine" and that it is uncontroverted that "no union miners had worked underground since the strike had begun." 13 FMSHRC at 1047.

The judge found that Cyprus' striking employees were not "working in a coal or other mine." 13 FMSHRC at 1049. He concluded that, because the Commission and Courts of Appeal have not "gone beyond the plain meaning of the statutory words in section 3(g)," Cyprus' striking employees did not qualify as miners under section 103(f). Id. The judge vacated the two citations and the order. The Commission granted the UMWA's petition for discretionary review. The Secretary did not seek review of Judge Morris' decision.

³ Inspector St. Louis did not order the actual withdrawal of miners. The order stated that it was "a nonclosure order" that did not affect any area of the mine. Exh. S-2.

II.
Disposition of Issues

On review, the UMWA argues that the Commission should construe the term miner broadly to include employees who are on strike. Specifically, the UMWA contends that the strikers' previously designated walkaround representative should be entitled to accompany an MSHA inspector on an inspection during the strike. The UMWA maintains that, since strikers remain the employees of an operator, they should, by analogy, remain the miners of the operator. For the reasons stated below, we reject the UMWA's arguments and affirm the judge.

The "primary dispositive source of information [about the meaning of statutory terms] is the wording of the statute itself." Wyoming Fuel, 14 FMSHRC 1282, 1286 (August 1992). Neither party disputes that only miners are entitled to designate a walkaround representative to accompany an MSHA inspector. Miner is defined in the Act as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). The legislative histories of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), and the Mine Act provide no background to the language of this definition. Under the definition, an individual need not be an employee of an operator to qualify as a miner under the Mine Act. Likewise, an individual who is employed by a mine operator is not necessarily a miner under the Act unless he or she is working in a mine, as that term is defined in section 3(h). Thus, a person's status as a miner is determined not by the fact that he is employed by an operator, but rather by whether, as the statute provides, he works in a mine.

While the issue in this case is one of first impression, the Commission, as noted by the judge, has previously examined the term "miner" in the context of training rights under section 115 of the Act, 30 U.S.C. § 825. Finding the section 3(g) definition of "miner" determinative, the Commission held that, for section 115 purposes, job applicants and former miners on layoff did not qualify as "miners" under the Act and, hence, were not entitled to training rights under section 115. Emery Mining Corp., 5 FMSHRC 1391 (August 1983), aff'd in part, rev'd in part, 783 F.2d 155 (10th Cir. 1986)(job applicants); UMWA on behalf of James Rowe et al., etc. v. Peabody Coal Co., 7 FMSHRC 1357 (September 1985), Secretary on behalf of I.B. Acton, et al. v. Jim Walter Resources, 7 FMSHRC 1348 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987) Secretary on behalf of Jerry Dale Aleshire et al. v. Westmoreland Coal Co., 11 FMSHRC 960 (June 1989)(individuals on laidoff).

In Peabody, the Commission reasoned:

Underlying our holding is our belief that the Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners.

* * * * *

We are not prepared to interpret the rights and obligations mandated by the Act through interpretation of a private contractual agreement unless required to do so by the Act itself. See Local Union No. 781, District 17, United Mine Workers of America v. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1179 (May 1981).

* * * * *

We recognize that under the National Labor Relations Act and the Railway Labor Act, statutes governing labor-management relations, laid-off employees in general and laid-off employees with a right to reinstatement based upon seniority have been held to be entitled to certain rights granted by those acts.... However, these [principles] arise under statutes whose very purpose is the governance of labor-management relations.... The entirely discrete purpose of the Mine Act, and the nature of the rights granted by section 115, prevent us from transferring this reasoning to the Mine Act.

7 FMSHRC at 1364-65. These same general principles apply in this case.

There is no dispute that, for purposes of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1988) ("NLRA"), the strikers in this case were "employees" of Cyprus at the time of the inspection. Section 2(3) of the NLRA, 29 U.S.C. § 152(3), defines the term "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." In the Mine Act, however, which is the proper focus of our inquiry, Congress chose to define miners as individuals who work in a mine, rather than as employees of an operator. The Mine Act's definition of "miner" is not grounded in the rights of employees under the NLRA or under private collective bargaining agreements. See Peabody, 7 FMSHRC at 1364-65. We perceive no statutory warrant in the Mine Act for treating an operator's striking employees as "miners."

The courts also have analyzed the Mine Act's definition of miner in the context of training rights. In National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 704 (3rd Cir. 1979), a case involving challenges by operators to the Secretary's training regulations, the court stated that "the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction activities." (emphasis in original). In Peabody, the D.C. Circuit, in affirming the Commission, held that laid-off individuals are not miners for purposes of the training rights granted under section 115 of the Act because such individuals are not working in a mine, exposed to the hazards of mining, or employed by a mine operator. 822 F.2d at 1147-49. Finally, in Emery Mining, the court held that individuals who had obtained safety training at their own expense in order to be eligible for employment by the operator were not entitled to compensation for such training because they were not miners as defined in the Act. 783 F.2d at 157-59. These decisions are consistent with the result we

reach herein.

The UMWA argues that the Commission must defer to the Secretary's interpretation of the term "miner" as applied to walkaround rights. The Secretary's analogous construction of the term "miner," however, was rejected as unreasonable by the Peabody court. 822 F.2d at 1151. Moreover, the Secretary has not appealed the judge's adverse decision in the present case or otherwise participated in this appeal. She may well have abandoned her position that striking miners have the right under section 103(f) to designate a walkaround representative. In any event, the wording of the statute sets forth Congress' intent as to the definition of "miner." Even if there were remaining ambiguity, the Secretary has presented no position to which the Commission could accord weight.

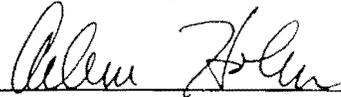
Contrary to the contentions of the UMWA (UMWA Br. at 4-5), the right of miners to refuse to work in the face of hazardous conditions, as set forth in section 105(c) of the Act, 30 U.S.C. § 815(c), and to file for compensation under section 111, 30 U.S.C. § 821, will not be affected by our affirmance of the judge's decision. Miners do not lose their status as miners by exercising their right under the Mine Act to refuse to work in the face of hazardous conditions or their right to compensation when they are withdrawn from the mine by order of the Secretary. These are rights specifically provided under the Mine Act. The term "miner" must be interpreted in the context of the particular Mine Act section in which it appears in order to effectuate the safety purposes of each section. Furthermore, the safety purposes of section 103(f) were not diminished in this instance because the striking employees were not exposed to the hazards of mining and, thus, did not require a walkaround representative. Those miners who were working in the mine at the time were represented by their chosen walkaround representative. When striking employees return to work, they once again have the right to designate a walkaround representative. If they believe that violations or imminent dangers exist, their representative can "obtain an immediate inspection by giving notice to the Secretary or his representative of such violation[s] or danger[s]" under section 103(g)(1), 30 U.S.C. § 813(g)(1).

In conclusion, we hold that the striking employees of Cyprus were not entitled to have their previously designated walkaround representative accompany the MSHA inspector during his inspection of the mine.

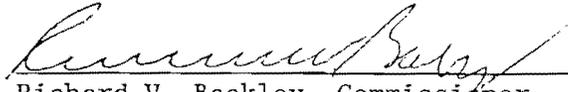
III.

Conclusion

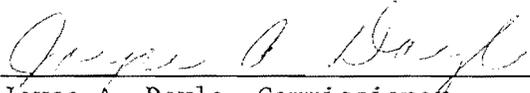
For the foregoing reasons, we affirm the judge's decision.



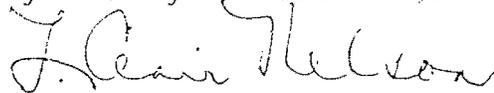
Arlene Holen, Chairman



Richard V. Backley, Commissioner



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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 4 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-749
Petitioner : A. C. No. 46-01437-03770
v. :
: McElroy Mine
MCELROY COAL COMPANY, :
Respondent :

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia, for
the Secretary;
Daniel E. Rogers, Esq., CONSOL, Inc., Pittsburgh,
Pennsylvania, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

In this docket, the Secretary of Labor seeks a civil penalty of \$1300 for a single alleged violation of 30 C.F.R. § 75.403 cited in section 104(d)(2) Order No. 3331715. Pursuant to notice, a hearing was held on the alleged violation in Wheeling, West Virginia, on September 9, 1992. Both parties have filed posthearing briefs, which I have duly considered in making the following decision.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 6-8):

1. McElroy Coal Company is the operator of the McElroy Mine, which is the subject of this proceeding.
2. Operations at the McElroy Mine are subject to the Mine Safety and Health Act.
3. The undersigned Administrative Law Judge has jurisdiction to decide this case.

4. MSHA Inspector Charles J. Hall was acting in an official capacity as a duly authorized representative of the Secretary of Labor when he issued Order No. 3331715 on October 31, 1991.

5. A true copy of Order No. 3331715 was properly served on the operator.

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

7. Respondent is a large operator and has an average history of prior violations for a mine operator of its size.

DISCUSSION

Section 104(d)(2) Order No. 3331715 was issued by MSHA Inspector Charles J. Hall on October 31, 1991. The inspector cited a violation of the mandatory safety standard found at 30 C.F.R. § 75.403¹ and the cited condition or practice is described as follows:

The floor of the numbers 1, 2 and 3 entries and connecting crosscuts in the 8 left off 4 south section was not adequately rock dusted in the following locations. The No. 2 (intake) entry from plus 35+50 to 39+50, a distance of 400 feet. No. 1 entry (return) from 34+50 to 38+50, a distance of 400 feet. No. 3 entry (intake) from 35+20 to 39+50, a distance of 430 feet. Eight rock dust samples were collected to substantiate this order. This was unwarrantable on part of the operator because the section foreman should have observed the black bottom area throughout the section. From 10-1-90 to 10-1-91, there have been 41 violations of 75.400 cited at this mine.

¹/ 30 C.F.R. § 75.403, entitled "Maintenance of incombustible content of rock dust," provides 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 aircourses shall be no less than 80 per centum. . . .

On October 31, 1991, Inspector Hall was conducting a weekly ABC spot inspection of respondent's McElroy Mine. Such an inspection is required for all mines which, on average, liberate more than one million cubic feet of methane gas within a 24 hour period, and McElroy Mine is such a mine. He was accompanied that day by Thomas Stern, a union safety committeeman, Thom Biega, a company safety inspector and training instructor, and also a regional safety inspector for the company, Pat Korsnick.

Inspector Hall observed that the floor of the mine in the cited areas was black, indicating to him that the area had not been adequately rock dusted. Mr. Stern corroborated the inspector's testimony that the floor of the cited areas was black. Various witnesses presented by the operator testified that the floor in the cited areas was grey, not black, and that these areas were adequately rock dusted. However, these witnesses also acknowledged that certain places in the cited areas were not adequately rock dusted. Section Foreman Corley testified that the No. 3 entry did need dusting, and that he had planned to rock dust that area prior to the issuance of the order by Inspector Hall. In addition, Thom Biega, a safety inspector for the respondent, acknowledged that there were several areas in the No. 2 entry which needed to be rock dusted. Finally, Jim Siko, Superintendent of the McElroy Mine, admitted that prior to abatement of the order issued by Inspector Hall, rock dusting was needed in at least one area in the No. 1 entry. It should also be noted that it is undisputed that the areas which Inspector Hall cited were in an active area of the mine.

Opinion evidence aside, Inspector Hall also obtained eight spot samples off the floor throughout the cited areas, using a so-called rock dust kit. He used a scoop, 6 inches long and 6 inches wide to collect the dust. The technique he used was to scoop down an inch deep and from rib to rib across the floor, to collect the accumulated dust mixture. He acknowledges that in scooping up the sample, he had to avoid wet material because it would not go through the 20 mesh screen that is used to strain out lumps of coal and rock.

After the samples were collected, they were secured in separate plastic bags and each individually collected sample was marked with an identification tag. Inspector Hall then placed the eight plastic bags into a larger canvas bag, which he then inadvertently left in Mr. Biega's office when he left the mine that day. The samples were returned to Inspector Hall by another MSHA inspector who visited the McElroy Mine early the following week. Although the samples were left unattended at the mine site

over a weekend, when they were returned to Inspector Hall, they were in the same condition as when he had placed them in Mr. Biega's office. He then prepared and sent the samples to the MSHA laboratory at Mt. Hope, West Virginia for analysis.

Results from the laboratory analysis of the samples collected and submitted by Inspector Hall revealed the following:

<u>SAMPLE NO.</u>	<u>INCOMBUSTIBLE CONTENT</u>
1	41%
2	46%
3	37%
4	48%
5	43%
6	32%
7	29%
8	24%

None of the samples collected were in compliance with the requirements of 30 C.F.R. § 75.403 because the incombustible content of the material collected in each sample was below 65 percent. Furthermore, the samples taken by Inspector Hall in the No. 1 return (Sample Nos. 4 and 5) were further out of compliance inasmuch as the regulation requires that the incombustible content in the return entry shall be at least 80 percent.

Inspector Hall further opined that these eight samples provided a representative sample of the dry material on the mine floor in the cited area. Mr. Stern again concurs with the inspector's opinion. Respondent, on the other hand, objects to the methodology of the inspector's sampling technique. Respondent alleges that the material in the dust samples collected by Inspector Hall were selectively, rather than randomly, chosen for collection based upon Inspector Hall's judgment as to whether certain areas were too wet to sample. Wet material was admittedly intentionally excluded by Inspector Hall from the materials he collected for sampling because it would not go through the mesh screen. But, I note that any wet material would very likely contain the identical percentage of combustible content as dry material adjacent to it as soon as it dried out, which it would if subjected to heat and flame.

In any event, it is well settled by Commission precedent that accumulations of coal and coal dust, even when wet or damp, are combustible, and do pose an explosion or ignition hazard if an ignition source is present. Utah Power and Light Company v. Secretary of Labor, 12 FMSHRC 965, 969, (May 1990); Black Diamond Coal Mining Company, 7 FMSHRC 1117, 1120-1121 (August 1985).

Respondent also objects because Inspector Hall took none of the eight samples he did take from the roof or ribs in the cited area, but I note that band sampling of an entry is not required.

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)² 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.

Therefore, I find the sample collected by Inspector Hall provided a representative sample of the conditions of the floor in the cited areas because they were collected in eight widely scattered locations throughout the cited areas and because his collection methods were allowable, reasonable, and produced a reliable and representative result.

^{2/} Section 304(d) of the 1969 Coal Act is identical in language to 30 C.F.R. § 75.403.

Inspector Hall also determined that the violation for which he issued Order No. 3331715 was significant and substantial (S&S); because the area cited was a very large, active area of the mine, there was electrical equipment operating in the area which could provide an ignition source, and the mine is gaseous.

A "S&S" 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 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).

Government Exhibit No. 4, the Dust Sampling Lab Report, by itself, establishes that the eight dust samples submitted had incombustible contents less than the required percentages by a substantial margin in each instance. This evidence, alone, without more, establishes a violation of 30 C.F.R. § 75.403 to my satisfaction.

The area which Inspector Hall observed as being inadequately rock dusted totalled approximately 1800-1900 linear feet of mine floor located within the three entries and various crosscuts constituting the Eight Left off Four South section of the mine. At the time the order was issued, respondent was producing coal and roof bolting in the cited area. This activity involved several pieces of mining equipment which could have provided an ignition source. This mine is also a gaseous mine which liberates more than one million cubic feet of methane in a 24 hour period. The presence of methane at these levels increases the hazard created by inadequate rock dusting in that any ignition or explosion and resultant fire could be spread more quickly and become a very serious incident/accident.

Because the cited area which was inadequately rock dusted was active and a relatively large area which also contained multiple ignition sources, in addition to potentially high levels of methane, it was at least reasonably likely that in the course of normal continued mining operations, a serious injury resulting in lost workdays or restricted duty would occur.

In the event an ignition occurred, the loose coal and coal dust which had not been properly neutralized by rock dust could contribute to the hazard of fire or further explosion or at least propagate the results of an otherwise unrelated explosion and/or fire which could in turn spread throughout and even beyond the cited areas. Consequently, the individuals working in the area could be burned, overcome by smoke or seriously injured by the force of the explosion. I therefore conclude that the violation was S&S.

The Secretary also urges that I find this S&S violation to be an "unwarrantable failure."

The Commission has held that an "unwarrantable failure" to comply with a mandatory standard means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company,

9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

I concur with the inspector that the violation occurred as a result of a high degree of negligence on the part of respondent as the conditions were readily observable and because it is undisputed that Inspector Hall had personally discussed proper rock dusting procedures with mine management on several previous occasions.

Inspector Hall testified that the floor was black in the cited areas. The Union Safety Committeeman, Mr. Stern, also testified that it was obvious upon entering the cited area that the floor was black -- "real black" (Tr. 123). And he also confirmed that no rock dusting had been done on the floor in these areas. Moreover, there was no rock dust beneath the surface according to this witness.

As I noted above, Inspector Hall has discussed rock dusting requirements previously with management officials at the mine, including Mr. Corley, the section foreman on the cited section. Mr. Stern also has had discussions with mine officials concerning rock dusting practices. Additionally, the company has been cited for failing to adequately rock dust on a number of previous occasions, and Mr. Stern reports that he has personally been prevented from adequately rock dusting on occasion.

The obviousness of the condition visually combined with the laboratory results on the analysis of the samples taken by Inspector Hall demonstrate to me that the operator was way out of compliance with the cited mandatory standard and should have known that these cited areas were not adequately rock dusted. In addition, the prior discussions and previously issued citations should have alerted the company to the need for heightened scrutiny to assure compliance. Consequently, the company's failure to heed the warnings given them through discussions and previous citations, as well as the failure to correct an obviously violative condition, combined with the results of the

laboratory analysis, which showed that the conditions were far out of compliance, establish that the company's action was clearly the result of aggravated conduct indicating an unwarrantable failure to comply with the cited mandatory safety standard.

With regard to the assessment of a civil penalty for the violation, respondent has an average history of violations, is a large operator, and demonstrated good faith by promptly abating the violation at bar. Furthermore, as more fully discussed above, I concur in the inspector's high negligence and "S&S" findings. I also find the violation to be a serious one.

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 of \$1300 is reasonable and appropriate.

ORDER

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

1. Section 104(d)(2) Order No. 3331715 **IS AFFIRMED.**
2. McElroy Coal Company is **ORDERED TO PAY** the sum of \$1300 within 30 days of the date of this decision as a civil penalty for the violation found herein.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

JAN 5 1993

HOMESTAKE MINING COMPANY, Contestant,	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. CENT 91-217-RM
	:	Citation No. 2653241; 8/8/91
	:	
v.	:	Homestake Mine
	:	
	:	Docket No. CENT 91-226-RM
	:	Order No. 2653196; 8/23/91
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Lead Mine
	:	
	:	Mine I.D. 39-00055
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. CENT 92-344-M
	:	A.C. No. 39-00055-05681
	:	
	:	
v.	:	Homestake Mine - Lead
	:	
HOMESTAKE MINING COMPANY OF CALIFORNIA, Respondent	:	
	:	

AMENDED DECISION

Appearances: Henry Chajet, Esq., Ann Simmons, Esq., JACKSON & KELLY, Washington, DC,
for Contestant/Respondent;
Robert J. Murphy, Esq., Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner;
Gene Ruff, President, Local 7044, United Steelworkers of America, Lead, South Dakota,
for United Steelworkers of America.

Before: Judge Morris

These consolidated cases are contest proceedings and a civil penalty proceeding arising pursuant to the Federal Mine Safety

and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalty proceeding herein is for the alleged violations of mandatory regulations enacted pursuant to the Act.

An expedited hearing commenced in Docket No. CENT 91-217-RM on September 17, 1991. At the hearing held in Denver, Colorado, the United Steelworkers of America were granted leave to intervene.

After an extensive conference, Contestant Homestake Mining Company of California ("Homestake") was granted leave to withdraw its motion for an expedited hearing. The case was further stayed until the Secretary proposed a civil penalty.

On November 5, 1991, the Judge vacated Closure Order No. 3630266.

On July 16, 1992, Docket Nos. CENT 91-217-RM and CENT 91-226-RM were consolidated.

On October 21, 1992, Docket No. CENT 92-344-M was assigned to the Presiding Judge.

On October 27, 1992, Docket Nos. CENT 91-217-RM, CENT 91-226-RM, and CENT 92-344-M were consolidated.

On November 6, 1992, a settlement motion, executed by Contestant and Secretary, was filed. The motion was also served on Cathy M. Dupree, the Miners' Representative of Homestake Mining Company.

No objection has been filed to the settlement motion.

In support of the motion, Contestant and Secretary state as follows:

Order No. 3909125

(a) A section 104(g)(1) Order No. 3909125 was issued to Homestake by the Secretary on March 25, 1991, alleging a violation of 30 C.F.R. § 48.7(c). This order was later assessed a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed penalty on this Order from \$20,000 to \$10,000.

Citation No. 3909122

(b) A Section 104(a) Citation No. 3909122 was issued to Homestake by the Secretary on March 16, 1992, alleging a violation of 30 C.F.R. § 57.14205. This order was later assessed a penalty of \$9,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed civil penalty on this Citation from \$9,000 to \$6,000.

Citation No. 3901926

(c) A Section 104(a) Citation No. 3909126 was issued to Homestake by the Secretary on Mary 25, 1991, alleging a violation of 30 C.F.R. § 48.7(c). This Citation was later assessed a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed civil penalty on this Citation from \$20,000 to \$15,000.

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

ORDER

1. The stay of proceeding is **LIFTED**.
2. The settlement agreement is **APPROVED**.
3. Order No. 3909125 and the amended penalty of \$10,000 are **AFFIRMED**.
4. Citation No. 3909122 and the amended penalty of \$6,000 are **AFFIRMED**.
5. Citation No. 3901926 and the amended penalty of \$15,000 are **AFFIRMED**.
6. Contestant/Respondent Homestake Mining Company is **ORDERED TO PAY** to the Secretary of Labor the sum of \$31,000 within 40 days of the date of this amended decision.

7. Contest proceedings CENT 91-217-RM and CENT 91-226-RM are **DISMISSED**.


John J. Morris
Administrative Law Judge

Distribution:

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(Certified Mail)

Ms. Cathy M. Dupree, Miners' Representative, Mr. Gene Ruff, President, Local 7044, United Steelworkers of America, c/o HOMESTAKE MINING COMPANY OF CALIFORNIA, 215 West Main Street, P.O. Box 875, Lead, SD 57754-1603 (Certified Mail)

Robert J. Murphy, Esq., Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
 1244 SPEER BOULEVARD #280
 DENVER, CO 80204-3582
 (303) 844-5266/FAX (303) 844-5268
 January 28, 1993

HOMESTAKE MINING COMPANY, Contestant,	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. CENT 91-217-RM
	:	Citation No. 2653241; 8/8/91
	:	
v.	:	Homestake Mine
	:	
	:	Docket No. CENT 91-226-RM
	:	Order No. 2653196; 8/23/91
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Lead Mine
	:	Mine I.D. 39-00055
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. CENT 92-344-M
	:	A.C. No. 39-00055-05681
	:	
v.	:	
	:	Homestake Mine - Lead
	:	
HOMESTAKE MINING COMPANY OF CALIFORNIA, Respondent and	:	
	:	
UNITED STEELWORKERS OF AMERICA, LOCAL 7044, Intervenor	:	

AMENDED DECISION

Appearances: Henry Chajet, Esq., G. Lindsay Simmons, Esq.,
 JACKSON & KELLY, Washington, D.C.,
 for Contestant/Respondent;
 Robert J. Murphy, Esq., Kristi Floyd, Esq., Office
 of the Solicitor, U.S. Department of Labor,
 Denver, Colorado,
 for Respondent/Petitioner;
 Gene Ruff, President, Local 7044, United Steel-
 workers of America, Lead, South Dakota,
 for United Steelworkers of America.

Before: Judge Morris

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An expedited hearing commenced in Docket No. CENT 91-217-RM on September 17, 1991. At the hearing held in Denver, Colorado, the United Steelworkers of America were granted leave to intervene.

After an extensive conference, Contestant Homestake Mining Company of California ("Homestake") was granted leave to withdraw its motion for an expedited hearing. The case was further stayed until the Secretary proposed a civil penalty.

On November 5, 1991, the Judge vacated Closure Order No. 3630266.

On July 16, 1992, Docket Nos. CENT 91-217-RM and CENT 91-226-RM were consolidated.

On October 21, 1992, Docket No. CENT 92-344-M was assigned to the Presiding Judge.

On October 27, 1992, Docket Nos. CENT 91-217-RM, CENT 91-226-RM, and CENT 92-344-M were consolidated.

On November 6, 1992, a settlement motion, executed by Contestant and Secretary, was filed. The motion was also served on Cathy M. Dupree, the Miners' Representative of Homestake Mining Company.

No objection has been filed to the settlement motion.

In support of the motion, Contestant and Secretary state as follows:

Order No. 3909125

(a) A section 104(g)(1) Order No. 3909125 was issued to Homestake by the Secretary on March 25, 1991, alleging a violation of 30 C.F.R. § 48.7(c). This order was later assessed a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed penalty on this Order from \$20,000 to \$10,000.

Citation No. 3909122

(b) A Section 104(a) Citation No. 3909122 was issued to Homestake by the Secretary on March 16, 1992, alleging a violation of 30 C.F.R. § 57.14205. This order was later assessed a penalty of \$9,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed civil penalty on this Citation from \$9,000 to \$6,000.

Citation No. 3901926

(c) A Section 104(a) Citation No. 3909126 was issued to Homestake by the Secretary on May 25, 1991, alleging a violation of 30 C.F.R. § 48.7(c). This Citation was later assessed a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed civil penalty on this Citation from \$20,000 to \$15,000.

Citation and Order No. 2653196

(d) A section 104(a)/107(a) Citation and Order No. 2653196 were issued to Homestake on August 23, 1991, alleging a violation of 30 C.F.R. § 57.14101(a)(3). The Citation and Order were later assessed with a penalty of \$20,000.

On the basis of information supplied by Homestake, the Secretary agreed to reduce the proposed penalty from \$20,000 to \$15,000.

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

ORDER

1. The stay of proceeding is **LIFTED**.
2. The settlement agreement is **APPROVED**.
3. Order No. 3909125 and the amended penalty of \$10,000 are **AFFIRMED**.

4. Citation No. 3909122 and the amended penalty of \$6,000 are **AFFIRMED**.

5. Citation No. 3901926 and the amended penalty of \$15,000 are **AFFIRMED**.

6. Citation/Order No. 2653196 and the amended penalty of \$15,000 are **AFFIRMED**.

7. Contestant/Respondent Homestake Mining Company is **ORDERED TO PAY** to the Secretary of Labor the sum of \$46,000 within 40 days of the date of this amended decision.

8. Contest proceedings CENT 91-217-RM and CENT 91-226-RM are **DISMISSED**.


John J. Morris
Administrative Law Judge

Distribution:

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(Certified Mail)

Ms. Cathy M. Dupree, Miners' Representative, Mr. Gene Ruff, President, Local 7044, United Steelworkers of America, c/o HOMESTAKE MINING COMPANY OF CALIFORNIA, 215 West Main Street, P.O. Box 875, Lead, SD 57754-1603 (Certified Mail)

Robert J. Murphy, Esq., Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 5, 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-884
Petitioner : A. C. No. 46-01455-03886
: :
v. : Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820.

Order Nos. 3716170, 3716171, and 3716172 were issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), for alleged violations of 30 C.F.R. § 75.1105. A hearing was held on November 16, 1992, the transcript has been received and the parties have filed post hearing briefs.

Section 104(d) of the Act, supra, 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 hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any cita-

tion 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.

30 C.F.R. § 75.1105, which restates section 311(c) of the Act, 30 U.S.C. § 871(c) sets forth the following:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fire proof construction.

Order No. 3716170 dated August 27, 1991, and challenged herein, charges a violation for the following alleged condition or practice:

The #17 thro mor pump operating at #24 block along the 15 south haulage is not ventilated with a current of air that is coursed directly to the return. The 10" vent tube provided has fallen down and separated 3 different places on the other

side of the 15 south escapeway and the air current at this location is leaking into the escapeway as cited on citation #3716169.

When this area was traveled on 8-8-91 this same vent tube was found to be leaking and in need of extra support. The condition was discussed with the company representative at that time. The company has failed to take adequate measures to prevent this condition from occurring even though they had knowledge of the area and condition.

This is a repeat violation of standard 75.1105, as 11 citations were issued for violations of 75.1105 during the last quarters (sic) inspection and this is the 3rd time this quarter that 75.1105 has been cited.

The problems of the fire proofing and ventilation of the electrical installations at this mines (sic) were discussed at length with management at both the last quarter close out and R.V.R.P. meeting.

Two other orders (#3716171 and #3716172) were issued today for similar conditions at other electrical installations inspected.

Order No. 3716171 dated August 27, 1991, also challenged herein, charges a violation for the following alleged condition or practice:

The #20 thro mor pump located at #27 block along the 15 south haulage is not ventilated with a current of air that is coursed directly to the return. The 10" vent tube used to ventilate this pump has fallen down in the intake escapeway so that any smoke from a fire on this pump would polute (sic) both the track and escapeway.

The vent tube has not been knocked down by fallen material or any abnormal roof condition but looks as if the support wires have rusted and the spads pulled out of the head coal.

This is a repeat violation of standard 75.1105, as 11 citations were issued for violations of 75.1105 during the last quarters (sic) inspection and this is the 4th time this quarter that 75.1105 has been cited on the electrical installations.

Two other orders (#3716170 and #3716172) were issued today for similar conditions at other electrical installations inspected.

The problems of the fire proofing and ventilation of the electrical installations at this mines (sic) were discussed at length with management at both the last quarter close out and R.V.R.P. meeting, and the company has failed to take adequate steps to correct their problem.

Order No. 3716172 dated August 27, 1991, similarly challenged herein, charges a violation for the following alleged condition or practice:

The #160 rectifier located at #29 block of the 15 south haulage is not ventilated with a current of air that is coursed directly to the return.

When tested no air is being pulled into the vent tube provided in the area and air is leaking from the area into the track entry thru (sic) holes in the frontwall. After examination the vent tube was found to be down in the old belt entry so that smoke from a fire on this rectifier would quickly polute (sic) both the track and belt air used to ventilate the 6 Butt and 7 Butt sections.

The vent tube does not look to have been torn down by abnormal roof conditions but looks to have fell down because of rusty wires and spads that pulled out of the top.

This is a repeat violation of 75.1105, as 11 citations were issued for violations of 75.1105 during the last quarters (sic) inspection and this is the 5th time this quarter that 75.1105 has been cited on the electrical installations.

Two other orders (#3716170 and #3716171) were issued today for similar conditions at other electrical installations inspected.

The problems of the fire proofing and ventilation of the electrical installations at this mines (sic) were discussed at length with management at the last quarter close out and R.V.R.P. meeting and the company has failed to take adequate steps to correct their problem.

The inspector found that the foregoing violations were significant and substantial and that they resulted from an unwarrantable failure on the part of the operator.

Prior to going on the record, the parties agreed to the following stipulations (Tr. 4-6):

(1) the operator is the owner and operator of the subject mine;

(2) the operator is subject to the jurisdiction of the Mine Act;

(3) I have jurisdiction in this case;

(4) the inspector who issued the subject orders was a duly authorized representative of the Secretary;

(5) true and correct copies of the subject orders were properly served upon the operator;

(6) copies of the subject orders and terminations thereof at issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any matters asserted therein;

(7) payment of any penalty will not affect the operator's ability to continue in business;

(8) the operator demonstrated good faith abatement;

(9) the operator has an average history of prior violations;

(10) the operator is large in size;

(11) a section 104(d) chain has been established;

(12) the fact of the violation is not contested in any of these orders;

Without objection, the stipulations were accepted (Tr. 6). In addition, it was agreed that the three orders would be tried as a group (Tr. 20-21).

Not only are the violations admitted, but there is no dispute with respect to the conditions described by the inspector in the orders and at the hearing (Tr. 31-32, 38-40, 44-47, 142-143, 147-149).

The first issue to be resolved then is whether the violations were significant and substantial. The Commission has held that a violation is properly designated as S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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.

The first element of the Commission's test is satisfied because the violations are admitted. The second element also is satisfied because the evidence demonstrates that should a fire occur in the installations and the air not be vented directly to the return, noxious air or smoke would travel to the faces where men were working (Tr. 68-69). The violation thus presented a discrete safety hazard. The fourth test is likewise met since individuals could inhale polluted air or become trapped by it (Tr. 71). It is with respect to the Commission's third requirement that the findings of significant and substantial herein, like those in many prior cases, founder. As the inspector acknowledged, the cited pumps and rectifiers were operating properly and had no permissibility defects (Tr. 33, 73-74, 76). Nothing else was cited with respect to the electrical equipment (Tr. 74). The inspector agreed that the potential danger would arise from a malfunction in the subject electrical equipment. However, on the day in question he saw no malfunction in the equipment (Tr. 76). This being so, it cannot be found that the Secretary has proved there was a reasonable likelihood that the hazard would result in injury.

