

JANUARY 1995

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JANUARY 1995

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

Secretary of Labor, MSHA v. W.P. Coal Company, Docket No. WEVA 92-746. (Judge Melick, December 1, 1994)

Secretary of Labor, MSHA v. New Warwick Mining Company, Docket No. PENN 93-445 & PENN 94-54. (Judge Amchan, December 9, 1994)

Secretary of Labor, MSHA v. Jim Walter Resources, Docket No. SE 94-74. (Judge Amchan, December 21, 1994)

Review was not granted in the following cases during the month of January:

Secretary of Labor, MSHA v. Power Operating Company, Docket No. PENN 92-849 & PENN 93-13. (Judge Weisberger, November 28, 1994)

Secretary of Labor, MSHA v. Mutual Mining, Docket No. WEVA 93-394-D thru 398-D. (Judge Amchan, November 30, 1994)

William Sinnott, II v. Jim Walter Resources, Docket No. SE 94-358-D. (Judge Maurer, December 8, 1994)



## COMMISSION DECISIONS





Department of Labor's Mine Safety and Health Administration ("MSHA"), was invalid under the Commission's holding in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994) ("*Keystone*"). Administrative Law Judge Roy J. Maurer, concluding that the case was controlled by *Keystone*, granted ASARCO's motion to dismiss and vacated the citation. Order of Dismissal, August 8, 1994 (unpublished). The Commission granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we vacate the judge's order and remand for further proceedings.

I.

Factual and Procedural Background<sup>2</sup>

On March 16, 1994, MSHA issued a citation to ASARCO at its Young Mine, a zinc mine in Tennessee. The citation alleged that a "skip tender"<sup>3</sup> in the mine was exposed to an average of

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thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

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30 C.F.R. § 57.5001.

Section 57.5005, which governs control of exposure to airborne contaminants, provides:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment .....

30 C.F.R. § 57.5005.

<sup>2</sup> This case was decided on ASARCO's motion to dismiss prior to a hearing. The pertinent facts are based on the parties' pleadings.

<sup>3</sup> A "skip tender" is a miner who directs the movement of cages or elevators that move miners, mine cars, and supplies between various levels of the mine and the surface. See Bureau of Mines, U.S. Dept of Interior, *A Dictionary of Mining, Mineral, and Related Terms*, 161, 1022 (1968).

2.3 milligrams of respirable silica-bearing dust per cubic meter of air (mg/m<sup>3</sup>), which exceeded the permissible level. The citation further stated that, although respiratory protective equipment was in use, all feasible engineering controls were not being used to control the exposure of employees to dust.

ASARCO filed a notice of contest, asserting that it was in compliance with the applicable standard and that the citation was based on a single, inaccurate dust sample. It also requested an extension of the abatement time. The Secretary filed an answer and ASARCO moved to dismiss based on the Commission's decision in *Keystone*.

In its motion, ASARCO contended that the citation was based on a single-shift dust sample and, citing *Keystone*, argued that the Commission had invalidated single-shift sampling as a method of measuring respirable coal dust. Mot. to Dismiss at 1-2. The Secretary opposed ASARCO's motion, asserting that *Keystone* dealt only with single-shift sampling in underground coal mines. The Secretary further argued that in *Keystone* the Commission had invalidated the Secretary's spot inspection program for coal mines on procedural grounds alone and had not addressed whether sampling during a single shift was substantively reliable. Statement in Opp'n at 1-2. In reply, ASARCO cited testimony, given in a hearing before a judge in another Commission case, on the unreliability of single-shift sampling. Reply to Opp'n at 1-2.

ASARCO's motion was granted and the citation was vacated; the judge stated:

I agree with the contestant that the validity of a citation issued on the basis of analysis of a single sample used to determine the average concentration of respirable dust in the atmosphere has been decided adversely to the Secretary by the Commission in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994). That decision applies equally to silica dust and coal dust in my opinion.

Order of Dismissal. The Secretary filed a petition for discretionary review, which ASARCO opposed. ASARCO also moved to strike certain arguments set forth in the Secretary's petition, asserting that they had not been raised before the judge. The Commission granted review.

## II.

### Disposition

At issue in *Keystone* was the validity of the Secretary's spot inspection program and citations alleging violations of the respirable dust standard for underground coal mines based on single-shift dust samples. The applicable mandatory standard, 30 C.F.R. § 70.100(a), provides that the "average concentration" of respirable dust in the mine atmosphere must be no greater than 2 mg/m<sup>3</sup>. Pursuant to section 202(f) of the Mine Act, 30 U.S.C. § 842(f), upon which 30 C.F.R. § 70.100(a) is based, the "average concentration" is to be determined by measurement

over a single shift unless the Secretary of Labor and the Secretary of Health and Human Services find that such a single-shift measurement "will not . . . accurately represent such atmospheric conditions during such shift."

Section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 842(f) (1976) (amended 1977) ("Coal Act"), predecessor to the Mine Act, established a virtually identical procedure for determining "average concentration." Pursuant to section 202(f) of the Coal Act, the Secretary of Interior and the Secretary of Health, Education and Welfare had published a notice in the *Federal Register* stating their conclusion: "single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed." 36 Fed. Reg. 13286 (July 17, 1971). See *Keystone*, 16 FMSHRC at 7-8. Title II of the Coal Act, including section 202(f), was carried over to Title II of the Mine Act, which establishes the mandatory standards for respirable dust in underground coal mines. *Id.* at 11 and n. 1.

In *Keystone*, the Commission concluded that the 1971 finding applied to MSHA sampling of the atmosphere in underground coal mines, including the spot inspection program, and not only to atmospheric sampling performed by operators. 16 FMSHRC at 11. The Commission further concluded that the 1971 finding was a legislative rule and that the Secretary had failed to rescind it through notice-and-comment rulemaking, in accordance with section 202(f) of the Mine Act and the Administrative Procedure Act (the "APA"), 5 U.S.C. § 551 et seq. *Id.* at 12-16. The Commission held that, because the spot inspection program bypassed the requisite rulemaking in attempting to rescind the 1971 finding, the citations in question were invalid. *Id.* at 16.

The Secretary argues that the judge incorrectly relied on *Keystone* because this case does not involve an underground coal mine and, therefore, is not subject to section 202(f) of the Mine Act, 30 U.S.C. § 842(f). The Secretary contends that section 201(a) of the Mine Act, 30 U.S.C. § 841(a), explicitly provides that section 202(f) is applicable only to underground coal mines. Sec. Br. at 4-5. He also argues that ASARCO misstates the scheme of the Mine Act by asserting that, with the enactment of the Mine Act, the provisions of the Coal Act, including section 202(f), were made applicable to all mines. Sec. Br. at 10-11.

ASARCO contends that single-shift sampling in metal and nonmetal mines does not result in an accurate representation of atmospheric conditions, that the 1971 finding established the inaccuracy of such sampling, and that the decision in *Keystone* is dispositive here because the core issue, the validity of single-shift sampling, is the same. A. Br. at 2-4, 5-7. ASARCO also asserts that, contrary to the review provisions of section 113(d) of the Mine Act, 30 U.S.C. § 841(d), the Secretary attempts to raise on review issues not raised below. A. Br. at 7-16.

We agree with the Secretary that *Keystone* is not dispositive of the issue in this case. *Keystone* did not reach the merits of single-shift sampling.<sup>4</sup> Contrary to ASARCO's argument, *Keystone* addressed only the procedural validity of single-shift samples in determining violations of the respirable dust standard for underground coal mines, 30 C.F.R. § 70.100(a). Section 201(a) of the Mine Act is clear: "The provisions of sections 202 through 206 of this title [including section 202(f)] . . . shall be interim mandatory health standards applicable to all *underground coal mines* until superseded . . ." 30 U.S.C. § 841(a) (emphasis added). Thus, the legal basis underlying *Keystone* limits its application to underground coal mines.<sup>5</sup> By contrast, this case involves a citation alleging a violation of 30 C.F.R. § 57.5001(a) and § 57.5005, the dust standards for metal and nonmetal mines. Neither section 202 nor the *Federal Register* notice pertain to metal and nonmetal mines. Thus, the issues in this case are not controlled by the Commission's decision in *Keystone*. The judge erred in dismissing the citation on that basis.

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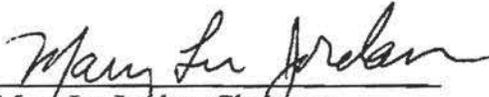
<sup>4</sup> On February 18, 1994, the Secretary published in the *Federal Register* his intent to rescind the 1971 *Federal Register* notice and to use single-shift samples, in addition to multiple-shift samples, to enforce the respirable dust standard in coal mines. 59 Fed. Reg. 8356.

<sup>5</sup> The Commission denies ASARCO's motion to strike the Secretary's argument that section 202(f) applies only to underground coal mines. In its opposition to ASARCO's motion to dismiss, the Secretary discussed and distinguished *Keystone*, relying in part on section 202(f). See Sec. Opp'n. at 2. Thus, section 202(f) was raised and argued sufficiently before the judge to meet the requirements of section 113(d)(2), 30 U.S.C. § 823(d)(2). Further, the Secretary also opposed ASARCO's theory before the judge that *Keystone* is applicable to metal and nonmetal mines and that opposition inherently encompassed his argument on review concerning section 202(f). See generally *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (August 1992). We need not reach the other issues raised in ASARCO's motion to strike.

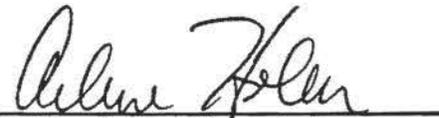
III.

Conclusion

For the foregoing reasons, we vacate the judge's order dismissing the citation and remand for further appropriate proceedings consistent with this opinion.

  
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Mary Lu Jordan, Chairman

  
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Joyce A. Doyle, Commissioner

  
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Creek's conduct resulted from unwarrantable failure. Buck Creek also alleged that the judge had deprived it of due process. The Commission granted the petitions.

For the reasons that follow, the Commission affirms the judge's conclusions that Buck Creek violated section 75.360(a) and that the violation resulted from Buck Creek's unwarrantable failure; we reverse the judge's determination that the violation was not S&S. We conclude that Buck Creek was not deprived of due process.

## I.

### Factual and Procedural Background

Buck Creek operates an underground coal mine in Sullivan, Indiana. The mine, developed in two sections referred to as "north" and "south," extends about three miles from one end to the other. Entry is gained through the bathhouse portal, which is situated near the middle of the mine.

The mine was idle from 3:30 p.m. on Saturday, April 24, 1993, until Monday morning, April 26. Buck Creek postponed the start of the first shift on April 26 from 7:00 a.m. to 9:00 a.m. 16 FMSHRC at 134; Tr. 19, 111, 167. Charles Austin, mine foreman, and Charles Chin, section foreman, conducted the preshift examination; each examined one side of the mine. According to the preshift books, the examination of the north side began at 6:22 a.m. and concluded at 7:22 a.m.; the examination of the south side began at 7:00 a.m. and was completed at 7:30 a.m. 16 FMSHRC at 134.

In addition to the preshift examiners, three miners, Carlos Maggard, Dave Sales and Terry O'Bannon, were in the mine at 6:45 a.m., when MSHA Inspectors John Stritzel and Mike Bird arrived to conduct a ventilation inspection. Maggard and Sales were certified examiners. The three had descended prior to the completion of the preshift examination in order to repair a mantrip used to transport miners to the face. 16 FMSHRC 133-34, 137, 139; Tr. 163. When they reached the bottom of the slope, where the mantrip was situated, that area had been examined by a preshift examiner. 16 FMSHRC at 134-35, 139.

Mine foreman Austin called the results of his preshift examination to the surface at 7:35 a.m. At that time, Inspector Stritzel told Austin to withdraw all miners from the mine and issued Order No. 4055142 pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), which alleged that Buck Creek violated 30 C.F.R. § 75.360(a) and that the violation was S&S and a result of the operator's unwarrantable failure.<sup>2</sup> The order was terminated after the miners were

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<sup>2</sup> Order No. 4055142 states:

Three miners entered the mine at 6:45 a.m. without a valid pre-shift

withdrawn and instructed by Buck Creek's Safety Director not to reenter the mine until the preshift examination was completed and the results recorded. 16 FMSHRC at 134-35; Joint Ex. 1. Maggard, Sales and O'Bannon were assigned other work following their return to the surface. *See* Tr. 214. Normally, employees performing maintenance work join the oncoming production shift. *Id.*

Following an evidentiary hearing, the judge concluded that, by permitting miners to enter the mine before completion of the preshift examination, Buck Creek violated section 75.360(a). 16 FMSHRC at 135-37. The judge also concluded that the violation was not S&S, finding that the Secretary had failed to establish that the violation would result in a reasonable likelihood of injury. *Id.* at 137-39. He further concluded that the violation was due to Buck Creek's unwarrantable failure. *Id.* at 139-40. The judge assessed a penalty of \$3,000. *Id.* at 141.

## II.

### Disposition

#### A. Violation

Section 75.360 essentially restates the requirements of section 303(d)(1) of the Mine Act, 30 U.S.C. § 863(d)(1). Under section 75.360(a), a certified examiner must conduct a preshift examination within three hours before "the beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . ." Subsections (b) through (g) of section 75.360 set forth the required elements of the examination. Under section 75.360(g), the results of the preshift examination must be recorded in a book at the surface before miners are permitted underground.

The judge found that the foot of the slope, where the miners were repairing the mantrip, was an underground area of the mine. 16 FMSHRC at 136. Relying on the fact that Maggard, Sales and O'Bannon worked during the morning shift and that repair of the mantrip was necessary

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examination of the mine being completed. Two certified pre-shift examiners were in the process of conducting the pre-shift examination. The south side of pre-shifting of the mine began at 7:00 a.m. and finished at 7:30 a.m., called out to surface at 7:35 a.m. and north side of mine pre-shift exam began at 6:22 a.m. and finished at 7:22 a.m. and was called out to surface at 7:30 a.m. Both pre-shift examiners were operator's agents, 1 mine manager and 1 foreman. Operator should know if pre-shift exam is completed before permitting miners to enter the mine.

Joint Ex. 1.

to enable other miners to travel to the face, the judge found that the miners were part of the oncoming shift. *Id.* at 136-37. He concluded that, because the three miners arrived at the foot of the slope before the preshift examination had been recorded, Buck Creek violated section 75.360(a). *Id.*

Buck Creek concedes that the plain language of section 75.360(a) requires a preshift examination before any shift of workers enters the mine to perform production or non-production work. B.C. Br. at 3. It asserts, however, that substantial evidence does not support the judge's conclusion that Maggard, Sales, and O'Bannon were part of the oncoming shift and, thus, subject to section 75.360(a). *Id.* at 4-7. It also contends that the mine was idle when the three miners entered and that, pursuant to 30 C.F.R. § 75.361, only a limited examination of the slope area was required before miners could enter. *Id.* at 6-7. Buck Creek contends further that, because the area where the miners were working had, in fact, been examined before they entered, Buck Creek was in compliance with section 303(d)(2) of the Mine Act, 30 U.S.C. § 863(d)(2). *Id.* at 8-9.

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

We conclude that substantial evidence supports the judge's finding that Maggard, Sales and O'Bannon were part of the oncoming shift and thus, that they were not permitted to enter the mine before completion of the preshift examination. The overlapping schedules of the maintenance and production employees, together with the necessity of completing the mantrip repair before production could begin, support the judge's finding that Maggard, O'Bannon and Sales were the vanguard of the first shift on April 26.

The dictionary definitions of the term "shift" proffered by the operator, "[a] group of people who work or occupy themselves in turn with other groups, a scheduled period of work or duty," are sufficiently broad to encompass the three miners who entered the mine to perform repair work.<sup>3</sup> Buck Creek also relies on the definition of "normal work shift" contained in 30 C.F.R. § 71.2(i). B.C. Br. at 4. That term, which is used relative to respirable dust sampling, applies only to the Part 71 regulations governing health standards at surface coal mines.<sup>4</sup> Moreover, as the Secretary points out, it is unimportant, for purposes of the preshift standard, whether the miners were the earliest crew of the first shift or whether they constituted a separate maintenance shift; a preshift examination was required before they were permitted to enter the mine.

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<sup>3</sup> B.C. Br. at 4, citing *Webster's Third New Int'l Dictionary* (1976).

<sup>4</sup> That it has no relevance to the preshift standard is evident by the fact that it is defined, in part, as "a shift during which there is no rain . . . ." 30 C.F.R. § 71.2(i).

We also reject Buck Creek's contention that the operator was required to satisfy only the supplemental examination provisions of section 75.361.<sup>5</sup> That section, which implements section 303(m) of the Mine Act, provides, as relevant here, for a supplemental examination of idle and abandoned areas whenever miners who are underground are dispatched to an area of the mine that was not required to be examined as part of the preshift examination. *See* 57 Fed Reg. 20,895 (1992). Such an examination is in addition to, not a substitute for, a preshift examination. Moreover, the record makes clear that all miners had to travel through the area at the bottom of the slope to reach the north and south faces. Tr. 174-77; Resp. Ex. A. Thus, the area was not "idle."<sup>6</sup>

To further support its position that its actions were not violative, Buck Creek erroneously relies on the language of section 303(d)(2) of the Mine Act, 30 U.S.C. § 863(d)(2). Buck Creek asserts that the judge erred by imposing an additional requirement that the results of the entire examination be reported before miners enter the mine. B.C. Br. at 8. Section 303(d)(2) complements section 303(d)(1) by prohibiting anyone, other than designated certified persons, from entering a mine unless the preshift examination required under the preceding paragraph has been made within the immediately preceding eight hours. Section 303(d)(2) does not repeat the requirement of section 303(d)(1) that the results of the examination shall be reported to the surface before anyone enters the mine.

Buck Creek's position is without merit. Section 303(d)(1) of the Mine Act and 30 C.F.R. § 75.360, the regulation under which it was cited, require that the results of the preshift examination be recorded at the surface before miners on an incoming shift enter the mine.<sup>7</sup> Because we have affirmed the judge's determination that Maggard, Sales and O'Bannon were part of a shift, we conclude that the judge was correct in finding that Buck Creek violated section 75.360.

For the foregoing reasons, we affirm the judge's determination of violation.

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<sup>5</sup> Section 75.361 states in part:

(a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

30 C.F.R. § 75.361.

<sup>6</sup> The dissent erroneously concludes that the bottom of the slope "was an area of the mine that was idle." Slip op. at 11.

<sup>7</sup> We note that section 75.360(a) does not authorize piecemeal examinations of a mine.

## B. Significant and Substantial

A violation is S&S<sup>8</sup> 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (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 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.

*Id.* at 3-4. See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The Secretary asserts that the failure to conduct a preshift examination is presumptively S&S. In support, he argues that it was reasonably likely that failure to conduct such an examination would leave undiscovered a hazard that would result in an injury. S. Br. at 17-20. Alternatively, the Secretary argues that the judge incorrectly applied the *Mathies* test and that the record evidence supports an S&S finding. S. Br. at 21-25. Buck Creek challenges the use of a presumption because the record lacks evidence as to why such a presumption is legally supportable. The operator further asserts that substantial evidence supports the judge's determination that the alleged violation was not S&S. B.C. Rep. Br. at 3-7.

In determining that the violation was not S&S, the judge concluded that, although the first and second elements of the *Mathies* test were established, the third element was not. He found a violation of a mandatory safety standard that created a discrete safety hazard, noting that the mine had "a history of roof falls and high methane levels." 16 FMSHRC at 139. He concluded that the Secretary had not proven the third *Mathies* element because two of the three repairmen were certified preshift examiners, they entered the mine only as far as the foot of the slope, and the area where the miners entered had already been inspected with no hazards noted. *Id.* Substantial evidence does not support the judge's conclusion that the violation was not S&S.

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<sup>8</sup> The S&S terminology is taken from section 104 (d)(1) of the Act, 30 U.S.C. § 814 (d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . ."

The considerations that the judge relied upon in addressing the third element of *Mathies* are not dispositive of the issue. Although we do not lightly overturn a judge's factual findings, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). Further, the judge viewed the record narrowly, ignoring relevant evidence. See generally *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1613-14 (August 1994). In reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483 (1951).

The Secretary's evidence consisted chiefly of the testimony of Inspector Stritzel. He noted that the mine had been idle over a weekend and that the maintenance workers were the first shift back into the mine on Monday. Tr. 33. He further noted that the last preshift examination before the miners descended had been conducted two days earlier. Tr. 37. During idle periods methane may build up. Further, as Stritzel stated, falls or breaks in stoppings during idle periods could interrupt ventilation, permitting methane to accumulate. Tr. 34, 117-18, 121. Indeed, the mine had prior ventilation problems. Tr. 20. As the judge found, the mine had experienced methane accumulations before the citation was issued and it had a history of roof falls. Tr. 35-36, 118-19.

We reject Buck Creek's contention that the miners were not exposed to any actual hazards because the area where they performed their repair work had been inspected. Hazards in an unexamined portion of the mine could affect the slope area where the repair crew was working. The mine was developed for more than a mile both north and south of the area in question. See Tr. 28, 45-47, 172-73; Resp. Ex. A. Nor does the fact that two of the three miners were certified inspectors bear on the S&S determination. They entered the mine to repair a mantrip, not to inspect the mine, and there is no evidence their attention was focused on mine conditions rather than on the mantrip.

Considering the record as a whole, we find that substantial evidence does not support the judge's determination that Buck Creek's violation was not reasonably likely to result in an injury. We also conclude that the fourth element of *Mathies* is established: injuries resulting from the hazards posed are reasonably likely to be of a reasonably serious nature. Accordingly, we reverse the judge's determination that the violation was not S&S.<sup>9</sup>

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<sup>9</sup> In light of our disposition, we need not reach the S&S presumption advocated by the Secretary.

### C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. This determination was 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"). *Id.* Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991). This determination was also based on the purpose of the unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. *Emery*, 9 FMSHRC at 2002-03.

The judge found that Buck Creek's failure to comply with the requirements for a preshift examination was the result of more than inadvertence or thoughtlessness and thus arose from Buck Creek's unwarrantable failure. 16 FMSHRC at 140. Buck Creek argues that its actions do not constitute unwarrantable failure because any Commission decision upholding the finding of a violation would be one of first impression. B.C. Br. at 15. We disagree.

The preshift examination requirement is unambiguous and is of fundamental importance in assuring a safe working environment underground. By its express terms, section 75.360 gives notice to the mine operator of the requirement of a preshift examination under the circumstances presented here. It is common knowledge that the preshift examination must be completed and recorded at the surface before miners are allowed to enter a mine. We reject Buck Creek's argument that the preshift standard is ambiguous and that consequently it is absolved of unwarrantable failure.

We agree with the judge's conclusion that Buck Creek's failure to comply with the requirement that a preshift examination be completed before miners are permitted underground was the result of aggravated conduct, constituting more than ordinary negligence. By sending miners underground prematurely, Buck Creek exhibited the "serious lack of reasonable care" that constitutes unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC at 1616. Accordingly, we affirm the judge's determination of unwarrantable failure.

### D. Due Process

Buck Creek argues that the judge improperly considered information of a factual nature contained in the Secretary's post-hearing brief: the Secretary alleged that McDowell was superintendent of the Pyro William Station Mine when, following a fatal explosion, a citation was

issued for failure to conduct an adequate preshift examination in areas of the mine considered to be idle. The Secretary argued to the judge that McDowell's involvement in that incident must have made him aware of the requirements of the preshift standard. Buck Creek claims that the judge relied on these statements in refusing to credit McDowell's testimony.

Although the Secretary's belated attempt to discredit McDowell was improper,<sup>10</sup> Buck Creek has failed to demonstrate that it was prejudiced thereby. The Secretary's post-hearing brief provided information to support his argument that the judge should disregard McDowell's testimony regarding distinctions between idle hours and production hours under the standard. S. Post-Hearing Br. at 13-14. There is no indication that the judge in reaching his decision relied on the passage in the Secretary's brief to which Buck Creek objects or that the material in question was admitted by the judge.<sup>11</sup> The judge did not base his interpretation of the standard on a credibility finding. Rather, he relied on the plain language of section 75.360(a) in determining that a violation occurred. 16 FMSHRC at 137.

The judge's discrediting of McDowell related solely to his testimony that, before proceeding underground, the miners had called into the mine to check conditions.<sup>12</sup> 16 FMSHRC at 140, n. 7. The judge discredited this testimony because he found it "self-serving, uncorroborated [and] hearsay." *Id.* Moreover, the testimony was not dispositive of any issue in this case. Even assuming *arguendo* that the miners were told it was safe to go into the mine, a violation occurred when they went underground prior to the completion of the preshift examination. The testimony would not affect our determination that substantial evidence supports the judge's conclusion that the violation was S&S. Furthermore, McDowell's testimony, if credited, would not have militated against a finding of unwarrantable failure. Rather, the testimony would have

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<sup>10</sup> We note that Buck Creek likewise appended to its post-hearing brief information that had not been introduced at the hearing. B.C. Post-Hearing Br. at 2.

<sup>11</sup> Unlike juries composed of "ordinary untrained citizens" . . . judges possess professional experience in valuing evidence." 1 J. Strong, *McCormick on Evidence* 238 (4th ed. 1992) (citations omitted). Appellate bodies reviewing cases tried without a jury generally presume that the judge "disregarded the inadmissible and relied on the admissible evidence." *Id.* The ability of judges to distinguish admissible from inadmissible evidence has led to the common practice "adopted by many experienced trial judges in nonjury cases of provisionally admitting all debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in." *Id.* at 239 (citations omitted).

<sup>12</sup> The judge credited McDowell over Inspector Stritzel when he accepted McDowell's account of where the miners were working. 16 FMSHRC at 134. The inspector testified that Austin had told him that one of the three miners was in "main north, main east" in "the north part of the coal mine." Tr. 58; Gov't Ex. 1. McDowell testified that all three miners worked on the mantrip repair at the foot of the slope. Tr. 180.

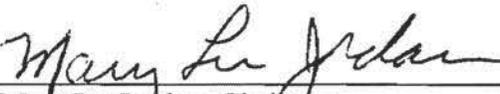
provided additional evidence that the operator, through its supervisory agents, endorsed the miners' entry underground prior to the completion of the preshift examination.

In any event, Buck Creek's attack on the Secretary's post-hearing submission is, in essence, a request to overturn the judge's conclusion that McDowell's testimony regarding the alleged call was not credible. As the Commission has observed, "a judge's credibility determinations may not be overturned lightly." *Wyoming Fuel Co., n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, 1629 (August 1994), citing *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1618 (September 1987). It was within the judge's discretion to discredit McDowell's testimony for the reasons the judge set forth in his opinion and we find no reason to overturn that determination.

### III.

#### Conclusion

For the foregoing reasons, we affirm the judge's determination that Buck Creek violated section 75.360(a) and that the violation resulted from its unwarrantable failure. We reverse the judge's conclusion that the violation was not S&S, reject Buck Creek's claim that it was denied due process and remand for reassessment of a civil penalty consistent with this opinion.

  
Mary Lu Jordan, Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

Commissioner Marks, dissenting:

I dissent.

I would vacate the decision of the Administrative Law Judge on two independent grounds and remand this case to the Chief Administrative Law Judge for reassignment to another Administrative Law Judge for a hearing *de novo*. First, in my view, the judge erred in not adequately considering the contention of Buck Creek Coal Company, Inc. ("Buck Creek") that under sections 303(d)(2) & (m) of the Mine Act, 30 U.S.C. § 801 et seq. (1988) ("Act"), it was not required to conduct a section 303(d)(1) of the Act preshift examination under the facts and circumstances of this case. Second, in my view, Buck Creek did not receive a fair hearing.

I.

The Judge Erred in Failing to Consider Whether a Section 303(d)(1) Preshift Examination Was Required Under the Facts and Circumstances of This Case in Light of Section 303(d)(2) & (m) of the Act and 30 C.F.R. § 75.361

The law generally requires that a preshift examination be conducted prior to a shift entering the mine. *See* section 303(d)(1) of the Act, 30 U.S.C. § 863(d)(1), and 30 C.F.R. § 75.360(a). Buck Creek presented an argument that under sections 303(d)(2) & (m) of the Act and regulation section 75.361, a preshift examination is not required when persons enter an idle area of a mine that has not been preshifted, so long as a "certified person [has] examine[d] the area for hazardous conditions, determine[d] whether the air is traveling in its proper direction and at its normal volume, and [has] test[ed] for methane and oxygen deficiency." Section 75.361(a). The judge did not adequately consider Buck Creek's position in this connection. I believe that the judge erred in failing to consider whether, under sections 303(d)(2) & (m) of the Act and regulation section 75.361, a supplemental examination may be conducted in lieu of a preshift examination when anyone enters an idle area in which a preshift examination has not been conducted.

Buck Creek proffered un rebutted testimony that the area into which its maintenance crew descended to conduct repairs was an area of the mine that was idle and that had not been preshifted. Buck Creek further proffered un rebutted testimony that a "certified person . . . examine[d] the area for hazardous conditions, determine[d that] the air [was] traveling in its proper direction and at its normal volume, and [had] test[ed] for methane and oxygen deficiency." Section 75.361(a). Under these facts and circumstances, the judge erred by not fully addressing the issues presented, namely: (1) whether Buck Creek's interpretation of Mine Act sections 303(d)(2) & (m) and regulation section 75.361 is supported by the Act and its implementing regulations; (2) whether the area of the mine in question was in fact an idle area within the meaning of the Act and its implementing regulations; and (3) if issues (1) and (2) were answered in the affirmative, whether a supplemental examination may be conducted in lieu of a preshift examination under the circumstances presented. The judge did not address these issues. Rather,

the judge stated that "I do not decide what difference, if any, McDowell's self-serving, uncorroborated, hearsay testimony that the three men called into the mine before entering to determine if it was safe to go in . . . makes, since I do not credit that testimony." *See Buck Creek Coal Co., Inc.*, 16 FMSHRC 133, 140 at n. 7 (January 1994). In my view, inasmuch as Buck Creek presented un rebutted testimony that the area in question was idle and a "certified person . . . examine[d] the area for hazardous conditions, determine[d that] the air [was] traveling in its proper direction and at its normal volume, and [had] test[ed] for methane and oxygen deficiency[.]" it was incumbent upon the judge to decide the three issues set forth above. Section 75.361(a). Therefore, I would vacate the judge's decision and remand the case for further proceedings on those issues.

## II.

### Buck Creek Did Not Receive a Fair Hearing

In my view, Buck Creek did not receive a fair hearing. First, as noted above, the judge failed to consider Buck Creek's contention that it was not required by law to conduct a preshift examination under the facts and circumstances presented. The judge rejected Buck Creek's position in this connection out of hand.