I reject the Secretary's contention that in determining whether or not there was a reasonable likelihood that the hazard would result in injury, the emergency (in this case a fire in the electrical installation), must be presumed to have occurred (Secretary's brief p. 10). The Secretary does not define "emergency", or in any way indicate what standards in addition to § 75.1105 would qualify under the "emergency" umbrella. The scope of what she proposes, is therefore, unexplained. Admittedly, § 75.1105 is designed to prevent the serious effects that

could arise from a fire in an electrical installation. This does not, however, mean that the standard presupposes the likelihood of the occurrence of the hazardous situation. What the standard does is set forth the ventilation requirements for electrical installation which must be followed in all instances. The standard is silent on likelihood or possibility or probability or any like inquiry. Degrees of chance are relevant to evaluation of gravity, of which S&S is a particular variant. Nowhere in the standard or elsewhere is there any basis for adopting a presumption that would do away with the Commission's requirements of proof. The inevitable consequence of giving the Secretary the benefit of the proposed presumption would be to render this violation and whatever other ones qualify as emergencies, per se significant and substantial. By so doing, the third step of the Commission's test for S&S would be vitiated, because the very facts which the Commission in Mathies required the Secretary to prove would be assumed to have happened without reference to what actually transpired in the case. The Commission's conclusion that a confluence of factors must exist in order to establish S&S is premised upon a case by case evaluation of the particular circumstances as adduced through the evidence of record. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988).

Also without merit is the Secretary's assertion that the subject violation is S&S, because if there were an immediate risk of fire, the violation would constitute an imminent danger rather than just being S&S (Secretary's brief p. 10). The Secretary has misframed the issue. A reasonable likelihood of fire can exist without there being an immediate danger. Consideration of imminent danger involves analysis of the facts pursuant to precepts and rules laid down by the Commission for that purpose. Wyoming Fuel Co., 14 FMSHRC 1282 (August 1992); Utah Power & Light Co., 13 FMSHRC 1617 (October 1991); Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989). The Secretary submits no such analysis of imminent danger. She cannot make out her case by confusing the concepts of imminent danger and significant and substantial, because under governing law they are separate and distinct. It is recognized that in several recent decisions the Commission declined to rule on the propriety of the presumption advanced by the Secretary herein, because in those cases the issue had not been presented at the trial level. Shamrock Coal Company, Inc., 14 FMSHRC 1300 (August 1992); Shamrock Coal Company, Inc., 14 FMSHRC 1306 (August 1992); Beech Fork Processing Inc., 14 FMSHRC 1316 (August 1992). For the reasons set forth herein, I have no difficulty in declining to accept and apply a presumption which I perceive to constitute a material and unsupported departure from current Commission interpretation and practice.

The fact that the violations in this case do not meet all the tests required to support a finding of S&S does not however, mean that they were not serious. The Commission has recognized

that S&S and gravity are not identical, although they are frequently based upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n.11 (September 1987). Following Commission precedent, I have previously held that although they may have common elements, the term "significant and substantial" is not synonymous with gravity. Consolidation Coal Company, 10 FMSHRC 1702, 1706 (December 1988); Columbia Portland Cement Company, 10 FMSHRC 1363, 1373 (September 1988), See also, Energy West Mining Company, 14 FMSHRC 1595, 1611 (September 1992). In this case the dangers posed by smoke and contaminated air reaching men at the face, where mining was going on at the time, were grave (Tr. 74). On the basis of such proof I find the violations were serious.

The remaining issue is whether the violations resulted from an unwarrantable failure on the part of the operator. The Commission has determined that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). The Commission has also stated that this determination is derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

The evidence shows that prior to 1990 the operator used plastic tubing to vent air from electrical installations to the returns (Tr. 122, 136-137, 149-150). When the Mine Safety and Health Administration no longer accepted plastic tubing due to the fire hazard it presented, the operator over a three month period removed the plastic and replaced it with metal tubing (Tr. 37, 98, 123). The galvanized metal tubing came in 10 foot sections and was 10 inches in diameter (Tr. 37, 150). Spads 15 or 20 or more feet apart were driven into the coal roof attached by wires wrapped around the tubing (Tr. 38-39). As demonstrated by the orders issued in this case, air was not being vented from the electrical installations directly to the return because the metal tubing had fallen down. Spads coming loose from roof and wires rusting caused the tubing to fall (Tr. 37-38, 45-46, 137, 143). Due to changing climatic conditions the roof was flaky, sloughing and deteriorating over time, making the spads fall out of the roof (Tr. 39, 44, 137-138). Also, wires just rusted and fell down (Tr. 44).

A conflict exists over when the operator learned of the tubing's inadequacies. On August 8, 1991, the inspector found ventilation tubing that had fallen down from a broken wire and spads that had come loose from a roof deteriorating from climatic changes (Tr. 40-41). Because the operator's escort accompanying

the inspector temporarily fixed the tubing before the inspector reached the pump, the inspector did not issue a citation on that occasion (Tr. 40-41, 43). The inspector did discuss the matter with the company escort and told the escort that precautions should be taken to insure the tubing was properly repaired and secured or else it would fall down again (Gov't. Exh. 5; Tr. 42-43). However, three weeks later the inspector found the tubing down again at the same location and issued the first of the three withdrawal orders at issue herein (Tr. 32).

According to the operator's safety supervisor, the operator only became aware of tubing problems from the deteriorating roof on August 8, 1991, when the inspector found tubing down at the location he subsequently cited on the 27th (Tr. 150-152, 155-156, 161-163). The supervisor testified that between August 8 and August 27 the operator instituted a program of reinforcing the tubing which took about two and a half months to complete (Tr. 152, 167-168). In his view citations issued by the inspector prior to the subject orders did not put the operator on notice of deteriorating roof and climatic conditions as a cause of tube falls because the earlier citations concerned situations where the tubing had been dislodged by pieces of falling rock and roof (Tr. 151).

Upon review I find more persuasive the evidence of the Secretary which clearly shows that the operator had knowledge sufficient to enable it to take action which would have rendered unnecessary the issuance of the subject orders. I accept the inspector's testimony that the operator attempted to address the August 8 situation merely by putting up one wire with no evidence of support anywhere (Tr. 179). I, therefore, approve the inspector's opinion that no one paid attention to that area (Tr. 179-180).¹ Under the circumstances, it was all but inevitable that tubing would fall again in the same and at other locations, as it in fact did, leading to issuance of the subject withdrawal orders. Had the operator heeded the advice of the inspector on August 8, the situation would have been remedied. The information which the operator received on August 8 put it on notice that immediate and wholesale corrective action to resupport the

¹ The operator's safety escort testified that an entry in the fireboss book that the ventilation tubing was rehung, referred to the August 8 condition involved in this case (Tr. 114, 126-127). This testimony is rejected because it is not based on first-hand information and because it is directly contradicted by the inspector who did have direct knowledge that the fireboss entry dealt with a different situation concerning inadequate examinations of intake escapeways (Tr. 178-179).

tubing was necessary to prevent the possibility of miners at the face being exposed to smoke and polluted air. The operator's inception of a program which took 2½ months to complete was an inadequate response to a potentially dangerous situation of which it had actual knowledge. Such conduct can be fairly characterized as "aggravated" within the purview of Commission precedent.

A finding of unwarrantability is further supported by evidence that for some months before the August 8 incident the operator knew it had problems with falling ventilation tubes, calling for remedial action. In this connection, I accept the inspector's testimony that during the second quarter of 1991 he had a number of meetings with mine management pursuant to the operator's Repeat Violation Reduction Program (R.V.R.P.) at which ventilation problems under § 75.1105 were talked about (Tr. 52-60). The operator's safety escort who with the inspector initiated these meetings, stated that ventilation tubing was identified as a problem at the meetings (Tr. 132-133). According to the inspector, beginning in April the deterioration of the spads and wires was visible and was pointed out during inspections (Tr. 176). At the final R.V.R.P. meeting with the general mine foreman at the end of June, the inspector highlighted problems with the ventilation of electrical installations (Tr. 52-53, 61-62, 175-176). In particular, the inspector called attention to the fact that tubes and the wires supporting them were rusting and that spads were pulling out of the top (Tr. 62). At this meeting all conditions and suggestions about the tubing were noted (Tr. 175-176). Insofar as deterioration of the roof due to climatic conditions was concerned, the inspector testified that the company was well aware of changing weather conditions which occur every year (Tr. 180).

The foregoing evidence is compelling and based upon it, I conclude that prior to the issuance of the subject orders, the operator had known for some months that it had an ongoing problem with ventilation tubing for electrical installations. I further conclude that the operator was conversant with climatic conditions and changes which caused deterioration in the roof, loosening the spads and rusting the wires which held the tubing up. I also determine that it is not necessary that the fallen tubing in the prior citations have resulted from exactly the same cause as the three orders involved herein. Nor is it necessary for a finding of unwarrantability that the tubes repeatedly fall down at the same location. The operator's suggestions to this effect is rejected (Operator's brief pp. 8-9). What matters is that for a long period of time the operator not only understood it was having difficulty regarding the ventilation tubing, but also was apprised of all the various circumstances which caused the problem. The operator's failure to remedy the situation despite continual suggestions from the inspector can only be characterized as aggravated conduct. The inspector's findings of unwarrantable failure are affirmed.

Based upon the foregoing evidence I further find the operator is guilty of high negligence.

Since the inspector's findings of violations and of unwarrantability are valid, the requirements of section 104(d)(2) are satisfied and the subject orders are upheld. UMWA v. Kleppe, 532 F.2d 1403 (D. C. Cir. 1976); Old Ben Coal, 1 FMSHRC 1954, 1959 (Dec. 1979); Eastern Associated Coal Corp., 13 FMSHRC 902, 911 (June 1991).

It is well established that hearings before the administrative law judges of this Commission are de novo and that the judges are not bound by penalty assessments proposed by the Secretary. Sellersburg Stone Co. v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984); Consolidation Coal Company, 11 FMSHRC 1935, 1939 (Oct. 1989). In determining the appropriate penalty amounts for these orders, I bear in mind that the findings of significant and substantial have been deleted. However, the violations were serious and resulted from high negligence. Taking into account these criteria and the others to which the parties have stipulated, I find that a penalty of \$900 is justified for each of the subject withdrawal orders.

The post-hearing briefs filed by the parties have been reviewed. To the extent the briefs are inconsistent with this decision, they are rejected.

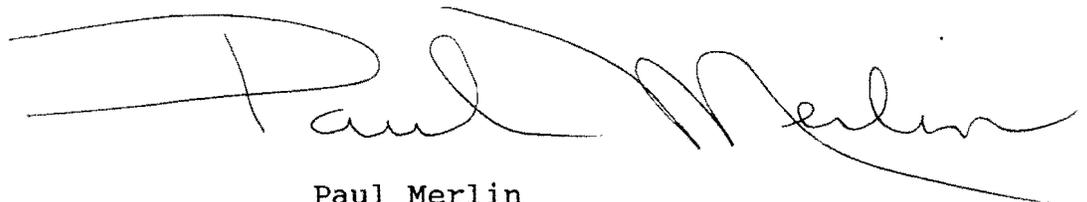
ORDER

It is **ORDERED** that the findings of significant and substantial for Order Nos. 3716170, 3716171, and 3716172 be **VACATED**.

It is further **ORDERED** that the findings of unwarrantable failure for Order Nos. 3716170, 3716171, and 3716172 be **AFFIRMED**.

It is further **ORDERED** that Order Nos. 3716170, 3716171, and 3716172 be **AFFIRMED**.

It is further **ORDERED** that a penalty of **\$2,700** be **ASSESSED** and that the operator **PAY \$2,700** within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 6 1993

DOTSON & RIFE COAL CO., INC.,	)	CONTEST PROCEEDINGS
Contestant)	
v.	)	Master Docket No. 91-1
	)	Docket No. KENT 91-670-R
SECRETARY OF LABOR,	)	through KENT 91-678-R
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),	)	Citation Nos. 9858724
Respondent	)	through 9858732; 4/4/91
)	
	)	Mine No. 1
	)	Mine ID 15-05417
)	
SECRETARY OF LABOR,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),	)	Docket No. KENT 91-1200
Petitioner	)	A.C. No. 15-05417-03532D
v.)	
	)	Mine No. 1
DOTSON & RIFE COAL CO., INC.,)	
Respondent)	

ORDER OF DISMISSAL

Before: Judge Broderick

On December 8, 1992, the Secretary filed a motion to dismiss these proceedings on the grounds that on August 12, 1991, the Respondent Dotson & Rife Coal Company and Jimmy Dotson, principal of Respondent entered into plea agreements, agreeing to plead guilty to charges of conspiracy to defraud an agency of the United States in connection with the civil violations charged herein. Respondent contracted with Triangle Research to handle its dust sampling program. Triangle's principal and agent admitted falsifying the samples submitted to MSHA and admitted that on numerous occasions they blew air on the filtered surfaces of manufactured dust samples. Harry White and Ronald Ellis of Triangle have been convicted of defrauding the Government and have received prison sentences.

On May 8, 1992, Judge Joseph M. Hood, of the Eastern District of Kentucky, sentenced Dotson & Rife Coal Company to pay a fine of \$25,000 and to 2 years probation. Jimmy Dotson was sentenced to 2 years probation, 3 months home detention, and 3 months community service. As part of the plea agreement the Secretary agreed to move to dismiss pending civil penalty

proceedings against Respondent for violations of the laws governing the dust sampling program.

I conclude that under the circumstances, dismissal of these proceedings effectuates the purposes of the Mine Act.

Accordingly, these proceedings are DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

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Hand delivered to Lead Defense Counsel Committee

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 7 1993

PONTIKI COAL CORPORATION,
Contestant
v.

CONTEST PROCEEDING

Docket No. KENT 91-97-R
Citation No. 3516447;
11/14/90

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

Pontiki No. 2 Mine
Mine ID 15-09571

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

CIVIL PENALTY PROCEEDING

Docket No. KENT 92-305
A.C. No. 15-09571-03604

Pontiki No. 2 Mine

PONTIKI COAL CORPORATION,
Respondent

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee;
Timothy M. Biddle, Esq., Crowell & Moring,
Washington, DC;
Susan E. Chetlin, Esq., Pontiki Coal Corporation,
Lexington, Kentucky.

Before: Judge Weisberger

At issue in this consolidated notice of contest and civil penalty proceeding are the validity of an Order issued under Section 107(a) of the Federal Mine Safety and Health Act of 1977, ("the Act,") and a Citation alleging a violation of 30 C.F.R. § 75.1725(c). Pursuant to notice, a hearing was held in Huntington, West Virginia on August 11, 1992. At the hearing, Harold Yates testified for the Secretary (Petitioner). The Operator (Respondent) did not call any witness on its behalf.

Findings of Fact and Discussion

In the main, the relevant facts have been stipulated to by the Parties, and I accept these stipulations. These stipulations are as follows:

1. Pontiki is the owner and operator of the Pontiki No. 2 Mine, located approximately 15 miles from Inez, Kentucky.
2. At the relevant times, Pontiki and the Pontiki No. 2 Mine were subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Act").
3. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Act.
4. Inspector Harold L. Yates, who issued § 107(a) Order No. 3516447 and § 104(a) Citation No. 3516448, is an authorized representative of the Secretary.
5. The Order and Citation were properly served upon an agent of Pontiki at the Pontiki No. 2 Mine on November 14, 1990, at 8:00 a.m., and 8:10 a.m., respectively.
6. The Pontiki No. 2 Mine mines coal in the Pond Creek coal seam using Joy continuous mining machines operated by remote control. Shuttle cars carry the coal from the continuous mining machine to the mine's belt conveyor system which carries the coal out of the mine.
7. On November 12, 1990, Pontiki mined coal on two sections underground and employed 81 people.
8. On November 12, 1990, the day shift crew for the 002-0 section arrived on the section at approximately 8:10 a.m., as the third shift maintenance crew was leaving.
9. The third shift maintenance crew informed the section foreman of malfunctions on one of the Joy 14-10 CM continuous mining machines; the machine would only tram in slow speed and the water sprays would not operate by remote control.
10. The section foreman assigned two electricians -- Argel Bowen and Russell Maynard, Jr. -- to repair the continuous miner.
11. The continuous miner was moved into an intersection for repairs.
12. Bowen repaired the tram controls while Maynard went to repair a shuttle car cable.
13. After Maynard repaired the shuttle car cable, he informed the section foreman that he would repair the solenoid valves controlling the water sprays. These valves were located on the off operator side of the continuous miner.
14. Maynard prepared to troubleshoot the problem with the solenoid valves by cleaning coal off of the solenoid valve covers.
15. At the same time, two miners and the section

foreman walked to the front of the continuous miner to inspect the cutting drum for worn bits.

16. As the section foreman walked by the continuous miner, he observed Maynard sitting on top of the continuous miner in front of the operator's deck. Maynard asked the section foreman to hand him the remote control box and then move the switch in the operator's deck to the remote position.

17. Section 75.509 requires that electric equipment be deenergized when repairs are being made, "except when necessary for trouble shooting or testing." 30 C.F.R. § 75.509. See also 30 C.F.R. § 75.1725(c). Maynard had to first troubleshoot the solenoid valves before he could repair them.

18. When troubleshooting malfunctions on continuous mining machines, it is standard practice for mechanics and electricians at Pontiki to switch the miner controls to remote and to keep the remote control box with them at all times. This precaution is necessary to prevent another person from accidentally operating the machine with the remote control or from the operator's deck while troubleshooting is taking place.

19. Since Maynard had the remote box with him, the section foreman asked Maynard if he could bump (rotate slightly) the cutting head, so the head could be inspected for worn bits. The cutting head on the Joy 14-10 CM continuous miner must be bumped with the power on, because the ripper/veyor chain connected to the ripper head makes it impossible to bump the head manually.

20. Maynard told the section foreman that he would rotate the cutting head using the remote control box, but he inadvertently activated the conveyor chain instead of rotating the cutting head.

21. The activated conveyor chain pulled Maynard from his work position and trapped him beneath the conveyor chain guard, resulting in fatal injuries.

22. MSHA conducted an investigation, which was concluded on November 13, 1990.

23. Two days after the accident occurred, MSHA issued imminent danger Order No. 3516447 which is at issue in this proceeding. Copies of the Order and subsequent modifications are attached to Pontiki's Application for Review.

24. MSHA also issued § 104(a) Citation Nos. 3516448 and 3516449.

25. Citation No. 3516448, at issue here, alleged a violation of § 75.1725(c), as follows:

Evidence obtained during a fatal accident investigation revealed that Russell Maynard Jr. placed himself in the conveyor boom of an energized JOY 14-10 continuous miner on the

002-0 working section while working on the water spray system. The electrician had with him the operative remote control unit for the miner. This citation is a contributing factor to imminent danger order #32516447 dated 11-14-90. Therefore no abatement time is set.

26. Citation No. 3516449 also alleged a violation of § 75.1725(c) as follows:

Evidence obtained during a fatal accident investigation revealed that three men were setting bits on the cutting head of an energized JOY 14-10 continuous miner on the 002-0 working section. The electrician victim was in the conveyor boom area of the miner and had the operative remote control unit with him. This condition is a contributing factor to the issuance of the imminent danger order #3516447 dated 11-14-90. Therefore no abatement time is set.

27. On December 11, 1990, Citation No. 3516449 was vacated for the following reasons:

This violation is being vacated for the following reason(s).

Evidence obtained during a safety and health conference reveals bits were not being set in the 14-10 continuous miner head on the 002 working section. At the time of the fatal accident three men were observing the cutting head of the continuous miner to determine if bits were needed while the victim was rotating (bumping) the cutting head.

I. Violation of 30 C.F.R. § 75.1725(c)

The parties stipulated that on November 12, 1990, an electrician Russell Maynard, Jr., was sitting on top of a continuous miner, and had in his possession a remote control box switched to the remote position. Maynard was to trouble shoot the solenoid valves controlling the water sprays before he could repair them. At the same time, two miners and the section foreman walked to the front of the miner to inspect the cutting drum for worn bits. The foreman asked Maynard to bump the cutting head so it could be inspected for worn bits. Maynard inadvertently activated the conveyor chain instead of rotating the cutting head, and was caught by the conveyor chain and trapped beneath the chain guard. He received a fatal injury.

MSHA Inspector Harold Yates issued a citation alleging a violation of 30 C.F.R. § 75.1725(c) in that Maynard "...placed himself in the conveyor boom of an energized joy 14-10 continuous miner on the 002-0 working section while working on the water

spray system. The electrician had with him the operative remote control unit for the miner."

In essence, as pertinent, Section 75.1725(c), supra, provides as follows: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

Petitioner apparently concedes that there was no violation for Maynard to be located on top of the mining machine with the power on trouble shooting the solenoid valves. However, Petitioner argues that when Maynard activated the controls "as part of the Act of changing bits on the cutting head" (emphasis added), a violation of Section 75.1725(c) supra occurred.

Considering the record as a whole, I do not find support for Petitioner's position that there was herein a violation of Section 1725(c) supra. In essence, the Citation at issue sets forth two assertions as the bases for a violation herein of Section 1725(c) supra. The Citation alleges that (1) Maynard was placed in the boom of the energized miner while working on the water spray system and (2) that he had with him the remote control unit for the miner. Neither of these activities are prohibited by the clear language of Section 75.1725(c) supra. Indeed, as pointed out by Respondent, Yates conceded on cross-examination that, in essence, neither of these activities violates a regulatory standard.

In his direct testimony, Yates asserted that the basis for the violation was the fact that Maynard was on the miner when he attempted to bump the miner head by remote control. In essence, Section 75.1725(c), provides that, in making repairs or maintenance, power must be off, and the machinery is to be blocked against motion. As correctly pointed out by Respondent, Section 75.1725, supra, contains no requirement concerning a person's position while repairs are being made.

The Commission has noted that the purpose of Section 75.1725(c) is to prevent "to the greatest extent possible", accidents in the use of equipment and that "the manifest intent of the regulation is to restrict repair of machinery while the power is on." (Arch of Kentucky, Inc., 13 FMSHRC 753, 756 (1991)). However, in evaluating the scope to be accorded the language of a regulatory standard, the Commission, in Southern Ohio Coal Co., 14 FMSHRC 978 (June 1992), reiterated its test of whether the regulation gives a reasonably prudent person notice that it prohibits the cited conduct. Section 75.1725(c) supra, does not give any notice that it prohibits persons from being on energized miners with remote control equipment. Its plain language expressly sets forth requirements for blocking and turning off power to machinery, but does not contain any words

that could reasonably be interpreted as governing a person's position vis a vis a piece of equipment that is being repaired or maintained.

Therefore for the all the above reasons I conclude that it has not been established that there was a violation herein of Section 75.1725(c) as alleged in the citation at issue. Therefore, the citation must be dismissed.

II. The Validity of the Section 107(a) Withdrawal Order.

As a consequence of the fatal accident which had occurred on November 12, 1990, MSHA Inspector Harold L. Yates issued a Section 107(a) withdrawal order two days later on November 14, 1990. It appears to be the position of Petitioner, that the Section 107(a) order was properly issued because the underlying hazard remained. In this connection, Petitioner refers to the parties' stipulation that it was standard practice for mechanics and electricians at Pontiki to switch the miner controls to remote, and to keep the remote control box with them at all times. Hence, it is Petitioner's argument that the underlying hazard remained in that "there was clearly a very definite chance for this tragic occurrence to be duplicated." In support thereof, Petitioner also refers to the fact that the abatement of the Section 107(a) order at issue indicates that Pontiki's employees were "retrained on the use of a remote control unit and work while trouble shooting, and that this retraining eliminated the hazard which had remained present." I find Petitioner's arguments to be without merit for the reasons that follow.

The Order at issue alleges the existence of an "imminent danger", as per section 107(a) of the Act. Section(3)(j) of the Act defines an imminent danger as "...the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In Utah Power and Light Co., 13 FMSRHC 1617 (1991) the Commission reviewed the Legislative History of this definition, and concluded as follows: "Thus the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." (13 FMSHRC supra at 1621). (Emphasis added)

The Commission rejected an interpretation of the imminent danger provision of the Act which includes "...any hazard that has the potential to cause a serious accident at some future time..." (Utah Power and Light, supra. at 1622). The Commission future explained its holding as follows:

To support a finding of imminent danger, the inspector must find that the hazardous condition has a

reasonable potential to cause death or serious injury within a short period of time. An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners". (Utah Power and Light supra, at 1622.)

In the instant case, when the Section 107(a) Order was issued two days after the accident no one was working on the miner in question, and, according to Yates, it was "sitting by itself" (Tr. 52). Yates testified that the reason that he issued the order was that "the same accident could happen again if they [the miners] were not retrained in performing this type of work" (Tr. 36). However, there is no indication in the record that the lack of retraining had a reasonable potential to cause a serious injury "within a short period of time" (c.f., Utah Power and Light, supra at 1622). To the contrary, when Yates was asked on cross-examination, "But you will agree with me, we don't have any issue over the fact that there was nothing happening at that time [when the Order was issued] which caused you to issue the order," Tr.52 (emphasis added), the inspector replied, "There was no action being done, the mine[r] was sitting by itself."

In addition, on direct examination, the inspector testified that the reason he issued the Order was that "the same accident could happen again if [the miners] were not retrained in performing this type work." Tr.36 (emphasis added). Absent from the inspector's description, however, is any reference to the immediacy of the potential harm. Rather the inspector issued the Order because he "thought it might occur sometime in the future that somebody would have that same set of circumstances and do the same thing." Tr. 51-52 (emphasis added).

Although there was a chance for the fatal occurrence to be duplicated, as argued by Petitioner, I find this not sufficient to sustain an imminent danger order, under the rationale of Utah Power and Light, supra.

I conclude that it has not been established that when Yates issued the Section 107(a) order there was any condition constituting an imminent danger. Accordingly, the order at issue is to be vacated.

ORDER

It is hereby **ORDERED** that Docket No. KENT 92-305 be **DISMISSED**. It is further ordered that the Notice of Contest, Docket No. KENT 91-97-R, be sustained. It is further ordered that Order No. 3516447 and Citation No. 3516448 be **DISMISSED**.



Avram Weisberger
Administrative Law Judge

Distribution:

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nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 7 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-434
Petitioner	:	A.C. No. 15-16743-03509
v.	:	
	:	No. 3 Mine
RAVEN MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

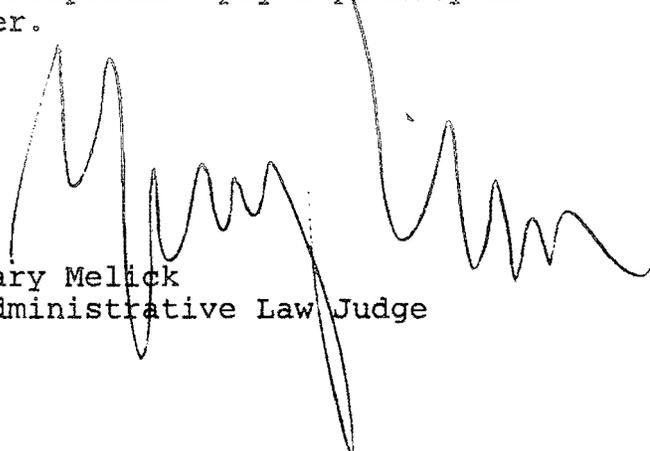
Appearances: Darren L. Courtney, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Billy R. Shelton, Esq., Baird, Baird, Baird, and Jones, P.S.C., Pikeville, Kentucky, for the Respondent

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). Following hearings on October 23, 1992, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$1,000 to \$500 was proposed. I have considered the representations and documentation submitted in this case, as well as proceedings at trial, 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 \$500 within 30 days of this order.

Gary Melick
Administrative Law Judge



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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 7 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-1043
Petitioner : A.C. No. 46-01452-03861
v. :
 : Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

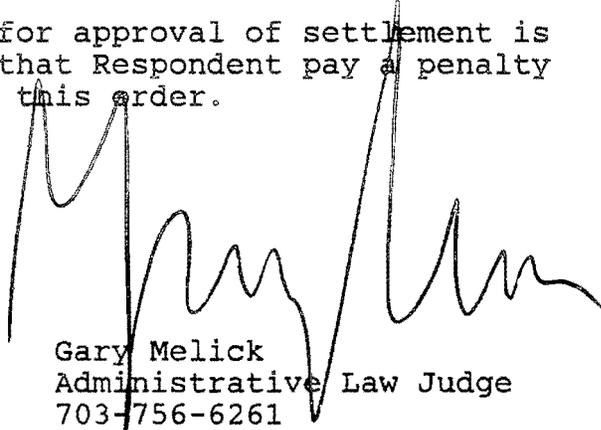
DECISION APPROVING SETTLEMENT

Appearances: Robert S. Wilson, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner;
Daniel E. Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). During hearings Petitioner noted that the parties had reached a settlement agreement and Petitioner subsequently filed a motion to approve that agreement. Petitioner has vacated Order No. 3717881 and proposes a reduction in penalty from \$6,000 to \$3,500 for the remaining two orders. 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 \$3,500 within 30 days of this order.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 8 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 92-82
Petitioner : A.C. No. 44-00649-03541
v. :
: Coronet Jewell Prep Plant
JEWELL SMOKELESS COAL :
CORPORATION, :
Respondent :

DECISION

Appearances: Tina Mullins, Esq., Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Charlie R. Jessee, Esq., Jessee & Read, Abingdon, Virginia, 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). Petitioner seeks a civil penalty assessment in the amount of \$58, for an alleged violation of mandatory safety standard 30 C.F.R. § 77.1607(v). The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Grundy, Virginia. The parties filed posthearing arguments, and I have considered them in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty; (2) whether the alleged violation was significant and substantial (S&S); 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. Additional issues raised by the parties are identified and disposed of in the course of this 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. 30 C.F.R. § 77.1607(v).
4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations and Admissions (Tr. 5-9).

1. The respondent is the owner and operator of the Coronet Jewell Preparation Plant, and its operations at that plant are subject to the jurisdiction of the Mine Act.
2. The Commission and the presiding judge have jurisdiction to hear and decide this matter.
3. The inspector who issued the contested citation was acting in his official capacity as an authorized representative of the Secretary of Labor.
4. True copies of the citation were served on the respondent or its agent.
5. Assuming a violation is established, the payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.
6. The cited condition or practice was timely and immediately abated by the respondent.
7. The preparation plant annual coal production in 1991 was two-million tons, and the plant is a medium sized operation.
8. The respondent's history of prior violations is shown in an MSHA computer print-out covering the period October 1, 1989 through September 30, 1991 (Exhibit P-5).

Discussion

Section 104(a) "S&S" Citation No. 3507478, issued on October 17, 1991, by MSHA Inspector Robert P. Davis, cites an alleged violation of mandatory safety standard 30 C.F.R. § 77.1607(v), and the cited condition or practice states as follows:

Railcars were not being kept under control at the raw coal shakeout area on 10-1-91, when the car hoist cable hook slipped out of the hook eye on railcar and two

loaded and one empty car got away (Run Away), and one employee was injured while making an attempt to stop the cars. The run away cars rammed loaded cars and threw the employee against the end of the cars causing injury to the employee's ribs.

Petitioner's Testimony and Evidence

Gary R. Buckland, employed by the respondent as a utility person, testified as to his training and seventeen years of experience on the job, and he confirmed that he worked at the shake out area of the plant. He described his duties and the procedures for shaking and dropping the railroad cars from the shake out area to the load out area. He stated that the cars are dropped by hand, and one person is on the car operating the hand brake while it is dropping down to the load out area after it has been emptied at the shake out area. He confirmed that he was aware of the accident of October 1, 1991, which resulted in an injury to Mr. Benny Shook. Mr. Buckland stated that a trip of two loaded cars and an empty car became unhooked from a cable and hook apparatus which holds the cars in place during the shake out and they began rolling freely towards the load out area.

Mr. Buckland described what he was doing at the time he was positioning the cars at the shake out area, and he stated that while he was in the process of pulling one of the cars into position he observed that the cable hook was still on the car, and that "it must have rolled another foot on farther backwards when I quit looking at it". He then proceeded to attend to another car and that when he "turned around and looked, two loads and an empty, I guess,, about a car length past the shake out or farther, they came off the hook and started rolling freely themselves" (Tr. 25).

Mr. Buckland stated that he ran after the cars and climbed on one of the loaded cars and tried to tighten the brake. However, the car had no brakes and he climbed down the ladder and jumped off. The cars continued to roll as he chased after them, and they collided with three other cars at the load out area, and this slowed them down. As the cars proceeded under the tipple, he climbed on one of the cars that had escaped from the shake out area and attempted to set the brake, and Mr. Shook climbed on one of the cars that had broken free at the load out area after the initial collision. However, the two trips came together and collided with other loaded cars parked on the tracks below the tipple, and Mr. Shook was thrown off and injured his ribs, (Tr. 20-28).

Mr. Buckland disagreed with the respondent's contention that no "runaway" occurred, and he did not believe that the cars that got away drifted slowly. However, he did not know how fast the cars were moving, and he stated that "they had to start out slow

to get fast" (Tr. 29). He stated that two people are used to shake each car and that one person is always on the car tightening the brakes to stop it. He confirmed that prior to the accident, the hook that attaches to the car to hold it in place "would come out sometimes three times a day, sometimes three times a week", but that since a chain has been installed on the hook, it does not slip free anymore (Tr. 29-31).