Second, the judge accepted and considered new, highly prejudicial evidence that the Secretary of Labor improperly submitted in its post-hearing brief. The Secretary's new, highly prejudicial evidence in his post-hearing brief went to the issue of unwarrantability. The Secretary submitted evidence for the first time in his post-hearing brief to establish that Buck Creek's failure to conduct a preshift examination amounted to more than mere negligence. Again, in concluding that Buck Creek's failure to conduct a preshift examination was unwarrantable, the judge stated that it would be "astonishing to find *any* miner who was not aware of [the preshift examination requirement]." *See Buck Creek Coal Co., Inc.*, 16 FMSHRC at 140. (Emphasis in the original). Because of that view, the judge did not decide what difference, if any, Buck Creek's position that it was not required by law to conduct a preshift examination made, since he did not consider Buck Creek's position in this connection or find it persuasive on the issue of unwarrantability. *Id.* The judge incorrectly rejected out of hand Buck Creek's position that a preshift examination was not required by law under the facts and circumstances of this case, summarily concluding that Buck Creek's position was specious and insufficient to defeat a finding of unwarrantability.

While the judge, in his decision, did not refer to the evidence that the Secretary submitted in his post-hearing brief when he decided the issue of unwarrantability, it is clear to me, for several reasons, that Buck Creek was denied a fair hearing as a result of that submission. First, Buck Creek was not given an opportunity to cross examine the evidence submitted by the Secretary in his post-hearing brief. Second, the evidence submitted by the Secretary was inflammatory and prejudicial. In this connection, the evidence submitted by the Secretary suggested that Buck Creek's witness must have known about the Secretary's position on preshift examinations in idle areas of a mine based on the witness's participation in an investigation of an

explosion in which ten miners lost their lives. Because this inflammatory and prejudicial evidence was submitted by the Secretary in his post-hearing brief, Buck Creek was not afforded an opportunity to confront or cross-examine this evidence. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the United States Supreme Court stated that:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . [T]his is important in the case of documentary evidence . . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

*Id.* at 270 (quoting *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959)). I place a higher value on the principles protected by the Sixth Amendment, namely confrontation and cross-examination, than I do on the ability of any one, including judges, to put out of mind highly prejudicial statements that they have heard or read. Experience has taught those of us who have tried hundreds of civil and criminal lawsuits before judges and juries to be skeptical when we hear those with no trial experience blindly state that a trier of fact was not prejudiced because he or she did not refer to the highly prejudicial statements they read or heard, in their opinion. I am unwilling to allow the inflammatory statements deliberately placed in the Secretary's post-hearing brief to be written off as easily as the majority so casually sets them aside. Buck Creek is entitled to the benefits of the Sixth Amendment. I would not trade their Sixth Amendment right on the chance that the judge in this case was not adversely affected by the deliberate insertion by the Secretary's counsel of highly inflammatory, prejudicial statements.

Accordingly, because the judge failed to consider Buck Creek's contention that it was not required by law to conduct a preshift examination under the facts and circumstances of this case and allowed new, prejudicial evidence to be introduced in the Secretary's post-hearing

brief, I would vacate the decision of the judge and remand this case to the Chief Administrative Law Judge for reassignment to another judge for a hearing *de novo*. As a result of the foregoing, I do not reach the other issues disposed of by my colleagues in this case.

A handwritten signature in black ink, appearing to read "Marc Lincoln Marks". The signature is fluid and cursive, with a large initial "M" and "L".

Marc Lincoln Marks, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

January 24, 1995

JIM WALTER RESOURCES, INC. :  
 :  
v. : Docket Nos. SE 93-56-R  
 : SE 93-132  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
and :  
 :  
UNITED MINE WORKERS OF AMERICA :

BEFORE: Doyle, Holen and Marks, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding pending on review, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1988), counsel for petitioner, Jim Walter Resources, Inc. ("JWR"), has filed a Motion to Withdraw Petition for Review. The Secretary of Labor and intervenor, United Mine Workers of America, have indicated that they do not oppose the motion. In the proceeding below, Administrative Law Judge Gary Melick concluded that JWR had violated 30 C.F.R. § 75. 316 and that MSHA's rejection of a proposed modification to JWR's ventilation plan was not arbitrary or capricious.

In support of its motion, JWR states:

This case concerns MSHA's approval and interpretation of a model dust control plan at the company's four mines. At three of the mines, JWR has ceased operating under the terms of the disputed plan. At the remaining mine, MSHA's interpretation of the plan is now clear. . . . As such, further litigation with respect to this plan

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<sup>1</sup> Chairman Jordan has recused herself in this matter.

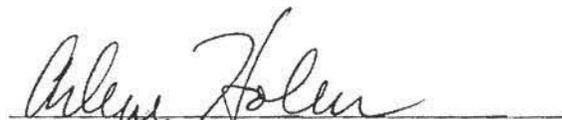
would not involve the best use of judicial, MSHA or JWR's resources.

Motion at 1.

Upon consideration of JWR's motion, we grant it. *See Golden Oak Mining Co., L.P.*, 12 FMSHRC 1758 (September 1990).

Accordingly, the Commission's direction for review is vacated and this proceeding is dismissed.

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 25, 1995

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

v.

PEABODY COAL COMPANY

:  
:  
:  
:  
:  
:  
:

Docket No. KENT 93-295

BEFORE: Jordan, Chairman; Doyle and Holen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988), presents the issue of whether a violation by Peabody Coal Company ("Peabody") of its ventilation plan was significant and substantial ("S&S"). Administrative Law Judge Arthur Amchan concluded that the violation was not S&S. 15 FMSHRC 1887 (September 1993) (ALJ). For the reasons that follow, we affirm the result reached by the judge.

I.

Factual and Procedural Background

Peabody owns and operates the Martwick mine, an underground coal mine in Muhlenberg County, Kentucky. On November 19, 1992, Darold Gamblin, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed a continuous mining machine operating 60 feet inby the last open crosscut in the No. 1 entry. Gamblin instructed the operator of the continuous miner to shut it down and he then measured the air flow 25 feet behind its cutting edge at the end of the line brattice. He found the air flow to be 2,340 cubic feet per minute ("cfm"), less than the 5,000 cfm required by Peabody's ventilation

plan. The inspector issued a section 104(a), 30 U.S.C. § 814(a), citation to Peabody, alleging an S&S violation of 30 C.F.R. § 75.316 (1991) based on the air flow deficiency.<sup>1</sup> Gov't Ex. 3.

At the hearing, the citation was amended to allege a violation of 30 C.F.R. § 75.370(a)(1), which superseded section 75.316 three days before the inspection.<sup>2</sup> 15 FMSHRC at 1891. Peabody conceded the violation. *Id.* The judge determined, however, that the Secretary had failed to prove that the violation was S&S. *Id.* at 1894. The Commission granted the Secretary's petition for discretionary review, which challenged this determination.

## II.

### Disposition

Peabody's approved ventilation plan required that "[a] minimum of 5000 cfm of air shall be delivered to the inby end of the line brattice before the scrubber<sup>3</sup> [on the continuous miner] is started and shall be maintained until the cut has been completed." Gov't Ex. 4, at 4, ¶ 2. The Secretary submits that the judge, in making his S&S determination, improperly focused on the fact that the continuous mining machine was not running at the time the inspector took his air flow reading. The Secretary contends that the judge erred in distinguishing *U.S. Steel Mining*

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<sup>1</sup> Section 75.316, which restated 30 U.S.C. § 863(o), provided as follows:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form . . . .

30 C.F.R. § 75.316 (1991).

<sup>2</sup> Section 75.370(a)(1) states in pertinent part:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. . . .

30 C.F.R. § 75.370(a)(1). This section became effective November 16, 1992. 57 Fed. Reg. 34683 (August 6, 1992).

<sup>3</sup> The scrubber, a fanlike device, vacuums coal dust from the atmosphere by suctioning in air from behind the continuous miner's cutting head and spraying it with water. The water-laden dust is collected on a screen; the air is dried and discharged dust-free. *See* Tr. 88-90, 106-07, 109, 141-42.

*Co.*, 7 FMSHRC 1125 (August 1985), in which the Commission found that a violation of a ventilation plan provision was S&S. The Secretary also argues that the judge erred in rejecting the inspector's testimony that injury or illness was reasonably likely to result if the violation continued.

Peabody responds that the judge's S&S determination is supported by substantial evidence and is not in conflict with *U.S. Steel*.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to a more serious type of violation. A violation is 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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825-26 (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 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.

*Id.* at 3-4. See also *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The issue in question is the third element of the *Mathies* test. Peabody conceded the violation, establishing the first element. 15 FMSHRC at 1891. As to the second element, a discrete safety hazard, the judge found that "the lack of 5,000 cfm of air prior to operation of the scrubber increased the likelihood of serious injury or illness." *Id.* at 1893. The judge also found that the fourth element was proven. He concluded that resulting injuries -- from inhalation of excessive amounts of respirable coal dust as well as from explosions -- would be serious. *Id.* at 1891. The judge concluded, however, that the Secretary had failed to prove the third element of *Mathies*, a reasonable likelihood that the 2,340 cfm air flow prior to the machine being placed in operation would result in injury or illness. *Id.* at 1892-93.

The Secretary bears the burden of proving that a violation is S&S. See, e.g., *Union Oil Co. of Cal.*, 11 FMSHRC 289, 298-99 (March 1989). We agree with the judge that the Secretary failed to establish the reasonable likelihood of injury or illness and, thus, failed to meet his burden of proof.

The inspector measured the air quantity while both the scrubber and the continuous miner were off and cited Peabody for its failure to deliver 5,000 cfm before the scrubber was started. At hearing, the Secretary's case essentially relied upon the testimony of Inspector Gamblin, who testified that, without 5,000 cfm air flow, a person "could" be exposed to respirable dust and that pneumoconiosis "can" result. Tr. 93, 97. He also stated that methane ignitions "can" result. Tr. 93. He said that ignition sources "could" still be present when the continuous miner is not operational. Tr. 120. The inspector was also concerned with the danger of methane and dust recirculation due to inadequate air flow, but he indicated only that recirculation "can" or "could" occur. Tr. 122. Gamblin's testimony, as found by the judge, does not establish that delivery of 2,340 cfm of air before the scrubber is started, when no mining is occurring, would be reasonably likely to result in injury or illness. See *Union Oil*, 11 FMSHRC at 298-99.

The judge rejected the Secretary's argument that *U.S. Steel* is controlling here. In *U.S. Steel*, the operator was cited for running its continuous miner while its air quantity was below the required level of 5,000 cfm and, based on the evidence presented in that case, the Commission determined that U.S. Steel's failure to provide the required level of air during mining was S&S. 7 FMSHRC at 1126-31. Under Commission precedent, however, determination of whether a violation is S&S must be based on the facts surrounding the violation as evidenced in the record. See, e.g., *Texasgulf, Inc.*, 10 FMSHRC 498, 501-03 (April 1988). The facts giving rise to this violation differ significantly from those in *U.S. Steel*: here, the violation rested on the operator's failure to provide a specific quantity of air before either the scrubber or continuous miner was started. Thus, we conclude that the judge was correct in distinguishing the Commission's holding in *U.S. Steel* from the issue in this case.

The Secretary also argues that Peabody was grossly out of compliance with its ventilation plan and that there is no evidence that, during production mining, operation of the scrubber would have increased the air flow to 5,000 cfm or more.<sup>4</sup> Inspector Gamblin conceded that the scrubber was in operation until he requested that it be shut down. Tr. 108-09. The Secretary presented no evidence as to the air quantity being delivered prior to the shutdown and the record contains no evidence that the inspector measured the air prior to the shutdown. Thus, the Secretary did not provide support for his theory that the air flow during production would also be inadequate. In fact, Gamblin testified that, with the scrubber running, an air flow of approximately 5,000 to 6,700 cfm could be generated. Tr. 110. In reaching our conclusion that the Secretary failed to prove that the cited violation was S&S, we do not suggest that there is a threshold of diminished air flow required for a ventilation plan violation to be considered S&S.

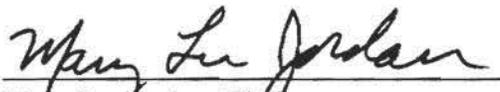
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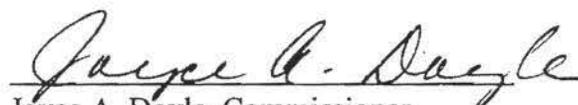
<sup>4</sup> The judge found and the Secretary has conceded on review that, had the air quantity been measured with the scrubber in operation, the air flow would have been greater than that measured by the inspector. 15 FMSHRC at 1892-93; PDR at 7 n.5.

III.

Conclusion

For the foregoing reasons, the decision of the Administrative Law Judge is affirmed.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Joyce A. Doyle, Commissioner

  
\_\_\_\_\_  
Arlene Holen, Commissioner

Commissioner Marks, not participating:

I assumed office after this case had been briefed, considered at a Commission decisional meeting, and a decision had been drafted. As a new Commissioner, I possess legal authority to participate in pending cases and such participation is discretionary. In light of these circumstances, I elect not to participate in this case.



Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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JAN 6 1995

LARRY J. NEASE, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 94-891-D  
: :  
IVA COAL COMPANY, : PIKE CD 94-09  
Respondent : No. 2 Mine  
:

## DECISION

Appearances: Mr. Larry J. Nease, Cumberland, Kentucky, *Pro Se*;  
Gerald L. Gray, Esq., Gerald Gray Law Firm, P.C.,  
Clintwood, Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by Larry J. Nease against Iva Coal Company under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that Mr. Nease did not engage in activities protected under the Act and, therefore, was not discriminated against by Iva Coal.

Mr. Nease filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). MSHA concluded that the facts disclosed during its investigation did not constitute a violation of Section 105(c). Mr. Nease then instituted this proceeding before the Commission under Section 105(c)(3), 30 U.S.C. § 815(c)(3).

The case was heard on November 14, 1994, in Big Stone Gap, Virginia. Gregory G. Boggs, James P. Owens, E. Randall Ferguson and Larry J. Nease testified for the Complainant. David L. Rutherford, Gary L. Rutherford and James E. Harris testified on behalf of the Respondent.

## SUMMARY OF THE EVIDENCE

Mr. Nease was hired by Iva Coal sometime around Christmas 1993 as an inexperienced miner. He was assigned to work as a miner helper on the second shift. Sometime in January 1994 he and three other employees were laid off because the company was experiencing low production. Mr. Nease was recalled to work four days later and given a job separating rock from coal at the

"picking table." He was subsequently taken off of the "picking table" and reassigned as a miner helper on the first shift. On February 15, 1994, he was discharged by Iva Coal.

Mr. Nease testified that his termination was a "setup." (Tr. 35.) He said that shortly before he was laid off, he worked under unsupported roof. He claimed that he told Mr. Boggs that he was "going to report David [Rutherford] if he didn't call me back to work." (Tr. 36.) He further asserted that the incident for which he was ultimately let go, allowing a shuttle car to park on the cable between the continuous miner and the power center causing the system to shut down, did not occur in his presence and was not his fault. Finally, he denied that any of the examples of his poor performance presented by the company's witnesses happened.

Both Boggs, a scoop operator, and Owens, a roof bolter, testified that they were working the second shift and observed the Complainant accompanying a continuous miner under unsupported roof. They both warned him not to work under unsupported roof. Boggs stated that he, along with the miner operator and several other miners, reported the incident to management, but that Mr. Nease did not say anything to him at the time, nor did he hear Nease say anything to anyone else about the occurrence.

Ferguson testified that on the day before the Complainant was fired, he rode out of the mine in a scoop with Jerry Rutherford and Jamie Harris. He related that both miners were mad about Nease "letting the miner pull the cathead out of the power center." (Tr. 23.)