Mr. Buckland explained the safety procedures for runaway cars, including the use of warning sirens, oral instructions to try and catch and stop the cars if they get away, and the use of a safety belt while on the car (Tr. 32-33). He stated that there were occasions when the cars had no brakes, but that this was "very seldom" and that "you can run into that" (Tr. 34). He stated that if a car gets away and causes some damage it is reported to a supervisor, but if he catches up to a car and gets it under control, and no damage has occurred, it is not reported (Tr. 34).

On cross-examination, Mr. Buckland stated that during his 17 years with the company there have been no other incidents such as the one which occurred on October 1, 1991. He confirmed that Mr. Shook had his safety belt on at the time of the accident. He also believed that the respondent is a safety conscious company and he confirmed that it received the corporate president's safety award and numerous other safety commendations. Mr. Buckland further explained how he attempted to stop the cars which had moved away from the shake out area at the time of the accident, and he confirmed that when he tightened the brake down it failed. If the brake had not failed, there would have been no accident (Tr. 40). Mr. Buckland could not recall any conversations that he may have had with Inspector Davis in October, 1991 (Tr. 41). He confirmed that he has never reported a disengaged car hook to his foreman (Tr. 38).

Benny H. Shook, testified that he has been employed by the respondent for approximately 15 years, and that he has worked as a railroad car dropper for the past four years. He confirmed that he has received safety training from the respondent and that he has 36 years of preparation plant experience. He described his work in the load out area and he explained how the empty cars are dropped from the shake out area to the load out area for loading. He explained that there is always someone on one of the three-car trips that are dropped, and that this person operates the brake wheel which is tightened by hand to control the cars (Tr. 46-47).

Mr. Shook stated that the accident happened after a trip of two loaded and one empty railroad cars "got loose at the shake out", but he did not see them come loose and had no first hand

knowledge as to how they got away. He described what occurred as follows at (Tr. 48):

A. And the three cars came down and there was a young man on them, Gary Buckland, trying to stop them. They hit the cars that we had on our load out rope. It broke that rope and they started running away. So, I got one car and set a brake. Got off of it and got on another car and set a brake. Now, by this time I...we had somewhere between three and five cars on our rope and then the three that he come with down, with, the empty and two loads. And by the time we got the brakes set on them again, they hit cars that were already parked out on the lower yard ready for shipment. When they hit, then I hit against the side of the car like against here, broke my ribs.

Mr. Shook could not estimate how fast the cars were travelling, and he confirmed that he had time to catch up to the first car and set the brake, and then step off and get on the next car and set that brake. He confirmed that he wore and used a safety harness while doing this. When asked if he believed that the cars which came down from the shake out area were "under control", he responded "No, the boy was trying to get them under control, but they weren't under control or he would have stopped them" (Tr. 50). He confirmed that those cars were stopped after the cars that he was on hit the loaded cars and threw him against the end of a car (Tr. 50).

Mr. Shook stated that he was treated at a hospital emergency room where he was x-rayed and given a complete physical examination by a doctor. He was diagnosed as having broken ribs, wore a rib cage protective device for three weeks, but returned to work the day after he was treated, and was assigned less strenuous work until he was able to resume his car dropping duties a week or so later (Tr. 51-52).

Mr. Shook was of the opinion that a "runaway" occurred and that he cars that came from the shake out area "ran away", and he explained as follows at (Tr. 53):

A. Well, there is a restraining rope on those cars with a hook on it and the hook fell off the cars and they were below the shake out before Gary got on them to get them stopped. And he couldn't get them stopped until they hit the ones that we were on. So, I consider that to be a runaway. Yes, I do.

Q. Is a person supposed to be on the cars before they are released from the cable?

A. Yes.

Q. And they were not? A person was not on the cars?

A. Well, they weren't released purposely, so there wasn't anyone on it.

Q. Would you agree that the cars drifted slowly?

A. Probably when they first...when the hook first came off of them. But, then after they cleared the shake out they picked up speed.

Mr. Shook confirmed that the respondent had established procedures to be followed in the event a car gets away, and these include the use of warning devices, safety harnesses, and instructions not get on a runaway car (Tr. 54-55). He believed that chains have been installed in conjunction with the use of eye hooks to keep the hook from falling off, and he confirmed that prior to the accident, a hook had never come off a car in the loading area where he worked (Tr. 56). Mr. Shook explained the car dropping procedures, and he confirmed that the loaded cars are brought in by the N & W Railroad (Tr. 57-61).

On cross-examination, Mr. Shook confirmed that he missed no work as the result of the accident, and he believed that the respondent is safety conscious and has received safety awards at its preparation plant. In the 15 years that he has been employed by the respondent, he was not aware of any prior similar accidents with personal injury (Tr. 62). He confirmed that the plant and shake outs have been inspected on numerous occasions by state and Federal inspectors with the same steel rope cable and hook in use, and he believed that the respondent was doing what it thought was safe by using the steel rope and hook assembly (Tr. 64).

MSHA Inspector Robert D. Davis, testified that he has served as an inspector for 17 years and he confirmed that he visited the respondent's preparation plant on October 17, 1991, as a follow-up to an accident report filed by the respondent. He stated that he spoke with plant superintendent Bill Lipps and plant foreman Jessie Williams, and they basically told him what had been written up in the accident report. He was told that "the rail cars had runaway or broke loose from the shake out area and one man was injured trying to stop the cars" (Tr. 69). He was also informed that a safety or slack chain was installed in place of the cable that was previously used and that this chain served to keep the cable tight (Tr. 70).

Mr. Davis stated that based on what was reported to him by Mr. Lipps and Mr. Williams, and the company accident report, he issued the citation in question. He confirmed that the citation was not issued because of the accident, but that it was issued

because the railroad cars were not under control, and it was his opinion that this constituted a violation of section 77.1607(v) (Tr. 70-71). He confirmed that he made a finding of "moderate" negligence because "I felt that management should keep a better . . . if this had happened before, then something should have been done before" (Tr. 72). He also believed that the violation was "significant and substantial", and he explained as follows at (Tr. 71-72):

A. Well, it met the criteria of and S & S citation.

Q. What is that?

A. Condition existed, if not corrected, it reason...likely cause an accident.

Q. Now, what kind of accident would occur?

A. And if it did occur, it would cause serious injury.

Q. What kind of accident can you envision with the cars getting away?

A. Well, get caught in the cars, throw their feet under the track and get their leg cut off or crushed, fatal injuries.

Q. And those would be more serious than the accident that occurred in this case?

A. Yeah.

Q. How likely do you think it is that an injury...that injuries would occur because of rail cars getting away?

A. It would be reasonably likely that, you know, over a period of time this keep happening, maybe.

Inspector Davis agreed that his citation only makes reference to one set of cars, two loaded and one empty, when in fact the testimony of the prior witnesses that two sets of cars were out of control is correct. However, he did not believe that this made any difference and that a violation still existed. He also believed that appropriate safety procedures were not being followed because the cars would not have gotten away if the employees were more alert. He confirmed that there are no MSHA safety standards covering the use of car hooks or protective devices to prevent the hooks from coming off (Tr. 73-76).

On cross-examination, Mr. Davis stated that he based his "significant and substantial" finding on the fact that the cars were not being controlled at the time of the accident. He

confirmed that the likeliness of an occurrence is to be considered when making such a finding, and the fact that such an incident may have occurred in the past is part of the criteria for an "S&S" finding (Tr. 76-77). He conceded that at the time he made his finding he had no knowledge as to whether any accidents of the kind in question had occurred in the past, and stated that "anytime the railroad cars get away, there is a chance that someone could get hurt" (Tr. 78). He further conceded that he did not determine whether the kind of injury suffered by Mr. Shook had ever occurred in the past, and he disagreed that one incident or injury in the past 15 years would constitute an unlikely event because "you just heard those two fellows say those hooks come out often" (Tr. 81).

Mr. Davis denied that he had the citation prepared when he visited the plant on October 17, 1991, or that he had previously discussed what he would write with his supervisor before going to the mine site. He confirmed that he did not speak with Mr. Shook or Mr. Buckland prior to issuing the citation, and although he actually observed no violation taking place, he went to the area where the accident occurred and took some notes (Tr. 85-87). He further explained the basis for his "S&S" finding as follows at (Tr. 90-91).

Q. It's not. What parameters do you use then, to determine that an injury is likely?

A. If this condition would reasonably cause...if it occurred, it would cause an accident and if that..if those rail cars are not under control, it could reasonably cause an accident.

Q. But what parameters did you use to determine what was reasonably likely to have occurred?

A. To people at work?

Q. Do you not have to...let me help you a little bit. An injury of illness has to be reasonably likely to occur, before you can write a S&S violation, does it not, sir?

A. Yes, yes.

Mr. Davis confirmed that he is required to substantiate an "S&S" violation, and that he made notes and relied on the information given him by Mr. Lipps and Mr. Williams. Mr. Davis conceded that he did not bother to determine whether Mr. Buckland had applied the car brakes, where Mr. Shook was located when he was injured, or the extent of his injuries, and that he "just tried to determine if the cars were under control at the time of the accident" (Tr. 94). Mr. Davis stated that an S&S violation could be issued even if there were no injury, but that the

potential for an injury may be considered, and if an injury did in fact occur, he may consider the seriousness of the injury as part of his finding (Tr. 95).

Mr. Davis confirmed that prior to issuing the citation he made no determination as to whether or not mine management had any indication of prior problems with the car hook. He explained that he based his negligence finding on the fact that the hook did come out, and that "if somebody wasn't negligent, the hook wouldn't have come out. It would have been a better system" (Tr. 97). He agreed that there was no regulatory safety standard concerning car hooks, and he confirmed that he had inspected the shake out area on prior occasions and has observed cars being pulled by the hooks that were used at the time of the accident. He was not aware of any prior violations concerning car hooks or the shake out area (Tr. 98-99). He agreed that the use of a hook, or a chain which is presently in use, does not in and of itself constitute a violation. He also agreed that an accident would not have occurred if the car brakes had worked (Tr. 99-100).

Mr. Davis reiterated that he issued the citation because the cars were out of control, and not because an accident occurred. He stated that the cars were out of control because "the hook had come out of the eye", and that "the brake did have a bearing on it. I don't know if he could get there in time to apply the brake or not" (Tr. 100). Mr. Davis believed that a "reasonably serious accident" is "one that could cause an accident if not corrected" (Tr. 101). He did not personally know that Mr. Shook had a broken rib at the time he wrote the citation on October 17, 1991, and he agreed that the accident would not have occurred if Mr. Buckland, the car dropper, had been paying attention (Tr. 105). Since the cars were not under control, a violation had to exist, and it was the result of moderate negligence on the part of the respondent (Tr. 105-106).

Mr. Davis agreed that the respondent has a good safety record, and in response to a question as to whether the respondent "was really negligent", Mr. Davis responded "I think they could have through training, they could have been more alert on what's going on over there, the employees, I think". He explained that the employees on the job should have been more alert, and if they had been watching the eye hook, they could have prevented it from coming out (Tr. 108). He confirmed that a car dropper has a duty to keep an eye on the hook (Tr. 112).

Respondent's Testimony and Evidence

Jessie Ray Williams stated that he has served as plant foreman for the past 11 years, that the shake out area has existed for 14 years, and that the cable hook configuration at

the car spotter hoist has been in use during this entire time. He confirmed that there have been no prior incidents, accidents, or injuries involving cars drifting down to the plant because of a car hook coming loose. He stated that the car hooks in use at the time of the accident were especially designed to be handled safely, and no one ever informed him that there was a hook problem prior to that incident. He believed that the hook that was being used at that time was "state of the art" and standard for the industry (Tr. 117).

Mr. Williams stated that Mr. Buckland admitted that the accident would not have happened if he had been paying attention, and also informed him that the cars would not have collided if the brakes had worked. Mr. Williams confirmed that Mr. Shook missed no work because of the accident, and that he and Mr. Buckland were wearing safety belts. He confirmed that the respondent is a safety conscious company, and that the plant has recently received safety awards, including the company president's award and an honorable mention from the State of Virginia. He confirmed that the shake out area and hook arrangement have been inspected many times by MSHA, that no violations have ever been previously issued because of that arrangement, and that no inspectors have ever suggested any better method of hooking cars (Tr. 119).

Mr. Williams described the yard grade from the shake out area to the preparation plant 575 feet away as one percent, and less in places, and he did not believe that this was a very steep grade. He confirmed that the cars will roll freely from the shake out area to the plant, starting at a gradual speed, and building up speed if they are let go, and depending on whether they are empty or loaded. He stated that some impact is desirable in order to facilitate the closing of the car couplings (Tr. 121).

On cross-examination, Mr. Williams stated that he has never observed the car hook come out of the eye, and that none of his employees have ever informed him of such an occurrence. Although Mr. Shook and Mr. Buckland were wearing safety belts at the time of the accident, he did not know if they were using them, and he did not ask them about it when he spoke with them during his accident investigation. He confirmed that it was not uncommon for railroad car brakes to fail as the cars travel from the shake out area to the load out area. He stated that "you get quite a few railroad cars with bad brakes on it", and that the Norfolk Southern Railroad, and not the respondent, owns the cars and maintains the brakes (Tr. 123).

In response to further questions, Mr. Williams stated that he was familiar with an accident and a violation at the Bedrock Pocahontas Company, similar to the one in this case, and that no violation was issued by MSHA (Tr. 124). He stated that the

respondent cannot maintain the railroad cars which it does not own, and it cannot determine whether a car brake is defective before it comes on mine property (Tr. 126). He explained the operation of the car hook, and confirmed that three cars are coupled together when they are at the shake out area, and that the hook is attached to a cable that is attached to a car hoist. The chain which was attached after the accident has slack in it to keep the hook in place and to prevent it from being pushed out of the eye hole when a car is pulled back (Tr. 131-135).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1607(v), for failure to keep certain railcars under control at the raw coal shake out area of the preparation plant. A trip of three cars got away after the car hoist cable hook slipped out of the hook eye on one of the railcars, and the cars collided with another trip of cars resulting in injuries to an employee who was attempting to stop the cars. The cited standard section 77.1607(v), states as follows:

Railroad cars shall be kept under control at all times by the car dropper. Cars shall be dropped at a safe rate and in a manner that will insure that the car dropper maintains a safe position while working and traveling around the cars.

In support of the violation, the petitioner argues that Car Dropper Buckland's testimony clearly establishes that the railroad cars were out of control, and that the respondent's own accident report states that "two loaded and one empty railroad cars had gotten away from shakeout", and that mine superintendent Lipps and Foreman Williams acknowledged to Inspector Davis that the railroad cars had gotten away. Further, another eyewitness, car dropper Shook, corroborated the fact that the railroad cars coming from the shake out area were not under control. Under all of these circumstances, the petitioner concludes that the failure of the car dropper to keep the railroad cars under control constitutes a violation of section 77.1607(v), and that the cause or reasons for the cars being out of control, and the car dropper's inability to stop the cars, are irrelevant to the issue of whether a violation occurred.

The respondent argues that the cited regulatory section 77.1607(v), does not define "under control" or "safe rate", and is therefore void for vagueness. Respondent also maintains that the regulation does not provide a remedy to the mine operator should the car dropper by reason of his own

negligence, fail to maintain proper control of the equipment to which he is assigned.

The respondent argues that but for the negligence of Car Dropper Buckland, who was admittedly inattentive, the incident in question would not have occurred. The respondent asserts that the fact that an accident occurred does not give rise to an inference of a violation, and it cites the testimony of foreman Williams that in the 14 years that he worked at the plant a similar incident had never occurred; that no railroad cars had ever gotten loose because of the hook coming undone; that the shakeout area had been inspected many times by MSHA and no violations had ever been issued because of the hook arrangement; that no inspector had ever suggested a better method for attaching the hook; that he had never observed the hook come out of the cable eye; that no employee had ever told him that the hook had come out of the eye; and that the hook arrangement as it existed at the time of the incident was the standard of the industry.

The respondent also relies on the testimony of plant employees Buckland and Shook who testified that no similar incidents had ever occurred at the plant in the past 17 to 36 years; that Mr. Shook missed no work because of his injury; that the respondent is a safety-conscious company; and that Mr. Shook and Mr. Buckland were wearing safety belts at the time of the incident.

In Harman Mining Corporation v. Secretary of Labor (MSHA), 3 FMSHRC 45, 62 (January 1981), a railroad employee suffered fatal injuries after he was struck by a runaway trip of loaded coal cars. The facts established that after a trip of two cars was loaded at the preparation plant, a car dropper employed by Harman Mining proceeded to drop the cars into position to be coupled with another trip of parked loaded cars and hauled away by a locomotive. The car dropper started the two cars down the track, and after picking up speed, he applied pressure to the car brakes. However, the brakes would not hold, and when the car dropper was unable to control the cars, he jumped to the ground and the cars continued on and collided with the parked cars, one of which ran over and fatally injured the employee who was engaged in coupling two of the cars. I affirmed a violation of section 77.1607(v), after concluding that the failure of the car dropper to maintain control of the cars constituted a violation.

My decision in the Harman Mining case, supra, was affirmed by the U.S. Fourth Circuit Court of Appeals on December 24, 1981 2 MSHC 1551. The Court rejected Harman Mining's argument that it would have been more appropriate for MSHA to cite the railroad company, as an independent contractor, since it supplied the railroad cars with faulty brakes and therefore caused Harman's car dropper to lose control of the cars. The Court held that

even if the railroad has some degree of culpability, MSHA had discretionary authority to cite Harman for the violation. Citing its decision in Bituminous Coal Operators' Ass'n v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), the Court ruled that mine operators are absolutely liable for violations regardless of who violated the Act or created the danger. Subsequent court decisions have ruled that the Mine Act is a strict liability statute, and the courts have upheld the mine operator's liability for violations which resulted from unpreventable and unforeseeable employee conduct. Western Fuels-Utah, Inc. v. FMSHRC, 870 F.2d 711 (D.C. Cir. 1989), aff'g 10 FMSHRC 256 (March 25, 1988); Asarco, Inc.-Northwestern Mining Department v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989), aff'g 8 FMSHRC 1632 (November 10, 1986).

The Commission has consistently rejected arguments advanced by mine operators that they should escape liability for a violation because of unauthorized or careless actions by a miner. See: A.H. Smith Stone Company, 5 FMSHRC 13 (January 1983); Southern Ohio Coal Company, 4 FMSHRC 1459, 1462-64 (August 1982); Sewell Coal Co. v. FMSHRC, 686 F.2D 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982).

The respondent's "void for vagueness" defense IS REJECTED. The first sentence of section 77.1607(v), requires a car dropper to keep control of railroad cars at all times. I find nothing vague about this requirement. I agree with the petitioner's position with respect to the fact of violation, and I take note of the fact that the respondent conceded that the car dropper "allowed three (3) railroad cars to drift free from the shakeout and roll down the grade (approximately 1%) to the preparation plant, striking cars located at the preparation plant and causing the same to drift away from him because of his inattentiveness" (pags. 2,6, posthearing brief).

On the facts and evidence presented in this case, it seems clear to me that the railroad cars in question were out of control and that the car dropper could not maintain control of the cars as they drifted and travelled from the shake out area immediately before they collided with the other cars at the load out area, causing those cars to drift free and out of control. I reject the respondent's arguments that it should not be held liable for the violation because of the negligence of the car dropper, the absence of similar incidents in the past, or the lack of prior violations for the same cited condition. These are matters that may be considered in mitigating the respondent's negligence, but they may not serve as a basis for absolving the respondent of liability for the violation. I conclude and find that the petitioner has established a violation by a preponderance of the credible testimony and evidence adduced in

this case. The failure by the car dropper to maintain control of the loaded cars in question constituted a violation of section 77.1607(v), and the citation 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).

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). Further, any determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Company, 6 FMSHRC 1573, 1574 (July 1984); U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citing the applicable case law concerning significant and substantial violations, the petitioner argues that the evidence in this case clearly establishes the four-prong test enunciated by the Commission in Secretary of Labor (MSHA) v. Mathies Coal Company, supra, for determining whether a violation is significant and substantial.

With respect to the underlying violation, the petitioner asserts that the uncontradicted evidence in this case establishes that the car dropper failed to keep the railroad cars under control on October 1, 1991, and that this establishes a violation of section 77.1607(v). Petitioner argues that the hazard presented by the violation is the railroad cars being out of control and subjecting workers to serious injuries, and it cites the inspector's testimony that he considered the violation to be significant and substantial because it was reasonably likely that the railroad cars would become out of control and cause a reasonably serious injury. Petitioner also cites the testimony of car droppers Buckland and Shook that the restraining hooks often came out of the eye of the railroad cars allowing the cars to come out of control. Petitioner concludes that the frequency with which the hook slipped out of the eye increased the likelihood that the cars would come out of control and cause a serious injury, and it points out that a serious injury actually occurred in this case as a result of the railroad cars being out of control. Conceding that the inspector believed that the cars may not have gotten away if the employees had been more alert, the petitioner points out that the inspector did not state that such human error could be avoided, and citing Secretary of Labor (MSHA) v. Eagle Nest, Inc., 7 FMSHRC 1119 (July 1992), petitioner concludes that the likelihood of an injury continues to exist regardless of whether the miners exercise caution.

Finally, petitioner concludes that it was reasonably likely that a reasonably serious injury would occur if the railroad cars were not kept under control by the car dropper. In support of this conclusion, petitioner cites the testimony of the inspector that railroad cars which are not kept under control can cause serious injuries such as being caught between cars, crushing or cutting off a foot or leg, and fatalities. Petitioner also relies on the inspector's testimony that in issuing the citation, he considered the seriousness of any potential injury rather than

only the injury that actually occurred, and the inspector's belief that fractured ribs, which is the injury sustained by Mr. Shook, was a reasonably serious injury.

The respondent maintains that the inspector issued the citation without consulting the MSHA Program Policy Manual guidelines for determining significant and substantial violations (Exhibit R-7). Citing the applicable manual guidelines, the respondent asserts that the inspector did not evaluate the actual circumstances surrounding the purported violation; did not evaluate the nature of the injury; did not include in his notes all of the factors he relied upon to make a judgment that the violation was significant and substantial or that the respondent's negligence was moderate; and did not interview the injured employee (Shook) or the shake out operator Buckland. Further, the respondent asserts that the inspector did not know whether Mr. Shook and Mr. Buckland were wearing safety belts at the time of the incident in question, and he did not know whether any other violations were ever written pursuant to section 77.1607(v) in Southwest Virginia within the last 10 years. Respondent maintains that such determinations are mandatory in considering whether or not to label a violation "significant and substantial", and it concludes that in light of the admitted failure by the inspector to follow the manual guidelines, his "S&S" finding cannot stand and should be vacated.

Although it is true that Inspector Davis admitted that he did not read the MSHA policy manual "just before" he wrote the citation (Tr. 110), I cannot conclude that his failure to do so is grounds for vacating his "S&S" finding. The Commission has held that the MSHA Manual guidelines and instructions are not officially promulgated regulatory rules binding on the Commission or its Judges. Old Ben Coal Company, 2 FMSHRC 2806, 2809 (October 1980); King Knob Coal Company, Inc., 3 FMSHRC 1417, 1420 (June 1981); United States Steel Corp., 5 FMSHRC 3, 6 (January 1983).

The respondent's suggestions that the absence of prior accidents involving a car hook slipping out and causing a car to get out of control, the lack of any evidence that the respondent and other mine operators in Southwest Virginia have ever been previously cited for violations of section 77.1607(v), and the fact that Mr. Shook and Mr. Buckland were wearing their safety belts, support a finding of a non-"S&S" citation ARE REJECTED. These are matters that may or may not mitigate the respondent's negligence and its history of prior compliance.

The term "significant and substantial", in the context of a violation within the meaning of section 104(d)(1) of the Act, has been interpreted by the Commission in the principal cases enumerated earlier in this decision. In the instant case, the critical question presented is whether or not the evidence

presented by MSHA in support of the inspector's "S&S" finding, which is essentially the same information that he had at his disposal and considered at the time he issued the citation and made that finding on October 17, 1991, meets the "S&S" criteria enunciated by the Commission.

The evidence in this case reflects that the citation was issued more than two weeks after the October 1, 1991, accident. The inspector went to the mine on October 17, 1991, as a follow-up to the accident report that was filed by the respondent. The inspector's credible and un rebutted testimony reflects that he spoke with the plant superintendent and plant foreman (Williams and Lipps), who corroborated the information supplied by the respondent in the accident reports (Secretary's Exhibits 2 and 3), did not contradict that information. In fact, they confirmed and agreed that the cars in question had gotten away. Mr. Williams did not dispute the inspector's testimony, and Mr. Lipps did not testify in this matter. Under these circumstances, it seems clear to me that the inspector relied on the information supplied by the respondent's accident reports, made some notes, and considered the information from the superintendent and foreman to support his finding that a violation had occurred and that it was significant and substantial.

On the facts and evidence adduced in this case, it seems clear to me that the failure of the car dropper to keep the cars under control, a condition which I have found constituted a violation of section 77.1607(v), contributed to the cause and effect of a discreet safety hazard, namely the real potential of a car drifting or travelling out of control and striking other cars or miners working the area. Once a car is out of control, particularly in a situation where the car has bad brakes that are subject to failure, I believe that one can reasonably conclude that miners working in the area would be exposed to the hazard. In this case, not only was there a reasonable likelihood that the hazard contributed to would result in an injury, the hazard came to fruition when the cars got away and caused or contributed to the accident that resulted in an injury to Mr. Shook's ribs. The fact that Mr. Shook did not suffer more serious injuries and lost no time from work is not determinative, Secretary v. Ozark-Mahoning Company, 8 FMSHRC 190 (February 1986). I take note of the fact that Mr. Shook's un rebutted testimony reflects that he was assigned to less strenuous duties, had to wear a rib cage protective device for three weeks, and did not resume his normal car dropper's duties until a week or so after returning to work a day after the accident.

After careful review and consideration of all of the evidence in this case, including the arguments advanced by the parties in support of their respective positions, I conclude and find that the petitioner has the better part of the argument and

that it has established by a preponderance of the evidence that the cited violative conditions in question constituted a significant and substantial violation of mandatory safety section 77.1607(v). Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Negligence

Inspector Davis testified that he based his moderate negligence finding on what he was told by Mr. Lipps and Mr. Williams with respect to how the accident occurred. Mr. Davis conceded that prior to issuing the citation he made no determination as to whether or not mine management had any indication that the car hook had been a problem, and he stated that "if somebody wasn't negligent, the hook wouldn't have come out. I would have a better system" (Tr. 96-96).

In support of the inspector's moderate negligence finding, the petitioner relies on the testimony of car dropper Buckland who estimated that prior to the accident, the hook came out of the railroad cars between three times a day and three times a week, that co-workers had reported this problem to their supervisor, and that since the respondent installed a slack chain, the hook no longer slips out of the car. Conceding the fact that there is no statutory or regulatory requirement regarding the type of cable system used, the petitioner concludes that the cable system in use at the time of the accident left room for improvement, and that the installation of the slack chain was not a difficult or time-consuming procedure. Under all of these circumstances, the petitioner further concludes that the respondent was moderately negligent by failing to ensure that the railroad cars did not become out of control.

In reply to the respondent's assertion that it was not negligent because MSHA had inspected the shake out area many times before but had never issued a citation for using the cable hoist system without a slack chain, the petitioner points out that the inspector explained that the hoist system itself did not constitute a violation, and the violation occurred when the hook slipped out of the eye of the railroad car allowing the cars to become out of control. Since MSHA had never observed the cars out of control, and had not otherwise been informed that they had become out of control, petitioner maintains that no basis existed for issuing prior citations for such an occurrence.

Regarding the respondent's contention that the cable hoist system in use at the time of the accident was "state of the art", and the "industry standard", petitioner suggests that even if this were true, the industry standard is unsafe and subject to failure, and the fact that the respondent quickly and easily installed a slack chain shortly after the accident to prevent the hook from slipping out of the eye of the cars shows that the

system in use allowed room for improvement. Further, since the cars often got away, petitioner concludes that the respondent should have taken corrective action sooner to prevent an accident from occurring. The petitioner further concludes that the fact that no prior accidents had occurred due to the hook slipping out of the eye does not excuse the respondent's failure to take corrective action sooner, particularly in light of the evidence that the hook often slipped out of the eye and caused the cars to get away, and that this condition previously had been reported to the supervisor. Petitioner believes that the fact that the respondent has been lucky and has avoided prior accidents by stopping the cars quickly does not support a reduction in the degree of negligence.

In reply to the respondent's suggestion that the accident would not have occurred if the railroad car brakes had worked, petitioner concedes that the inspector acknowledged that properly functioning brakes may have prevented the accident, but it cites the inspector's testimony that the cars were out of control before the car dropper ever applied the brakes. Consequently, regardless of whether the brakes functioned properly, and in light of foreman Williams' testimony that the respondent was aware of the bad brake problem and received quite a few railroad cars with bad brakes, petitioner concludes that the respondent's knowledge of the brake problem also supports a finding of moderate negligence.

Aside from the respondent's liability for the violation, the conduct of an employee may mitigate the degree of negligence, if any, of the mine operator for the violation. A.H. Smith Stone Company, 5 FMSHRC 13, 15 (January 1983). In cases of this kind, the judge may consider the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent a violation. Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (August 1982); Nacco Mining Co., 3 FMSHRC 848, 850-51 (April 1981), Western Fuels-Utah, Inc., 10 FMSHRC 256, 259-60 (March 1988).

Mr. Shook testified that prior to the accident, he was not aware of a hook ever coming off a car in the area where he worked, and there is no evidence that he ever reported such an incident to mine management. Although Mr. Buckland testified that the hook came out rather often, he admitted that he had never reported this to management, and while he also testified that "other men" had reported it to their supervisor, none of these unidentified individuals were called to testify, and I have given Mr. Buckland's hearsay testimony in this regard no weight. Plant Foreman Williams' testimony that no one had ever previously reported a hook slipping out of the car stands unrebutted, and I find no credible evidence to support any conclusion that the respondent was previously aware of the problem.

Mr. Buckland and Mr. Shook confirmed that the respondent had safety procedures in effect to deal with runaway cars, that they were wearing safety belts at the time of the incident, and there is no evidence that they were not adequately trained by the respondent to perform their respective job tasks. However, I take note of Mr. Shook's testimony that the respondent's safety procedures include instructions prohibiting anyone from getting on a runaway car, and Mr. Buckland's contradictory testimony concerning "oral instructions" that he is to attempt to "catch and stop the cars if they get away", and that "get away" cars are not reported to management unless some damage has occurred (Tr. 34, 54-55). The respondent may wish to reexamine its safety procedures in light of this testimony.

I find no evidence to support any reasonable conclusion that the respondent could have foreseen the lack of attention on the part of Mr. Buckland which initially resulted in the first trip of cars drifting away from the shake out area and rolling freely towards the load out area. However, on the facts of this case, one of the contributing factors to the accident was the failure of the brakes on the trip of railroad cars that got away from Mr. Buckland. If the brakes had not failed, I believe that it is reasonable to conclude that Mr. Buckland could have brought the cars under control and the initial collision with the other cars may have been avoided. However, the brakes did fail, and foreman Williams candidly admitted that the respondent accepted railroad cars with bad brakes for use at the plant, and that it was not uncommon for car brakes to fail as the cars travelled from the shake out area to the load out area. Under the circumstances, and notwithstanding the lack of knowledge by the respondent that car hooks have come loose in the past, I conclude and find that the respondent should have foreseen that the acceptance and use of railroad cars with faulty brakes at its preparation plant property posed a potential accident hazard. Under the circumstances, the moderate negligence finding by the inspector IS AFFIRMED.

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

The parties have stipulated that the Coronet Jewell Preparation Plant is a medium-sized operation, and the unrebutted information found in an MSHA computerized "Proposed Assessment Data Sheet" (Exhibit P-6), reflects that the respondent's overall corporate mine production was in excess of twenty-three (23) million tons in 1990. This same production information is also reflected in the Proposed Assessment (Exhibit A), which is part of the initial civil penalty assessment pleading served by the Secretary on the respondent. I conclude and find that the respondent is a large mine operator, and the parties have stipulated that the payment of the proposed civil penalty

assessment for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

An MSHA computer print-out (Exhibit P-5), reflects that for the period October 1, 1989, to September 30, 1991, the respondent paid civil penalty assessments for twenty-two (22) violations issued at the plant. None of these prior violations involved the same safety standard in issue in this case, and the petitioner believes that the respondent has a low history of violations. I agree with the petitioner in this regard, and for an operation of its size, I conclude and find tht the respondent has a good compliance record, and I have taken this into consideration in assessing the civil penalty for the violation which has been affirmed.

Good Faith Compliance

The parties stipulated that the respondent timely and immediately abated the violation, and I adopt this as my finding on this issue and have taken it into consideration in this case.

Gravity

Based on all of the evidence adduced in this case, including my "S&S" findings, I believe that Mr. Shook was fortunate in avoiding more serious injuries, and I conclude and find that the violation was serious.

Civil Penalty Assessment

Taking into consideration all of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment of \$58, for the violation in question is reasonable, and IT IS AFFIRMED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$58, for the section 104(a) "S&S" Citation No. 3507478, October 17, 1991, 30 C.F.R. § 77.1607(v). 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 11 1993

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. PENN 91-147-R
: Citation No. 3701661; 1/17/91
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 91-148-R
ADMINISTRATION (MSHA), : Citation No. 3701662; 1/17/91
Respondent :
: Docket No. PENN 91-149-R
: Citation No. 3701663; 1/18/91
: Robena Preparation Plant
: Mine ID 36-04175
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 92-391
Petitioner : A.C. No. 36-04175-03557
v. :
: Robena Preparation Plant
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Daniel E. Roger, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Consol;
Richard Rosenblitt, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Weisberger

At issue in these consolidated cases is the validity of a withdrawal order issued under Section 107 of the Federal Mine Safety and Health Act of 1977 ("the Act"). Also at issue are citations alleging violations of 30 C.F.R. § 77.1605(k), and 30 C.F.R. § 77.1713(a). Subsequent to notice, the cases were scheduled and heard in Washington, Pennsylvania, on September 22, 1992. At the hearing, George Rantovich, Robert W. Newhouse, and Robert L. Campbell testified for the Secretary (Petitioner). Edward F. Bodkin, Jr., testified for the Operator (Respondent). Also, subsequent to the hearing, Petitioner offered in evidence Government Exhibit No. 7 which was not

objected to by Respondent. Accordingly, Government Exhibit No. 7 is hereby admitted. Petitioner and Respondent filed post hearing briefs on December 7, 1992 and December 16, 1992, respectively.

Findings of Fact of Discussions

I. Citation No. 3701662 (Violation of 30 C.F.R. § 77.1605(k))

On January 17, 1991, MSHA inspector George Rantovich issued Citation No. 3701662 alleging a violation of 30 C.F.R. § 77.1605(k) in that at various locations along both sides of the elevated haulage road at Respondent's Robena preparation plant ("Robena")¹ adequate berms were not provided.² Section 77.1605(k) supra, provides as follows "Berms or guards shall be provided on the outer bank of elevated roadways".

The terrain at the Robena facility is hilly. A haulage road traverses this terrain from the plant to a refuse dump. The haulage road is at a 10 degree incline from the plant to a point where the road crosses railroad tracks. From there to a "Y" intersection the slope of the grade is 5 degrees. Terex haulage trucks regularly travel from the plant to the refuse dump and back.

On January 17, 1991, George Rantovich, an MSHA inspector, inspected Robena along with Robert Campbell, Robert W. Newhouse, and Edward F. Bodkin, Jr. Rantovich walked on the haulage road from the plant to the "Y" intersection. Rantovich testified that there was a "definite drop off" on both sides of the roadway up to 3 to 4 feet in some areas (Tr. 26).

¹Robena is a facility that cleans coal. It is not physically connected to an underground mine, nor it is dedicated to one. The Dilworth Mine, ("Dilworth") operated by Respondent is located approximately eight miles away. Coal is normally transported from Dilworth mine to Robena, by way of barges that travel a river route. Dilworth and Robena have separate mine identification numbers and are required to maintain separate records.

²The citation issued by Rantovich alleges that adequate berms were not provided on the haulage road from the preparation plant, ".to the slate dump". Newhouse and Rantovich conceded that they walked on the haulage road only as far as the "Y" intersection and did not reach the slate dump. I find that the error in the citation with regard to the extent of the area cited is not fatal, inasmuch as Bodkin indicated that Newhouse had pointed out to him the area of inadequate berms, and Respondent does not allege any prejudice as a result of the error in the citation.

Newhouse, an MSHA supervisory inspector testified that he measured a 32 degree drop off on the left side of the roadway. He indicated that there was a zero to 20 degree drop off on the right side from the roadway to a ditch which ran alongside the roadway from the plant area up to the intersection with the railroad track. He said that from the railroad track to the "Y" intersection, the bed of the roadway was raised up to 20 to 25 feet above the natural terrain. Respondent did not impeach or rebut the testimony of Newhouse and Rantovich in these regards. Hence I conclude that the roadway was elevated.

Newhouse estimated that 50 percent of the berms on both sides of the road between the plant and the Y intersection were inadequate as they were only 25 to 26 inches high. In essence, Rantovich and Newhouse both indicated that the road was muddy and slippery, and that berms less than 42 inches high, the height of the axles of the terex vehicles in question, are not adequate to stop these vehicles from going over the embankment. Newhouse said that Bodkin, Robena plant foreman, agreed that there was an inadequate berm. Bodkin did not contradict the testimony of Rantovich and Newhouse with regard to the existence of areas where the berms were less than the axle height of 42 inches. Nor did Bodkin impeach or contradict the testimony of Newhouse that he (Bodkin) said that the berm was inadequate. Also, Respondent did not impeach or contradict the testimony of Petitioner's witnesses that the road was elevated in relation to the adjacent land.

Pursuant to Section 77.1605(k), supra berms must be provided on the outer bank of elevated roadways. A "berm" is defined in 30 C.F.R. § 70.2(d), as ... "a pile or mound of material capable of restraining a vehicle;"

In Secretary v. U.S. Steel Corp., 5 FMSHRC 3 (1983), the Commission addressed what is meant by "restraining a vehicle".

Restraining a vehicle does not mean . . . absolute prevention of over travel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

The Commission in U.S. Steel, supra, at 5 held as follows:

We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by

the standard.

Newhouse testified, in essence, that the protection intended by Section 77.1605(k) supra requires berms to be at least the height of the axle of the largest vehicle normally using the road in question. Rantovich measured a terex's axle height and noted it was 42 inches. MSHA has in the past notified operators of this height requirement.

Robert L. Campbell, Chairman of the Union's Health and Safety Committee, and an employee of the operator, testified that, for the last six years, during monthly inspections the union and the operator measure the berms to determine whether they are at least 42" high. According to Campbell, if a section of the berm is less than 42", the operator immediately builds the berm to at least the 42" level. This testimony was not inspected or contradicted by Respondent.

I conclude, considering all the above, that the berms less than 42" high were not adequate under Section 77.1605(k), supra, as they were not capable of restraining the vehicles in question.

Also, according to Rantovich, at 3 to 4 locations on both sides of the haulage road for distances between 15 to 20 feet, there were no berms at all. He indicated that in all these areas the roadway was elevated. He indicated that near the railroad track crossing and for approximately 15 feet there were no berms, there was an immediate drop off of 2 to 3 feet which tapered off towards the ditch. Newhouse estimated that 10 percent of the roadway did not have any berms.

Bodkin indicated that, for purposes of drainage, a bulldozer had cut through and eliminated approximately 12 to 15 feet of the berms on the right side of the roadway approximately 20 to 30 feet from the intersection with the railroad track in the direction the "Y" intersection.

Although the testimony of Bodkin is not congruent with that of Rantovich's testimony with regard to the area where there were no berms, his testimony does not contradict that of Rantovich and Newhouse with regard to the existence of at least one elevated area where there were no berms.

Based on all the above, I find that on elevated portions of the roadway, there were areas without berms, and other areas where the berms were not adequate. Therefore, it has been established that Respondent violated Section 77.1605(k) supra.

II. Order No. 3701661 (imminent danger withdrawal order)

Rantovich indicated that when he walked the haulage road at approximately 11:00 p.m., on January 17, 1991, it was slippery

and some of the mud on the road was ankle high. Rantovich stopped a terex driver who was coming down the haulage road toward the plant, and asked him if he had any problems. Rantovich said that the driver told him that he had problems controlling the vehicle as it was fish tailing. Rantovich had the terex driver turn around and head back up the roadway so that the roadway could be closed. According to Rantovich as the terex went back up the hill, its traction was "a little slippery but he (the driver) turned around and got started up once he got started up he was alright" (Tr. 41)

Bodkin indicated that he had been on the premises since approximately 2:30 p.m., and had not received any complaints with regards of the condition in the road. He indicated that, specifically, neither of the terex operators who were on duty during the night shift had complained of any problems with the roadway. I do not find this testimony sufficient to rebut the testimony of Rantovich as to what was told to him by one of the terex operators. Further, Bodkin did not specifically rebut the testimony of Rantovich as to his having observed that the traction of the terex vehicle was "slippery". According to Newhouse, if a vehicle would leave the road due to not being stopped by a berm, it could travel 20 to 25 feet on the right side before it hit something. In contrast, Bodkin testified that if a truck fell over the hill in the area where there was a cut in the berm it would only go 5 to 8 feet. He also said that vehicles travel on the left side of any 5 to 10 m.p.h., and that any danger is further minimized by the fact that the "bowl" of the terex can be dropped and "that would be like a brake" (Tr.154).

Rantovich took into account the muddy, slippery condition of the road as well as the inadequate berms, and issued a section 107 withdrawal order.

The Commission, in Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989), the Commission, at 2164 noted the recognition the seventh circuit accorded to the importance of the inspector's judgment as follows:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added) Old Ben Coal Corp. v. Interior Bd of Mine, Op. App., 523 F.2d 25, at 31 (7th Cir. 1975)

Recently, the Commission in Utah Power and Light Company,

13 FMSHRC 1617 at 1627 affirmed its holding in Rochester and Pittsburgh supra. that "...an inspector must have considerable discretion in determining whether an imminent danger exist." In its analysis of whether an inspector's discretion has been abused, the Commission, in Utah Power and Light Company, supra, at 1622 set forth as follows: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time".

Taking into account the slippery condition of the road, its grade, the degree of drop off at either side, the lack of adequate berms for significant distances, and the fact that the road had two curves, I conclude that Rantovich did not abuse his discretion in finding an imminent danger herein, and that his conclusion in this regard is affirmed.

III. Citation No. 3701662

A. Significant and Substantial

I find that the record establishes that, as alleged by Rantovich in the Citation that he issued, the violation was significant and substantial. Clearly, the lack of adequate berms contributed to the hazard of a truck leaving the slippery roadway, and sliding off the road. For the reasons set forth above in the discussion of the issue of imminent danger, II, infra, I conclude that there was reasonable likelihood that the hazard contributed to by the lack of adequate berms would result in a injury. Respondent did not impeach or contradict the testimony of Petitioner's witnesses that, in essence, there was a reasonable likelihood that the resulting injury will be of a reasonably serious nature. Thus I accept their testimony in this regard. For these reasons I conclude that the violation herein was significant and substantial (See Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984).

B. Penalty

Considering all the factors discussed in the analysis of the imminent danger issue infra, II, I conclude that the violation herein was of a high level of gravity. According to Bodkin he had been at the site since approximately 2:30 in the afternoon and no one had complained to him about the conditions of the berms. Also he indicated that the two terex operators on the night shift indicated that they were not having any problems traveling the roadway. On the other hand, Newhouse testified that on January 17, at approximately 9:30 p.m., he received a telephone call from a miner at the mine alleging a possible imminent danger in the haulage road. He then called Respondent's plant foreman and advised him of the same. Bodkin testified Newhouse called and advised him that a 103(g) inspection was

going to be made on the haulage way. According to Bodkin, Newhouse told him that the area in issue was "where the Terexes start up the hill" (Tr.140). Bodkin indicated that he was aware of the problem in that area, and had assigned persons to clean it up. Taking into account the phone call from Newhouse alerting Bodkin to possible problems in the haulage road, as well as the slippery conditions of the road, Bodkin was clearly moderately negligent in not inspecting the roadway at that point for adequate berms. Such an inspection would have revealed inadequate berms as per the testimony of Petitioner's witnesses and not rebutted by Bodkin.

Taking all the above into account, and considering the statutory factors set forth in Section 110(i) of the Act as stipulated to by the parties, I conclude that a penalty of \$1,200 is appropriate for the violation cited in Citation No. 3701662.

IV. Citation No. 3701663

On January 18, 1991, Rantovich issued Citation No. 3701663 alleging a violation of 30 C.F.R. § 77.1713 in that an examination during the last shift was not conducted on the haulage road for hazardous conditions.

On the night of January 17, 1991, the muddy nature of the road, and lack of adequate berms road, and created a hazardous condition as discussed above, infra, II. According to Rantovich, he asked Bodkin to provide him the record book wherein the examinations are noted. Rantovich testified that the record book did not indicate any inspection of the haulage road on January 17. Rantovich then looked at the records for the preceding "couple of weeks or months" (Tr.47), and there was no indication of an inspection of the haulage road. Rantovich said that no one explained to him why there was no indication in the record book of any inspection. Rantovich said that he asked Bodkin if an inspection was made of the roadway that day, and he said that he did not make one and that he was not aware of one.

Based on the above, I conclude that there was no indication in the Respondent's record book that the haulage road at issue had been inspected for hazardous conditions on or about January 17, 1991. I thus find that Petitioner has established a prima facie case of a violation (See L.J.'s Corporation, 14 FMSHRC 1278 (August 26, 1992)). I also find that Respondent has not established that indeed the roadway had been inspected on or about January 17, 1991. I thus find that Section 77.1713 was violated by Respondent.

Bodkin testified, as noted above, that, in essence, on January 17, Newhouse had advised him of a possible imminent danger in the area where the terex trucks start their trip up the haulage road, and that he was actively engaged in cleaning up the

slippery road at that point. He also testified that no employee including the two terex operators on the evening shift had told him of any problem with the road condition. However, taking into account the muddy slippery conditions of the roadway, the fact that Bodkin had been advised as of 9:30 p.m., of a possible hazardous condition with regard to the roadway, I conclude that Respondent's negligence herein was more than ordinary negligence and constituted unwarrantable failure.³ (See, Emery Mining Corporation, 9 FMSHRC 1997 (1987)).

I conclude that a penalty of \$1,000 is appropriate for the violation cited in this order.

ORDER

It is ORDERED that: (1) the Stay Order previously issued in Docket No. PENN 91-147-R is hereby lifted; (2) Respondent shall, within 30 days of this decision pay \$2,200 as a civil penalty for the violations found herein; (3) Order No. 3701661 be affirmed; and (4) Docket Nos. PENN 91-147-R, PENN 91-148-R, and PENN 91-149-R, be DISMISSED.


Avram Weisberger
Administrative Law Judge

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³It appears to the Respondent's position, as set forth in its brief, that the management of Robena did not consider that 30 C.F.R. Part 77 was applicable to the facility. Respondent's position appears to be based on its assertions in its brief, that there is "confusion" in the Act concerning MSHA Jurisdiction over preparation plants not located at mine sites and the "confusing" lack of a definition in Part 77 regarding the applicability of that Part. As such, Respondent argues that its failure to inspect does not justify a findings of "unwarrantable failure". I do not accept this argument. Respondent has not proffered any evidence that its agents were "confused" as to the applicability of Part 77. I do not assign any probative weight in this regard to the arguments of counsel, as such are not evidence.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 13 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. KENT 92-350
v. : A. C. No. 15-04670-03673
: No. 37 Mine
ARCH OF KENTUCKY INCORPORATED, :
Respondent :

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Marco M. Rajkovich, Esq., Wyatt, Tarrant, & Combs,
Lexington, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

This civil penalty proceeding is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) alleging a violation by the Operator (Respondent) of 30 C.F.R. § 75.326. Pursuant to notice the case was scheduled and heard in Johnson City, Tennessee on October 22, 1992. James W. Poynter testified for Petitioner, and Don Henderickson, and Benny Dixon, testified for Respondent. Petitioner and Respondent filed post-hearing briefs on December 29 and December 28, respectively.

Findings of Fact and Discussion

I. Introduction

The G-4 Longwall Panel at Respondent's Karst Mine is located under another coal mine, and has experienced pressure from both the roof and the mine floor. Subsequent to the opening of the section on February 28, 1991, due to continuing roof control problems Respondent had to have the area re-bolted with super bolts. Additional supports in the forms of cribs, and donut cribs with beams on top, were also installed.

On July 15, 1991, a roof fall approximately 120 feet long, and the full width of the 18 foot wide entry, occurred in the

belt entry between crosscuts 6 and 8. Additional cribbing was again installed in the G-4 North Panel, and the area was rebolted. The following day, another roof fall occurred in the belt entry on top of the first fall, and it was decided to abandon the area and remove all equipment. As a consequence of the roof falls and deteriorating roof condition, stoppings were removed in the 6 and 8 crosscuts in order to installed additional support around the fall. The belt line was re-routed to detour the area of the fall, and new stoppings were installed to isolate the re-routed belt line from the intake entry. Subsequent to the roof fall on July 15, supplies were continuously brought to the area in question, in order to provide additional support which was being done on an on going basis. Subsequent to the roof fall, nothing was done to intentionally alter the ventilation as required by Respondent's ventilation plan.

Once supplies were brought onto the section, they had to be hand carried either through a door in the third crosscut between the belt and intake entry, or between the doors built into the stoppings in crosscut No. 8 between the belt and intake entries, and in the intake entry just inby crosscut No. 8.

In normal operation, the doors separating the belt from the intake entries are kept closed in order to prevent air in the belt from going to the face. However, subsequent to the roof falls on July 15, the doors were opened in order to allow the transfer of material to the belt entry, as there was no other access. None of the doors were kept open for the purpose of having air go from the belt entry to the face.

A few days after July 15, another roof occurred in the No. 7 crosscut to the track entry. The fall, 8 to 10 feet high, covered the width of the entry and extended 100 feet.

II. Violation of 30 C.F.R. § 75.326

On July 31, 1991, James W. Poynter, an MSHA Inspector, inspected the area in question. According to Poynter, at approximately 10:30 a.m., while in the belt entry between crosscuts 5 and 6, he felt movement of air in the beltway which was "very perceptible" (Tr. 65). He picked up a hand full of rock dust, tossed it in the air, and it "easily showed the direction of the air current travel" (Tr. 65) inby. The active working place was a little more than four crosscuts inby. According to the ventilation plan, air in the belt entry is to course outby to a regulator located at the intersection of the G-4 Beltline and the return entry of the G-North Panel. Poynter issued a section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.326, which, as pertinent, provides that intake entries shall be separated from the belt entry and that air coursing the belt entry "...shall not be used to ventilate" active working places.

Respondent has not rebutted or impeached the testimony by Poynter with regard to the flow of air inby as observed by him in the belt entry. As conceded by Benny Dixon, who was Respondent's day shift supervisor on July 31, if air is going inby in the belt entry it is "likely" that some will go across the face (Tr. 305) It is Respondent's position that Section 75.326 supra, which precludes air in the belt entry from being used to ventilate the working place, is violated only when an operator has "employed belt air for the given purpose of ventilating the working face". I do not accept Respondent's argument. There is nothing in the plain language of section 75.326 supra, to support the interpretation urged by Respondent. There is no language indicating that only a planned or intentional use by an operator by air from the belt entry to ventilate the working face is prohibited. Nor does the legislative history of the statutory provision which has been repeated in section 75.326 supra, allow for the interpretation urged by Respondent. In this connection, I take cognizance of the Senate Report of the Committee on Labor and Public Welfare accompanying S. 2917, regarding the purpose of Section 204(y) whose pertinent language was continued in the Federal Mine Safety and Health Act of 1977, "the Act," and reiterated in Section 75.326 supra. (S. Rep. No. 91-411, 91st Cong., 1st Sess. (1969), reprinted in Legislative History of the Federal Coal Mine Health and Safety Act of 1969. ("Legislative History") The Senate Report provides as follows:

The objective of the section is to reduce high air velocities in trolley and belt haulageways where the coal is transported because such velocities fan and propagate mine fires, many of which originate along the haulageways. Rapid intake air currents also carry products of the fire to the working places quickly before the men know of the fire and lessen their time for escape. If they use the return aircourses to escape, the air coursed through may contain these products and quickly overtake them. Also, the objective is to reduce the amount of float coal dust along belt and trolley haulageways. (Senate Report supra at 64, Legislative History, supra at 190).

Hence, the expressed intention of Congress in enacting the language found in Section 75.326, was to reduce the hazards of the propagation of mine fires and the carrying of fire products to the working places. In order to interpret Section 75.326 supra consistent with Congressional intent, i.e. to minimize the hazards which formed the basis of Congressional concern, I conclude that Section 75.326 supra has been violated where the proscribed condition, i.e. air in the belt entry used to ventilate the working place, has arisen even inadvertently and

without the expressed intent of the operator.¹ To accept Respondent's position, would be in conflict with Commission authority holding that because the purpose of the Act is the protection of miners, the regulatory scheme of mandatory safety standards contemplates the strict liability of an operator. (See Western Fuels-Utah, 10 FMSHRC 256 (1988); Asarco, Inc, FMSHRC 1632 (1986))

III. Unwarrantable Failure

According to Poynter, when he observed the flow of air from the belt entry inby, he went to examine the cause for the direction of air flow. He indicated that he observed four conditions which could have given rise to the violative change in air flow. In the No. 3 crosscut, the double doors were partially open, a car was parked in the opening, and a curtain had been draped across the car but did not extend to the floor. Also, at a point where the belt in question went over an overcast, two doors at the inby wall of the overcast were closed. At a head drive (headdrive C) a door was open in the stopping isolating the belt from intake air. Lastly, at a point approximately 120 feet outby the working face where the belt was separated from the intake entry, a curtain was hung "very loosely". (Tr.60) According to Poynter, these conditions were "easily observed" (Tr.67), and the improper direction of the flow of air could have been remedied by tightening the curtain that was loosely hung, closing the mandoor, and properly closing off the two supply doors. He also indicated that as soon he entered the belt entry, "instantaneously" (Tr. 68), he could feel that the air direction was wrong. In essence, none of this testimony by Poynter in these regards was rebutted or impeached by Respondent. Indeed, Benny Dixon, Respondents day shift supervisor conceded that the four factors referred to by Poynter could possibly have caused the air to go the wrong way. In essence, this testimony of Poynter appears to provide the basis for the argument of Petitioner that the violation herein was as a result of Respondent's "unwarrantable failure".

In order to find that a violation resulted from the Respondent's "unwarrantable failure" it must be established that there existed "aggravated conduct", on the part of the Respondent i.e. more than ordinary negligence (Emery Mining Co., 9 FMSHRC 1997 (December 1987)).

I find, based on Poynter's testimony, that the improper direction of the air in the belt entry was obvious. Also, I find, based on Poynter's testimony, that once a change in a

¹to the extent that American Coal Company, 1 FMSHRC 1057 (August 17, 1979, Judge Michels) relied on by Respondent, is inconsistent with this decision, I choose not to follow it.

direction in the air flow was noted, a search for its cause should have been made, and such a search would have revealed the conditions observed by Poynter as, according to his testimony, they were obvious. Also unchallenged are Poynter's assertions with regard to the steps that should have been taken to remedy the reversal in air flow. I thus find that Respondent herein was negligent to a moderate degree with regard to the violation herein.

However, there is no evidence as to when the change in air flow first became perceptible. Nor is there any evidence as to how long the conditions observed by Poynter, which could have caused the reversal in air flow had been in existence. Neither the pre-shift examination report of July 31, nor the report of two other examinations made on July 30 and July 31 (Exhibits R-1 and R-2), note any abnormality in the direction of air flow in the beltline. According to Poynter, he spoke with Ben Rhymer, the foreman of the shift that had begun at 8:00 a.m., and asked him if he "made the belt", and Rhymer indicated that he did, but he did not recall the direction of the air. Further, a finding of a degree of negligence more than ordinary i.e. aggravated conduct, is mitigated by the fact that, as indicated by Dixon, the doors were left open, as they were the only means of access for equipment to be brought to the area in question. The equipment was being brought to the area in question on a continuous basis in order to provide critical support to an unstable roof that had already fallen three times, and had experienced numerous bumps. It also is noted that the doors were normally closed, and employees were instructed at weekly meetings with regard to the closing of doors. Further, although a car had been parked in the doorway which apparently resulted in a curtain being draped over it which did not reach the floor, according to the uncontradicted testimony of Dixon there was no other area for the car to be stored. He indicated that such storage was necessary in order to allow other equipment to go in by to facilitate the supporting of the roof. For these reasons, and taking into account the priority placed by Respondent on working on a continuous basis to support the hazardous roof, I find that it has not been established that the violation herein was as the result of Respondent's unwarrantable failure. (See, Emery, supra).

IV. Significant and Substantial

Petitioner also takes the position that the violation herein has set forth by Poynter is significant and substantial. 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); Youghioheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

As discussed above infra, II, the record establishes a violation of a mandatory standard i.e. Section 75.326 supra. I also find that the flow of air from the beltline toward the working place clearly contributed to the hazard of an injury to miners working inby as a consequence of a fire. Hence, the first two elements of Mathies have been met. The key issue herein is the existence of the third element of Mathies. In order for this element to be met, Petitioner must establish a reasonable likelihood of the existence of an injury producing event i.e.,

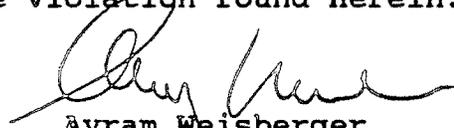
herein, a fire. In this connection, Poynter testified that the drives contained electrical installations and drive motors which are known to cause fires. Further, in the event of a fire the hazards are exacerbated by the fact that the deluge system is not present at the drives of the belts. However, Poynter did not indicate the existence of any defects in any of the electrical equipment. Also, he indicated on cross-examination, that from the new belt drives to the section it was very wet. According to the uncontradicted testimony of Dixon, the belt was 5 1/2 feet off the bottom of the floor, and hence there were no friction points. Also, according to the uncontradicted testimony of Dixon, although the deluge system was not present, the CO Censor was in operation, there were four fire extinguishers at the head drives, as well as a 2,000 foot fire hose at a power center in the area, as well as 4 inch water lines. Also mitigating against likelihood of a fire is the fact that no methane was indicated to be present.

Therefore, for all these reasons I conclude that there was not a reasonable likelihood of an injury producing event, i.e. a fire, contributed to by the violation herein. Thus, I find that it has not been established that the violation was significant and substantial (See Mathies and U.S. Steel).

Considering all the statutory factors set forth in Section 110(i) of the Act, I find a penalty of \$700 to be appropriate.

ORDER

It is **ORDERED** that Citation No. 3834380 be amended to reflect the fact that the violation therein was not significant and substantial and was not the result of the Operator's unwarrantable failure. It is further **ORDERED** that the citation herein be amended to a Section 104(a) citation. It is further **ORDERED** that within 30 days of this decision Respondent pay a civil penalty of \$700 for the violation found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

JAN 15 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-202-M
Petitioner : A.C. No. 03-01475-05526
: :
: Docket No. CENT 92-204-M
v. : A.C. No. 03-01475-05528
: :
: Docket No. CENT 92-205-M
LITTLE ROCK QUARRY COMPANY, : A.C. No. 03-01475-05529
INCORPORATED, :
Respondent : De Roche Creek Quarry

DECISION AND ORDER DISMISSING PROCEEDING

Before: Judge Lasher

Petitioner MSHA, by my Order to Show Cause dated December 3, 1992, and subsequent Order of December 11, 1992, was given until December 31, 1992, to show good cause for its failure to comply with the Prehearing Order of September 14, 1992. As I have repeatedly advised and explained to counsel in the Solicitor's Dallas office over the past two years, one of the purposes of this Prehearing Order is to screen cases to determine if they are going to settle before setting them for hearing. Setting cases for hearing requires a great deal of time and work on the part of our limited secretarial staff. Administrative law judges who approach their docket by automatically setting their cases without screening them do so selfishly both as to the secretaries and fellow judges. Our office would not function efficiently if we all did it. This has been explained at length to the Secretary's counsel.¹

The Commission has set some form of time limitations for its judges. Handling cases out of the Dallas office makes it impos-

¹ The Secretary is not being required to settle the cases by my Prehearing Order. It is required, as the party initiating the proceeding before the Commission, to initiate discussion and communication with the Respondent to determine if the matter will settle. Normally, a large percentage of cases do settle if the Secretary's Solicitor proceeds responsibly and in good faith.

sible to comply with such. Over the past two years, I have found it necessary to plead with several of the attorneys--not all--in this office to get some kind of feedback on the status of cases. As I pointed out in the Order to Show Cause:

The situation has matured to the point that it is impossible to process proceedings, in many of which there is not even a minimum level of response. This is necessary for the Commission's work to be done.

In view of the continuing failure of the Petitioner, I conclude that Petitioner has abandoned its prosecution in these three docket and these proceedings are **DISMISSED**.


Michael A. Lasher, Jr.
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 19 1993

MARTINKA COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 93-45-R
	:	Order No. 3720402; 10/26/92
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 93-46-R
MINE SAFETY AND HEALTH	:	Order No. 3720403; 10/26/92
ADMINISTRATION (MSHA),	:	
Respondent	:	Tygart River Mine
	:	
	:	Mine ID 46-03805

DECISION

Appearances: Thomas L. Clarke, Esq., Charleston, West Virginia, for Contestant;
Glenn Loos, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me base on an Application for Review and Motion to Expedite filed by Martinka Coal Corporation (Operator) on November 12, 1992, challenging the issuance of a Section 104(b) Withdrawal Order. The Secretary (Respondent) opposed the Motion to Expedite and in a telephone conference call on November 13, 1992, with the undersigned and counsel for both parties, argument was heard regarding Contestant's Motion to Expedite. The Motion was granted and the case was set for hearing on November 24, 1992, in Morgantown, West Virginia. At the hearing Robert A. Blair, and David Kenneth Kincell, testified for the Secretary. John Metz, David Kevin Conaway, and Joseph Anthony Keener, testified for the Operator. After the hearing was concluded the parties requested the opportunity to file proposed findings of fact and memorandum of law two weeks after receipt of the transcript of the hearing. This request was granted and it was so ordered. The parties further indicated that they did not wish to file any reply briefs.

The transcript was received in the Office of the Administrative Law Judges on December 3, 1992. On December 23, 1992, counsel for Contestant called the undersigned with the permission of counsel for Respondent and advised that both counsel had agreed to file briefs by December 31, if it was

amendable to the undersigned. The request was granted.

Respondent filed a post hearing brief on December 24, 1992, Contestant filed its brief on January 8, 1993.

Findings of Facts and Discussion

1. Introduction

On October 21, 1992, Mine Safety and Health Administration (MSHA) Inspector Robert A. Blair inspected the four flyte belt line at the Operator's Tygart River Mine. He observed an accumulation of coal dust and float coal dust that had accumulated under the belt, belt drive, belt rollers and on the belt structure along the entire belt line. He also noted the existence of haystack forms, and the fact that at several points rollers were running in the accumulation. He issued a citation alleging a violation of 30 C.F.R. § 75.400 which in essence, provides that, "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." The Operator indicated at the hearing that it does not contest the fact of the violation as well as the allegations set forth in paragraph 8 of the citation.

Blair discussed with Daniel Kevin Conaway, the Operator's Safety Manager for the Tygart River Mine, the time to be allowed for the Operator to abate the violative conditions. Blair allowed until October 26, 1992, for abatement. In essence, Conaway and Wesley Dobbs who works for Conaway, indicated that it would take about two days to clean and fix the beltline. On that date, Blair returned to the belt line in question. He indicated that although the most serious conditions were cleaned up, there was an accumulation of combustible material in the same location as was observed on October 21, 1992. He issued a Section 104(b) order which states as follows:

An effort to totally abate the citation No. 3107658 was not made. Conditions that still exist include was combustible materials still under the No. 4 flyte tail piece area under the belt, also the combustible materials was still on the belt top rollers and bottom rollers in several locations along the belt outby 151, inby 145, inby 148 to 149 and 145 block outby their was haystack forms under the belt, at 139 block inby the bottom rollers was running in muck, inby 124 block bottom roller was running in muck. At No. 133 block the belt was rubbing against the structure of the bottom roller. The belt is operating and no one was observed working on the condition this shift. [sic]

In addition, on October 21, 1992, Blair observed several rollers missing as well as several broken rollers, and that the belt was rubbing against the belt structure. He concluded that the belt was not maintained in a safe condition and issued a Citation No. 3107659 alleging a violation of 30 C.F.R. § 75.1725(a). When Blair returned on October 26, 1992, the date set for abatement of Citation No. 3107659, he observed frozen rollers. He noted that there were hangers missing. He also observed the belt rubbing against the belt structure.

He issued a Section 104(b) order which states as follows:

An effort to totally abate the Citation No. 3107659 was not made. Conditions that still exist include frozen roller was still existing at the tail piece. 151 block outby to 152 top rollers was still bad. Inby 146 block the bottom roller was stuck, and the belt hanger was missing. 139 block inby belt hanger missing, 133 block inby the belt was rubbing the bottom roller structure, outby 124 block a frozen roller, the belt is operating and no one was observed working on the condition this shift. [sic]

None of Contestant's agents stated that the abatement time for either citation previously issued on October 21, 1992, was too short. Nor did any of Contestant's agents request an extension of time to abate the violative conditions. Blair indicated he did not consider extending the abatement time, "Because I gave them adequate time in the beginning" (Tr.51)

II. Extension of the Time for Abatement

Essentially it is Contestant's argument that Blair did not consider extending the abatement, and that there were no hazards posed to miners by the granting of an extension. Contestant, in arguing that the 104(b) order was improperly issued, also refers to its abatement efforts. Contestant cites the fact that 40 man-shifts were expended in abatement efforts, and 60 tons of rock dust were applied. I do not accept Contestant's argument for the reasons that follow.

Section 104(b) of the Federal Mine Safety and Health Act of 1977 ("the Act") provides, in essence, that a withdrawal order shall be issued if an inspector finds that a violation described in a previous citation has not been totally abated within the period set for abatement, and "that the period of time for the abatement should not be further extended".

In issuing the two Section 104(b) orders at issue, Blair indicated he did not consider extending the abatement time, "Because I gave them adequate time at the beginning" (Tr.51). The critical issue is thus whether Blair acted reasonably in not

extending the time for abatement (Peabody Coal Company, 11 FMSHRC 2068, 2100 (October 27, 1989) (Judge Koutras)).