Gary Rutherford and Harris testified that they were both present at the incident which resulted in Nease's dismissal. Rutherford was operating the continuous miner for which Nease was the helper, and Harris was operating the shuttle car which had pulled up to the miner to take on a load of coal and got on the miner's cable causing the system to stop working. Both stated that the Complainant was present at the rear of the miner and the front of the shuttle car when this happened and that he did nothing to move the cable or to warn the shuttle car operator that the car was on the cable.

David Rutherford testified that he is the owner of Iva Coal Company and is involved in the day-to-day management of the mine. He stated that he had hired the Complainant. He asserted that Boggs told him about the unsupported roof incident, but did not say that Nease was under unsupported roof. He maintained that he never told Nease that he had to follow the miner under unsupported roof, that Nease never told him that he had been under unsupported roof and that Nease had never stated that he was going to file a complaint for being under unsupported roof.

He recounted that after investigating the episode with the shuttle car, he called Nease out of the mine and told he that he was no longer needed.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2768 (1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (2d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

In this case, the Complainant has failed to establish that he engaged in protected activity. If Mr. Nease had complained to management about working under unsupported roof, that would have constituted engaging in protected activity. However, none of the credible evidence shows that such a complaint was made to management. David Rutherford testified that while he was made aware of the incident, nothing was said to him about the Complainant making a safety complaint. Furthermore, since Boggs testified that Nease did not say anything to him about the incident, he could not have told Rutherford that Nease had a complaint about working under unsupported roof.

The Complainant did not claim to have directly reported the situation to management. Under his theory, he assumed that the miner operator had informed management that he (Nease) was going to report it. There is no evidence to support this theory. Since there is no evidence that Nease complained to management, either directly or indirectly, it cannot be said that Nease engaged in protected activity. Further, since management was not aware of any complaints on Nease's part, it cannot be said that they discriminated against him because of the complaints.<sup>1</sup>

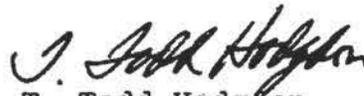
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<sup>1</sup> As there is no evidence that Nease engaged in protected activity, or that management was aware that he had engaged in protected activity, it is not necessary to decide whether a miner is engaging in protected activity when he threatens management with the reporting of a safety violation unless management does something that he wants done.

Finally, even if Mr. Nease had engaged in protected activity, he has not shown that his firing was motivated in any way by his having engaged in the protected activity. There is evidence in the record that "Mr. Nease was on the lazy side and that he didn't want to listen and he used a lot of bad language," (Tr. 42.), that he would take his hard hat off and sit against the rib of the mine, that he worked under unsupported roof, that coal buyers would not buy coal that he had "picked" because there was too much rock in it and that when he was assigned to warn the miner operator that the slack was out of the miner cable, he failed to do so, which resulted in the cable being pulled out of the power center. All of these provide ample basis for discharging him.

**ORDER**

I conclude that Mr. Nease did not engage in protected activity and that, even if he did, no adverse action was taken against him because of it. Accordingly, it is **ORDERED** that the complaint filed by Larry J. Nease against Iva Coal Company for violation of Section 105(c) of the Act is **DISMISSED**.



T. Todd Hodgson  
Administrative Law Judge

**Distribution:**

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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 9 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 94-238  
Petitioner : A.C. No. 46-08174-03537  
v. :  
KENNIE-WAYNE, INC., : Mine: Kennie-Wayne No. 1A  
Respondent :

DECISION

Before: Judge Amchan

This case is before me on a stipulated record. The only issue is whether payment of the proposed civil penalties will adversely affect Respondent's ability to continue in business. In Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), the Commission held, "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse effect would occur." See also Spurlock Mining Company, Inc., 16 FMSHRC 697, 700 (April 1994). From these decisions I infer that the operator not only has the burden of going forward with evidence, it has the burden of proving that payment of the penalties will adversely affect its ability to stay in business.

The total amount of penalties proposed for the two citations and one order in this case is \$5,601.<sup>1</sup> However, Respondent's schedule of liabilities attached to its July 19, 1994, contract of sale indicates \$36,560.45 in outstanding MSHA penalties. Moreover, Administrative Law Judge William Fauver's decision and order in Kennie-Wayne, Inc., Docket Nos. WEVA 93-471 through WEVA 93-473 (December 5, 1994), assesses an additional \$40,454 in civil penalties under the Act.<sup>2</sup>

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<sup>1</sup>These citations and order are affirmed based on the stipulations of the parties.

<sup>2</sup>Kennie-Wayne, Inc., Docket Nos. WEVA 93-471, WEVA 93-472, and WEVA 93-473 (ALJ Decision December 5, 1994).

In the instant proceeding the parties have made the transcript of the August 30, 1994, hearing before Judge Fauver in Docket Nos. WEVA 93-471 through WEVA 93-473 part of the record. That transcript establishes that Stephen Hairston purchased Kennie-Wayne on July 16, 1994 (Tr. 6-7).

In this case, as in the one before Judge Fauver, Mr. Hairston contends that Kennie-Wayne mines coal under a contract with M & H Coal Company (M & H). M & H leases the mine property from McDonald Land Company. Respondent states that it cannot sell the coal that it mines to anyone other than M & H without M & H's permission. Mr. Hairston testified that he purchased Kennie-Wayne with the understanding that he would be able to sell any coal not purchased by M & H to Hampden Coal Company, but that M & H has neither paid him in a timely fashion nor allowed him to sell to Hampden (Tr. 8-11, 18, 39-40).

As noted by Judge Fauver, the record does not establish that Respondent is contractually prohibited from selling its coal to customers other than M & H (Judge's decision, Docket Nos. WEVA 93-471 through WEVA 93-473, page 1). Moreover, the record establishes only that M & H was five days late on one payment for coal delivered by Respondent (Tr. 16-18).

Judge Fauver ruled against Respondent primarily on the grounds that it had not established that it was on the brink of financial collapse (Judge's decision, page 3). I go one step further and find that even if Respondent's ability to continue in business is in jeopardy, the proposed penalties in this case are largely irrelevant to its situation.

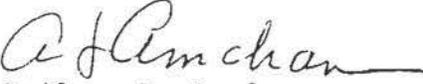
Respondent's accountant, Glenn Hall, testified that Kennie-Wayne's financial well-being was "precarious" (Tr. 59). However, he stated further that if Respondent could sell its coal to Hampden Coal its cash flow would improve and it could resume profitable operations (Tr. 59-60).

Thus, I conclude that if Respondent is successful in getting its shipments to Hampden resumed, or in getting paid by M & H or other customers, it will be able to continue in business regardless of whether I reduce the penalties in this case. Conversely, if Respondent is unsuccessful in these endeavors it will likely go out of business even if I reduce the penalties herein to one dollar.

In conclusion, I find that the instant record indicates that assessment of the \$5,601 civil penalty proposed by the Secretary will have no effect on Respondent's ability to continue in business. Therefore, I assess civil penalties in that amount.

**ORDER**

Respondent is ordered to pay Petitioner \$5,601 in civil penalties within 60 days of this decision, or pursuant to any payment plan to which the parties may agree. Upon payment of the penalties this case is **DISMISSED**.

  
Arthur J. Amchan  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 1 1 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 91-187  
Petitioner : A.C. No. 15-16715-03507  
v. :  
: No. 2 Mine  
DANIEL LEE COAL COMPANY, :  
INCORPORATED, :  
Respondent :

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner.

Before: Judge Barbour

This civil penalty proceeding arises under section 105(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act). The Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA), petitions for the assessment of a civil penalty for a violation of mandatory safety standard 30 C.F.R. § 75.220. The standard requires the operator of an underground coal mine to adopt and to comply with a roof control plan approved by MSHA. The Secretary alleges that on July 11, 1990, Daniel Lee Coal Company (Daniel Lee) violated the standard at its No 2 Mine, an underground coal mine located in Letcher County, Kentucky, when it changed the type of roof bolts used at its mine without first notifying MSHA.

PROCEDURAL HISTORY

The Secretary's petition for assessment of civil penalty was received in the Commission's Docket Office on April 1, 1991. On September 3, 1991, Harold D. Bolling, the company's chief executive officer, filed an entry of appearance on behalf of the company. Three days later Bolling filed a response to the Secretary's petition. In the response he denied generally the Secretary's allegations.

On October 17, 1991, the case was erroneously stayed pending the resolution of a case that was then before the Commission for decision. The error was not discovered until after the instant

matter had been dismissed. The Secretary therefore moved to reinstate his petition. On November 16, 1993, the Commission granted the motion, reopened the case and remanded the matter to the Chief Judge. On November 17, 1993, the Chief Judge ordered the parties to confer and to advise him on or before December 22, 1993, of the results of the conference. The Chief Judge noted that failure to comply could result in a default.

Approximately one month later, counsel for the Secretary filed with the Commission a copy of a cover letter that was attached to a joint settlement motion. The letter indicated the parties had agreed to settle the case. However, nothing further was heard from the parties and on September 2, 1994, the Chief Judge ordered the Secretary to show cause why the matter should not be dismissed for failure to prosecute.

On September 15, 1994, counsel responded that she had made numerous attempts to get Harold Bolling to return the settlement motion for filing and that, "[t]he failure to forward a written settlement in this matter is due to the dilatory action of the [R]espondent" (Secretary's Response to Order to Show Cause 2). On September 21, 1994, the Chief Judge found the response to be adequate and assigned the case to me.

The matter was scheduled to be heard on October 13, 1994, in Pikeville, Kentucky. The company's copy of the notice of hearing was mailed to Bolling at his business address. The return receipt indicates that it was received on September 26, 1994. The receipt is signed by Betsy Addington, Bolling's agent. On October 5, 1994, the company's copy of the notice of hearing site was sent by facsimile copy, as well as by registered mail, to Bolling at the same address. The return receipt indicates the "hard copy" was received by Bolling on October 11, 1994. Again, Betsy Addington signed for Bolling.

At 8:30 a.m., on October 13, 1994, the matter was called for hearing in Pikeville. Counsel for the Secretary entered her appearance. Harold Bolling did not. At my request, counsel for the Secretary described her attempts to contact Bolling. Counsel explained that on September 28, 1994, she had called his office. Counsel was told that Bolling was "in court," but that he would return counsel's telephone call that day. He did not.

Counsel stated that she called again on September 29 and was told that Bolling was "in court." She also was told to telephone Bolling after 4:00 p.m. She did, and there was no answer (Tr. 11-12).

Counsel explained that on September 30 she spoke with Bolling's secretary on two occasions. According to counsel, the secretary was concerned because she had spoken with my

office and understood there was to be a conference call. (I had tried to arrange such a call among counsel, Bolling and me that day.) The secretary told counsel that Bolling was out of the office and that she expected he would call counsel or me. He did not (Tr. 12-13).

I recessed the hearing for one half hour and asked counsel to contact Bolling by telephone to determine his intentions. In the meantime, I placed a telephone call to my office to determine if Bolling had attempted to reach me there. When the hearing resumed, I reported that Bolling had not attempted to contact me and counsel reported that Bolling's secretary told her that Bolling was not in the office and that there was nothing on his calendar to indicate he intended to attend the hearing. Counsel stated she made two additional calls during the recess and was told that Bolling had not arrived at the office and that no one had any knowledge of his intentions or his whereabouts (Tr. 14-16).

I expressed consternation at Bolling's failure to appear or to otherwise contact me or counsel, and the hearing proceeded as scheduled (Tr. 17-18).

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
3160289	7/11/90	75.220	\$400

THE SECRETARY'S WITNESSES AND EVIDENCE

NANCY EDMONDS

Nancy Edmonds is a coal mine inspection supervisor for MSHA, She is also the custodian of records at the agency's Paintsville, Kentucky, Subdistrict Office. In her capacity as records custodian, she identified the roof control plan in effect at Daniel Lee's No. 2 Mine on July 3, 1990 and Order No. 3160289, an order issued to Daniel Lee on July 11, 1990, and signed by MSHA Inspector Norman Page (Gov. Exh. Nos. 1 and 2; Tr. 22-23).

AFFIDAVIT OF NORMAL PAGE

Counsel explained that Page was unable to appear as a witness due to a medical emergency involving his son. Counsel therefore presented Page's affidavit. In the affidavit, Page stated that on July 11, 1990, when inspecting the 001 working section of the No. 2 Mine, he determined the company had changed the roof bolts from 48 inch resin-grouted bolts to 36 inch mechanical bolts. The 36 inch bolts had been used for a distance of approximately 150 feet in the Nos. 1 through 3 entries and

in the connecting crosscuts. The approved roof control plan sanctioned only the use of 48 inch resin-grouted bolts in this area.

The roof had surface cracks and water was seeping through it. The condition of the roof indicated to Page that the roof might be unstable. Because of the condition of the roof, Page believed that changing the type of roof support without first obtaining MSHA's approval was reasonably likely to result in a serious accident (Gov. Exh. No. 3).

In addition, because the difference between the two types of roof bolts was visually obvious, Page believed mine management would have known that the 36 inch roof bolts were being used (Gov. Exh. No. 3).

#### BUSTER STEWART

Buster Stewart is an MSHA roof control specialist. As such, it is his job to evaluate roofs and to determine what should be included in MSHA-approved mine roof control plans (Tr. 27). Stewart confirmed that under the plan approved for No. 2 Mine, 48 inch resin-grouted roof bolts were to be used to support the roof in the subject area (Tr. 29). Stewart explained that when a resin-grouted roof bolt was inserted in the roof, the resin or glue was released and spread into the cracks in the roof strata. The glue helped to hold the roof in place. When resin-grouted bolts were used in sequence, they were like having "five or six 2 by 4s ... glued ... all together ... form[ing] a beam across" (Tr. 31). Stewart described a resin-grouted bolt as "the best roof support" (Tr. 33).

A mechanical roof bolt uses a chuck to secure the roof. (The bolt functions in a manner similar to a toggle bolt.) In Stewart's opinion, the problem with mechanical bolts was that if they were not anchored in firm roof, they would pull out (Tr. 34-35). The mine has a shale roof, and Stewart believed that with such a roof it was difficult to find firm material in which to anchor mechanical roof bolts (Tr. 51-52).

Stewart testified he had read Page's affidavit. Stewart stated that when Page described water coming through the roof it meant to Stewart that there were interior cracks in the roof (Tr. 38). Resin-grouted bolts could seal the cracks (Tr. 38-39). With mechanical bolts a roof fall was possible (Tr. 39-40).

When an operator wants to change the type of roof bolts, MSHA will first conduct a stratus scope test to determine the roof's consistency. In addition, MSHA will conduct a "pull test" to determine the holding power of the proposed bolts (Tr. 40-41).

Because the equipment used to install mechanical roof bolts is different from that used to install resin-grouted bolts, Stewart believed a mine foreman would have known which kind of bolt was being used (Tr.42). In addition, because the section foreman makes sure the roof bolting machine operator is supplied with roof bolts and with glue, the section foreman also would have been aware of the type of roof bolts used (Tr. 43, 46-47). Finally, Stewart believed that it would have taken at least three shifts to roof bolt the area cited in the order (Tr. 49).

#### THE VIOLATION

Section 75.220 requires each mine operator to develop and follow a roof control plan approved by MSHA. Here, the roof control plan for No. 2 Mine in effect on July 11, 1990, provided for the use in different areas of 36 inch conventional roof bolts and 48 inch resin-grouted bolts (Gov. Exh. No. 1 at 4-5). The plan also stated, "MSHA shall be notified and an investigation made and approval granted before resin bolting can be discontinued" (Id. at 5). It is the Secretary's contention, as stated in the order, that 48 inch resin-grouted roof bolts were required in the cited area. The evidence supports this assertion and I accept it. It is also the Secretary's contention that 36 inch mechanical roof bolts were used without MSHA being notified and without an investigation being made. The evidence likewise supports this assertion and I except it. I conclude, therefore, that Daniel Lee was in fact operating in contravention of its approved roof control plan and that the violation of section 75.220 existed as charged.

#### SIGNIFICANT AND SUBSTANTIAL

The violation was cited in an order of withdrawal issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). One of the inspector's findings in issuing the order was that the violation constituted a significant and substantial (S&S) contribution to a mine safety hazard. A four-part test for determining whether a violation is S&S was enunciated by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). It is well known and need not be repeated here.

I have concluded that the violation of section 75.220(a) existed as charged. Moreover, the evidence easily establishes a discrete safety hazard. As Stewart persuasively explained, the failure to use 48 inch resin-grouted roof bolts subjected miners on the 001 section to the hazard of injury from falling roof. Moreover, given the laminated shale roof and the water seeping through it, I accept Stewart's opinion that the mechanical roof bolts might not hold and that roof falls were reasonably likely.

Such falls are the most common cause of death in the nation's mines, and I conclude therefore that the violation properly was designated S&S.

#### GRAVITY

The concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. The potential hazard was one of death or serious injury caused by falling roof. The probability was high due to the makeup of the roof and the fact that the roof was leaking water. This was a very serious violation, and the fact that Daniel Lee took it upon itself effectively to alter its plan without consulting MSHA augments the violation's gravity.

#### UNWARRANTABLE FAILURE AND NEGLIGENCE

In issuing the order, the inspector found that the violation was caused by the unwarrantable failure of Daniel Lee to comply. To establish that a violation resulted from an operator's unwarrantable failure, it must be proven that the operator engaged in aggravated conduct that was more than ordinary negligence (Emery Mining Corp., 9 FMSRHC 1997, 2203-2204 (December 1987)).

I conclude that Daniel Lee's failure to comply with its plan resulted from more than a failure to exercise the care required by the circumstances. Stewart detailed the obvious differences between resin-grouted and mechanical roof bolts. Stewart further described the differences in the equipment used to install the bolts. An operator is presumed to know the requirements of the its roof control plan, which means that Daniel Lee is presumed to have known which type of roof bolts were required at the various areas of No. 2 Mine.

Because the differences in the types of roof bolts and in the equipment used to install them were obvious, I can only conclude that the mine foreman and/or section foreman deliberately chose to install the conventional bolts despite the fact they were prohibited, or that the foremen were totally oblivious to what was happening on the 001 section and thus were highly negligent. In either event, they unwarrantably failed to comply with the standard by exhibiting more than ordinary negligence.

#### HISTORY OF PREVIOUS VIOLATIONS

In the 24 months prior to July 11, 1991, Daniel Lee was cited for 137 violations. For a mine the size of the No. 2 Mine, this is a large number of prior violations (Gov. Exh 4). In addition, at my request, counsel supplemented the record with

information regarding the compliance history of Harold Bolling and Daniel Lee. Counsel advised me that MSHA regards Bolling as the controlling entity of five mines: Moriah Branch Coal Company, No. 1 Surface Mine; Daniel Lee, Mine No. 1; Daniel Lee, Mine No. 2; Daniel Lee, Mine No. 3 and Daniel Lee, Surface Mine No. 1. Counsel also stated that the last payment of a civil penalty was received from Bolling on May 23, 1991. Further, as of October 24, 1994, MSHA closed its files on \$24,323.26 in uncollected penalties from these entities (see Letter of October 31, 1994 and attachments) (When asked whether the Secretary had brought a collection action against Daniel Lee (and Bolling), counsel replied, "Not to our knowledge . . . . Unfortunately, he doesn't owe us as much as some other people" (Tr. 56). Because the Secretary has written off the uncollected civil penalties, the amount currently due the Secretary from Daniel Lee is \$1,684.28. *Id.* Nevertheless, and as explained below, the uncollected penalties are a most significant assessment consideration.

#### SIZE OF BUSINESS

Counsel stated the No. 2 Mine, employed approximately nine persons who worked one shift (Tr. 59; Letter of October 31, 1994). In addition, it is clear from the supplemental information supplied by counsel that Bolling and Daniel Lee operated other mines and that Bolling controlled or controls another mining company.

#### ABILITY TO CONTINUE IN BUSINESS

The effect of assessed penalties on the ability of an operator to continue in business is a matter to be proven by the operator. Here, of course, there was no such proof.

When asked whether the company was still in business, counsel replied, "Not to my knowledge" (Tr. 57). If in fact Daniel Lee has ceased operation, imposition of a civil penalty for a past violation may still be appropriate. Cessation of mining does not mean a company intends to forego operations at some future time, either at the same location or at some other location, using the same or another name (See Steele Branch Mining, 15 FMSHRC 1667, 1701 (August 1993) (ALJ Koutras)). Therefore, I conclude any penalty assessed will not affect Daniel Lee's ability to continue in business.

#### GOOD FAITH ABATEMENT

The violation was abated the following day. This constituted good faith abatement.

### CIVIL PENALTY ASSESSMENT

The Secretary has proposed a penalty of \$400. Given the seriousness of the violation and the more than ordinary negligence of mine management, as well as the other civil penalty criteria, this proposal would have been appropriate had there not been another very important factor to consider. This factor -- the operator's compliance record -- mandates the penalty assessed be substantially more than that proposed.

The Act mandates a civil penalty be assessed for each violation. The statutory enforcement scheme is premised upon the assumption that compliance is encouraged and violations deterred by the payment of penalties. Payment is the culmination of the citation and assessment process. Thus, consideration of an operator's history of previous violations should include the operator's history of payment. As I have noted previously, when an operator has a poor payment history for which the record provides no explanation, I can only assume it is the result of contempt for the Act and for the Commission, a contempt that is here mirrored by Bolling's totally unexplained failure to appear. Bob & Tom Coal Company, Inc., 16 FMSRHC 1974, 1990 (September 1994); see also May Resources Incorporated, 16 FMSRHC 170 (January 1994) (ALJ Fauver)).

Because of Daniel Lee's and Bolling's abysmal history in this regard, I will greatly increase the penalty from the amount I might otherwise have imposed and assess a civil penalty of \$9,000 for the violation of section 75.200.

Finally, this is the first case in which Bolling was to have appeared before me, as well as the last in which similar behavior on his part will not trigger a disciplinary referral to the Commission (29 C.F.R. § 2700.80).



David F. Barbour  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 17 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. LAKE 94-156  
v. : A.C. No. 11-00877-04042  
: :  
AMAX COAL COMPANY, : Docket No. LAKE 94-197  
Respondent : A.C. No. 11-00877-04049  
: :  
: Docket No. LAKE 94-198  
: A.C. No. 11-00877-04051  
: :  
: Docket No. LAKE 94-222  
: A.C. No. 11-00877-04054  
: :  
: Wabash Mine

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the  
Solicitor, U.S. Department of Labor, Chicago,  
Illinois, for Petitioner;  
R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Amchan

Overview

These cases arise out of inspections conducted at Respondent's Wabash Mine in southeastern Illinois. Docket Nos. LAKE 94-156 and LAKE 94-222 each contain one citation which was settled at the outset of the hearing. Citation No. 4261640 in Docket No. LAKE 94-197 was also settled.

At issue in Docket No. LAKE 94-197 is Citation No. 3845251 which alleges that Respondent violated 30 C.F.R. § 77.201 in that methane concentrations exceeded one percent at the head house on the top of the No. 1 silo at the preparation plant. Also unresolved is Citation No. 3536113 in Docket No. LAKE 94-198, which alleges that Respondent violated 30 C.F.R. § 75.371(hh) in failing to provide MSHA

with the ambient carbon monoxide (CO) levels in areas in which CO sensors are installed. For the reasons stated below, I vacate both these citations and the penalties proposed therefor.

#### Excessive Methane in the Head House

On February 2, 1994, MSHA representative Arthur Wooten was inspecting the silo area of the Wabash Mine. This is an area where clean coal is brought by conveyor from the preparation plant and deposited prior to shipping it to customers. At about 9:15 a.m., Wooten entered the head house on top of silo No. 1 and his methane detector activated, indicating a concentration of methane in excess of one percent (Tr. 20-21, 90)<sup>1</sup>.

Methane readings in the head house ranged from .4 percent to 1.4 percent. The highest readings were detected near a light switch and near an opening where the conveyor belt dumps coal into the silo (Tr. 59-60). These areas were approximately 3 1/2 feet above the floor and one foot away from the sides of the building (Tr. 54, 60). Respondent's safety director, Charles Burggraf, who was accompanying Wooten, immediately diluted the methane by opening the one entrance door of the head house and a set of double doors normally used only to bring in equipment (Tr. 81-82). The methane concentration then dropped below one percent (Tr. 69-70).

Inspector Wooten issued Citation No. 3845251 alleging a violation of 30 C.F.R. §77.201. The cited regulation states that, "the methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

Wooten required that the sides of the head house be removed to assure that methane concentrations in the head house remained below one percent (Tr. 90-91). He further required that this be accomplished in a period of two hours (Citation No. 3845251, blocks 2 and 18). Respondent shut down its preparation plant and sent its five day-shift employees to the top of the silo. The sides were removed within the requested time period (Tr. 98-100).

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<sup>1</sup>Respondent, in a letter dated January 10, 1995, has noted a number of errors in the transcript. I hereby correct the transcript as noted in this letter. There are other transcript errors not noted by Respondent [e.g. Tr. 226, lines 4 and 5 should read "slope heaters" rather than "slope feeders"]. In most instances, particularly those critical to the resolution of the case, what was actually said at hearing can be determined from the context of the testimony.

The citation was characterized as "significant and substantial" (S & S) and MSHA subsequently proposed a \$595 civil penalty for this alleged violation. Among the factors that led to the S & S designation was the fact that the head house contained electrical equipment, such as a 4,160 volt conveyor belt starter, a 220 volt automatic lubrication system, and a 120 volt lighting circuit (Tr. 30).

Another factor in the S & S designation was that Respondent experienced a brief and self-extinguishing ignition on January 13, 1994, at the bottom of Silo No. 1, where coal was loaded into railroad cars (Tr. 30-32, 59)<sup>2</sup>. On February 1, the day before the instant citation was issued, 3.1 percent methane had been detected by MSHA inspector Ron Stahlhut at the train load-out, which is approximately 200 feet directly below the head house (Tr. 26, 34-35)<sup>3</sup>. On February 2, the methane concentration at the train load-out was four percent (Tr. 42-44).

The head house was constructed with tin sheeting placed over a steel framework (Tr. 80-81). The floor of the head house is six feet above the roof of Silo No. 1 (Tr. 106-08). The roof of the silo has several holes for ventilation and access (Tr. 105-06). In the 20 years in which it has been situated on top of Silo No. 1, methane had apparently never been detected in the head house prior to February 2, 1994, either by Respondent, who tests for methane every shift (Tr. 80-81, 87-88, 96-97) or by MSHA (Tr. 52).

Does a methane reading in excess of 1 percent establish a violation of 30 C.F.R. §77.201?

The central issue with regard to this citation is whether a valid methane reading of one percent or higher establishes a violation of the cited regulation. Although the language of the standard, standing alone, would lead to an affirmative answer, I agree with Respondent that the standard must be interpreted in the context of other portions of subpart C of Part 77, 30 C.F.R., and MSHA's enforcement policy for similar provisions relating to underground areas of coal mines.

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<sup>2</sup>Respondent contends that this ignition was due to coal dust rather than methane (Tr. 101).

<sup>3</sup>MSHA issued Citation No. 4261637 for this methane concentration. A citation was not issued on February 2, because Respondent was in the process of installing an exhaust system to abate the previous day's citation (Tr. 44, 87).

Section 77.201-2, with which Respondent clearly complied, states:

If, at any time, the air in any structure, enclosure or other facility contains 1.0 volume per centum or more of methane, changes or adjustments in the ventilation of such installation shall be made at once so that the air shall contain less than 1.0 volume per centum of methane.

Respondent contends that compliance with this provision negates any theoretical violation of section 77.201 in this case. In support of its position, the company notes that MSHA's Program Policy Manual directs that the mere presence of methane in excess of one percent is not a violation of the corresponding MSHA standards for underground coal mines.<sup>4</sup> Volume V of the current Program Policy Manual states:

75.323 Actions for Excessive Methane

Section 75.323 specifies actions to be performed for excessive methane. Neither the Act nor the regulations provide that a mere presence of methane gas in excess of 1.0 percent is per se a violation. A violation would exist if a mine operator, upon becoming aware of the presence of excessive methane fails to perform the actions specified in Section 75.323.

The wording of the corresponding underground standard, section 75.323, is generally different than that of section 77.201. It provides that when 1.0 percent or more methane is present in a working place, etc., certain corrective actions are to be taken, such as de-energizing equipment and adjusting the ventilation system. However, section 75.323(e) relating to bleeder and other return air courses contains the same kind of categorical prohibition that is present in section 77.201 [The concentration of methane ... shall not exceed 2.0 percent].

Regardless of the differences between the text of sections 75.323 and 77.201, I find any interpretation of 77.201 that makes a per se violation of a methane concentration of one percent or more to be an unreasonable one, to which I need not defer. I therefore conclude that this record does not establish a violation of 30 C.F.R. §77.201. There is no evidence that Respondent either failed to act prudently to anticipate

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<sup>4</sup>Part 77 rather than Part 75 is applicable to surface work areas of underground coal mines, such as the silo and head house in the instant case.

the presence of excessive methane or that it failed to take appropriate and timely corrective action. Without such evidence I vacate Citation No. 3845251.

Citation No. 3536113: Ambient Carbon Monoxide Levels

On January 27, 1994, MSHA issued Respondent Citation No. 3536113, alleging a non-significant and substantial violation of 30 C.F.R. §75.371(h)(h). Section 75.370 of MSHA's regulations requires that mine operators develop and follow a ventilation plan. Section 75.371 states:

The mine ventilation plan shall contain the information described below and any additional provisions required by the district manager:

\* \* \*

(hh) The ambient level in parts per million of carbon monoxide, and the method for determining the ambient level in all areas where carbon monoxide sensors are installed.

Designation of the proper ambient carbon monoxide (CO) level is important in setting the CO sensors. If they are set far above the ambient CO level they may give insufficient warning when CO levels rise due to fire. If they are set too low, nuisance alarms may be so frequent that miners will disregard the alarms when there is a fire (Tr. 268-272).

The instant citation was the culmination of a months-long dispute between MSHA and Respondent as to whether the company had satisfied the requirements of the standard. On August 26, 1993, MSHA approved Respondent's ventilation plan, which was submitted pursuant to the agency's new ventilation regulations (Tr. 142, Exh. P-6). The plan approval followed several discussions between MSHA officials and the company, which resulted in modifications to the original submission, unrelated to the issue in this case (Tr. 201-213). Paragraph H of the new plan noted that it allowed the use of carbon monoxide (CO) sensors in lieu of point-type heat sensors for an automatic conveyor belt warning system<sup>5</sup>. It went on to state:

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<sup>5</sup>The parties agree that CO monitors are superior to point-type heat sensors in alerting miners to a fire along the belt line (Tr. 168). Use of such sensors are optional and Respondent would not have to designate an ambient CO level if it did not use a CO monitoring system (Tr. 174-75).

3. The alarm level of carbon monoxide will be set at 10 ppm above the ambient level of the area of the mine in which the sensors are installed. The ambient level will be determined using properly calibrated hand-held detectors. (Exh. P-6, page 7.)