At the time the citations were written on October 21, 1992, Blair asked the mine management how long they needed to abate the violations. Management stated that two days should be enough time. Blair then allowed five days, including a weekend, for abatement.

In addition, the Contestant's failure to timely correct the violations posed hazards to miners. The combination of combustible accumulations together with possible ignition sources such as frozen rollers and the belt rubbing the structure of the belt line, producing heat and friction, created a fire hazard which could send smoke down onto the sections and trap men working inby the fire. Dry and drying coal, and coal dust present behind the tail roller and on the center rollers of the belt line was in contact with the belt and rollers, and presented a fire hazard.

Hence, for all the above reasons, I conclude that Blair acted reasonably in determining not to extend the time to abate the violations previously cited on October 21.¹

II. The validity of the Section 104(b) orders

The Commission, in Mid-Continent Inc., 11 FMSHRC 505, at 509, held that when an operator challenges the validity of a section 104(b) order,

...it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case, by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

¹The case cited by Contestant did not adjudicate the specific issue presented herein, i.e., whether considering the set of facts in this record the inspector's decision not to extend the time for abatement was reasonable. Thus, to the extent that these cases decided by Commission Judges are inconsistent with my decision, I choose not to follow them.

A. Order No. 3720402

1. The Secretary's prima facie case

As set forth by the Commission in Mid-Continent Resources, supra, at 509, the Secretary has the burden of proving that the "violation described in the underlying citation has not been abated within the time period originally fixed, or as subsequently extended."

The "violation described" in the underlying citation was an accumulation of coal dust and float coal that was combustible. According to Blair, on October 21, 1992, there was loose coal, dry loose coal, and dust that was "not wet" packed under the tail piece (Tr. 25). Also, Donald Keith Kincell, a union walk around who accompanied Blair, indicated the presence of dry material at the back of the tail piece.

On October 26, 1992, Blair returned to reinspect the area. He indicated that he noted the continued presence of combustible material at the tail such as loose coal, and coal dust, which was packed and "dull", and had been there for "a while" (Tr.44).² He also observed dry loose coal and dust on top of the rollers at the tail. He indicated that the material was shiny but underneath it was dull. Kincell testified that at the back end of the tail there was still a build-up that was dry to partially wet. He indicated it was in contact with the back rollers, and was approximately 8 inches deep by 15 inches wide. He said that it was damp to dry and was "drying out" (Tr. 85). He was asked whether he observed this same material on October 21, and he said: "Yes, basically all of it was still there" (Tr. 85). He said that behind the tail piece "the coal was more of in the dry stage" (Tr.96). He indicated that under the tail piece the material was in contact with the belt and with the rollers where the belt rubbed the structure.

John Metz, the manager of the mine, indicated that every shift subsequent to October 21, men were assigned to clean the structure, rock dust, and wet the area. According to his testimony approximately 60 tons of rock dust were used. He indicated that on October 26, the material at the tail was "extremely wet" (Tr. 136) and not in contact with either the belting or any rollers.

Contestant does not challenge validity of the citation issued on October 21, 1992, i.e., the presence of an accumulation of combustible material. The testimony of Blair and Kincell

²In general, according to the uncontradicted testimony of Blair, a fresh spill of coal is "shiny", whereas an "old" accumulation is "dull" (Tr.40).

indicates that the violative condition at the tail i.e., coal that was not wet under the tail piece and the back of the tail, was in existence on October 26. I find that the testimony of Metz that the material at the tail was "extremely wet", insufficient to rebut the more specific testimony of Blair that the coal in the tail area was dull, and the testimony of Kincell which in essence indicates the existence of the same conditions noted by Blair on October 21. I thus find, that, at the tail, the Secretary has established a prima facie case that the violative conditions there had not been abated. I find the Operator's evidence inadequate to defeat this prima facie case.

According to Blair, on October 21, he observed loose coal dust all along the belt line, and haystacks. Also, at several locations he observed that the belt and rollers were in contact with material. He said that the material consisting of loose coal, was dry, and was not muck. According to Kincell along the entire length of the beltway there was a build-up of coal between the rollers and the structure, and the rollers were running in haystacks.

Metz indicated that he walked from the head to the tail on October 21, and that he did not observe any dry material. He described the material he observed in as being non-combustible, wet, mucky, and watery. However, it is significant to note that the operator has not contested the fact of the violation i.e. in accumulation of combustible material, as set forth in the citation initially issued.

Further, in this connection, Blair's notes, taken on October 22, 1992, indicate an accumulation on the belt top roller and bottom roller at several locations outby block 151, inby block 145, inby block 148 to 149, and that outby block 145 there were haystacks under the belt. The notes also indicate that at the 139 block inby, rollers were running in muck which was described as being wet to dry and inby block 145 the bottom was running in muck. Due to the fact that these notes were written contemporaneous with the issuance of the 104(b) order, I accord them considerable weight.

According to Blair, on October 26, in general, the area was cleaned up, haystacks were removed, and the walkside of the beltway was cleared. However, he indicated that accumulations were the same as on October 21, in the same locations, and were dull not shiny, indicating an accumulation which was not fresh. Kincell indicated that on October 26, there was fine coal in contact with the belt for the full length of the beltway. He further indicated that under the center rollers, there was the same accumulation that had existed on October 21. He indicated the center roller "was drying material out" (Tr. 86). He said the accumulations in the area of the bottom roller were, "more to the dry stage" (Tr. 95). He also indicated that "The build-up on

the structure, the center roller or the towing roller was dry" (Tr.101), and for the entire of the belt length there was an accumulation under the center rollers.

Based on the above, I conclude that the Secretary has established a prima facie case that at least some of the violative conditions described in the 104(a) citation, as elaborated upon in the testimony of Blair and Kincell, existed at the time the 104(b) order was issued.

2. The Operator's Rebuttal

It appears to be Operator's position that: (1) on October 23, 1992 the violative conditions were abated; and (2) any accumulations of materials present on October 26, 1992, were not combustible, and thus their accumulation does not constitute a failure to abate.

Metz testified that on October 23, 1992, he examined the entire belt structure, although not each individual piece. He said that the material that was present was wet, and not capable of being burnt. He said that he examined the material with his hand, and in some location it ran through his fingers. He said that at other locations he was able to squeeze water out of the accumulation, and no accumulation was any dryer. According to Metz, on October 23, 1992, no material was in contact with the belt roller or any moving parts. He also said that at the tail piece there was no material in contact with any moving parts, and there was no accumulation at the tail.

At best, Metz' testimony tends to establish that the material observed by him on October 23, was wet and non-combustible. However, Metz did not compare the conditions that he observed on October 23, to that to which he had observed on October 21, shortly after the initial citation was issued. I accordingly find that his testimony is insufficient to predicate a finding that as of October 23, 1992, the violative conditions set forth in the citation and elaborated upon in the testimony of Kincell and Blair, were no longer in existence.

Metz indicated, in essence, that the material that he observed on the belt line on October 26, was muddy and wet. He said that he touched haystacks a couple of times and the material ran through his fingers. He also said that a couple of times he picked up material from the floor under the belt. He said he made mud balls, and as he squeezed them the material oozed through his hand. He described this material as non-combustible. According to Blair, he did not observe Metz picking up any material in his presence, and that although he was walking in front of Metz "when I walk I constantly turn my head" (Tr. 265). Due to the fact that Blair was walking in front of Metz, and thus had his back to Metz, I find Blair's testimony insufficient to

contradict the testimony of Metz with regard to his having felt the material in issue.

It is clear that on October 26, 1992, there still was an accumulation of material. The issue from the operator's perspective, appears to be whether that material still be considered combustible. However, according to Mid-Continent, supra, the key issue is whether the violative conditions which were initially cited continued in existence when the 104(b) order was issued i.e. on October 26. Clearly, by all accounts, on October 26, 1992, there continued to be an accumulation of coal in the belt line. Only the Secretary's witnesses compared the accumulations on October 26, 1992, to that which were in existence on October 21. Their testimony indicates, in essence, that in some respects, the accumulations were the same. The fact that some of the accumulations on October 26, were very wet does not negate the existence of the conditions initially cited by Blair on October 21, to be violative of Section 75.400 and not contested by the Operator. It would appear to be the thrust of the Operator's case to challenge determination by Blair that the accumulations were "combustible". It would appear that such a challenge is germane to a contest of the initial citation. However, such a challenge does not appear relevant when the only issue is the validity of 104(b) order, which in turn depends upon a resolution of only whether the conditions originally cited were still in existence at the time of the issuance of the 104(b) order (See Mid-Continent, supra). In this connection I find that the weight of the evidence establishes that the cited violative conditions were still in existence on October 26, and that this conclusion has not been rebutted by the Operator. For these reasons I conclude that Order No. 3720402 was properly issued, and the contest to its issuance is to be dismissed.

B. Order No. 3720403

1. The Secretary's prima facie case

Essentially, according to Blair, on October 21, 1992, the conditions that he observed which caused him to issue the initial citation consisted of several missing bottom rollers, a 100 foot length of the belt where roller were missing, and that the fact that several frozen rollers were observed. In addition, he noted that some bearings were bad, and the belt was rubbing against the structure causing rubber to flake.

Blair indicated that on October 26, the same rollers that were frozen on October 21, were also frozen on October 26, although he did not know how many were frozen. He also said that although some of the bottom rollers at the head were repaired, the bottom rollers that were missing on October 21, were still missing on October 26. In this connection, he indicated that along 100 foot area all bottom rollers were still missing.

Kincell indicated that the rollers that he observed missing on October 26, were also missing on October 21. He thought that they were in the area of blocks 137 to 138. Notes taken by Blair on October 26, indicate that the top roller 151 outby to 152 is still bad. Kincell indicated that October 26, within 25 feet of the tail piece on he observed two stuck rollers, one on top and one on the bottom. He said that these were among those that he had observed on October 21.

Metz indicated that on October 23, he spent "probably" two hours looking for frozen rollers (Tr.180). He said he inspected all the rollers, i.e. 2,800, and did not observe any frozen rollers along the belt line. He said that there were no frozen rollers at the tail piece. It was further Metz' testimony that between October 21 and October 26, 15 to 18 rollers were replaced.

According to Metz, on October 26, Blair pointed out to him rollers that he (Blair) said were frozen. Metz indicated that some of the rollers Blair had pointed to were not in contact with the belt, and the others which were in contact with the belt did turn when Metz reached in and turned them. Blair, in rebuttal, indicated that on October 26 when he pointed out frozen rollers to Metz, Metz did not demonstrate that they were not frozen, and instead said they were trying to change them. In this connection, Blair testified that after the two 104(b) orders in question were issued, Daniel Kevin Conaway the safety manager at the Tygart Mine to whom he spoke, said "we just failed to correct them more properly" (Tr. 60). Conaway, who testified, did not specifically rebut this testimony.

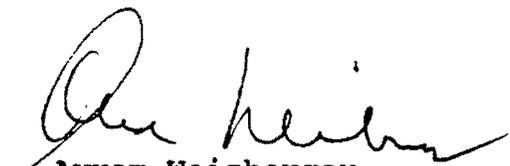
I conclude, based on all the above, that the Secretary has established a prima facie case that some of the rollers that were observed missing on October 21, were still missing on October 26. Metz testified that 15 to 18 rollers were replaced, however there is no evidence in the record as to the locations where these were replaced. Nor is there any evidence as to the total number of rollers that had been observed missing on October 21, aside from the testimony of Blair, that for 100 feet rollers were missing, and the testimony of Kincell that at a point 10 feet removed from block No. 133 for a distance of 120 feet, there were no rollers. Accordingly, I find that based on the testimony of Blair and Kincell that the Secretary has established a prima facie case that some of the rollers observed missing on October 26, were the same that had been missing on October 21.

2. The Operator's Rebuttal

There is not any specific testimony to rebut the specific testimony of Kincell that two of the rollers that he observed frozen or not turning on October 21, where in that same condition on October 26. I thus conclude that a prima facie case has been

established that some of the violative conditions cited on October 21 continued to exist on October 26 with regard to defective or inoperative rollers. The operator has not introduced any specific evidence to rebut this prima facie case such as evidence of missing rollers which had been replaced. Nor is there any evidence that any missing rollers which had been replaced after October 21, subsequently were no longer in place. (See Mid-Continent, supra). Therefore I find the Operator's challenge to this order to be without merit.

Therefore for all the above reasons, I order that these cases be DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

JAN 21 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-33-M
Petitioner	:	A.C. No. 41-02926-05515
	:	
v.	:	Crusher #2
	:	
PRICE CONSTRUCTION INC.,	:	
Respondent	:	

DECISION

Appearances: Nancy B. Carpentier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Bob Price, President, PRICE CONSTRUCTION, INC., Big Spring, Texas, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Complaint Proposing Penalty by Petitioner on December 20, 1991, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking assessment of a penalty for a violation described in Citation No. 3448774 issued April 2, 1991.

At commencement of hearing in Abilene, Texas, on November 19, 1992, the parties conferred and reached an amicable resolution of this matter. The parties agreed that the "Significant and Substantial" designation of the violation should be deleted and that an appropriate penalty should be \$25.00. This settlement was approved from the bench by my order on the record (T. 5-6) and such is here **AFFIRMED** and the penalty stipulated is here **ASSESSED**.

ORDER

1. Citation No. 3448774 is **MODIFIED** to delete the "Significant and Substantial" designation thereon and is otherwise **AFFIRMED**.

2. Respondent, if it has not previously done so, **SHALL PAY** to the Secretary of Labor within 40 days from the date hereof the sum of \$25.00.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 21 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-46-M
Petitioner : A.C. No. 41-03142-05522
: :
v. : Atkins Pit
: :
YOUNG BROTHERS INCORPORATED, :
Respondent :

DECISION

Appearances: Nancy B. Carpentier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Richard C. Baldwin, Risk Manager, Waco, Texas, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Complaint Proposing Penalty by Petitioner on February 3, 1992, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking assessment of a penalty for a violation described in Section 107(a) Withdrawal Order No. 3895378 issued May 29, 1991.

At commencement of hearing in this matter in Abilene, Texas, on November 17, 1992, the parties conferred and reached an amicable resolution of the litigation wherein Respondent agreed to pay a penalty of \$250 for the violation described in the Withdrawal Order. This settlement was approved by my bench order on the record (T. 4) and such is **AFFIRMED** here, and the penalty agreed to is here **ASSESSED**.

ORDER

Respondent, if it has not already done so, **SHALL PAY** to the Secretary of Labor within 40 days from the issuance date of this decision the sum of \$250.00.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 21 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-223
Petitioner : A.C. No. 15-14074-03601
v. :
 : Docket No. KENT 92-635
PEABODY COAL COMPANY, : A.C. No. 15-14074-03608
Respondent :
 : Martwick Mine

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
David R. Joest, Esq., Midwest Division Counsel,
Peabody Coal Company, Henderson, Kentucky,
for Respondent.

Before: Judge Melick

These consolidated proceedings are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Peabody Coal Company (Peabody), in two citations and two withdrawal orders, with four violations of mandatory standards. In these cases Peabody challenges only certain "significant and substantial" and "unwarrantable failure" findings made by the Secretary.

Docket No. KENT 92-223

In this case Peabody is charged, in Citation No. 3548378, with one violation of its ventilation plan under the standard at 30 C.F.R. Section 75.316. The citation alleges as follows:

The old No. 4 unit return was not separated from the track and belt entry at the second cross-cut from the mouth of the unit. The return stopping was knocked out in this location.

At hearing the issuing inspector for the Mine Safety and Health Administration (MSHA), Keith Ryan, testified that he issued the citation at bar upon what he considered to be

violations of the mine operator's approved ventilation plan (Government Exhibit No. 1), and, in particular, page 1, paragraph 4, of that plan under the description of "Permanent Stoppings." Those provisions read as follows:

Stoppings shall be erected between the intake and return aircourses in entries and shall be maintained to and including the third connecting crosscut outby the faces of the entries on the return side, and shall be maintained to the unit tailpiece on the intake side.

In addition, Inspector Ryan maintains that paragraph 8 on page 3 of the plan was violated. Those provisions read as follows:

All ventilation controls shall be installed in workman-like manner and maintained in a condition to serve the purpose for which it was intended.

It is, of course, established law that once a ventilation plan is approved and adopted its provisions are enforceable at the mine as mandatory safety standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Carbon County Coal Co., 6 FMSHRC 1123 (1984); Carbon County Coal Co., 7 FMSHRC 1367 (1985), Jim Walter Resources, Inc., 9 FMSHRC 903 (1987).

Inasmuch as Peabody admits the violation charged in the citation, the only issues remaining are whether the admitted violation was "significant and substantial" and the appropriate penalty to be assessed. Inspector Ryan has 6-1/2 years experience as a federal mine inspector and 6 years prior experience working in the coal mining industry. He was at the Martwick Underground Mine on October 1, 1991, performing a regular inspection in the old No. 4 Unit off of the south submain. It is not disputed that at the time of this inspection the old No. 4 Unit was being sealed and equipment and materials were being reclaimed from the unit. Seals had been built across the two intake entries to the unit blocking one entry completely and the other "3/4 of the way" leaving a 2- by -3 foot opening. A stopping had also been constructed at the belt entry to the unit.

Ryan attempted to take an air reading with his anemometer in the old No. 4 Unit but there was insufficient air. He then used a smoke tube and calculated the flow at 6,100 cubic feet per minute (at the red "x" on Joint Exhibit No. 4). Ryan also noted that, while taking an air reading in the return, his "270" monitor sounded indicating the presence of low oxygen. Ryan also noted that miners were working at

this time in the track entry. The violation, according to Ryan, consisted of the removal of one of the permanent stoppings separating the track and belt entries from the return. It had been located in the first cross cut outby the line of pillars in which the seal were being constructed.

Ryan testified that the danger or threat to safety contributed to by the violation was low oxygen. In this regard he testified as follows:

It was reasonably likely if it was continued to allow the stopping to be out, possible chances of low oxygen coming back onto these men anywhere on this area on the track entry to old No. 4, allowing them to become unconscious or even to die from it (Tr. 48).

He also believed that the absence of the stopping affected the overall ventilation of the old No. 4 Unit:

It was short-circuiting what little bit of air was coming up the trackage into the belt area, not allowing enough ventilation being established up the track and belt which would have been short-circuited back in the return here.

He further expressed concern with explosions. In this regard the following colloquy occurred:

When you have possible chance of low oxygen, which it was in this case, people can't come -- overcome and die from lack of oxygen, possible methane content that might be up in the air. In this case with battery motors and power center all in the track entry inby the doors, this allowed the equipment to -- it could cause a spark or even cause an explosion.

* * *

Q. [Government counsel] How can a spark occur --- or how can a sparking cause an explosion in this area?

A. When you have low oxygen, a lot of the time it's being replaced by either methane or carbon monoxide, CO 2, [sic].

Not knowing what conditions were in by these seals on old No. 4 where the old work -- worked out area out -- in by, I had no idea what kind of a methane content was up in that area.

Q. All right. And if injury occurred based on the things that you've noted, would it be a reasonably serious injury?

A. Yes, sir. Any time it's -- you've got below 19-1/2 percent, there's reasonable likelihood if something was to happen, it'd be highly likely to happen. (Tr. 49-50)

Inspector Ryan illustrated the intended airflow through the old No. 4 Unit on Joint Exhibit No. 4 with pink arrows, using a single arrow for intake and a double arrow for return. He indicated the "short circuiting" effect on the exhibit with orange arrows. The difference between normal airflow (pink) and "short circuited" airflow (orange) is illustrated by an arrow showing airflow from the belt and track entries, through the missing stopping, into the return.

It is not disputed that airflow in the neutral entries is normally in an outby direction from intake regulators. Ryan did not take any measurements of airflow or direction in the belt or track entry. He took a smoke tube measurement in the return which showed little movement, but in an outby direction.

The inspector also obtained an oxygen level reading of 19.4 percent in the return with his hand held detector (marked on Joint Exhibit No. 4 with a green "X"). He took a bottle sample at the same location which, on analysis, showed 19.36 percent oxygen (Government Exhibit No. 3). His detector showed 0.4 percent methane and the bottle sample 0.38 percent. The explosive range of methane is from 5 to 15 percent. The bottle sample also showed 0.36 percent carbon dioxide.

Inspector Ryan testified at one point that the low oxygen in the old No. 4 Unit return was actually caused by the restriction of intake airflow by the partial seals built across the panel's intake entries. Later, Ryan opined, however, that the missing stopping exacerbated the panel's ventilation problems by short-circuiting the airflow to the panel by allowing the restricted intake air to follow another path.

MSHA Health and Safety Officer Robert Phillips testified that oxygen levels below 16.5 percent, the level at which a flame safety lamp is extinguished, represents an immediate threat to individuals. He further explained that at that level it may take a period of time for there to be an adverse effect. Phillips admitted that the subsequent ventilation plan approved for the Martwick Mine after October 1991 allowed stoppings to be taken out when seals were being constructed.

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'd 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria)). The third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also, Halfway, Inc., 6 FMSHRC 1573, 1574 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1969).

Respondent argues that the instant violation was not "significant and substantial" for three reasons. It first argues that there is no credible explanation in the record as to how the cited hazards in the return entry could have affected the safety of the miners who were working in the belt/track entries. However, even assuming arguendo, that just as Respondent claims that the miners' working in the belt/track entries, so long as they remained in the same

location, may not have been exposed to the oxygen deficiency hazards alleged by the Secretary, it fails to account for exposure to the described hazards by others, including the inspection party itself.

Respondent next claims that the issuing inspector himself acknowledged that the real cause of the low oxygen and lack of airflow in the return were the partial seals built across the intakes, which was not a violation and not the condition cited.

Inspector Ryan did in fact testify that the reason for the alleged hazard of inadequate ventilation in the old No. 4 unit was the substantial obstruction of the intake entries by the partially built seals, which completely blocked one entry and left only a 2' X 3' opening in the other. However, Ryan also testified that the missing stopping exacerbated the ventilation problems by short circuiting the air flow to the panel thereby allowing the restricted intake air to follow another path. Under the Mathies test, the Secretary need prove only that the violative condition contributed to the discrete safety hazard, not that the condition was the sole cause, or even the major cause, of the hazard. Accordingly, I reject Respondent's argument in this regard.

Finally, Respondent argues that since MSHA subsequently approved a revision to the ventilation plan for the subject mine allowing stoppings to be removed during the sealing of panels, MSHA does not in fact believe that removal of the subject stopping in fact created any health or safety hazard. While it appears to be true that a revision of this nature was subsequently made in the ventilation plan, this evidence is not sufficient in itself to permit the inference suggested by Respondent. The ventilation plan must be reviewed in its entirety and there may very well have been other corrective procedures required or implemented along with the noted revisions and mining conditions may have changed subsequent to the violation cited herein.

Under the circumstances I find that the cited violation was indeed "significant and substantial" and of high gravity. Considering all of the available evidence in reference to the criteria set forth in Section 110(i) of the Act, including the Inspector's undisputed negligence findings in his citation, I conclude that the proposed civil penalty of \$227 is appropriate for the instant violation.

This case involves one citation (No. 3417070) and two withdrawal orders (Nos. 3417071 and 3417072) issued pursuant to Section 104(d)(1) of the Act.¹ The citation and orders were initially issued as citations under 104(a) of the Act on October 2, 1991. They were modified on November 20, 1991, based upon subsequent findings by the Secretary of unwarrantable failure. Peabody does not dispute the violations nor that those violations were "significant and substantial" and challenges in these proceedings only the Secretary's findings that the violations were the result of its "unwarrantable failure."

Citation No. 3417070 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. Section 75.301 and charges as follows:

Obvious violations were observed and present in the 4 east sub main entries, in that the ventilating current of air was not sufficient to dilute, render harmless, and carry away harmful gases and the air quality was less than the required oxygen content 19.5 volume per centum of oxygen required, air samples collected in the No. 2 entry (intake) and the

¹ Section 104(d)(1) of the Act provides as follows:
If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) 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.

No. 5 entry (return) of the east sub main entries, citations issued in conjunction with 107(a) Order No. 3417069 therefore no time was set.

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

All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes.

Order No. 3417071 alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 75.305, for failure to conduct adequate weekly examinations for hazardous conditions, and charges, as follows:

The weekly examinations for hazardous conditions were not adequate in the 4 east sub main entries and seals in that obvious violations were present. 6 man doors were open in the permanent stopping line between the Nos. 4 and 5 entries return side that was a short circuit to the ventilating air current to the seals and permanent stoppings between Nos. 2 and 3 entries. Intake side to the seals had been removed and replaced with curtains in 6 crosscuts short circuit in air current that ventilated the seals, the air quality and quantity were not sufficient to dilute harmful gases as to properly ventilate the area where persons were required to work. Citation issued in conjunction with 107(a) Order No. 3417069.

Finally, Order No. 3417072 alleges a "significant and substantial" violation of the mine operator's ventilation plan under the standard at 30 C.F.R. Section 75.316 and charges as follows:

The approved ventilation plan dated February 14, 1991 was not being followed in the 4 east sub main entries off the south west sub mains, in that 6 man doors

were open to short circuit the air current, this being ventilation controls not maintained in a condition to serve the purpose for which they were intended (ventilating the 4 east sub main seals) creating a hazardous condition low oxygen at the seals page (3) Statement (8) of the approved plan citation issued in conjunction with 107a Order No. 3417069.

More particularly, the Secretary maintains that in the above order Peabody violated page 3, paragraph 8, of its ventilation plan (Government Exhibit No. 1) which provides that "all ventilation controls shall be installed in a work-manlike manner and maintained in a condition to serve the purpose for which it was intended."

The evidence is essentially undisputed that during the course of an inspection by MSHA Inspector Darold Gamblin at the old No. 4 Unit of the subject Martwick Mine on October 2, 1991, a hand held detector carried by Peabody Safety Supervisor Paul Cotton sounded a low oxygen alarm, indicating oxygen levels below 19.5 percent. Gamblin marked the location (on Joint Exhibit No. 4 with a pink "X") at approximately the same location Inspector Ryan had found low oxygen the previous day. Gamblin took two bottle samples at that same location and the test results showed 19.12 and 19.06 percent oxygen. Gamblin then proceeded up the track entry and found 6 man doors open in the return stopping line. He considered this to be a violation of paragraph 8, page 3, of the approved ventilation plan noted above and the condition was accordingly cited in Order No. 3417072. Inspector Gamblin also considered that the weekly examination of the area (which was performed shortly after midnight on the morning of October 2, 1991) was inadequate because those hazards were not reported. (See Joint Exhibit No. 2).

As previously noted, Peabody challenges only the "unwarrantable failure" findings made by the Secretary. Unwarrantable failure has been defined by the Commission as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997 (1987); Youghiogheny and Ohio Coal Co., 8 FMSHRC 2007 (1987). In the latter decision the Commission further stated that whereas negligence is conduct that is "inadvertent, thoughtless, or inattentive, unwarrantable conduct is conduct that is described as not justifiable or inexcusable."

In its post-hearing brief, the Secretary, in support of her finding that these violations were the result of "unwarrantable failure" stated only as follows:

It is clear from the testimony of Inspector Ryan, Mike Abney, Health and Safety Conference Officer Bob Philips, Inspector Gamblin, and Kenneth Baggarly that the operator was fully aware of the fact that there was a problem with low oxygen on the old No. 4 Unit on October 1, 1991. Nevertheless, when the area was inspected 24 hours after the operator was made aware of low oxygen on the section, the problem of low oxygen still existed. Not only did the problem still exist, but the area had been examined for weekly hazardous conditions and the presence of low oxygen was not noted on the examination book. Additionally, the operator continued to send miners into the area to work, knowing that there was a problem with low oxygen that had not yet been corrected.

While the evidence is undisputed that indeed there was an oxygen deficiency in the old No. 4 Unit on October 1, 1991, as the Secretary alleges, the fact that low oxygen also existed 24 hours later in the same general area which was the result of new violative conditions (the fact that 6 man doors had been left open in the return stopping line) not cited on October 1, does not, however, necessarily lead to the inference the Secretary suggests. The citation and orders now at issue admittedly arose out of an interrelated set of facts, commencing with the fact that 6 man doors had been left open in the return stopping line, admittedly a violation of the ventilation plan and as charged in Order No. 3417072. It is alleged by the Secretary that this violation in turn caused the low oxygen in the return in violation of 30 C.F.R. Section 75.301 and as charged in Citation No. 3417070. It is further alleged that since the weekly examination conducted on the morning of October 2, 1991, failed to disclose these open man doors, the examination was therefore also purportedly inadequate. The latter violation was charged in Order No. 3417071.

The Secretary has failed, however, to sustain her burden of proving that these violations were the result of Peabody's "unwarrantable failure." There is no evidence as to when the man doors were opened or by whom. More specifically, there is no direct nor adequate circumstantial evidence that the doors were open in the early morning of October 2, 1991, at the time the weekly examination was conducted. Accordingly, there is no evidence to support a

conclusion that Respondent knew or even should have known that the 6 man doors had been opened in the return stopping line of the old No. 4 Unit.

While the Secretary also apparently claims that the examination was inadequate in that the examiner failed to note low oxygen on the weekly examination performed on the morning of October 2, 1992, there is again no direct or adequate circumstantial evidence as to what the oxygen level actually was during that examination. The oxygen levels measured on October 1 and 2, 1992 were only slightly below the required 19.5 percent and it may just as reasonably be inferred that the oxygen levels were at or above 19.5 percent during the examination. It cannot reasonably be inferred therefore that the examiner had knowledge of an any oxygen deficiency during his examination on October 2, 1991.

In addition, while MSHA Supervisor Charges Dukes concluded that the violations were the result of "unwarrantable failure," his testimony cannot be credited because it was based upon erroneous assumptions of fact. Nothing in the two citations issued by Inspector Ryan on October 1, 1991, could be deemed to have given notice of the specific violations charged on October 2, 1991, regarding the open man doors inby the panel mouth.

Under the circumstances, I conclude that the Secretary has failed to sustain her burden of proving such a level of aggravated conduct or omissions that constitutes more than ordinary negligence. The "unwarrantable findings" in Citation No. 3417070 and Order Nos. 3417071 and 3417072 are therefore unsupported, and, accordingly, they are modified to citations under Section 104(a) of the Act. Considering the lower level of negligence therefore associated with these violations, but also considering the admitted "significant and substantial" nature of these violations and the remaining criteria under Section 110(i) of the Act, I find that civil penalties of \$500 for each of the above three violations are appropriate.

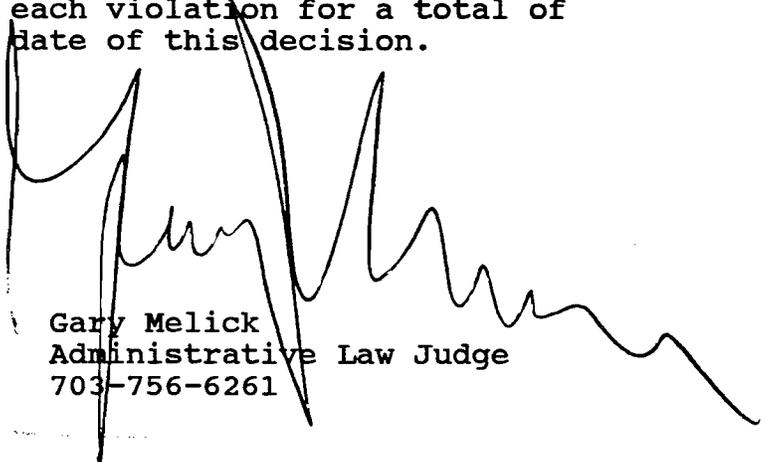
ORDER

Docket No. KENT 92-223

Citation No. 3548378 is affirmed with its "significant and substantial" findings and Peabody Coal Company is directed to pay a civil penalty of \$227 for the violation charged therein within 30 days of the date of this decision.

Docket No. KENT 92-635

Citation No. 3417070 and Order Nos. 3417071 and 3417072 are hereby modified to citations under Section 104(a) of the Act and Peabody Coal Company is directed to pay civil penalties of \$500 for each violation for a total of \$1500 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
703-756-6261

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 21 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 90-346-M
Petitioner :
v. :
FORD CONSTRUCTION COMPANY, :
Respondent :

DECISION AFTER REMAND

Before: Judge Morris

On December 2, 1992, the Commission remanded the above case. In its decision the Commission concluded Respondent's scraper (Co #8-7) and its bulldozer (Co #5-1) were within the coverage of 30 C.F.R. § 56.14130(g). The Commission further directed the Judge to determine whether the scraper citation was properly designed as being S&S. The Commission also directed the Judge to assess civil penalties for both Citations.

In connection with the scraper Citation, the evidence shows that MSHA Inspector James Alvarez observed an employee of Ford Construction Company ("FCC") operating a CAT 637D scraper without wearing a seat belt. Inspector Alvarez described the scraper as a large piece of mobile equipment approximately 49 feet long, 13 feet wide, and 14 feet high. The equipment operator was sitting in the cab that had no door on it. It was approximately five-and-a-half to six feet from the operator's position to the ground. The scraper was being operated on a steep, declining road which was in poor condition, with pot holes, bumps, and loose material (Tr. 17). After speaking to management Inspector Alvarez issued a Section 104(a), S&S Citation in which he stated:

The operator of the CAT-637-D (Co. No. 8-7) scraper was observed driving this vehicle on steep, up and down grades on a bumpy roadway, which could easily cause him to be knocked or bumped out of the driver's seat because he was not wearing his seat belt as required.