On September 27, 1993, MSHA inspector Michael Bird informed Respondent that the approved ventilation plan required additional revisions, including specification of the ambient level of carbon monoxide (Tr. 215, Exh. R-75). This was followed by a letter from MSHA, dated December 15, 1993, requesting corrections to the plan, including providing MSHA with the ambient CO level (R-76).

In response, Respondent, through Terry Theys, the supervisor of engineering at the Wabash Mine, proposed that the company provide MSHA with a range of ambient levels between 0 - 15 ppm based on hand-held detector samples taken every 30 days (Tr. 203, 220). Respondent's hesitancy to designate a single number was based on its sampling results showing that ambient CO levels fluctuated, even at the same location during the same shift (Tr. 220, Exh. R-90).

Neither the company nor MSHA realized in the fall of 1993 that there were much greater fluctuations in ambient CO levels at a single location depending on whether slope heaters were being employed (Tr. 260-61). The company's initial proposal would have resulted in nuisance alarms when the slope heaters were running if the sensors were set on the basis of ambient CO levels when the heaters were not running. Conversely, if the sensors were set when slope heaters were running, they may have been set too high to provide an adequate early warning of a fire when the heaters were not operating.

MSHA rejected Respondent's proposal and asked the company to specify a single CO ambient level that was "in the 70, 75 percentile plus or minus the standard deviation (Tr. 220)." On January 12, 1994, Respondent submitted a revised proposal, which stated in pertinent part:

In addition to the point-type sensors, mine atmosphere sensors (CO, ...) may be installed at various locations to facilitate additional monitoring of atmospheric conditions in locations selected by company representatives.

When CO sensors are installed for additional atmospheric monitoring at company selected locations, the alarm level of carbon monoxide will be set a 10 ppm above the ambient level (normally from 4 - 8 ppm along the belt/haulroad entries) of the area of the mine in which the sensors are installed. The ambient level will be determined using properly calibrated hand-held detectors. (Exh R-80, p. 4).

On January 18, 1994, MSHA acknowledged receipt of the revised ventilation plan (Exh. R-81). The next communication between MSHA and Respondent was the issuance of the citation on January 27, 1994 (Tr. 233, Exh. R-82). On February 26, 1994, Respondent submitted another revision to MSHA which was approved on March 29, 1994 (Exh. R-85, 86, and 88)<sup>6</sup>. The approved language was as follows:

The ambient CO level at all sensors will be set at 5 ppm with no slope heaters operating. During the periods of slope heater operation, the CO ambient levels will be set at 35 ppm for the slope sensors, 30 ppm for sensors from the slope to the fault crossing, 30 ppm from the slope to the Portal 2 area of Main South, at 10 ppm from Portal 2 area inby, and 10 ppm from the fault crossing inby. The ambient levels will be returned to the minewide ambient level of 5 ppm within eight (8) hours following the shutdown of the slope heaters. The method used to determine the ambient CO level was statistically valid sampling occurring over a period of four days during heater operation and four days without heater operation using an MSA-DAN system for data collection. (Exh. R-88, p. 7.)

#### Was a Citation appropriate?

I conclude that MSHA cannot issue a citation for violation of section 75.371(hh). The MSHA Program Policy Manual, Chapter V, (Exh. R-91, p. 3c) states that if the operator and the agency can not agree with regard to MSHA-initiated changes to the operator's ventilation plan, revocation of the ventilation plan and a citation for operating without an approved plan in violation of section 75.370(a)(1) is the appropriate procedure to be followed.

Although the Program Policy Manual is not binding on MSHA, the structure of the agency's ventilation regulations mandates such a process. Section 75.371 merely lists the items that must be satisfactorily addressed in a ventilation plan to secure MSHA approval. The penalty for failure to satisfy the requirements of 75.371 is non-approval or revocation of the plan, rather than a citation.

I therefore vacate Citation No. 3536113 and the \$50 civil penalty proposed for this alleged violation. Vacating the citation on this basis is not merely a matter of placing form

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<sup>6</sup>Although approval of the provisions regarding CO sensors was tentative for a period of 90 days, there is nothing in the record that indicates that MSHA has required further changes from Respondent.

over substance. Had MSHA revoked Respondent's ventilation plan and proceeded under section 75.370(a)(1), it would not have necessarily been successful.

MSHA may not have been able to satisfy its burden of proving that Respondent's ventilation plan was no longer suitable for the Wabash Mine and that the plan with MSHA-initiated changes was suitable, Peabody Coal Company, 15 FMSHRC 628 (April 1993). Given the fact that prior to January 27, 1994, neither MSHA nor Respondent was aware of the impact of the slope heaters on ambient CO levels, it is not certain that either plan was suitable to the Wabash Mine.

Respondent's primary arguments in support of vacation of the citation are: (1) that it complied with §75.371(h)(h) and (2) assuming that it did not, the citation should be vacated because MSHA failed to negotiate in good faith, or comply with the requirements of §75.370(b)(1) and (2). Despite my grounds for vacating the citation, the first argument deserves comment because it relates to the questionable suitability of the plan as approved in August 1993 and with the ambient level demanded by MSHA prior to the issuance of the citation.

It appears to me that the standard demands something more than what was contained in the plan as approved in August, 1993 [monitors to be set 10 ppm above CO levels detected]. However, the standard may allow for something other than a single number--given the variation in CO levels from location to location, and at the same location depending on whether diesel equipment and/or slope heaters were in operation (Tr. 225-26, Exhs. R-89, R-90). In view of my disposition of this citation and the fact that both parties missed the significance of the slope heaters at the time the citation was issued, I decline to rule on whether Respondent complied with requirements of §75.371(h)(h).

MSHA's compliance or non-compliance with §75.370(b)(1) and (2) is also sufficiently ambiguous that I decline to rule upon this issue given my disposition on other grounds. One could regard the agency's December 15, 1993, letter (Exh. R-76) as compliance with these procedural requirements. Rather than deciding whether the company's January 12, 1994, response (Exh. R-80) required further written notifications from MSHA, I have determined that the issue should have been decided through the mechanism of plan revocation rather than citation.

Citation No. 3843883 (Docket No. LAKE 94-156),  
Citation No. 4261640 (Docket No. LAKE 94-157),  
and Citation No. 3845974 (Docket No. LAKE 94-222)

The parties have settled these items on the following terms:

Citation No. 3843883 is modified to a non-significant and substantial violation and the penalty is reduced from \$2,173 to \$500.

Citation No. 4261640 is modified to a non-significant and substantial violation and the penalty is reduced from \$903 to \$100.

The penalty for Citation No. 3845974 is reduced from \$950 to \$650.

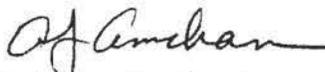
I have considered the representations made and conclude that the above settlement is consistent with the criteria set forth in section 110(i) of the Act.

**ORDER**

Citation No. 3845251 (Docket LAKE 94-197) is VACATED.

Citation No. 3536113 (Docket LAKE 94-198) is VACATED.

Respondent shall pay the penalties agreed to in the aforementioned settlement agreement within 30 days of this order.



Arthur J. Amchan  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 20 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-269-M
Petitioner	:	A. C. No. 02-02264-05501
v.	:	
	:	San Manuel Plant
CDK CONTRACTING COMPANY,	:	
Respondent	:	

## DECISION

Appearance: Susanne Lewald, Esq., Office of the Solicitor,  
U.S. Department of Labor, San Francisco,  
California, for Petitioner;  
Katherine Shand Larkin, Esq., Jackson & Kelly,  
Denver, Colorado, for Respondent.

Before: Judge Weisberger

### Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner), alleging a violation by CDK Contracting Company (Respondent) of 30 C.F.R. § 56.9301. Pursuant to notice, the case was heard on September 12, 1994, in Phoenix, Arizona. Petitioner filed a post hearing brief on November 14, 1994. Respondent filed a post hearing brief on November 18, 1994.

### Findings of Fact and Discussion

#### I. Violation of 30 C.F.R. § 56.9301

CDK Contracting Company, (CDK) a contractor, had contracted with Magma Copper to excavate a foundation for the construction of a plant at the latter's SX-EW site. The excavation was commenced by the removal of a portion of an 18 foot wide asphalt road, and the removal of overburden to create a trench. Concrete support was placed in the trench for a foundation.

On November 16, 1993, MSHA Inspector Pete Gutierrez, inspected the subject site. He estimated that the trench at issue was 10 feet deep, and 25 feet wide at the top. Gutierrez indicated that the width narrowed to about 5 feet at the bottom. Gutierrez

estimated that the angle of the slope of the trench wall was 45 degrees. In essence, he indicated that the estimation was based upon his experience in the past of having observed the slopes of walls, and then having measured their angles.

According to Gutierrez, he observed an operator of a Case 590 turbo backhoe dumping ABC crushed aggregate into the trench. The front wheels of the backhoe extended beyond the horizontal top of the trench onto the sloped wall of the trench. Gutierrez said that there were no berms along the edge of the top of the trench, nor was anything else in place to impede the backhoe. He described the soil at the top of the trench as being loose, not compact, and wet. Gutierrez was concerned that, due to the angle of the slope and the soil conditions, the operator of the backhoe could lose control and overtravel the edge of the trench, and fall down into the trench.

Gutierrez issued a citation alleging a violation of 30 C.F.R. § 56.9301 which alleges as follows "Berms, bumper blocks, safety hooks, or similar impending devices shall be provided at dumping locations where there is a hazard of overtravel or overturning."

Patrick Sandoval, CDK's Project Superintendent, indicated that the soil was classified as reasonably stable. (Class "c" soil) However, he did not testify regarding any of his observations of the conditions of the soil on November 16, when cited by Gutierrez. He opined that considering the condition of the soil on November 16, the backhoe could have been operated safely down a 45 degree slope of a trench. He also indicated that the trench at issue was made by a backhoe which drove down the sides of the trench.

Ronald J. Hain operates a 410 backhoe for CDK. He testified that on November 16, 1993, he was operating a 410 backhoe approximately 20 feet away from where the 590 backhoe at issue was cited by Gutierrez. He said that the slope of the trench where he was working was about 30-35 degrees. He also indicated that he drove into the trench in order to place materials next to the construction forms on the bottom of the trench. Hain opined, based upon the conditions that he observed on November 16, that a 590 backhoe could have been operated down a 45 degree slope. He indicated that he has driven a backhoe down a 45 degree slope. Also, he opined that the surface of the material that the 590 backhoe at issue was driven on, was not slippery. He said that its rear wheels were on asphalt. He opined that there was no hazard of overtravel.

Larry McIntyre, who was Respondent's Area Safety Manager in November 1993, testified that, in his opinion, a berm was not necessary. He said, in essence, that he never "heard" of a berm "being applicable to a trench." (Tr. 192). He said that if a berm would be placed at the rim of a trench, a backhoe traveling down to

the trench in the normal course of its operation, would get stuck on the berm with its front wheels elevated, as its undercarriage would be lower than the height of the berm. He indicated that based on his experience, assuming a 35 degree angle, and class C soil, it would have been "absolutely" safe for the backhoe to travel in and out of the trench. (Tr. 190).

Section 56.9301 supra, requires the provision of berms or other similar impeding devices, "... at dumping locations where there is a hazard of overtravel ... ." Hence, the plain language of Section 56.9301, requires berms where material is being dumped.<sup>1</sup> There is nothing in the language of Section 56.9301 supra, to indicate that it is limited to a dumping location utilized by haulage equipment as argued by Respondent. The only qualification set forth in Section 56.9301 supra, is that berms<sup>2</sup> are required only at those dumping locations "where there is a hazard of overtravel or overturning."<sup>3</sup> Respondent's witnesses testified that in normal operation backhoes travel beyond the rim of the trench while either constructing the trench, or while bringing materials down to the trench. In contrast, in the instant situation, as observed by Gutierrez, the loader at issue was at the rim of the trench not to enter the trench to construct it, but rather to dump materials into the trench while remaining at the rim.

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<sup>1</sup>Because the language of Section 56.9301 supra is clear and unambiguous, it is not necessary to resort to its regulatory history, as argued by Respondent, to ascertain its intended scope.

<sup>2</sup>Respondent argues that section 56.9301 is inapplicable based on the following definition of "berm" as used in Subpart H of Title 30: "[a] Pile or mound of dirt along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway" (30 C.F.R. § 56.9000).

In this connection, Respondent argues that the berm requirements of Section 56.9301, supra do not apply herein as the site at issue was not an elevated roadway. I reject this argument. I find that the regulatory definition of a "berm" does not operate to limit the applicability of Section 56.9301, which by its clear wording applies to "dumping" locations where there is a hazard of overtravel.

<sup>3</sup>There is no evidence that there was any hazard of overturning. Nor is that hazard alleged by petitioner.

I find, based on the testimony of Gutierrez,<sup>4</sup> that the soil at the rim of the trench was wet, loose and not compacted. I also find that the slope of the trench wall was diagonal.<sup>5</sup> I conclude that there was a possibility of overtravel<sup>6</sup> by the backhoe at issue. I thus find that it has been established that there was a hazard of overtravel at the dumping location at issue. Since no berm was provided, I find that Respondent violated Section 56.9301 supra.

## II. 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

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<sup>4</sup>Sandoval testified that the soil was classified as reasonably stable. However, he did not describe the soil condition on November 16 based upon his personal observation. I thus accept Gutierrez's testimony regarding the soil condition, as it was based upon his personal observations and not contracted or impeached.

<sup>5</sup>In essence, Sandoval testified that the slope of the wall of the trench was 35 degrees. McIntyre and Hain both testified, in essence, that it would be safe for the loader at issue to go down such an incline. However, Sandoval indicated that he could not state how he calculated the 35 degree angle. I note that measurements that he testified to regarding the height of the trench and its width, were based upon dimensions called for, in a construction plan. He did not take any measurements post construction of the trench. Specifically, he did not take any measurements on the date the area was cited by Gutierrez. I thus do not place much weight upon his testimony. In the same fashion, Hain testified that the angle of the wall of the trench was between 30 and 35 degrees. However, he did not indicate the basis for this opinion. Gutierrez estimated the angle of the wall of the trench as 45 degrees. He indicated that the estimate was based upon his experience in the past having observed angles of various slopes, and then having subsequently measured these angles. I thus find a reliable basis for Gutierrez's estimate of the angle of the slope of the wall of the trench at issue.

<sup>6</sup>I find that the regulatory need for a berm at dumping locations is met when there is evidence, as here, of some degree of hazard of overtravel. The likelihood of such overtravel and the likelihood of any resulting injury will be discussed below under the heading "significant and substantial." (II, infra)

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 critical issue for resolution is the likelihood herein of an injury producing event as a result of the lack of a berm. According to Gutierrez, he observed the subject backhoe at the rim of the trench, and saw that the bucket, while dumping, was tilting back and forth. In essence, he opined that because of the wet non-compacted nature of the soil, and the slope of the wall of the trench, it is likely that the backhoe would overtravel the rim of the trench. He opined that in the event of such overtravel, the operator of the backhoe would not have control over the back of the vehicle, due to loss of traction. He opined that an injury was likely to occur to the operator from being jostled about in the cab. Also the backhoe could fall and fatally injure the two employees who were in the trench approximately five feet away from the dumping path of the backhoe. He noted that a spotter who was adjacent to the backhoe at the top of the trench could be injured by the back of the backhoe, should it overtravel the rim of the trench, and the operator lose control.