Significant and Substantial

A violation is properly designated as being of an S&S nature "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary, 861. F.2d 99,104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

Following the Mathies formulation, the record here establishes (1) an underlying violation of the seat-belt regulation, 30 C.F.R. § 56.14130(g); (2) a measure of danger to the CAT operator was contributed to by the violation; (3) The steep declining road and the lack of a door subject the CAT operator to falling approximately five-and-a-half to six feet to the ground--the condition of the road would render the CAT unstable; (4) if the driver fell from the CAT, there is a reasonable likelihood that such a fall itself could cause an injury of a reasonably serious nature. In addition, a fatality could result if the driver fell under the wheels of the equipment.

For the foregoing reasons, the S&S allegations should be affirmed.

Civil Penalties

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

There is no evidence of the size of FCC's business, nor the effect the imposition of penalties would have on that business, nor FCC's prior history. FCC abated the violations and, accordingly, it is entitled to statutory good faith.

FCC was negligent as to both seat belt citations. A cursory check by the company would have shown the equipment operators were not wearing their seat belts.

The gravity of the situation involving the CAT operator driving the scraper (Citation No. 3458357) was discussed under the S&S designation. The gravity of the situation involving the DH8 dozer (Citation No. 3458425) was less than in the previous citation. Specifically, the dozer was not moving over five miles per hour. In addition, it was being operated on level ground.

Considering the statutory criteria for assessing civil penalties, the penalties set forth in the order of this decision are appropriate.

Accordingly, I enter the following:

ORDER

1. A civil penalty of \$75 is **ASSESSED** for the violation of 30 C.F.R. § 56.14130(g) and the S&S findings are **AFFIRMED** as to Citation No. 3458357.
2. A civil penalty of \$20 is **ASSESSED** for the violation of 30 C.F.R. § 56.14130(g) as to Citation No. 3458425.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582
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JAN 21 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-98-M
Petitioner	:	A.C. No. 02-01049-05530
	:	
v.	:	Docket No. WEST 92-313-M
	:	A.C. No. 02-01049-05531
MAGMA COPPER COMPANY -	:	
PINTO VALLEY DIVISION,	:	Pinto Valley Operations
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

These cases are consolidated civil penalty proceedings initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

Prior to a hearing, the parties filed a motion seeking to settle the cases. The Citations, proposed penalties, and dispositions are as follows:

<u>Citation No.</u>	<u>Assessments</u>	<u>Disposition</u>
3925620	\$ 20.00	Vacate
3925619	\$2000.00	\$600.00

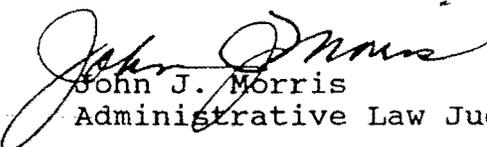
In connection with the motion, the parties further amended Citation No. 3925619 and submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the 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 is **APPROVED**.
2. Citation No. 3925620 is **VACATED**.
3. The remaining citation and amended penalty are **AFFIRMED**.
4. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of \$600.00 within 30 days of the date of this decision.


John J. Morris
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 21 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. WEVA 92-793
v. : A.C. No. 46-01438-03932
: Ireland Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Patrick DePace, Esq., U.S. Department of Labor
Office of the Solicitor, Arlington, Virginia
for Petitioner;
Daniel Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

This case is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (The Act). The petition charges Consolidation Coal Company, pursuant to 104(a) of the Act, with four nonsignificant and substantial violations of certain mandatory safety standards specified in 30 C.F.R. Part 75.

This matter was heard in Wheeling, West Virginia, at which time Lyle R. Tipton testified for the petitioner and Hestle B. Riggle Jr., and Steven Perkins testified on behalf of the respondent. The parties' stipulations concerning the pertinent jurisdictional issues and the relevant civil penalty criteria found in section 110(i) of the Act are of record. The general issue for determination is whether the respondent violated the cited safety standards and, if so, the appropriate civil penalty to be assessed. The parties filed post-hearing briefs which I have considered in my disposition of this matter.

At the hearing the Secretary moved to settle two of the citations in issue. In this regard, the respondent stipulated that it had agreed to pay the \$20 assessed penalty for Citation No. 3331974.¹ The remaining part of the settlement agreement concerned the Secretary's request to vacate Citation No. 3331975 because of her inability to establish that the unreported presence of water in an escapeway existed at the time of a pre-shift examination. As noted at the hearing, the parties' settlement agreement was approved and will be incorporated as part of this decision.

PRELIMINARY FINDINGS OF FACT

Lyle Robert Tipton is an experienced Federal Coal Mine Inspector with specialized training as a mine ventilation expert. On January 14, 1992, during an inspection of the respondent's Ireland Mine, Inspector Tipton issued 104(a) Citation No. 3331969 for a nonsignificant and substantial violation of the mandatory safety standard found in 30 C.F.R. § 75.1707.² Citation No. 3331969 noted:

At the conclusion of a verbal request for an Inspection/Investigation it has been determined that 34 out of 40 Kennedy type stoppings each identified to management, that are used to separate the No. 3 conveyer belt entry from the No. 2 track intake air escapeway entry, did not effectively separate the two entr[ies] due to cracks in the stopping sealant which allows air to travel between the two entries on the 5 right off 3 north 3 entry development section. Pressures were positive track to belt.

Inspector Tipton returned to the Ireland Mine on January 22, 1992, at which time he issued Citation No. 3331973 for a similar

¹ At the hearing the Secretary amended the proposed civil penalty assessments for each of the four citations from \$50 to \$20 because they were issued prior to the modification of the Secretary's single penalty assessment criteria.

² 30 C.F.R. 75.1707 provides, in pertinent part, that ". . . the escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section . . ." (Emphasis added).

nonsignificant and substantial violation of 30 C.F.R. § 75.1704.³ Citation No. 3331973 noted:

The No. 2 designated track intake air escapeway servicing the 5 right off 3 north section, was not adequately separated from the No. 1 return secondary escapeway entry where the sealant on the Kennedy Stopping separating these entr[ies] had cracked and/or fell off causing the two entries not to be adequately separated in this three entry development section. Twelve stoppings were leaking and all were marked for identification.⁴

This case involves the condition and resultant effectiveness of the Kennedy type stoppings observed by Inspector Tipton on January 14, and January 22, 1992, in the respondent's three entry development section at its Ireland Mine. Stoppings are erected between entries to adequately separate the air courses in those entries. Stoppings serve the dual purpose of 1) providing discrete airways for ventilation of the mine face and 2) maintaining the integrity of escapeways to prevent smoke in one escapeway from contaminating the adjoining escapeway in the event of evacuation due to fire. Kennedy stoppings are a recent development in the mine industry. Conventional stoppings are constructed of masonry block. A Kennedy stopping is comprised of

³ Section 75.1704 provides, in pertinent part, that ". . . at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuance to the surface escape drift opening, . . . shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and flood water. Escape facilities . . . properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency." (Emphasis added).

⁴ Citation No. 3331973 was issued on January 22, 1992, for a violation of 30 C.F.R. § 75.1704. It was subsequently modified to a Section 75.316 violation as a result of a Health and Safety Conference on January 26, 1992. At the hearing the Secretary moved to modify this citation back to a Section 75.1704 violation as initially issued. The respondent had no objection. (Tr.16). The motion was granted as it was unopposed and there was no allegation of any prejudice on the part of the respondent.

steel panels strapped to two steel cross beams erected across each entry. The steel panels extend from the cross beams at the mine roof to the mine floor. These steel panels, which must be installed by trained personnel, are pressurized against the mine roof and floor and locked into position. Foam is installed at the top and bottom of the panels to prevent against air leakage and to allow for some flexibility in the event of roof sagging or floor movement. Finally, sealant is applied in an approximate four inch bead at the connecting seams between each panel and around the roof, rib and floor.

As in the instant case, Kennedy stoppings are frequently used in three entry development sections for longwall panel operations. As the longwall advances, the Kennedy stoppings can be recovered and reused as a cost effective measure. (Tr.61). Use of Kennedy stoppings in the three entry development of the respondent's mine, a short life area, complies with the respondent's approved ventilation plan. In long life areas, such as the main entry and main return airways, the respondent's ventilation plan requires use of permanent block stoppings. When properly installed and maintained Kennedy stoppings are as effective as masonry block stoppings. (Tr. 87).

The Kennedy stoppings in issue are located between the No. 1 secondary escapeway and No. 2 intake air primary escapeway and between the No. 2 intake air escapeway and the No. 3 conveyer belt entry. The stoppings are erected in the crosscuts separating these three entries at approximately 180-foot centers. Each entry is approximately 15-1/2 feet wide by seven feet in height. Therefore, each Kennedy stopping installed in each crosscut is comprised of numerous vertical steel panels totalling the approximate 15-1/2 foot width by 7 foot height of each crosscut entry.⁵

FURTHER FINDINGS AND CONCLUSIONS

Citation No. 3331969

On January 14, 1992, Inspector Tipton conducted a spot inspection of the respondent's Ireland Mine.⁶ Tipton was accompanied by the respondent's Safety Director Hestle B. Riggle

⁵ These stoppings are pictured in the manufacturers' pamphlet detailing the Kennedy stopping specifications. (Ex.7). Inspector Tipton described the extensive presence of the sealant in issue by annotating an exhibit at the hearing. (See ex.9).

⁶ Under section 103(i) of the Act, a spot inspection is required once in every five working days for any mine which liberates more than one million cubic feet of methane in a 24 hour period.

and hourly employee William Keller. During the inspection, Tipton was approached by a member of the United Mine Workers' Safety Committee who complained that the stoppings in the 5 right off 3 north, 3 entry development section were not being adequately maintained.

Tipton, accompanied by Riggle, inspected the three entry development section. The inspection was accomplished with Riggle in the No. 3 conveyer belt entry while Tipton stood in the No. 2 intake escapeway entry. Each individual proceeded to shine his cap lamp across the stoppings. Tipton observed the amount of light shining through the stoppings to evaluate the effectiveness of the sealant and to determine whether the stoppings were adequately maintained. Tipton described his observations as ". . . a field with a bunch of automobiles in it with their lights turned on, that would be an example of how much light I could see shining through the stoppings through the [sealant] being cracked." (Tr.27). Of the forty stoppings observed in this area, Tipton observed thirty-four that had excessive cracks in the sealant between the vertical steel panels. The cracks observed by Tipton varied in size from the width of a piece of paper to one quarter inch in diameter. Tipton also observed cracks in the remaining six stoppings. However, these stoppings were determined to be in compliance because the cracks were minor and the stoppings remained effective.

Tipton testified that he was "absolutely positive" that he determined that the air current traveled from the No. 2 intake entry to the No. 3 conveyer belt entry because air pressure was positive in the No. 2 entry. (Tr.81). Although Tipton did not recall doing any formal smoke test to determine the airflow direction, he stated that the air current direction could be easily ascertained by something as simple as opening a man door between the entries. (TR.81).

On cross examination Tipton conceded that he did not perform any testing to determine the quantity of airflow that was infiltrating through the stoppings. Tipton testified that such testing could be accomplished only in a laboratory setting and was not feasible in a mine environment, particularly, in this case involving air infiltration through a multitude of cracks in numerous stoppings. However, Tipton opined that it is undisputed that there is greater air pressure in an intake entry, particularly in a three entry development system, which would increase the rate of air infiltration from the No. 2 intake entry to the adjacent entries through the defective stoppings.⁷

⁷ On cross-examination Riggle conceded that the direction of air flow was out from the No. 2 entry given the positive pressure in that entry. (Tr.137).

The respondent called Hestle B. Riggle, Jr., to testify with regard to his recollection of the inspection in question. Although Riggle testified that it was Tipton who predominantly shined the light on the stoppings, thus purportedly preventing Tipton from observing the light through the cracks, Riggle ultimately admitted on cross examination that he also shined his light toward Tipton. (Tr.125). Although Riggle stated that he could not feel air through the cracks, he corroborated Tipton's testimony that the air pressure was positive from the No. 2 intake escapeway to the No. 3 conveyer belt entry. He admitted that the direction of air flow could be easily determined by opening any man door which was present at approximately every third stopping. Riggle also corroborated Tipton's testimony with regard to previous discussions between the respondent's mine management and the manufacture of the Kennedy stoppings concerning several different kinds of sealant that could be used to counteract the deterioration of the stoppings. In fact, Riggle testified that he had met with representatives of the manufacture to discuss problems with the sealant. (Tr. 140).

Citation No. 3331973

On January 22, 1992, Inspector Tipton returned to the respondent's Ireland Mine. Tipton once again examined the three entry development section in issue. Tipton was accompanied by safety department representative Steven Perkins and hourly employee Rich Baker. Tipton again determined the effectiveness of the sealant by observing the amount of light which could be seen through the stoppings. This was accomplished by repeating the procedure performed the previous week with Riggle. Specifically, he examined the Kennedy stoppings used to separate the No. 2 track intake air primary escapeway from the No. 1 return secondary escapeway. Of the stoppings observed between these two entries, Tipton noted twelve stoppings where the sealant between the panels had cracked or fallen off. He cited these twelve stoppings because of the multiple cracks which he believed rendered the stoppings ineffective.

Perkins testified that he did not feel air moving through the stoppings. Perkins opined that the difference in air pressure between the two entries would not effect the movement of air, a conclusion that was contradicted by both Tipton and Riggle. Perkins corroborated the methodology described by Tipton in that it was he who shined his light toward Tipton so that Tipton could evaluate the condition of the sealant. (Tr.145).

DISCUSSION AND EVALUATION

The fundamental issue is whether the conditions cited by Inspector Tipton resulted in violations of sections 75.1704 and 75.1707. These mandatory safety standards require intake primary

escapeways for mining sections to be kept "separate" from the belt and trolley haulage entries.

The respondent, in its brief, asserts that the stoppings fulfilled the functions for which they were erected, i.e., to promote positive pressure in the intake escapeway so as to provide an abundance of fresh air to the working face. Consequently, the respondent maintains that the evidence, which establishes positive pressure in the intake escapeway and a high volume of air reaching the working section, demonstrates that the intake escapeway was adequately "separated" from the adjacent entries. In this regard, the respondent argues that although the regulations require the entries be kept separate, they do not require the ". . . intake escapeway to be absolutely, hermetically sealed off from other entries." (Respondent's Brief, P.4).⁸

The petitioner, on the other hand, relies on the MSHA Program Policy Manual which interprets the separation standard in section 75.1707 as:

Separation of the escapeway from belt and trolley haulage entries shall be made with substantially built, permanent-type stoppings, such as concrete blocks, brick, tile, or metal, and they shall be reasonably airtight (emphasis added). See exhibit no. 8.

In support of MSHA's interpretation the petitioner points to a holding by Judge Melick involving application of section 75.1707 wherein he noted that it is understood in the mining industry that "reasonably airtight" is the applicable separation standard. However, Judge Melick also acknowledged widespread disagreement over what constitutes a "reasonably airtight" separation. See Rochester & Pittsburgh Coal Company 10 FMSHRC 1576 (November 1988).

Resolution of this case requires placing the term "separation" in the proper perspective. Thus, "separation" must be viewed in the context of the hazards that the mandatory safety standards in section 75.1704 and 75.1707 are intended to prevent.

⁸ In support of this proposition the respondent relies on a recent decision by Judge Weisberger that entries were adequately separated as contemplated by section 75.1707 despite an 8 x 16 inch hole in a cement block. See Consolidation Coal Company 14 FMSHRC 1450 (August 1992), appeal pending. I do not view my decision in this case as inconsistent with Judge Weisberger's finding in that I do not equate widespread deterioration of sealant on numerous stoppings with one 8 x 16 inch hole in a single stopping.

Significantly, these regulatory provisions concern escapeway rather than ventilation safety standards. Therefore, the respondent's reliance on the apparent effectiveness of its Kennedy stoppings in ventilating the working face as required by the mandatory ventilation safety standards in 30 C.F.R. § 75.301 et seq. is not in issue and is, therefore, not dispositive of this matter.⁹

I credit Tipton's unrebutted testimony that failure to have reasonably airtight separation between each entry could result in smoke contamination of an escapeway effectively eliminating a possible escape route for miners, who for whatever reason, do not have the benefit of self-contained breathing apparatus. Moreover, a fire in the primary intake escapeway with ineffective stoppings would result in smoke contamination in the secondary return escapeway in advance of the escaping miners. Thus, while I am not bound by MSHA's "reasonably airtight" interpretation, I conclude that it is entitled to deference and that it is the reasonable and proper standard to be applied. See Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984); Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945).

The Commission has recognized that many safety and health standards must be broadly adaptable to a myriad of circumstances. See Kerr McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). The "reasonably airtight" requirement is one such broad standard. The application of broad standards is committed to the inspector's discretion which should be exercised in a reasonable manner. In exercising his discretion, Tipton acknowledges that air infiltration through conventional block or Kennedy stoppings is not, in and of itself, a violation of the escapeway mandatory safety standards. Moreover, Tipton's testimony reflects that masonry block stoppings, by nature are porous and permit some air infiltration. Similarly, Inspector Tipton testified that minor cracks in the sealant of Kennedy stoppings do not warrant a citation.

To support his judgment that the cited stoppings were defective, Tipton testified that he found 34 Kennedy stoppings between the No. 2 and No. 3 entries (Citation No. 3331969) and twelve Kennedy stoppings between the No. 2 and No. 1 entries (Citation No. 3331973) that were not adequately separating the

⁹ The respondent has relied on the stoppings' role in ventilation rather than escapeway safety throughout this proceeding. At trial Riggle testified that . . . "you just have to check [the stoppings] periodically to make sure that the stoppings are in the condition to put ventilation where you want it." (Tr. 129).

entries because of cracks in the sealant measuring up to one quarter inch in diameter.¹⁰ Tipton attributed these cracks to mine roof and floor movement and to a lack of durability of the Kennedy stopping sealant applied in numerous four inch beads approximately seven feet in height between the steel panels from floor to roof.

The testimony of Tipton is essentially corroborated by the two witnesses called upon by the respondent. Significantly, Tipton's testimony that the manufacturer of the Kennedy stoppings is aware of sealant problems related to durability and fitness was confirmed by Riggle. (Tr.59-60, 87). In fact, Riggle testified that the respondent's management has had several meetings with the manufacturer concerning sealant problems (Tr. 139-140). In addition, Riggle conceded that some of the sealant in question had in fact deteriorated. (Tr. 126-127). Finally, the respondent failed to call any representative of the manufacturer to attest to the performance of the sealant in question. Therefore, I conclude that the evidence supports Tipton's observations of widespread cracking as a result of extensive sealant deterioration.

Having determined that there was widespread cracking in the Kennedy stoppings, I must address the effect of such cracking with regard to direction of air loss and the magnitude of such loss. The respondent takes issue with Tipton's alleged failure to ascertain the direction of air flow and the magnitude of air infiltration. With respect to air direction, the testimony of both Tipton and Riggle indicates that air pressure was positive in the No. 2 intake entry as compared with the No. 1 and No. 3 entries. In fact, in its post hearing brief, the respondent prides itself on the pressure in the No. 2 entry. Therefore, it is reasonable to conclude that the direction of air flow, which could be determined by opening any man door between the entries, was from the No. 2 intake entry into the lower pressured No. 1 and No. 3 entries as stated by Tipton and confirmed by Riggle.

With respect to the extent of air loss, Tipton testified that he knew of no method to quantify the air loss due to the widespread nature of the cracking. Nor has the respondent offered any means of measurement. While the magnitude of escaping air could not be determined, it is clear given the nature and extent of the cracking and the higher pressure in the No. 2 intake entry, particularly, in a three entry development system, that significant air flow in the direction of the No. 1

¹⁰ Tipton characterized these stoppings as only approximately forty percent effective. (Tr. 105).

and No. 3 entries occurred.¹¹ Consequently, the Secretary established violations of sections 75.1704 and 75.1707 as the cited Kennedy stoppings were not reasonably airtight in that they did not effectively "separate" this three entry section.

Having determined that these violations occurred, I wish to emphasize that the evidence reflects that Kennedy stoppings are as effective as conventional masonry block stoppings when adequately maintained. These stoppings are apparently a cost effective alternative to block stoppings in that they can be recovered for reuse as the longwall advances. However, the benefit of the flexibility of design of the Kennedy stoppings which facilitates their removal and reuse imposes a corresponding obligation on the mine operator to monitor the condition of the sealant to ensure that these stoppings continue to create an effective barrier which maintains the integrity of the escapeway. In this regard, it is noteworthy that the violations in issue were abated by the application of additional sealant.

ULTIMATE CONCLUSIONS

Based on Tipton's testimony that the circumstances surrounding these violations constituted best case scenarios because the primary intake escapeway could not to be contaminated from adjacent entries because of its higher pressure, I conclude that the violations in issue were nonsignificant and substantial. I also concur with the opinion of Tipton that the respondent's underlying negligence associated with these violations was moderate and that these violations were of low gravity.

Considering the non S&S nature of the violations as well as the remaining statutory factors stipulated to by the parties, I conclude that a penalty of \$20 is appropriate for Citation No. 3331969 which was issued on January 14, 1992. Although Citation No. 3331973, issued on January 22, 1992, is similar in nature, I am assessing a penalty of \$100 because the respondent failed to service the sealant on these Kennedy stoppings despite the fact that it was placed on notice by the earlier citation that these stoppings may also be in need of maintenance. Thus, the negligence associated with this citation is higher in degree and justifies a higher penalty. I am also incorporating the previously noted settlement agreement in this decision which

¹¹ Tipton testified that pressures are higher in a three entry development section in order to maintain sufficient quantities of air to the last open crosscut. The integrity of these entries is critical in view of the reduced number of entries. A fire in the number 2 intake track primary escapeway with defective stoppings could subject personnel in the No. 3 belt entry to smoke inhalation and impede evacuation through the No. 1 secondary escapeway (Tr. 38,46-47,63).

requires the respondent to pay a penalty \$20 for Citation No. 3331974 and which results in vacation of Citation No. 3331975.

ORDER

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

1. Citation Nos. 3331969 and 3331973 **ARE AFFIRMED.**
2. The proposed settlement agreement concerning Citation No. 3331974 **IS APPROVED.**
3. Citation No. 3331975 **IS VACATED.**
4. The respondent shall **PAY** a civil penalty of \$140 within 30 days of the date of this decision.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 25 1993

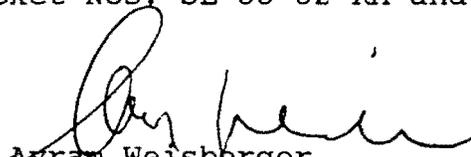
ASARCO, INCORPORATED,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 88-82-RM
	:	Citation No. 3252969; 7/16/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 88-83-RM
ADMINISTRATION (MSHA),	:	Citation No. 3252970; 7/17/88
Respondent	:	
	:	Immel Mine
	:	
	:	Mine ID 40-00170
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 89-67-M
Petitioner	:	A. C. No. 40-00170-05520
v.	:	
	:	Immel Mine
ASARCO, INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

These cases are 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 these cases. A reduction in penalty from \$16,000 to \$9,180 is proposed. I have considered the representations and documentation submitted in these cases, 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**. It is **ORDERED** that the hearing on February 23-25, 1993 is cancelled. It is further **ORDERED** that Respondent pay a penalty of \$9,180 within 30 days of this Order. It is further **ORDERED** that the Notices of Contest, Docket Nos. SE 88-82-RM and SE 88-83-RM are **DISMISSED**.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 25 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 92-132
Petitioner : A.C. No. 44-06259-03565
v. :
: Greenbrier Mine No. 1
HARMAN MINING CORPORATION, :
Respondent :

DECISION

Appearances: Patrick L. DePace, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner;
Thomas C. Means, Esq., Crowell and Moring,
Washington, D.C., for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Harman Mining Corporation (Harman), in its original form, with two violations in a citation and order issued pursuant to Section 104(d)(1) of the Act.¹ The mandatory standard

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

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds such violation

originally charged in both the citation and order, 30 C.F.R. §75.520, requires that "all electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed."

The citation at issue (No. 3783586) charges as follows:

The 240 volt pump cable supplying power to the water pump on the 5th Right Section did not have a plug-in installed on the end of the cable. The bare wires were stuck into the receptacle on the power center.

The order at issue (No. 3783587) charges as follows:

The 240 volt pump cable supplying power to the water pump at the mouth of 5th right did not have a plug-in installed on the end of the cable. The bare wires were stuck into the receptacle on the belt transformer box.

On July 24, 1992, the Secretary moved to amend her petition in this case to charge, based on the same alleged facts, that a different standard, 30 C.F.R. §75.514, had been violated in the citation and order.² The standard at 30 C.F.R. §75.514 provides as follows.

All electric connections or splices in conductors shall be mechanically and electronically efficient, and suitable

fn. 1 (continued)

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 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 It appears that the issuing inspector had attempted to make the same modifications on June 16, 1992, prior to the filing with the Commission on July 24, 1992, of the instant petition for civil penalty. The Commission noted in Wyoming Fuel Company, 14 FMSHRC 1202 (1992), that such attempted modifications are actually proposed amendments to the initial citation similar to an amendment of pleadings under the Federal Rules of Civil Procedure.

connectors shall be used. All electrical connections or splices in insulated wire shall be insulated at least to the same degree of protection as the remainder of the wire.

Harman opposes the Secretary's motion and, in a motion to dismiss, argues that it would suffer legal prejudice by the amendments.

Regarding the Secretary's authority to modify or amend charging documents such as citations, the Commission recently stated in Secretary v. Wyoming Fuel Company, 14 FMSHRC 1282 (1992), as follows:

Section 104(a) citations are essentially 'complaints' by the Secretary alleging violations of mandatory standards. The Secretary's attempted modifications, alleging, based on the same facts, that a different standard had been violated, are essentially proposed "amendments" to the initial complaints, i.e., citations. The Commission has previously analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a) [Footnote omitted]. Cyprus Empire Corp., 12 FMSHRC 911, 916 (May 1990). In Cyprus Empire, where the operator conceded that it was not prejudiced thereby, the Commission affirmed the trial judge's modification of a terminated citation to allege violation of a different standard. ID.

In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. See 3 J. Moore, R. Freer, Moore's Federal Practice, Par. 15.08[2], 15-47 to 15 49 (2d ed 1991) ("Moore's"). And, as explained in Cyprus Empire, legally recognizable prejudice to the operator would bar otherwise permissible modification.

It is not argued in this case that the Secretary has been guilty of bad faith or that she has acted for the purpose of delay, nor is it alleged that the trial of the issue would be unduly delayed by the proposed amendments. Harman maintains, however, that it would suffer legal

prejudice if the proposed amendments (modifications) were permitted. Under the unique facts of this case I agree.

It is undisputed that when the citation and order were issued the mine was no longer in production and was already in the process of permanent abandonment. Subsequently, after the termination of the original citation and order, the cited pump, power center, and electrical connecting cables were disassembled and the pumps and power centers sent to an off-site storage location in furtherance of the planned abandonment. On May 9, 1992, the mine fan was turned off, the mine openings were fenced off, and by May 16, 1992, the mine was physically sealed. Since then the mine has been inaccessible with the cited electrical connecting cables sealed inside.

It is further undisputed that on or about May 11, 1992, the Mine Safety and Health Administration (MSHA) was informed that the mine had been closed as of May 9, 1992, and permanently abandoned. The first modification of the citation and order was not attempted by MSHA until June 16, 1992, more than one month after the sealing and permanent abandonment of the mine.

Harman supports its claims of prejudice in this case in large part on the testimony of Harman's highly qualified expert witness, Larry Hambrick. Hambrick, a graduate electrical engineer, is a former assistant professor of electrical engineering technology and chief electrical engineer for the Island Creek Coal Company. He is presently a senior project engineer for the Westinghouse Electric Corporation.

Hambrick opined that the original charges in the citation and order under 30 C.F.R. § 75.520 could readily be defended without the need for testing or investigation. According to Hambrick, cable termination plugs are not in fact switches or controls within the meaning of that section. Hambrick testified that if faced with charges under 30 C.F.R. § 75.514, however, further investigation and testing would be necessary. In particular, he opined that it would be necessary to study the connection that was made and examine any exposed conductors to determine how far the conductors were stripped and how far the conductors were inserted into the connection -- questions relevant to the efficiency and suitability of the connection and exposure to a hazard and critical to the "significant and substantial" and gravity issues.

Hambrick further noted that to defend against charges under section 75.514, he would have performed infra-scanning tests to determine whether any "hot spots" or inefficient connections existed. He observed that it was possible that the wires inserted in the receptacle were indeed efficient and that it would have been possible to fasten the wires inside the receptacle to make good contact. Accordingly, he noted that it would also be essential to have examined the power center and the wire cable that was actually in use.

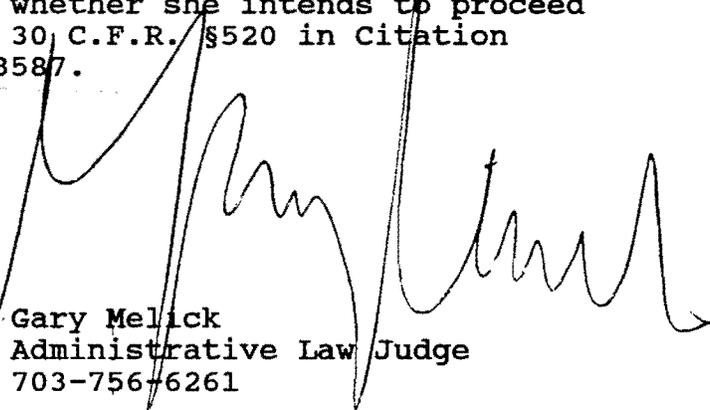
Hambrick further noted that to properly defend against charges under section 75.514, it would also be essential to examine the circuit breaker to determine, among other things, whether the equipment had a ground fault device and the size of the circuit breaker to determine what, if any, hazard might have existed under the circumstances. Hambrick indicated that he would also have tested and examined the cable, including the stranding, to determine its flexibility. He opined that it would have also been important to not only test the circuit breaker and ground fault capabilities of the power center but also determine access to the receptacle, i.e., was it in a location where people could come into contact with it.

Regarding the issue of mechanical efficiency, Hambrick opined that it would also have been important to know what, if any, strain relief was provided on the cable. Hambrick noted that whether a chained device or kellems grips were used would be relevant to this question. Finally, Hambrick opined that "plug-ins" are distribution devices and not control devices and that, indeed, there is such a separation in the field of electrical engineering between power controls and power distribution that they are separate disciplines of study into which electrical engineers may specialize.

Within this framework of evidence, I conclude that indeed Harman Mining Corporation would suffer legally cognizable prejudice if the Secretary was granted her motion to amend the petition for civil penalty in this case to change the charges in the citation and order from those under the standard at 30 C.F.R. § 75.520 to charges under the standard at 30 C.F.R. § 75.514. From the essentially undisputed evidence it is clear that Harman could reasonably have believed that charges under the standard at Section 75.520 could have readily been defended on the grounds that the plug-in device was not a control or switch within the meaning of that standard.

Harman would therefore not have found it necessary to perform any tests, or, for that matter, pay any particular attention to the specific facts surrounding the alleged violation. Upon the subsequent sealing and abandonment of the mine and the undisputed inability to reconstruct the cited equipment, power center, cables, and other conditions critical to issues that clearly would become relevant to new charges under Section 75.514, Harman would be at extreme disadvantage in attempting to defend itself. It would indeed suffer legal prejudice by the proposed amendment.

Under the circumstances, the Secretary's motion to amend is DENIED. In light of this determination the Secretary is directed to notify the undersigned and counsel for Harman Mining Corporation, in writing, within 15 days of the date of this Decision, whether she intends to proceed on the original charges under 30 C.F.R. §520 in Citation No. 3783586 and Order No. 3783587.



Gary Melick
Administrative Law Judge
703-756-6261

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JAN 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 91-168
	:	A.C. No. 05-00301-03764
	:	
v.	:	Docket No. WEST 91-421
	:	A.C. No. 05-00301-03765
MID-CONTINENT RESOURCES INC., Respondent	:	Dutch Creek Mine
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 91-594
	:	A.C. No. 05-00301-03785 A
	:	
v.	:	Dutch Creek Mine
	:	
	:	
THOMAS SCOTT, employed by MID-CONTINENT RESOURCES INC., Respondent	:	
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 91-626
	:	A.C. No. 05-00301-03784 A
	:	
v.	:	Dutch Creek Mine
	:	
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TERRANCE J. HAYES, employed by MID-CONTINENT RESOURCES INC., Respondent	:	
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 91-627
	:	A.C. No. 05-00301-03787 A
	:	
v.	:	Dutch Creek Mine
	:	
	:	
	:	
WILLIAM M. PORTER, employed by MID-CONTINENT RESOURCES INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Glenwood Springs,
Colorado,
for Respondent.

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner, the Secretary of Labor, against Respondents, Mid-Continent Resources, Inc. ("MCR") and three supervisors, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

Evidentiary hearings were conducted on April 15 and 16 and June 16 and 17, 1992, in Glenwood Springs, Colorado.

The parties filed post-trial briefs.

WEST 91-168, WEST 91-594 and WEST 91-626

The narrative allegations of Order No. 3410351 is the subject matter of Docket Nos. WEST 91-168 (MCR), WEST 91-594, (Scott), and WEST 91-626, (Hayes). The order issued by MSHA Inspector Frank Carver under section 104(d)(2) alleges a violation of 30 C.F.R. § 75.400¹ and states:

Coal fines and lump coal, from damp to extremely dry to the touch was [sic] stored in the downdip crosscut, adjacent to the number 18 crosscut on the 211 Longwall intake roadway. Plus very dry coal fines, float coal dust and lump coal was (sic) stored in the first crosscut inby the longwall face in the number 2 entry on the right hand side facing inby. In the outby crosscut the accumulations were 21 feet in length, 18 feet in width and 6 feet in height. Power cables were approximately 20 feet from the

¹ § 75.400 Accumulation of combustible materials.

[STATUTORY PROVISION]

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

accumulations and a diesel Ford tractor was parked in the roadway adjacent to the accumulations. In the most inby crosscut the accumulations were 24 feet in length, 30 feet in width, and 6 feet in height. A diesel scoop was parked 40 feet outby the accumulations. No work was being done to remove the accumulations from either crosscut. The accumulations could of been transported approximately 3-400 feet inby and dumped onto the face conveyor from the most outby crosscut and the accumulations from the most inby crosscut could have been transported approximately 75 feet and dumped onto the face conveyor. (Ex. M-1).

WEST 91-421 and WEST 91-627

103 Longwall Headgate

The evidence in the above two cases is initially considered as the events occurred on May 1, 1990. The events in the later cases occurred May 29, 1990.

Summary of Evidence

In the 103 longwall there were heavy loose coal accumulations observed by the inspector. MCR's evidence shows the accumulations occurred because the 103 strike conveyor belt broke.

Order No. 3412700

The narrative allegations of Order No. 3412700 are the subject matter of Docket No. WEST 91-421 (MCR) and WEST 91-627 (Porter). The order, issued by MSHA Inspector James Kirk under section 104(d)(2), alleges a violation of 30 C.F.R. § 75.400 and states:

The operating 103 longwall belt had accumulations of loose coal beginning at the belt drive and extending into the stage loader. The accumulations were at varies [sic] locations: [sic] Approximately 100 feet outby stage loader (from stage loader 100 feet outby)[.] Belt & rollers in contact with coal[.] Also just out-by shark pump. outby crosscut 11, by crosscut 9 for a distance of 260 feet, crosscut 8, cross [sic] 7 & 6. The coal in these areas were [sic] up to 18 inches deep. The area around the drive takeup were also built up. In general the entire belt were [sic] in need of clean up &

rock dusting. Belt was operating [.]. The distance from drive stage 1dr[.] 4000 feet. (Ex. M-2).

Issues

The issues are whether the two section 104(d)(2) orders are violations of the cited regulation; whether individuals Porter, Scott and Hayes, the MCR supervisors, violated section 110(c) of the Act. Alternately, further issues involve special findings of significant and substantial ("S&S") and unwarrantable failure. Finally, if violations occurred, what penalties are appropriate.

In connection with this order, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

1. MCR is an underground bituminous coal mine located in Pitkin County, Colorado. (Tr. 10).

2. During an MSHA inspection on May 1, 1990, James Kirk, a federal coal mine inspector, issued Order No. 3412700. At the time he was accompanied by Don Rippey of MCR's safety department. (Tr. 11, Ex. M-2).

3. The two men proceeded to the 103 longwall, an active advancing mining section. (Tr. 11).

4. Exhibit M-14 shows the direction the coal would normally move from the face to the stage loader and crusher. (Tr. 13, 16).

5. The 103 strike belt is a conveyor belt from the face area that normally transports coal from the face outby to the drive and dumps it onto the B-2 belt which moves it out of the mine. (Tr. 16, 17).

6. Mr. Kirk estimated the conveyor belt measured 3,000 to 4,000 feet from the drive area to the tailpiece. (Tr. 17, 18).

7. Mr. Kirk saw accumulations of coal at the belt tailpiece, the stage loader area and up to the end of the conveyor belt. Outby coal was compacted underneath the belt. The belt rollers and belt were in contact with the coal. (Tr. 18, 19).

8. Mr. Kirk marked the coal accumulations on Exhibit M-14 in orange. The accumulations, mostly compacted under the conveyor, ranged up to 12 inches high; the coal was dry. (Tr. 19).

9. At the shark pump, located outby the drive area, there were some 50-foot accumulations. (Tr. 19-20).
10. There were accumulations between crosscut 10 and 11, as well as at the 10 and 11 doors. The belt rollers and belt were in contact with the coal. (Tr. 21, 22).
11. At the number 9 door, outby there was a windrow of coal approximately 260-foot long, up to 18 inches deep. (Tr. 22).
12. It took the inspector approximately three to four hours to travel from the tailpiece to the drive examining for accumulations. (Tr. 22).
13. There was coal at number 6, 7 and 8 doors. The accumulations ranged at various heights. One section was 20 feet long, another was 40 feet long. At the number 6 door the rollers were in contact with the coal. (Tr. 23).
14. The coal, beginning at the tailpiece and going outby, was moist to extremely dry. (Tr. 24).
15. The coal within the takeup area was pretty much dry. From the takeup by the number 6 door out to the drive area there were accumulations. As they approached the drive area, the accumulations became very wet. (Tr. 23, 24).
16. Mr. Kirk marked on Exhibit M-14 the "mostly dry" and "wet" areas. (Tr. 24, 25).
17. Accumulations were concentrated around the drive area of the strike belt and the tailpiece of the B-2 belt. (Tr. 25).
18. The accumulations by the tailpiece of the B-2 belt were almost like a slurry. (Tr. 25, 26, 27).
19. The accumulations were mostly dry from the number 6 door inby to the tailpiece of the conveyor. (Tr. 24). Outby from the number 6 door towards the belt drive area the accumulations were moist or wet. (Tr. 25).
20. There were a lot of accumulations ranging up to two feet deep around the drive area of the strike belt and around the tailpiece of the B-2 belt. (Tr. 25).
21. Mr. Sam Salaz, the outby foreman, stated that occasionally the coal was so wet water would run off the belt when the coal landed on it. Mr. Salaz stated it was extremely difficult to maintain the area free of accumulations. (Tr. 27).
22. On May 1st Mr. Kirk did not see anyone cleaning up the accumulations. (Tr. 27).

23. Fire is one of the hazards of coal accumulations. (Tr. 28).

24. The Dutch Creek Mine is a gassy mine subject to five-day spot inspections. (Tr. 28).

25. Potential ignition sources included the area where the rollers rubbed on the coal as well as where the conveyor belt rubbed the framework of the conveyor. MSHA also found one area in the longwall that was not maintained. That area could also be considered as an ignition source. (Tr. 29).

26. Accumulations could be ignited by frictional contact. The amount of coal along the conveyor could be introduced into an ignition causing a more severe ignition. (Tr. 30).

27. Injuries from the described hazard could be serious and possibly fatal. (Tr. 30).

28. Prior to his inspection Mr. Kirk reviewed the mine file and learned MCR was on the D series.

29. In issuing the (d)(2) Order, Mr. Kirk considered the dryness and the amount of accumulations as well as their length, the area involved and the friction points. (Tr. 32).

30. Normally the 103 longwall produced coal on the graveyard shift. (Tr. 32).

31. The drier the coal, the more likely it will burn. (Tr. 34).

32. There were electrical cables for the shark pump and the normal electrical devices for the longwall. In addition, on May 1st there was a permissibility violation. (Tr. 42).

33. Mr. Kirk identified the pre-shift, on shift daily examination referring to the 103 longwall. (Tr. 43, Ex. M-11). The examinations, as reported, listed accumulations on the 103 longwall from April 25, 1990 to May 1, 1990. (Tr. 43-52). The conditions were reported and on one occasion the report noted that shoveling was undertaken. (Tr. 50, 51).

34. In Mr. Kirk's opinion, the fire boss and the pre-shift inspection noticed that there were accumulations on the 103 longwall belt at the drive and in-by. This was the area Mr. Kirk cited. (Tr. 52).

Discussion and Further Findings

MCR states the principal issues are whether Inspector Kirk properly issued the 104(d)(2) order since he failed to determine

the combustibility or ignitability of the Coal Basin Coal; further, Mr. Kirk failed to establish if there were ignition sources in the area of the "accumulations." (MCR brief at 21, 23).

It is clear that there were accumulations along the 103 longwall strike belt. Inspector Kirk marked these accumulations in orange on Exhibit M-14. (The exhibit was received in evidence to illustrate the inspector's testimony). As hereafter noted, MCR agrees accumulations existed and the operator's evidence further identified the cause of the accumulations.

It is uncontroverted that Inspector Kirk did not test the combustibility or ignitability of the coal accumulations. However, the regulation does not require that such a determination be made. In addition, the Commission has stated that 30 C.F.R. § 75.400 "is violated when an accumulation of combustible materials exists." Old Ben I, 1 FMSHRC 1954, at 1956. Further, "[i]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe" Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980) ("Old Ben II").

"Loose coal" is one of the combustibles prohibited by 30 C.F.R. § 75.400.

I agree that due to its low-oxygen, high-ash content MCR's coal burns only with great difficulty. (Reeves, Tr. 359, 411-412, 471, 750). However, burning "with difficulty" is not a factor considered by 30 C.F.R. § 75.400.

Ignition sources: The record establishes such sources. One location was where the conveyor rollers rubbed against the coal and also where the conveyor belt rubbed on the framework of the conveyor. Additional ignition sources could also include the electrical cables required to run the conveyor, the impermissible condition he cited as well as the electrical cables for the shark pump. The conveyor itself could contribute as an ignition source since it was "operating" when Mr. Kirk entered in the section. (Kirk, Tr. 28) but not continually as it would only "start and stop." (Rippy, Tr. 508). No ignition sources could arise from the mining of coal since production took place on the graveyard shift before Mr. Kirk arrived on the premises. Mr. Kirk confirmed that the stage loader, the face conveyor and the shearing machine were not running while he was in the mine. (Kirk, Tr. 69).

Ken Abbott, the 103 longwall foreman, told Mr. Kirk he wanted to "run coal" off the face. I believe Mr. Kirk misinterpreted Mr. Abbott's statement to mean MCR was intending to mine coal from the face. (Kirk, Tr. 34). Actually, the foreman was stating he wanted to run coal off the face chain conveyor. When Mr. Abbott ran the face chain conveyor it would intersect

the 103 longwall strike belt in close proximity to the coal accumulations.

MCR's principal contentions have been discussed. However, it is necessary to consider MCR's evidence as to whether a break in the belt occurred during the regular production (graveyard) shift for the 103 longwall.

Witnesses Reeves (Tr. 338), and Porter (Tr. 578, 580) were confirmed by Mr. Kirk's notes of May 1st that "Belt had operated on graveyard and had broken." (Kirk, Tr. 66). Mr. Kirk made no further inquiries and issued his order based on the assumption that there had not been a belt break. (Kirk, Tr. 89).

Mr. Kirk properly issued his order since there were accumulations in the section. The order as to MCR should be affirmed since the Commission and various courts recognize that the Mine Act (as well as its predecessor, the Coal Act) impose liability without fault. Asarco, Inc.-Northwestern Mining v. FMSHRC and AMC, 8 FMSHRC 1632 (1986), 868 F.2d 1195, 1197-98, 10th Cir. 1989; Western Fuels Utah, Inc. v. FMSHRC 870 F.2d 711, D.C.C.A. 1989; Bulk Transportation Services, 13 FMSHRC 1354, (September 1991).

However, evidence of the belt break will impinge on other issues in these cases and it is appropriate to enter the following additional:

Findings of Fact

35. On May 1, 1990, WILLIAM PORTER, an experienced miner, arrived at work at 6:20 a.m. The lampman advised him that the belt had broken. Production had been shut down for 1 1/2 to 2 hours to repair the belt. Excluding clean-up time, it normally takes between two and four hours to resplice the 103 longwall strike belt. (Porter, Tr. 550, 553, 578).

36. The strike belt had broken on the "C" shift, a regular production shift. (Porter, Tr. 578).

37. On March 1990, the 3,000 foot 103 longwall strike belt was in poor condition with 117 previous splices. The 42 inch belt (doubled for both sides) was 6000 feet long. (Tr. 542, 555).

38. If the belt breaks, it will scatter coal off on the sides and dump it on the bottom belt. (Tr. 544, 545).

39. If the belt breaks, production is shut down. (Tr. 549-550). No cleanup can be started until the belt is spliced and ready to run. (Tr. 553).

40. Mr. Porter described in detail how the belt is spliced. (Tr. 548-553).

41. The estimated load on the strike belt at any one time is 50 tons of coal. (Scott, Tr. 642).

In his testimony Mr. Kirk opined that the strike belt conveyor had not broken but was spilling coal in its normal operations. Further, the accumulations were scattered the entire distance of the conveyor.

I am not persuaded. MCR's witnesses Reeves and Porter testified the belt had broken on the graveyard shift. Further, Mr. Kirk's own notes taken on May 1, 1990 state: "Belt had operated on graveyard and had broken." (Tr. 66). Mr. Kirk's testimony that the accumulations were scattered the entire distance of the conveyor conflicts with his drawing (Ex. M-14) placing the accumulations at five principal places. It further conflicts with other portions of his testimony.

MCR established that the conveyor belt broke but as previously stated the defense cannot prevail.

103 Strike Belt Transfer Point (Drive Area)

The parties offered extensive evidence as to the coal accumulations in the drive area. This area (See Exhibit M-14) is where the 103 strike belt intersects the B-2 belt. The accumulations were described as being "like a slurry" and about two feet deep.

As to the drive area, it is necessary to consider several points of critical evidence.

I credit the testimony of MCR's geologist, Bruce Collins. Mr. Collins with a mining degree in geology has done field work at MCR. (Tr. 514, 516). He identified a piece of carbonaceous siltstone taken from the roof of the transfer point. (Tr. 522). After describing the siltstone, Mr. Collins indicated it is "virtually incombustible." (Tr. 524). Further, when material falls to the floor in flakes and become wet, its color turns "absolutely black." (Tr. 523). I find that Mr. Collins as a geologist has more knowledge than the Secretary's witness as to the rock composition of the material in the slurry. Although it appeared to be coal at least a part of it was virtually incombustible siltstone. (Tr. 514-530, Ex. R-22, R-23).

Additional critical uncontroverted evidence is that the drive area, at the intersection of the belts, normally builds some coal accumulations. In fact, an MCR employee was grading the area when Mr. Kirk was in the section.

In short, the material in the drive area and the slurry were at best incombustible rock and some coal. The evidence fails to convince the writer that the drive area material was combustible.

The Judge is aware of the testimony of MSHA Supervisor Lee Smith to the effect (with Ex. M-12) that water can cause coal mine fires to burn more intensely and therefore, water saturation of coal does not inert it. (Tr. 746-747). The evidence in M-12 applies to the explosibility and ignitability of coal dust, not siltstone. It is accordingly not persuasive to the issues involved in the drive area.

For the above reasons, that portion of the order citing the drive area is stricken.

Significant and Substantial

MCR contends Mr. Kirk's order should not be designated as "S&S."

A violation is properly designated as being S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011-12 (December 1987).

On the S&S issue as to the ignitability of MCR's coal I enter the following:

Findings of Fact

42. Due to its low oxygen, high ash content MCR's coal burns only with great difficulty and will not spontaneously combust. (Reeves, Tr. 411-412).

43. MCR must add diesel oil to its coal, the fuel to keep its coal-fired thermal dryers at the coal preparation plant burning. (Reeves, Tr. 410).

44. A major methane fire in the roof of the tailgate of the 211 advancing longwall section in the summer of 1990 failed to ignite adjacent coal pillars. (Reeves, Tr. 359).

45. The coal in the B-seam (1-Mine) contains 23.5 percent volatile matter while the M-seam (2-Mine) contains 27 to 28 percent volatile matter. (Reeves, Tr. 337).

Mr. Kirk confirms MCR's evidence as to the ignitability of the MCR coal. He testified that while the coal was in contact with the conveyor belt at four places, he didn't recall any hot areas. He also tested the friction points for heat. (Tr. 76, 88). Mr. Kirk testified the usual scenario is that the more friction the greater the heat. Thus, a smoldering fire then goes to full fire. (Tr. 98). However, Mr. Kirk agreed that if contact fails to heat the coals and the contact remains minimal, there would probably be no injury to an individual miner. (Tr. 100). Mr. Kirk describes the friction in four places as "light to heavy." (Tr. 104).

The Judge is aware of the testimony of MSHA's Lee A. Smith. He testified that at one point in his career at MCR he smelled smoke. When he located its source he found a roller turning in coal. This hot coal readily went out when he crushed it. (Tr. 742, 743).

I am not persuaded by the described event that occurred at some undisclosed time. The testimony weighs for naught since Mr. Smith agreed he had not seen any fires at MCR. Further, he did not even know of any coal fires at MCR. (Tr. 748, 750).

On the S&S issue, the record here does not satisfy paragraph (3) of the Mathies formulation. Due to the lack of ignitability of the loose coal I conclude there was not a reasonable likelihood that a fire would occur.

In support of her position the Secretary relies on Consolidation Coal Corp. v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987) and Coal Mac, Inc., 13 FMSHRC 1600, 1601.

In Consolidation Coal Co., the appellate court affirmed the Commission's presumption that the Secretary's respirable dust

regulation was S&S. In the instant case the Commission's precedent is set forth in the Mathies formulation.

In the second cited case the Secretary relies on Judge Fauver's rationale dealing with "substantial possibility" rather than "reasonable likelihood" as mandated in Mathies. I declined to follow Judge Fauver's reasoning in FMC Wyoming Corporation, 14 FMSHRC 1482, 1497 (August 1992) and I adhere to that view.

The S&S allegations should be stricken.

Unwarrantable Failure

"Unwarrantable failure" means "aggravated conduct constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act" Emery Mining Corporation 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). An operator's failure to correct a hazard about which it has knowledge, where its conduct constitutes more than ordinary negligence can amount to unwarrantable failure. Secretary v. Quinland Coals, Inc. 10 FMSHRC 705 (June 1988). While negligence is conduct that is "thoughtless", "inadvertent" or "inattentative" conduct constituting an unwarrantable failure is "not justifiable" or is "inexcusable".

The Secretary asserts unwarrantable failure is established by MCR's adverse history. In the period beginning October 1, 1988 and ending March 18, 1992, MCR was cited 215 times for violations of § 75.400 (Ex. M-3). I agree that such a large number of citations establish unwarrantable failure by MCR and for that reason such allegations should be affirmed. Peabody Coal Co. 14 FMSHRC 1261 (August 1992).

The Secretary's additional reasons to assert unwarrantable failure have been examined and found to be without merit.

Civil Penalties **As to MCR**

Section 110(i) of the Act mandates consideration of the criteria to assessing appropriate civil penalties.

MCR is in Chapter 11 Bankruptcy (Case No. 92-11658 PAC, District of Colorado). The penalty herein is appropriate considering the company has virtually shut down at this time.

MCR is only a debtor-in-possession and is no longer mining coal.

MCR's prior adverse history is not favorable: from October 1, 1988 to March 18, 1992, the company paid 375 violations of a

total 1,407 violations. (Ex. M-3). From May 1, 1988 to April 30, 1990, MCR paid 604 violations of 1,436 assessed. (Ex. M-15).

The operator was negligent since its strike belt was in poor condition.

However, the gravity of the violation was low since the MCR's coal will not combust and does not readily burn.

The company is entitled to statutory good faith for prompt abatement. The entire production crew was 1 1/2 to 2 hours into the 4 hour resplicing job when Mr. Kirk arrived at the mine. Cleanup cannot begin until the resplicing is accomplished.

The civil penalty of \$400 hereby assessed in WEST 91-421 is appropriate.

Docket No. WEST 91-627

William M. Porter, employed by Mid-Continent Resources Inc.

In this case, the Secretary seeks a civil penalty and charges Respondent, William M. Porter, the 103 longwall foreman, with violating Section 110(c) of the Act in that he knowingly authorized, ordered or carried out the violation of 30 C.F.R. § 75.400.

Section 110(c) of the Act provides:

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

It has been ruled that the word "knowingly" as used in this section does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowingly or having reason to know. A person has reason to know when he has such informations that would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. United States v. Sweet Briar, Inc., 92 F. Supp. 777,779 D.S.C. 1950, quoted

approvingly in Secretary v. Kenny Richardson, 3 FMSHRC 8 (1981), affirmed, Richardson v. Secretary of Labor and FMSHRC, 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983).

As previously noted, the evidence establishes that the coal accumulations were caused when the 103 strike belt broke. This occurred on the shift before Mr. Porter came to work. Accordingly, there is no evidence that Mr. Porter knowingly authorized, ordered or carried out the violation of the regulation.

Case No. WEST 91-627 against William M. Porter should be dismissed.

WEST 91-168, WEST 91-594 and WEST 91-626

I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

46. On May 29, 1990, **FRANK D. CARVER**, an experienced MSHA underground coal mine inspector issued Order No. 3410351 under Section 104(d)(2) of the Act. Mr. Carver has inspected MCR on an almost daily basis from January 1988. (Tr. 184-187).

47. When he was proceeding towards the face of the 211 longwall Mr. Carver saw coal and timbers in Crosscut 18. The crosscut itself was 20 feet wide, 6 to 7 feet high and 40 to 50 feet deep. (Tr. 187, 188).

48. The crosscut was mostly full. Mr. Carver also found coal dust, coal fires and float coal dust as well as lump coal. The area was lightly salt and peppered. (Tr. 188-189).

49. Mr. Carver at hand-depth picked up hands full of the material at different locations and measured the accumulations with a 6 foot wooden ruler. (Tr. 189, 237).

50. Crosscut 18 was 300 feet from the face. (Tr. 191).

51. When Mr. Burham (MCR representative) was asked what this was all about he merely shrugged, "more or less." (Tr. 191).

52. In the 211 longwall gassy section ignition sources included the power cables, and a non-permissible diesel. (Tr. 193-195).

53. Float coal dust and coal dust fines relate to fire and explosion hazards. (Tr. 192).

54. Fire and explosion could cause death or serious injury. (Tr. 193).

55. Mr. Carver checked the preshift and on shift books and except for May 28 through May 29, he was not alerted to the accumulations. Crosscut 18 should have been reported in the shift book. (Tr. 196).

56. Mr Carver knew there had been an order issued due to coal accumulations at tailgate 211 on May 1. (Tr. 200-201, Ex. M-7)). He considered this factor when he issued the May 29 order. (Tr. 201).

57. On May 29, 1990, MCR was on the (d) series that started on April 20, 1990. (Tr. 209, 210).

58. Mr. Carver did not see anyone cleaning up the accumulations in Crosscut 18. (Tr. 214).

59. MCR was not mining when Mr. Carver arrived in the section. (Tr. 216).

60. Mr. Carver believed the violation was S&S. (Tr. 193). It was further due to the unwarrantable failure of MCR. Specifically, it was because of the (d)(1) citation on April 20, 1990 and the (d)(1) order May 1. (Tr. 225).

61. When he issued his order on May 29, Mr. Carver was aware of two prior orders for accumulations within the previous month. (Tr. 251).

62. Exhibit M-16 (first page) shows coal accumulation at Crosscut 18, low side. The book recited the condition was reported. (Tr. 259).

63. Coal accumulations also shown for May 27 at Crosscut 18. (Tr. 259-261).

Discussion and Further Findings

MCR raises the combustibility and ignitability arguments it raised in connection with the previous order.

However, the facts are different. The record establishes that at Crosscut 18 there was considerably more than loose coal. Specifically, the accumulations in Crosscut 18 included very dry coal dust, coal fines and float coal dust. I credit Mr. Carver's experience that these accumulations relate to fire and explosion hazards which could cause death or serious injury. Mr. Carver further identified ignition sources including power cables and a non-permissible diesel. An additional ignition source would be in Eimco used to move the power center on the Memorial Day weekend. (Baley, Tr. 155).

It is true that MCR established by the credible evidence that the power in the 211 longwall was shut down over the Memorial Day weekend so the power center could be moved. (Hayes, Tr. 596). In addition, MCR was scheduling a gearbox change for the 211 longwall. (Hayes, Tr. 587). While some immediate ignition sources may have been without power other ignitions sources were present. In addition, fires elsewhere in the mine could have been propagated by the accumulations in Crosscut 18.

A dispute exists as to the composition of the accumulations in Crosscut 18. MCR asserts it was mostly rock from floor leave within the crosscut and floor material stored there from the power center move. MCR further cites the testimony of Bruce Collins, MCR's geologist who testified in connection with the previous order.

I am persuaded by Mr. Carver's prompt action at Crosscut 18 as well as Mr. Buram's unresponsive reply at the same time and place. Mr. Buram in describing the activity at Crosscut 18 stated "Dave [Carver] put his hands down and dug into it a little bit and said the section was closed down" (Tr. 267). Mr. Carver asked Mr. Buram what this was all about and he "got a shrug, more or less, and he [Buram] didn't want to discuss it." (Tr. 191).

Bruce Collins, MCR's geologist, testified as to the rock material that accumulated at the 103 strike belt and the B-1 belt intersect. While he testified the 211 longwall was carbonaceous siltstone (Tr. 527), he failed to indicate how these could be an accumulation almost large enough to fill a single crosscut 20 feet wide and 6 to 7 feet high. (Tr. 188). In addition, if the area was not combustible MCR would hardly have dusted it; or "lightly salt and peppered it." (Tr. 188).

John Reeves testified that he and his son toured the mine over the Memorial Day weekend. He walked in the 211 headgate roadway and observed that the crosscuts were badly heaved but he did not notice any accumulation in Crosscut 18. (Tr. 360). Terrance Hayes also testified he did not see anything remarkable in Crosscut 18 during the graveyard shift preceding Mr. Culver's order. (Tr. 601).

Mr. Reeves and Mr. Hayes may simply have been unobservant as to the contents of Crosscut 18.

I am persuaded by Mr. Carver's testimony as to the conditions in Crosscut 18.

Modification of Roof Control Plan

As a further defense in the 211 longwall MCR interposes MSHA's modification of the operator's roof control plan. (Ex.

R-11, R-12, R-13). The modification, in April 1990, approves the lengthening and extension of two crosscuts to allow for advance of the face.

MCR's defense is rejected. It is apparent that MSHA's modifications in the roof control plan did not directly or implicitly authorize MCR to violate 30 C.F.R. § 75.400.

Significant and Substantial

The formulation to be followed in determining whether a violation is S&S is set forth in connection with the previous order.

Following the Mathies formulation I conclude the Secretary proved the underlying violation of 30 C.F.R. § 75.400. There was a measure of danger contributed to by the violation. Mr. Carver testified the lump coal, the float coal dust and the coal fines relate to fire and explosion hazards. (Tr. 188-193). MCR's witness Burham conceded float coal dust is a hazard. (Tr. 271, 282). The third factor of the Mathies formulation was established by the opinion of Mr. Carver. (Tr. 193, 213). The propensities of a fire establish the final factor: A mine fire can cause serious injuries.

For the foregoing reasons the S&S allegations should be affirmed.

Unwarrantable Failure

For the reasons previously discussed in connection with Order No. 3412700 and as evidenced in Exhibit M-3 the special findings of unwarrantable failure should be affirmed.

Civil Penalties

MCR's financial status and prior history have been previously reviewed.

In connection with Crosscut 18 MCR was negligent. The accumulations were placed in Crosscut 18 because MCR was moving the power center and it was necessary to make additional space for it (Buram, Tr. 270; Baley, Tr. 155). At the time of the power center move, most of the power and ignition sources had been disconnected. MCR's did not properly schedule the move of its power center. Better planning could have been to make room for the power center and remove the accumulations from the mine before moving the power center. In short, I reject MCR's concept that the accumulations were "in transit." The preshift and on-shift reports in Exhibit M-16 indicate otherwise.

The gravity in connection with Crosscut 16 was high. The ingredients involved were such that if a fire and explosion occurred, serious injuries or fatalities could result.

MCR is entitled to statutory good faith as it rapidly abated the violative conditions.

The civil penalty of \$600 assessed in WEST 91-168 is appropriate.

Docket No. WEST 91-594
Thomas Scott, employed by Mid-Continent Resources, Inc.

In this case the Secretary charges Respondent, Thomas Scott, with violating Section 110(c) of the Act in that he knowingly authorized, ordered or carried out the violation of 30 C.F.R. § 75.400.

The statutory mandate and the case law are set forth in the William M. Porter case, supra.

In connection with this case I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

64. In May 1990 Thomas Scott was the MCR underground mine superintendent. (Tr. 629-630).

65. On Friday night Mr. Scott told miner Mike Jerome that the face was going to be shut down.

66. Over the Memorial Day weekend Mr. Scott was busy with family matters. He also went fishing at Trappers Lake. (Tr. 630).

67. When he returned home Monday evening he learned the 211 gearbox was not yet ready for installation. (Tr. 633).

68. On Tuesday Mr. Scott got the "rundown" from Terry Hayes, the graveyard foreman. (Tr. 631).

69. When he got back to work Tuesday morning the surprise waiting for him was that Dave Carver was underground. At approximately 8:30 or so his phone rang and they said he had an order for accumulations. (Tr. 634).

70. Mr. Scott looked at Crosscut 18 after Mr. Carver issued his order.

71. Mr. Scott didn't review the MCR books when he returned to work. (Tr. 649-650).

72. Mr. Scott went in after Mr. Carver issued his order. He agreed there were accumulations to some degree in Crosscut 18 but he didn't feel the accumulations were all coal. (Tr. 645, 646).

73. Mr. Carver had issued an order about a month before May 29 for accumulations in the same crosscut. The accumulations came about because the stamler had to be moved. (Tr. 650).

Discussion and Further Findings

If Mr. Scott had reviewed the books (Ex. M-16) he would have found reports of coal accumulations at Crosscut 18 on the low-side. Those accumulations are reported for May 27 at 5:45 a.m., 2:14 p.m. and 5:10 a.m. Subsequent shifts are recorded as idle. Since these conditions were reported to the company, Mr. Scott, as mine foreman should have known them.

Accordingly, the citation as to Thomas Scott should be affirmed and a civil penalty assessed.

Civil Penalty

Section 110(i) of the Mine Act mandates consideration of six criteria to be considered in assessing civil penalties under the Mine Act.

Criteria as to size, ability to continue in business and prompt abatement do not appear to be relevant in this 110(c) case.

As to the remaining criteria: Mr. Scott has no prior adverse history.

Mr. Scott was negligent: As superintendent he should have known of the accumulations in Crosscut 18.

The gravity of the violation was serious even though many of the potential ignition sources were not operative.

The penalty of \$200 assessed in the order of this decision is appropriate.

Docket No. WEST 91-626

Terrance J. Hayes, employed by Mid-Continent Resources, Inc.

In this case the Secretary charges Respondent, Terrance J. Hayes, with violating Section 110(c) of the Act in that he knowingly authorized, ordered or carried out the violation of 30 C.F.R. § 75.400.

The statutory mandate and the case law are set forth in the William M. Porter case, supra.

In connection with this case I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

Findings of Fact

74. In May 1990 Mr. Hayes was the shift foreman on the C or graveyard shift. (Tr. 586).

75. Mr. Hayes was off the Memorial Day weekend. (May 26, 27 and 28). (Tr. 587).

76. He was not in touch with the Mine until he returned to work at 11 o'clock at night on the C shift, Monday, May 28th. (Tr. 587, 588).

77. Various bullgang work were performed during the weekend. (Tr. 588, 589).

78. On the holiday weekend a power center move and a gearbox change were scheduled. (Tr. 589).

79. No one was present when Mr. Hayes entered the mine except Bruce Huntley who had been in charge of the power center move. (Tr. 595).

80. Mr. Ben Griego asked Mr. Hayes if he could kill the power in the whole mine. Mr. Hayes agreed. (Tr. 596).

81. Those present worked on the power center move except two men drilling the face. (Tr. 596-597).

82. Mr. Hayes countersigned all of the books even though he was not present at all times. (Tr. 598-599).

83. When Mr. Hayes saw there was an outstanding "ticket" on the 211 tailgate, he directed that the area be dusted. (Tr. 599).

84. Mr. Hayes walked by the area to where the power center was being moved. However, he didn't observe anything unusual nor did he observe any coal accumulations. (Tr. 601, 604).

85. The power center is 4 feet high by 16 feet long by 6 feet wide. (Tr. 604).

86. There was something in the books referring to a coal accumulation but the entry was before Mr. Hayes' shift. (Tr. 605).

87. The whole area was white from dusting. (Tr. 606).

88. Mr. Hayes didn't look at the accumulation referred to by Mr. Carver. (Tr. 606).

89. Mr. Carver wrote his order during the day of May 29th for the accumulation in the Crosscut 18. Mr. Hayes first became aware of the order when he came to work that night when he came on at 1 o'clock. (Tr. 614). This was the second shift after the Memorial Day weekend. (Tr. 618).

90. When he heard about the order Mr. Hayes went immediately to the 211 longwall. They were removing the last bucket out of Crosscut 18. (Tr. 614).

Discussion and Further Findings

Mr. Hayes was shift foreman on May 28 and on that day he read and signed the on-shift books. The books clearly refer to the accumulations in Crosscut 18.