The cab of the backhoe was framed, and was provided with a rollover protection structure. Also, in normal operations, the vehicle does travel down the wall of the trench to the bottom of the trench. There is no empirical evidence before me to base a conclusion that should the backhoe have overtravelled the rim of the trench, it could not have been operated safely down the wall of the trench, and stopped safely. I do not accept Gutierrez's opinion in these regards, as he did not set forth any basis for his conclusions. I find that, within the framework of the above evidence, it has not been established that an injury producing event was reasonably to occur as consequence of the lack a berm. I find that it has not been established that the violation was significant and substantial.

### III. Penalty

I find that should the backhoe at issue have overtravelled the top of the trench, and fallen down the wall of the trench in an uncontrolled fashion, a serious injury might have resulted either to the backhoe operator, or to the two miners working in the trench. I thus find the violation was of a very high level of gravity. The lack of a berm was obvious. However, I find that the failure to provide a berm resulted from a good faith belief on the part of CDK's agents that there were no hazards present. My finding in this regard is based upon my observations of the demeanor of CDK's witnesses. I concluded that CDK's negligence was only moderate. I find that a penalty of \$300.00 is appropriate for this violation.

### IV. Violation of Section 107(a)

The citation issued by Gutierrez alleges violation of Section 107(a) of the Act. Gutierrez indicated that he had ordered the backhoe withdrawn pending construction of a berm.

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

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

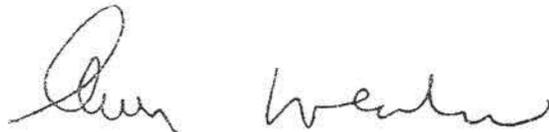
The term "imminent danger" is defined in Section 3(j) of the Act to mean ". . . the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

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

Gutierrez did not present any testimony providing the basis for the issuance of his Section 107(a) withdrawal order. Although the record indicates that there was a possibility of the hazard of overtravel due to lack of a berm, there is insufficient evidence before me to conclude that such a hazard was imminent i.e., that the overtravel could reasonably be expected to cause a fatality or a serious injury within a short period of time. I thus find insufficient facts in the record before me to support the 107(a) withdrawal order, and accordingly it must be dismissed.

#### ORDER

It is Ordered that Citation No. 4334296 be amended to reflect the fact that there was no violation of Section 107(a) of the Act, and that the violation alleged therein was not significant and substantial. It is further ordered that, within 30 days of this decision, Respondent shall pay a civil penalty of \$300.



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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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

JAN 23 1995

RICHARD E. GAWTHROP, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEVA 94-286-D  
: MSHA Case No. MORG CD 94-02  
TRIPLETT BROTHERS EXCAVATING, :  
Respondent : Grant Town Power Plant

## DECISION

Appearances: Richard E. Gawthrop, pro se, Rivesville,  
West Virginia, for the Complainant;  
Charles E. Anderson, Esq., Fairmont,  
West Virginia, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on June 7, 1994, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act) by the complainant, Richard E. Gawthrop, against the respondent, Triplett Brothers Excavating, Incorporated.<sup>1</sup> This case was heard on October 13, 1994, in Morgantown, West Virginia. Gawthrop filed a posthearing statement on November 4, 1994. The respondent's posthearing brief was received on December 19, 1994.

At trial, the respondent stipulated that it is a mine operator subject to the jurisdiction of the Mine Act. The parties stipulated that Gawthrop was hired by the respondent on May 7, 1993, and discharged on January 11, 1994. The parties further stipulated that Gawthrop's wage was \$8.00 per hour and

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<sup>1</sup> Gawthrop's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on February 14, 1994, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Gawthrop's complaint was investigated by the Mine Safety and Health Administration (MSHA). On May 6, 1994, MSHA advised Gawthrop that its investigation disclosed no section 105(c) violations with respect to Gawthrop's January 11, 1994, discharge. On June 7, 1994, Gawthrop filed his discrimination complaint with this Commission which is the subject of this proceeding.

that at the time of his discharge he was working 56 hours per week for a weekly gross salary of \$512.00.

The issues in this proceeding are whether Gawthrop's complaints concerning (1) a malfunctioning endloader (highlift) heater, and, (2) a malfunctioning haulage truck tailgate, constitute protected activities under the Mine Act, and, if so, whether Gawthrop's January 11, 1994, discharge was in any way motivated by these complaints. The respondent argues that these complaints are not protected. In the alternative, the respondent asserts that Gawthrop's use of profanity was unprotected activity that provided an independent basis for his termination. As discussed below, the evidence adequately reflects that Gawthrop's complaints were protected activities that played a significant role in his discharge.

### Background

The Grant Town Power Plant in Marion County, West Virginia, is a co-generation plant operated by the American Bituminous Power Partners and Mission Energy (power company). The power company owns an old inactive mine that is located adjacent to the power facility. There is a gob pile at this mine site that contains coal and slate. The plant uses this gob material to generate electricity. The power company contracted with Enersystems, Inc., to transport the gob to the power house where it is stockpiled and ultimately burned. In April 1993, Enersystems contracted with respondent Triplett Brothers Excavating, Inc., to haul the gob to the power house for stockpiling and to load the gob material into hoppers for burning. The contract also required the respondent to haul ice and gob rejects away from the power plant.

The respondent hired Gawthrop on May 7, 1993, shortly after it contracted with Enersystems. Gawthrop's primary duties involved operating an endloader to haul gob material from a stockpile to a hopper to feed the power preparation plant. Gawthrop's job duties also included hauling away rejects from the power plant. The rejects are gathered and hauled away from two separate piles. The first pile, called the filter cake, is composed of soupy rejects that is lava like in consistency because of the water added to the material during the preparation process. The second pile is composed of material that does not meet the size requirements for the plant. This pile also includes pieces of iron material.

### The Complainant's Case

It is undisputed that the Marion County, West Virginia area where the power plant is located experienced severe cold weather at the time of Gawthrop's discharge in the month of January 1994. (Tr. 62-63, 71, 138). Gawthrop normally worked the midnight shift from midnight until 7:00 a.m. During the winter months preceding his discharge, on several occasions Gawthrop complained to foreman Sennett Triplett and corporate president Randy Triplett that the heater in his Komatsu 500 endloader was not functioning properly and that the windshield was freezing up impairing his visibility. (Tr. 23-24, 136-137). Gawthrop testified that mechanic Clarence Triplett had unsuccessfully tried to fix the heater. (Tr. 30). Gawthrop had also complained on several occasions about the tailgate popping open on the haulage truck causing spillage and freezing of the soupy reject material on the blacktop road. (Tr. 23-24, 135-136).

At approximately 8:00 p.m. on the evening of January 9, 1994, Gawthrop telephoned Sennett Triplett at his home prior to reporting for the midnight shift. Gawthrop inquired whether the Komatsu endloader heater had been fixed because the weather forecast predicted temperatures of five degrees below zero. Gawthrop testified Sennett replied that he had been operating the Komatsu that day in his short-sleeves and that there was nothing wrong with the heater. (Tr. 38-39). Sennett stated that he had received complaints from Gawthrop about the heater "on two or three different occasions." (Tr. 137). Sennett testified that January 9, 1994, had been "...a super cold day, probably not the coldest, but it was one of the coldest we had." (Tr. 138) Given the severe weather, Sennett stated that "[y]ou couldn't ask nobody to run [the endloader] if the heater wasn't working." (Tr. 140). Sennett's summary of his January 9, 1994, telephone conversation was consistent with Gawthrop's description of the conversation. (Tr. 138-139).

Despite the assurances provided by Sennett, Gawthrop arrived at the power plant at 11:30 p.m. on January 9, 1994, only to find that the endloader's windshield had started to ice up. (Tr. 39). He testified that he worked the midnight shifts on January 10 and January 11, 1994, without a functional heater. (Tr. 39, 41-42). Consistent with Gawthrop's testimony, Sennett testified that the endloader's windshield frosted up during the 7:00 a.m. morning shift on January 10, 1994, while the endloader was operated by Floyd Fulk. (Tr. 140). However, without furnishing any rational motive, Sennett and Fulk suspect that Gawthrop tampered with the

heater. (Tr. 177, 199-200). Fulk's tampering theory was based on his opinion that Gawthrop "was an unhappy man." (Tr. 200).

Significantly, Sennett stated that Gawthrop's discharge was not related to any allegation that Gawthrop had tampered with the heater.<sup>2</sup> (Tr. 177). In this regard, I noted at the hearing that there was no credible evidence to support a finding that Gawthrop had tampered with the heater. (Tr. 283-286).

Earl McNemar and Frank Summers were called upon to testify on behalf of the complainant to corroborate his complaints about the Komatsu heater and the truck tailgate malfunctions. Both McNemar and Summers are currently employed by the respondent. McNemar operated the Komatsu endloader during the afternoon shift from 3:30 p.m. on January 10th until midnight on January 11, 1994, when he turned the endloader over to Gawthrop. Summers operated the haulage truck with the malfunctioning tailgate during the midnight shift on January 11th. Gawthrop was loading this truck with filter cake rejects at the time of his discharge.

McNemar characterized the Komatsu heater as working "all right for that type of machine" although he conceded the operator needed to wear a jacket. (Tr. 79-80). Although McNemar stated he never experienced frost on the windshield, he agreed that it would be colder on Gawthrop's midnight shift than on McNemar's afternoon shift. (Tr. 79). Although McNemar did not operate the haulage truck, he was aware of problems with the tailgate freezing up and opening. (Tr. 88-89).

Although Summers did not know about the condition of the heater in the Komatsu endloader, he testified that the heater in his truck had broken and that it was repaired by the respondent. (Tr. 97). Summers substantiated the complainant's testimony that there had been problems with the haulage truck's tailgate popping open and spilling reject material. The respondent's foreman, Sennett Triplett, also testified that the tailgate pops open quite often. (Tr. 135). Summers attributed the problem to soupy reject material freezing around the tailgate latch causing it to open. (Tr. 96). Summers admitted that the tailgate had popped open at approximately 6:00 a.m. on January 11, 1994, at the time of Gawthrop's termination. (Tr. 109).

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<sup>2</sup> The respondent also provided evidence concerning flat tires and damage to the bucket blade that had occurred during Gawthrop's endloader operation in the months preceding his discharge. However, Sennett Triplett testified these events played no role in his decision to terminate Gawthrop on January 11, 1994. (Tr. 168-169).

At approximately 6:15 a.m. on January 11, 1994, Gawthrop was loading soupy rejects with the Komatsu endloader into a haulage truck operated by Frank Summers. Gawthrop explained:

On the morning of January the 11th, 1994, I put six hours and 15 minutes of my shift in and I had done so with no heater in my highlift and having problems with this dirt truck that I was loading with this soupy material, kept coming open and spilling all over the place. (Tr. 22).

The tailgate sprung open spilling the soupy material out of the back of the truck. Gawthrop communicated with Summers over the citizen band (C.B.) radio. Gawthrop asked Summers to pull the truck up so that Gawthrop could position the bucket of the endloader against the tailgate to hold it shut until Summers could relatch it. Gawthrop testified that he then said "I wish they would fix this damn junk." (Tr. 25). Gawthrop testified that Sennett overheard him on the C.B. office radio and stated over the C.B. radio that he "didn't need [Gawthrop] to run his junk any longer." (Tr. 25). Gawthrop testified that Summers, who apparently heard Sennett's radio transmission, looked at Gawthrop through the truck window and shrugged his shoulders as if to say 'you're in trouble now.' (Tr. 29). Sennett then drove his pickup truck to Gawthrop's location and told him to 'get his stuff and get off the damn job. I don't want you here running my junk any longer.' (Tr. 25-26). Gawthrop was then summarily discharged.

Summers admitted that Gawthrop communicated to him over the radio to pull his truck up so that Gawthrop could position the endloader bucket against the tailgate so that Summers could relatch it. (Tr.91). However, Summers, who is still employed by the respondent, was understandably reticent to recall the radio communications in question claiming that he had gotten out of the truck to position himself near the endloader in order to close the tailgate. For example, Summers testified "...I didn't hear none of this conversation that I was supposed to hear and that everybody said I heard. I didn't hear it." (Tr. 107). When pressed further about what Gawthrop said over the radio, Summers stated "...if you was in my situation you'd know what I meant ...Like I say, I didn't hear nothing." (Tr. 112).

### The Respondent's Case

The respondent does not deny Gawthrop's history of complaints about the heater and tailgate. However, the respondent asserts that these complaints are not protected because they relate to nuisances rather than safety hazards. (Tr. 68-73). Regardless of whether Gawthrop's complaints warrant statutory protection, the respondent asserts Gawthrop was terminated for his continued use of profanity over the C.B. radio after he had been repeatedly cautioned.

As previously noted, the respondent is a subcontractor of Enersystems. Michael Jones is employed by Enersystems and oversees the work performed by the respondent at the power plant. (Tr. 203). Jones testified that on one occasion in the summer of 1993 and one occasion in the winter of 1993 he heard Gawthrop, whose voice he recognized, on the C.B. radio using profanity. Jones stated Gawthrop's radio communications were critical of the respondent's operations at the power plant. Jones also overheard Gawthrop making derogatory remarks about Japanese manufactured construction equipment. For example, Jones paraphrased Gawthrop as stating:

'these people here at the power plant don't have any idea what the [expletive] is going on. The Triplets are the dumbest [expletive] people I've ever worked for....we got to use this damn [Japanese] junk instead of Caterpillar equipment.' (Tr. 204, 206).

Jones felt that Gawthrop's comments were particularly offensive because Sumatoma, a Japanese company, was providing financing for the power plant's operations. (Tr. 214, 216-217). Jones stated that he warned Randy and Sennett Triplett about Gawthrop's use of profanity. (Tr. 209).

Jones testified that he had also heard others use profanity over the C.B. radio and he conceded that an occasional "cuss word" was not uncommon. (Tr. 215-216). Summers testified about day shift truck drivers using profanity on the radio. (Tr. 100-101). In fact, Summers admitted that he "cuss[es] a lot" and that it was "more than likely" that he had cussed on the C.B. radio. (Tr. 102). Randy Triplett testified that there was a problem with truck drivers using profanity over the radio in the summer of 1993. (Tr. 271). With the exception of Gawthrop, there is no evidence that anyone had ever been discharged or formally disciplined for using profanity. (Tr. 101).

Significantly, Jones did not hear the January 11, 1994, radio transmission that is the focal point of this case. (Tr. 212). It is also noteworthy that, despite Jones' reported concern over Gawthrop's use of profanity, Jones testified that "I never did get the reason why [Gawthrop was terminated]....No one told me, no, and I never asked." (Tr. 218).

Sennett Triplett testified that he and Randy Triplett had warned Gawthrop about using profanity on July 19, 1993, and December 6, 1993. The respondent proffered written notes summarizing these warnings. (Resp. Exs. 3A, 3B). Gawthrop was never asked to sign these notes to acknowledge that he had in fact been warned. (Tr. 144).

Sennett and Randy Triplett testified that they arrived at work on the morning of January 11, 1994, at approximately 4:30 a.m. They proceeded to the office where they were met by Sennett's sons William and Henry. The sons stated "Rick [Gawthrop] is at it again," whereupon they turned up the volume of the radio and listened. (Tr. 133-134). Sennett described the communications as follows:

[Gawthrop] said, this g-ddamn, m----r-f-----g junk. These c--k s---ers won't fix nothing here. And I got on the C.B. and I grabbed the mic, I said, Rick, that's enough. I said I'll be right down, park the highlift now. I jumped in my truck and I drove it down around and he was still running the highlift.... And when he started down out of the highlift I told him --- I said, bring your stuff with you. I don't need you no longer, you're fired. (Tr. 134-135).