One of MCR's defenses is that the power center move and the gear box changeover eliminated MCR's capacity to remove any accumulations in Cross 18. Mr. Hayes should have known of these circumstances.

Mr. Carver wrote his order on May 29th and it was not until after Mr. Hayes learned of the order that he went to Crosscut 18.

The above uncontroverted facts show that Mr. Hayes knew or should have known of the accumulations yet he failed to take remedial action.

The 110(c) case against Terrance Hayes should be affirmed and a civil penalty should be assessed.

Civil Penalties

As previously noted the statutory criteria as to size, ability to continue in business and prompt abatement do not appear to be relevent in a 110(c) case.

As to the remaining criteria: Mr. Hayes has no prior adverse history.

Mr. Hayes was negligent; he read and signed the pre-shift and on-shift reports and should have known of the accumulations in Crosscut 18.

The gravity of the violation was serious but many of the ignition sources were not operative.

The penalty of \$200 assessed in the order of this decision is appropriate.

For the foregoing reasons I enter the following:

ORDER

I

As to WEST 91-421, Order No. 3412700:

The allegations of significant and substantial are stricken.

Order No. 3412700 is affirmed.

A civil penalty of \$400 is assessed against Mid-Continent Resources, Inc.

II

As to WEST 91-627, William M. Porter, employed by Mid-Continent Resources, Inc.:

This case is dismissed.

III

WEST 91-168, Order No. 3410351:

Order No. 3410351 is affirmed and a civil penalty of \$600 is assessed against Mid-Continent Resources, Inc.

IV

WEST 91-594, Thomas Scott, employed by Mid-Continent Resources, Inc.

This petition is affirmed and a civil penalty of \$200 is assessed.

V

WEST 91-626, Terrance J. Hayes, employed by Mid-Continent Resources, Inc.

This petition herein is affirmed and a civil penalty of \$200 is assessed.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 28 1993

CONSOLIDATION COAL COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 92-502-R
: Order No. 3679001; 3/28/92
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Robena Prep Plant
ADMINISTRATION (MSHA), : Mine I.D. No. 36-04172
Respondent :

DECISION

Appearances: Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Anthony G. O'Malley, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the notice of contest filed by the Consolidation Coal Company (Consol) to challenge a control order issued by the Secretary of Labor under Section 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq., the "Act."

Section 103(k) of the Act provides that "in the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal."

The order at bar, No. 3679001, issued March 28, 1992, states as follows:

A structural failure occurred when the 600 ton coal surge bin between CC4 and CC5 belts fell from its support tearing out the up-river side of the building structure and severing 2,300 volt power cables and beams supporting the building. This order was issued verbally by

Robert W. Newhouse at 0100 hours on 3/28/92 to assure the safety of persons at the Preparation Plant and to preserve evidence until an examination or investigation can be made to determine that this area is safe. Only those persons selected from company officials, state officials, the miners' representatives and other persons who are deemed by MSHA to have information relevant to the investigation may enter the affected area.

There is no dispute that the Robena Prep Plant, where the alleged accident occurred, was a "mine" within the meaning of the Act. Consol argued however, through a full day of evidentiary hearings, that the above order was invalid in that no "accident" occurred within the meaning of the Act.¹ The term "accident" is defined in Section 3(k) of the Act as including "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person."

Whether or not the admitted structural failure of the Robena Prep Plant coal surge bin itself constituted an "accident" within the meaning of Section 3(k) of the Act, the evidence that a mine ignition and mine fire occurred on March 27, 1992, cannot be disputed. This evidence confirms the information received by the issuing inspector on March 28, 1992, around 3:00 a.m., upon which he relied in issuing the Section 103(k) order at bar.

According to issuing MSHA Inspector William Wilson's undisputed testimony, when he appeared at the Robena Prep Plant around 2:50 a.m., on March 28, 1992, to investigate an "accident," he was told by Consol Safety Director Jim Hunyady that the surge bin structure had failed and that there had been a small fire which they put out quickly. Bob Campbell, the mine safety committeeman, also confirmed to Wilson that there had been some small fires following the collapse of the coal surge bin. Campbell himself recalled telling Inspector Wilson at this meeting, before Wilson had issued his order, that there had been some fires in the coal. Within this framework of undisputed evidence, Wilson could reasonably have concluded that an "ignition" and a "mine fire" had occurred and that the issuance of a section 103(k) order was appropriate. Significantly, the evidence developed after the order was issued fully

¹ In its Post-Hearing brief Consol apparently now concedes the issue. So that no question remains, the issue is nevertheless discussed herein.

corroborates the information provided to Wilson when he issued the order, and confirmed that his actions were prudent and reasonable. These facts also clearly show that he did not abuse his discretion or authority.

Riverman John Markatan testified at hearing that around 9:00 or 9:30 p.m. on March 27, 1992, after loading a barge, and as he proceeded to the riverman's shanty approximately 75 yards from the surge bin, he noticed a sudden power loss followed by a loud "ripping" sound. As he started toward the window of the shanty he heard a loud muffled explosion, saw a bright yellow flash of light and felt heat on his face. He jumped to the floor immediately. When he looked outside he saw that the river bank and debris in the barges were on fire. Flashes, sparks and fire were also coming out of the coal bin. The fire was one foot or less in height and lasted for about one and a half hours.

Wallace Wright, a river boat pilot for Consol, was standing below the river tipple around 9:30 to 9:45 that night when he suddenly looked up and saw a large fire about 100 feet in height. There was fire in the bin itself and two small fires in the coal.

Robert Campbell, Chairman of the Mine Safety and Health Committee, arrived at the plant shortly after receiving a call about an explosion at the surge bin. When he arrived there was a fire on the river side of the bin with coal burning in several areas, including an area in which he thought was an acetylene tank.

Consol's own witness, Daniel Yanchek, the Robena Prep Plant Superintendent, also saw the coal fires following the surge bin failure. When he arrived at the plant around 11 o'clock that night the coal fires were still burning in the coal spilled beneath the bin.

Finally, the testimony of MSHA's specialist in the investigation of fires and explosions, Steven Luzik, provides convincing corroboration that an ignition of coal had in fact occurred at the "explosion" site. Luzik, a graduate chemical engineer who is an MSHA supervisory general engineer and former branch chief of its Industrial Safety Division, testified that he investigated the site on March 31, 1992, to determine whether a fire or explosion had in fact occurred. His observations, documented in photographs (see Gov't Exhibit Nos. 3.1, 3.2, and 3.3), showed evidence of burned material, including partly combusted coal dust. Comparing samples taken from the unburned area of coal spillage with burned samples, the MSHA laboratory performed proximate analysis and x-ray

spectrographic analysis test on the samples (Government Exhibit No. 5). Luzik was able to conclude that what appeared to have been burned coal had a high ash content thereby indicating combustion. He further concluded that both solid and dust coal particles had burned. It was Luzik's overall opinion that, while there had not been a large explosion, the collapse of the bin caused a suspension of coal dust followed by the cable rupturing causing an arc and ignition of the unconfined coal dust.

Within this framework of evidence, it is clear beyond all doubt that indeed a mine ignition and mine fire had occurred at the Robena Prep Plant on the evening of March 27, 1992. It may be reasonably inferred from Yanchek's testimony in conjunction with the undisputed testimony of Campbell, Wright, and Markatan, that the fires had continued burning from at least the time of the "explosion" around 9:30 p.m. until after Yanchek arrived at 11:00 p.m. Under the circumstances there was an "accident" at the Robena Prep Plant within the meaning of Section 103(k) as alleged.

Consol next makes the bald assertion that the issuance of the 103(k) order was precluded because the area where the surge bin collapsed had previously been "dangered off" by mine management. This contention is however without any legal support. The fact that management may have "dangered off" an area, whatever that means, may certainly be considered by the issuing inspector in his safety evaluations, but cannot bar the issuance of a section 103(k) order.

In its post-hearing Brief, Consol, for the first time, also claims that Inspector Wilson was not "present" within the meaning of Section 103(k) when he issued the order at bar. Consol argues, without any citation of authority, that Wilson's acknowledged presence at the mine was insufficient and that he must be present precisely at the accident scene itself when he issues such an order. It is a well-established rule, however, that a statute should not be construed in a way that is foreign to common sense or its legislative purpose. Consolidation Coal Co., 14 FMSHRC 956 (1992); Clinchfield Coal Co., 11 FMSHRC 2120 (1989).

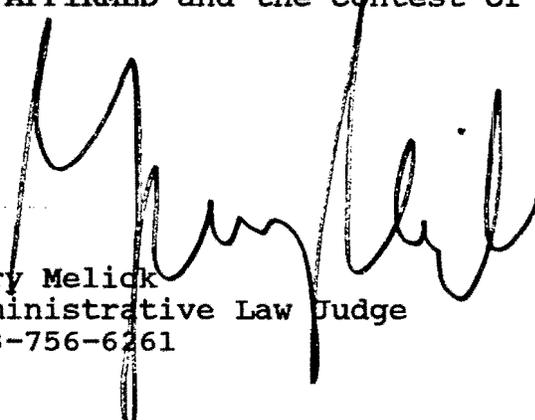
If Consol's suggested interpretation of section 103(k) were to prevail, then many control orders under that section could not be issued simply because the Secretary's representative would have no access to the precise scene of an accident, e.g., the site of an explosion in the depths of an underground mine. Such a construction is both contrary to legislative purpose and common sense and is accordingly

rejected. It is only required that the inspector issue the 103(k) order when present at the mine where the accident occurred. See also 1 Coal Law and Regulation § 10.08, Vish, McGinley and Biddle.

Under all of the circumstances, the issuance of Order No. 3679001 by Inspector Wilson in the early morning hours of March 28, 1992, under Section 103(k) was reasonable and in compliance with that section of the Act.

ORDER

Order No. 3679001 is hereby **AFFIRMED** and the contest of said order **DISMISSED**.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

JAN 28 1993

SECRETARY OF LABOR, MSHA, : DISCRIMINATION PROCEEDING
on behalf of :
DANIEL L. BAKER, : Docket No. WEST 92-665-DM
Complainant, : WE MD-02-09
: :
v. : South Area Quarry
: :
NEWMONT GOLD COMPANY, :
Respondent, :

ORDER OF DISMISSAL

Before: Judge Morris

In the above case, the undersigned entered an order of temporary reinstatement pursuant to Commission Rule 44, 29 C.F.R. § 2700.44.

Subsequently, a discrimination complaint was filed by Complainant and docketed with the Commission as WEST 92-654-DM. Further, the case was assigned to Administrative Law Judge Michael A. Lasher, Jr.

Accordingly, the captioned case is **DISMISSED** without prejudice to Complainant to proceed in WEST 92-654-DM.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 28 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-210
Petitioner : A.C. No. 42-01697-03635
: :
v. : Docket No. WEST 92-211
: A.C. No. 42-01697-03636
C.W. MINING COMPANY, :
Respondent : Bear Canyon No. 1

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

These cases are before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging C.W. Mining Company (C.W. Mining) with four "significant and substantial" (S&S) violations of mandatory safety standards and six non S&S regulatory standards found in 30 C.F.R. Part 75 entitled "Mandatory Safety Standards - Underground Coal Mines."

C.W. Mining filed a timely answer contesting the existence of each of the alleged violations, the significant and substantial designation of the alleged violations and the appropriateness of the proposed penalties.

Federal coal mine inspector Donald F. Gibson was the only witness called to testify for the Petitioner. Messrs. Kenneth Defa, mine superintendent, Nathan Atwood, the mine production supervisor and Ted Farmer, federal coal mine inspector were called to testify by C.W. Mining.

Stipulations

The parties stipulate to the following:

1. C.W. Mining Company is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. C.W. Mining Company is the owner and operator of Bear Canyon No. 1 Mine, MSHA I.D. No. 42-01697 an underground coal mine.

3. C.W. Mining 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 and orders were properly served by duly authorized representatives of the Secretary upon agents of C.W. Mining 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 C.W. Mining 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 penalty will not affect C.W. Mining Company's ability to continue business.

8. C.W. Mining Company is a medium size mine operator with 551,084 tons of production in 1990.

9. 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.

Docket No. WEST 92-210

Citation Nos. 3582644, 3582646 and 3582650 VACATED

This docket consists of seven citations based upon Inspector Gibson's inspection of the mine on July 18, 1991. At the hearing the parties on the record advised that because of insufficient evidence, the Secretary was vacating three of the seven citations in Docket No. WEST 92-210. The vacated citations are Citation Nos. 3582644, 3582646 and 3582650. The proposed penalties for those alleged violations are also vacated.

Citation Nos. 3582540, 3582645 and 3582579 AFFIRMED

C.W. Mining has accepted and withdraws its contest with respect to three of the remaining four citations. Consequently Citation Nos. 3582540, 3582645 and 3582579 are affirmed.

On consideration of the statutory criteria in section 110(i) of the Act, I find the appropriate penalty for each of these violations is the Secretary's proposed penalties which are respectively \$20, \$20 and \$192.

The remaining citation in this docket, Citation No. 3582643, was vigorously contested and is discussed below.

Citation No. 3582643

Federal coal mine inspector Donald E. Gibson inspected the Bear Canyon Mine on July 18, 1991. Based upon this inspection, Mr. Gibson issued Citation No. 3582643 charging the operator of the mine with a 104(a) non S&S violation of 30 C.F.R. § 75.1103-4(a)(1) for the operator's failure to have a "heat type fire sensor located at the end of the belt flight."

The citation describes the violation as follows:

The heat type fire sensors being used on the 2nd East South conveyor belt was not located at the end of the belt flight.

The sensor was located at cross cut 27 and the tail piece (end of the belt flight) was located at cross cut 29, approximately 160-170 feet inby the sensor.

There was no one observed advancing the heat sensor when condition was observed.

The sensor appeared to be functioning.

The belt was suspended from the mine roof and was not observed rubbing against oily material.

The relevant safety regulations 30 C.F.R. §§ 75.1103-4(a)(1) and 75.1103-4 provide for the minimum installation requirements for automatic fire sensor and warning devices for each belt unit operated by a belt drive. The relevant regulations read as follows:

§ 75.1103-4 Automatic fire sensor and warning device systems; installation; minimum requirements.

(a) Automatic fire sensor and warning device systems shall provide identification of fire within each belt flight (each belt unit operated by a belt drive).

(1) Where used, sensors responding to temperature rise at a point (point-type sensors) shall be located at or above the elevation of the top belt, and installed at the beginning and end of each belt flight (tail-piece), at the belt drive, and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) of this section.

* * * * *

(3) When the distance from the tail-piece (end of the belt flight) at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached. . . .

The Secretary's position is that the regulation requires that a sensor responding to temperature (point type sensor) must be in place over the end (tailpiece) of the belt flight at all times when the belt is in service. Under the Secretary's interpretation and enforcement of the regulation after the belt is moved (extended) the operator must install a heat sensor over the tailpiece before the belt is operated and cannot, as the operator contends, legally wait and install the sensor over the tailpiece later, within 24 production shift hours. It is undisputed in this case that less than 24 production hours had expired since the belt (including its tailpiece) had been extended in by over 160 feet past the last sensor.

The Secretary presented evidence that it has interpreted and enforced the regulation in this manner since 1969.

Under the Secretary's interpretation of the regulation the exception set forth in paragraph (a)(3) of 30 C.F.R. § 75.1103-4(a)(3) that allows sensor to be installed within 24 production hours, applies only to those sensors that must be installed in increments not to exceed 75 feet along each belt flight (belt haulageway) and not to the sensor that must be installed at the

beginning and end of each belt flight. Thus the Secretary's counsel in the post-hearing brief states the Secretary's position as follows:

It is necessary to carefully examine the wording of both the regulation and its exception to understand why the heat-type sensor must be placed over the tailpiece after the belt move and not some 24 production shift hours later as C.W. Mining contends. Section 75.1103-4(a)(1) requires that sensors responding to heat be located as follows:

- (a) at or above the elevation of the top belt, and
- (b) installed at the beginning, and
- (c) end (tail piece) of each belt flight,
- (d) at the belt drive, and
- (e) in increments along each belt flight...not to exceed 125 feet.

Sensors are to be located over the top of the belt and at the beginning (belt discharge roller) and end (belt tail piece) of the belt flight and at 125 feet maximum spacings along the length of the belt flight. It is abundantly clear that sensors are required at the beginning and end of the belt prior to putting the belt in service. Section 75.1103-4(a)(3) allows an Operator some 24 production shift hours for the sensor to be installed over the belt when the distance from the tail piece at the loading points to the first outby sensor (i.e., the sensor over the top of the belt) not the sensor at the end of the belt flight as per Section (a)(1) reaches 125 feet. As Inspector Gibson noted MSHA has enforced the regulation in this manner since 1969. (TR-26). See also Exhibit G-4. Inspector Gibson and at least one other inspector have informed Ken Defa, Mine Superintendent, previously that the sensor had to be placed over the tail piece immediately after a belt move. (TR-35).

It is the operator's position that the last phrase of

subsection (a)(1) "except as provided in paragraph (a)(3) of this section," applies to each clause of subsection (a)(1) joined by conjunctive commas and the word "and." The operator contends that had the drafters intended to limit the exception in (a)(3) to sensors installed in increments along the belt flight, they would have put a period after the clause "at the belt drive" and begun a new sentence, thus:

Sensors shall also be located in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) of this section.

Conclusion and Rationale

I concur and uphold the Secretary's interpretation that the regulation requires that a sensor must be located over the end of the belt flight (tail piece) as soon as the belt begins to operate.

It is clear from a reading of the relevant standards that the purpose of the automatic fire sensor system is to give warning automatically when a fire occurs on or near the belt that will result in rapid location of the fire (§ 75.1103-1). The specific regulation in question must be construed in the light of its underlying purpose - the protection of miners working underground.

It is well established that the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. Federal Mine Safety and Health Review Commission, 606 F2d 417, 419-20 (4th Cir. 1979); Old Ben Coal Co., 1 FMSHRC 1954, 1957-58 (December 1979). Section 75.1103-4(a)(1), like most coal mine safety standards, is aimed at the elimination of potential dangers before they become present dangers.

The regulation in question, therefore, should be construed in a manner that is consonant with the fundamental protective ends of the Mine Act as set forth in section 2 of the Mine Act. See 30 U.S.C. § 801(a), (d) and (e).

Logically the appropriate function of an exception in a regulation is to make certain the specific exception or exceptions to its general provisions. It is generally accepted that the exception be construed strictly and all reasonable doubts be resolved in favor of the general rule and against the exception.

In this case if the construction urged by the operator is followed, the exception set forth in paragraph (a)(3) of the

section allowing installation "within 24 production shift hours" would become the general rule rather than an exception to the general provision of the regulation.

Furthermore it is well established courts accord great deference to an agency's construction of regulations which it has drafted and continues to administer. Udall v. Tallman, 380 U.S. 1 (1965); Sec. of Labor v. Western Fuels-Utah, Inc. 900 F.2d 318 (D.C. Cir. 1990); Secretary of Labor v. Western Fuels-Utah, Inc., 900 F2d 318 (D.C. Cir. 1990). To uphold the agency's interpretation, a court need not find the agency's interpretation to be the only or the most reasonable one. City of Aurora v. Hunt, 749 F2d 1457, 1462 (10th Cir. 1984). "A regulation must be interpreted so as to harmonize with and further and not conflict with the objective of the statute it implements." Emery Mining Corp. v. Secretary of Labor (MSHA), 744 F2d 1411, 1414 (10th Cir. 1984); (quoting, Trustees of Indiana University v. United States, 618 F.2d 736 (1980).

Penalty

This difference of interpretation of the regulation in this case may be due to the somewhat imprecise draftmanship of the regulation. With this in mind I find on considering the statutory criteria in section 110(i) of the Act that the \$20 penalty proposed by the Secretary is the appropriate civil penalty for this non S&S violation.

Docket No. WEST 92-211

Citation No. 3582543 VACATED

This docket consists of three citations. The Secretary has moved to vacate one of the citations, Citation No. 3582543, on the grounds there was insufficient evidence to proceed. The motion was granted. The citation and its related proposed penalty are vacated.

The two remaining citations in this docket were vigorously tried. Both of these citations allege a significant and substantial (S&S) violation of 30 C.F.R. § 75.202(a). This safety regulation provides as follows:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The two citations alleging a violation of this safety standard are discussed below.

Citation No. 3582544

This citation alleges a violation of the mandatory safety standard 30 C.F.R. § 75.202(a) quoted above.

The citation in question, Citation No. 3582544, under item 8 condition or practice, reads as follows:

The mine roof was not adequately supported or otherwise controlled to protect persons from the hazards related to falls of roof in the 3rd West Section. There was a slip located in the crosscut between the #1 and #2 entry. Loose rocks were observed in the slip. These rocks were scaled down and measured 24-30 inches long x 4-16 inches wide x 1-1/2 inches thick. Another rock measured 24-30 inches long x 18-22 inches wide x 2-3 inches thick. These rocks were located over the roadway. In this condition (it) poses the hazard of injury related to falling materials.

Inspector Donald Gibson issued this citation on September 24, 1991 after his spot inspection (CAA) of certain portions of the mine. Inspector Gibson testified that in the 3rd West Section between the No. 1 and No. 2 entry he observed a "slip" which he defined as a separation from the immediate roof.

Inspector Gibson testified there were loose rocks in the slip. At Mr. Gibson's request, Mr. Defa, the mine superintendent, scaled down the rocks with a pry bar. After the rocks were scaled down, Mr. Gibson measured the rocks and obtained the measurements set forth in his citation quoted above. Inspector Gibson described the slip as approximately 10 to 12 feet long (Tr. 52) and on cross-examination as 8 feet wide and 2 feet long. (Tr. 71). He stated that the bulk of the slip was over the middle of the entry. There was conflicting testimony as to the time required for Mr. Defa to scale down the rocks. Mr. Defa said it took him one half hour of vigorous prying to scale down the rocks. Inspector Gibson stated that it took Mr. Defa only about 10 minutes to scale the rocks down.

There was also conflicting evidence as to the height of the roof. Mr. Gibson testified as follows:

"it runs in my mind that the mining height or the height of the coal seam was six feet, seven feet high." (Tr. 55). Later on cross examination when asked again the height of the roof he testified "Well, I think I've stated between seven feet and eight feet. I

didn't measure it. I don't know exactly."
(Tr. 65).

Mr. Defa, the mine superintendent, testified in a positive manner that the roof in the area in question was exactly 5 feet 8 inches high. He measured the height on the day of inspection and again just the day before he testified at the hearing.

Mr. Defa also testified that he saw a crack but did not see any slip. He stated that in the area in question there was a "laminated roof strata" which was roof bolted to hold the layers of rock strata together. The crack was between two layers of rock strata.

Mr. Atwood, the mine production supervisor, testified that when he observed the roof the day before the citation was issued, the roof was fully bolted and adequately supported in the area cited and that the height of the roof in that area was five feet 8 inches high.

Another federal coal mine inspector, Ted Farmer, was conducting a regular full AAA inspection of the mine during the time, as well as before and after Inspector Gibson's spot inspection of the mine. Inspector Farmer's AAA inspection included the roof and ribs in the area spot-checked by Gibson. Inspector Farmer testified that he had inspected the roof area in question a week or two before Mr. Gibson arrived and that he did not issue any roof or rib control citation because he did not observe any roof or rib hazard.

On evaluation of the testimony of each of the witnesses I find that Inspector Gibson did observe some loose rock in the roof in the cited area in violation of the cited standard. I am satisfied from Mr. Defa's testimony that the roof in the cited area was five feet eight inches high, that he had to duck down to get into the area, and that he had to work vigorously with his scaling bar to bring the disputed rock down.

Under these circumstances, summarized above, I find that there was a non S&S violation of 30 C.F.R. § 75.202(a) rather than a S&S violation. The evidence presented did not establish an S&S violation because the preponderance of the evidence did not prove a reasonable likelihood that the hazard contributed to would result in reasonably serious injury.

Considering that statutory criteria in section 110(i) of the Act I find the appropriate penalty for this 104(a) non S&S violation under the facts established at hearing is \$80.

Citation No. 3582545

Based upon his spot roof inspection of September 24, 1991 Inspector Gibson issued a second citation alleging a S&S violation of 30 C.F.R. § 75.202(a). Citation No. 3582545 reads as follows:

The roof was not being supported or otherwise controlled to protect persons from hazards related to falls from roof in the return entry on the 3rd West Section beginning 80 feet outby crosscut 16, the left rib was taking weight, (rib cutter) causing the rib to spall. The roof was tested, and when sounded was found to be drummy and cracked. The loose drummy roof was measured to be 6 feet wide and 18 feet long. This area was in the designated escapeway. The area was not barricaded to impede travel. Pieces of the mine roof were observed to have fallen onto the mine floor. It measured 20 inches wide times 40 inches long times 1 to 2 inches thick. This condition poses the hazard of persons being struck by falling material.

Inspector Gibson testified as to his observations of the roof in the cited area as set forth in the citation quoted above. He stated the roof was 6 to 6 1/2 feet high at this location and the roof was supported by bolting. The area first inby this location had already fallen and the operator had cribbed it off. The weekly examiner or anyone he might bring in to fix a faulty condition would be exposed. The area in question was not a primary entryway or exit. It was the secondary or alternate escape-way.

On cross-examination Mr. Gibson testified that the roof area in question was roof bolted on five foot centers or better and some roof material had fallen between the last row of bolts and the rib and had fallen on the floor next to the rib.

Mr. Defa testified the section in question was an inactive section. He was with Inspector Gibson during his inspection. He pointed out to Mr. Gibson that he "couldn't see a violation there, that the roof was bolted and there was no loose rock between the rib and the bolts." He also testified that since setting the timber to abate the alleged violation over one year ago the timbers are taking no weight, no material has had to be barred down and none has fallen.

Federal coal mine inspector Donald Farmer testified that he inspected the roof and ribs of the area in question during his regular AAA inspection a week or two before Inspector Gibson's

spot inspection. Inspector Farmer testified that he did not see any conditions to cite. The day after Mr. Gibson issued the citation, Inspector Farmer again inspected the area to abate Mr. Gibson's citation. Inspector Farmer testified that at neither inspection did he see any rock or material that had fallen onto the roadway. He did see some material that had fallen on the floor next to the rib. It was not in an area "where you normally expect people to walk." The section was idle. However, he would expect the weekly examiner to walk through this area during their weekly inspection.

Inspector Farmer further testified that he carefully inspected the cited area of the roof and stated "as I looked at it and observed and abated the citation, I couldn't see where it would have been an S&S citation." Inspector Farmer testified that had he seen the rib cutter described in the citation he would have issued a citation but he "couldn't see that it was S&S citation."

I credit Inspector Farmer's testimony and concur in his evaluation and opinion that the violation was not S&S.

Considering the statutory criteria in section 110(a) of the Act I find the appropriate penalty for this non S&S violation is \$80.

ORDER

1. Citation Nos. 3582544 and 3582545 are modified to delete the "significant and substantial" designation and, as modified, the citations are **AFFIRMED**.

2. Citation Nos. 3582643, 3582540, 3582645 and 3582579 are **AFFIRMED**.

3. Citation Nos. 3582644, 3582646, 3582650 and 3582543 are **VACATED**.

4. **C.W. MINING SHALL PAY** to the Secretary of Labor a civil penalty in the sum of \$412 within 30 days of the date of this decision for the violations found herein.



August F. Cetti
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 21 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1282
Petitioner	:	A.C. No. 46-01266-03670
v.	:	
	:	No. 1 Mine
LAUREL COAL CORPORATION,	:	
Respondent	:	
	:	
LAUREL COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 91-346-R
	:	Order No. 3751481; 3/13/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 91-347-R
ADMINISTRATION (MSHA),	:	Citation No. 3751482; 3/13/91
Respondent	:	
	:	Docket No. WEVA 91-348-R
	:	Citation No. 3751483; 3/13/91
	:	
	:	Docket No. WEVA 91-349-R
	:	Citation No. 3751484; 3/13/91
	:	
	:	No. 1 Mine
	:	I.D. No. 46-01266

ORDER GRANTING LIMITED CONTINUANCE

On October 26, 1992, hearings were scheduled in the captioned cases to commence on January 12, 1993, upon mutual agreement of counsel. On November 30, 1992, the Secretary of Labor filed a motion for continuance stating as grounds therefore, the following:

1. The above case involves three citations issued by MSHA Inspector James E. Davis and MSHA Inspector Herbert McKinney for violations resulting in a fatal roof fall. The roof fall in question was investigated by and the Accident Investigation Report authored by Investigator James E. Davis. For this reason, the testimony of Investigator Davis is extremely important to the Secretary's case.

2. Investigator Davis has recently become involved in a criminal matter, however, and as a result, is presently on suspension and unable to participate in any phase of the present MSHA case. The hearing in the criminal matter is presently scheduled for January 20, 1993.

3. There are important enforcement goals at issue in the instant proceeding due to the fatal roof fall accident involved and the \$75,000.00 civil penalty assessment which has been proposed.

4. Under these circumstances, the Secretary contends that the interests of justice require that the January 12, 1993, hearing date in this case be continued until Investigator Davis' criminal matter has been resolved.

Subsequently, in a conference call with both counsel and the undersigned, the Secretary was directed to supplement her motion to detail in writing her specific reasons for seeking a continuance and the specific length of time requested for said continuance. It was noted in that conference call, however, that additional criminal charges had been brought against the same MSHA investigator, and that the charges related to his official conduct as an MSHA employee. Thereafter, the Secretary filed a second motion for continuance stating only as follows:

Now comes the Secretary of Labor (Secretary) by her undersigned attorneys and for the reasons set forth in the Secretary's first Motion for Continuance, moves that the January 12, 1993 hearing scheduled in the above-referenced case be continued for nine months or until the criminal proceeding involving MSHA Inspector James E. Davis is resolved at the trial level, whichever occurs first.

Thereafter, in a response filed December 9, 1992, Laurel Coal Corporation (Laurel), while opposing a continuance for nine months, agreed to a continuance of "approximately three weeks." As grounds for its opposition for a nine month continuance, Laurel stated as follows:

Laurel Coal Corporation received the Secretary of Labor's Second Motion for Continuance in the captioned matter and wishes to register an objection. The roof fall accident at issue in this proceeding occurred over 21 months ago, on March 8, 1991. MSHA conducted an elaborate investigation at that time and prepared an investigative report which is available to all parties.

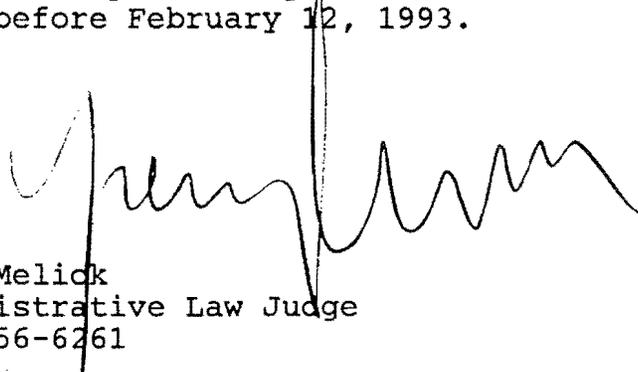
The basis of the Secretary's Motion is that MSHA Investigator James E. Davis is involved in a criminal proceeding and is unavailable to participate in a hearing for at least nine months. The Investigative Report indicates that MSHA employees John W.H. Baugh, Herbert McKinney, Ricky W. Boggs and Eddie White also participated in the investigation. Although Mr. Davis is indeed unavailable, there are four other MSHA investigators that have first hand knowledge of the roof fall fatality at issue and are available for testimony.

The Secretary's Motion will also cause prejudice to Laurel Coal Corporation. The proposed assessments in this proceeding total \$75,000 and this has caused substantial anxiety and potential hardship to the owners and officers of the Company. In addition, a continuance of nine months will lessen the recollections of the parties involved in this factually intensive case.

Laurel Coal answered all of the Secretary's discovery in November and has scheduled depositions for January 13-15, 1993. Our client very much wants to resolve this matter and respectfully requests that the Court deny the Secretary's motion. Laurel will agree, however, to a continuance of the January 12, 1993 hearing date for approximately three weeks. This concession is based solely upon our inability to conduct pre-trial discovery due to the uncertain status of Mr. Davis. Thank you for your consideration.

Nowhere in the Secretary's motions does she state why the potentially unavailable witness is essential to her case. Based on prior experience, it would appear that an after-the-fact investigator, who has no firsthand information as to the occurrence, would be of only marginal value to the case in any event. It is not represented that he has any firsthand information regarding matters at issue. In addition, there is a serious question whether the current criminal proceedings pending against the investigator would be concluded in nine months. Aside from postponements, such proceedings could very well continue for years in the appellate process. On the other hand, as noted by Laurel, the accident giving rise to the instant cases occurred over 21 months ago and further delays could indeed result in legal prejudice. I note however that Laurel has agreed to a continuance of approximately three weeks.

Under the circumstances and considering that the trial schedule of the undersigned is already full through the second week of March 1993, I will grant a limited continuance to March 16, 1993. Accordingly, hearings in the captioned cases will now commence at 9:00 a.m. on March 16, 1993, in Charleston, West Virginia. The prehearing requirements must now be met on or before February 12, 1993.



Gary Melick
Administrative Law Judge
703-756-6261

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