This incident was reportedly documented in a note written on January 11, 1994, by Randy Triplet and signed by Sennett Triplett. (Resp. Ex. 3C). However, Randy could not explain why the note reflects that January 11, 1994, was a Saturday, when, in fact, it was a Tuesday. (Tr. 245).

Finally, the respondent, in its post hearing brief, relies on Gawthrop's failure to complete the preshift safety reports and the fact that another endloader was available for Gawthrop's use as mitigating circumstances. (Resp.'s brief, pp. 4, 10). However, the alleged failure of the complainant to complete preshift reports does not absolve the respondent from its statutory obligations that prohibit discriminatory conduct. Likewise, the availability of alternative equipment, in the absence of tagging out defective equipment, is not an appropriate mitigating factor.

## Disposition of Issues

### Discriminatory Discharge

Gawthrop, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Gawthrop must establish that his complaints constituted statutorily protected activity, and, that the adverse action complained of, in this case his January 11, 1994, discharge, was motivated in some part by that protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

The respondent may rebut a *prima facie* case by demonstrating either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. The respondent may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

### Protected Activity

Miners are afforded the right to complain about safety or health related violations of mandatory standards under Section 105(c) of the Act. The Commission has noted that in order for the complaint to be protected, the complaining miner must have a "good faith, reasonable belief in a hazardous condition" and that a showing of good faith requires an "honest belief that a hazard exists." Thus, the complainant is not required to prove that an actual hazard existed. He must only show that his complaint was reasonable. See Secretary o.b.o. Clayton Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2211 (November 1994), and cases cited therein. Moreover, a complaining miner need not show that the violative condition exposes him to an immediate hazard, if, as in this case, the complaint does not involve a

work refusal. See Secretary o.b.o. Ronny Boswell v. National Cement Company, 16 FMSHRC 1595, 1599 (August 1994).

Section 77.1606(c), 30 U.S.C. § 77.1606(c), of the Secretary's mandatory safety standards requires that defects of loading and haulage equipment that affect safety must be corrected before the equipment is used. The dangers associated with the frozen soupy rejects spilling onto the blacktop roadway traveled by vehicles at the power plant facility are readily apparent. Surely, the loading of a haulage truck on one end with the material spilling out the other end is not within the scope of normal, safe mine site haulage operating procedures.

Notwithstanding the dangers caused by an icy roadway, the tailgate malfunction exposed Summers to serious injury by requiring him to position himself in close proximity to the endloader in order to relatch the tailgate while Gawthrop was holding the tailgate shut with the endloader's bucket. In this regard, the mandatory safety standard in Section 77.1607(k), 30 C.F.R. § 77.1607(k), prohibits miners from working or passing under buckets of loaders in operation. Consequently, Gawthrop's January 11, 1994, tailgate complaint was based upon his reasonable belief that a hazard existed. Thus, his complaint must be considered as activity protected by the Act.

Similarly, Gawthrop's complaints about the malfunctioning endloader heater, particularly in sub-zero temperatures, were reasonably related to safety and health. Ice on a windshield interfering with an endloader operator's visibility creates significant safety hazards to anyone in the vicinity of the vehicle. Moreover, the impropriety of an operator's exposure to frigid temperatures over an entire shift without adequate heat is self evident. Although the nature and extent of the heater problem is in dispute, Gawthrop perceived it to be a problem. Gawthrop's concern was consistent with McNemar's testimony that the endloader operator needed to wear a jacket. Gawthrop's complaint was also supported by the endloader heater malfunction reported by Fulk the day before Gawthrop's discharge. Therefore, Gawthrop's attempts to bring this heater problem to management's attention must be afforded protection under the Act as these were good faith complaints related to health and safety.

An operator has an obligation to respond to a miner who makes a safety or health related complaint in a way that should reasonably quell the miner's fears. Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989). In the instant case, the respondent failed to do so. Gawthrop's January 11, 1994, discharge was contemporaneous with his protected tailgate and heater complaints. Therefore, Gawthrop has met his burden of presenting

a *prima facie* case that he engaged in protected activity and that his discharge was motivated by that activity.

### The Respondent's Defense

Having rejected the respondent's assertion that Gawthrop's complaints were unprotected because they concerned nuisances rather than safety or health related hazards, we turn to the respondent's defense. The respondent argues that Gawthrop's "...discharge was also motivated by [his] unprotected activity, the use of profanity over the radio, and that it would have taken the adverse action in any event for the use of the profanity alone." (Resp.'s brief, p. 10).

As a threshold matter, profanity is considered to be "opprobrious conduct" that is not protected under the Act. Amos Hicks v. Cobra Mining, Inc., 13 FMSHRC 523, 532 (April 1991). Therefore, the respondent attempts to separate the substance of the complaint from its alleged profane contents. To determine whether the respondent should prevail in such instances, the Commission has applied the "in any event" test to ascertain if the complainant would have been discharged for profanity alone. Secretary o.b.o. John Cooley v. Ottawa Silica Corp., 6 FMSHRC 516, 520-521 (March 1984).

Applying the Cooley test in this case involves an analysis of whether Gawthrop would have been discharged if his use of profanity was not associated with his protected complaints concerning defective equipment. Thus, this approach requires determining whether Gawthrop's complaints played a meaningful role in his termination. Significantly, three Triplett's testified they considered Gawthrop's characterization of company equipment as junk to be offensive even without the use of profanity. Sennett testified:

Court: Did you indicate to [Gawthrop], if you think this is such a piece of junk --- or were you offended by that at all?

Sennett: Sure I was offended by it.

Court: That he called the equipment junk?

Sennett: Why sure. The highlift just passed inspection by Federal inspectors. I mean, it's a 100 and some thousand dollar piece of machinery and I'm still making --- we're

still making payments on it. We probably still owe payments on it, yes. (Tr. 162-163).

The court subsequently inquired:

Court: ...now suppose Mr. Summers was in the truck and he said, 'I'm freezing my expletive butt off,' and in a subsequent sentence or two elaborated on that with four-letter words, would you have terminated Mr. Summers?

Sennett: Not on that occasion right there, because it wouldn't have been fair to him....

Court: Now suppose Mr. Gawthrop had said, 'I'm freezing my four-letter butt off,' would you have terminated him for that?

Sennett: I probably wouldn't have if that's all he had said....

Court: What if he said, 'I'm freezing my four-letter word butt off and this equipment is a piece of junk because the heat is not working properly and it's not worth a damn,' would you have terminated him?

Sennett: Probably not. Probably not. If that's all he had said, I probably wouldn't have. (Tr. 181-183).

Sennett's son William Triplett testified:

Court: Now, the language that you heard that you found offensive, would you have found it offensive if profanities hadn't been used but the context would have been the same? For example, 'these jerks don't know what they are doing and the equipment is junk,' would you have found that offensive?

William: Yes, Sir. They worked very hard for that equipment and, I mean, --- they worked very hard for it. Yes, I would have found it very offensive too. (Tr. 236-237).

Randy Triplett testified:

Court: So did you feel that it was particularly inappropriate for [Gawthrop] to be criticizing the equipment in view of the fact that he damaged the tires?

Randy: Yeah. I didn't appreciate him bad-mouthing our highlift. When we --- I showed the paper work there --- \$138,000 we spent. That's not a lot of money to a lot of people, but that's a heck of a pile of money to people like the brothers and I. And then to put \$12,000 worth of tires on it or \$8,000, whatever that figure was, it was pretty phenomenal. And then to get them busted and laughed at in your face, that, you know, I got another tire, yeah, that kind of dug into me pretty good. (Tr. 279).

In deciding this case, I note that virtually all of the witnesses conceded that the use of profanity on a construction or mine site is a common occurrence. With the exception of Gawthrop, there is no evidence that any employee has ever been discharged or otherwise disciplined for using profane language.

Gawthrop denies that he received any specific reprimands concerning his use of profanity. The written notes of alleged warnings in July and December 1993 were not signed by Gawthrop to acknowledge that he had been warned. Moreover, the reportedly contemporaneous note summarizing the Tuesday, January 11, 1994, incident, that inexplicably reflects it was written on a Saturday rather than on a Tuesday, undermines the probative value of the alleged previous warnings.

With respect to the nature and extent of the profanity uttered by Gawthrop at the time of his discharge, I note that Jones did not overhear this January 11, 1994, radio communication. It is also significant that Jones was never told by Randy or Sennett Triplett why Gawthrop was fired although he had reportedly complained about Gawthrop's use of profanity on several occasions.

The only non-party witness to the January 11, 1994, communication was Frank Summers. Although Summers, who is employed by the respondent, was reluctant to provide details concerning what he had heard, his demeanor at trial indicated that he was not particularly offended by Gawthrop's language and that he found nothing extraordinary in Gawthrop's conduct. Complaints about working conditions expressed to peers are

neither uncommon nor *per se* insubordinate. Here, the alleged offensive language does not constitute insubordination in that the communications were intended for Summers rather than company officials.

Sennett Triplett testified that his "...main reason for firing [Gawthrop on January 11, 1994] was for the words [Gawthrop] used, the way [Gawthrop] used them, [and] the tone of voice [Gawthrop] used." (Tr. 184). Although the parties disagree about the extent of the profane language used by Gawthrop on January 11, 1994, it is undisputed that the thrust of the communications concerned the maintenance and condition of equipment. While Gawthrop's radio transmissions may have been provocative with respect to his criticism of the respondent's equipment and the respondent's maintenance efforts, protective safety related complaints are by nature frequently provocative. Implicit in such complaints is an assertion that an operator is either unaware of a purported hazard or unwilling to address it. An operator, as in this case, acts at its own peril when it allegedly discharges a miner because it is offended by the form rather than the substance of a protected complaint.

In short, Sennett, Randy and William Triplett testified they found Gawthrop's criticism of company equipment to be offensive in the absence of profanity. Thus, the respondent has failed to rebut Gawthrop's *prima facie* case by demonstrating that it was not motivated in any part by Gawthrop's protected activity. Sennett Triplett also testified that he would not have terminated Gawthrop for profanity unrelated to the equipment. Nor is there any evidence of any other formal disciplinary actions or discharges for use of profanity on the C.B. radio or on the job site. The respondent, therefore, has also failed to establish its affirmative defense that it would have discharged Gawthrop for his profanity alone. Consequently, the record evidence establishes that Gawthrop is entitled to relief under the Mine Act as his January 11, 1994, discharge was significantly motivated by his protected activity.

#### ORDER

Accordingly, the respondent's January 11, 1994, termination of Richard E. Gawthrop was discriminatorily motivated in violation of Section 105(c) of the Mine Act. Consequently, **IT IS ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

(a) stipulating to the position and salary to which Gawthrop should be reinstated at the Grant Town Power Plant, or, in the alternative, agreeing on economic reinstatement terms (i.e., a lump sum agreed upon payment in lieu of reinstatement);

(b) stipulating to the amount of back pay and interest computed from January 12, 1994, to the present, less deductions for unemployment benefits and earnings from other employment;

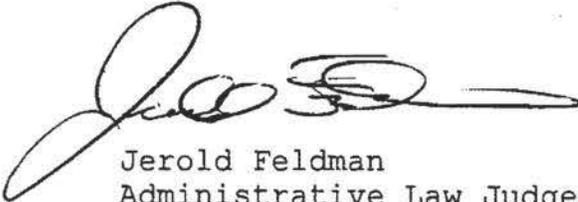
(c) stipulating to any other reasonable and related economic losses or litigation costs incurred as a result of Gawthrop's January 11, 1994, discharge.

2. If the parties are able to stipulate to the appropriate relief in this matter, they shall file with the judge, within 30 days of the date of this decision, a Proposed Order for Relief. The respondent's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of this decision on liability or relief.

3. If the parties are unable to stipulate to the relief, the complainant shall file with the judge and serve on opposing counsel, within 30 days of the date of this decision, a Proposed Order for Relief. The complainant's proposed order must be supported by pertinent documentation such as check stubs from his prior and current employment, notices of pertinent unemployment awards, and receipts to support any other losses or expenses claimed.

4. If the complainant files a Proposed Order for Relief, the respondent shall have 14 days to reply. If issues on relief are raised, a separate hearing on relief will be scheduled.

5. This decision shall not constitute the judge's final decision in this matter until a final Order for Relief is entered.



Jerold Feldman  
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 23 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 94-14-M
Petitioner	:	A.C. No. 30-00066-05523
v.	:	
	:	Lake Placid
COLD SPRINGS GRANITE COMPANY,	:	
Respondent	:	

## DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner; Steven R. McCown, Esq., Little, Mendelson, Fastiff & Tichy, Dallas, Texas, for Respondent.

Before: Judge Weisberger

This case is before me based upon a Proposal for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging a violation by Cold Springs Granite Company of 30 C.F.R. § 56.3400.<sup>1</sup> A hearing on this matter was held in Burlington, Vermont, on November 1, 1994. Subsequent to the hearing, Petitioner, filed a Post Hearing Memoranda on December 22, 1994. Respondent's Brief was received on December 28, 1994.

### Findings of Fact and Discussion

Cold Springs Granite Company ("Cold Springs") operates the Lake Placid Blue and Green Quarry in Ausable Forks, New York. In general, the first step in Cold Springs granite mining operation

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<sup>1</sup>Initially the proposal also sought a penalty for the violation of 30 C.F.R. § 50.10 (Citation No. 4079780). Subsequently, the parties filed a joint motion for approval of a settlement of this citation. By order dated June 23, 1994, Chief Judge Merlin issued an order approving the settlement and ordering dismissal of this citation. Subsequent to the filing of the proposal, Petitioner filed a motion to amend the citation at issue (No. 4079928) to change the standard allegedly violated from 30 C.F.R. § 56.16001 to 30 C.F.R. § 56.3400. On April 18, 1994, Chief Judge Merlin issued an order granting the motion to amend.

is the drilling of the loaf<sup>2</sup> to be blasted from the quarry. In the next step, the granite loaf is blasted from the quarry. After the loaf has been blasted and freed from the earth or the quarry, it is then split at the quarry site by wedges or explosives in order to break off smaller pieces of material. Those pieces of material that are broken off and squared off and are of transportable size, are removed from the quarry site to be placed in inventory for shipping to customers. The material from the loaf that have not been squared off (blocks) are transported to the finishing yard where they are washed and split further.

On March 12, 1993, Joseph C. Cayea, a rock driller, was assigned to split blocks at the finishing yard. The blocks of granite were about four or five feet high laying on their side in close proximity to each other. The blocks had been pre-drilled by machine. From a position standing on top of the blocks of granite, Cayea split the blocks of granite by using tools he called "wedges" and "half-rounds." The half-rounds are rod-like tools that start thin on the top, and become larger on the bottom. Cayea took two of the half-rounds together and slid them into every other pre-drilled hole. Then he took the wedge and put it between the half-rounds, and pounded the half-rounds into the pre-drilled holes until the blocks were fully cracked. Exhibit Nos. P-11, 12 and 13 are illustrations of the blocks of granite viewed from different angles, and demonstrates how the accident occurred.

Following the above procedure, Cayea split the first block (Block No. 1 as depicted in the diagrams). Then he similarly split another block (Block No. 3 as indicated in Exhibit P-11),<sup>3</sup> leaving a larger piece, and a smaller piece (Block B).<sup>4</sup> According to Cayea, after he split Block No. 3, it was stable. The larger piece from No. 1 was removed from the area leaving the smaller piece (Block A), which remained upright.

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<sup>2</sup>The loaf is a piece of granite approximately 80 to 100 feet wide, 15 to 20 feet deep, and 15 to 20 feet high.

<sup>3</sup>In response to direct examination, Cayea referred to the three blocks of granite that he was splitting on the day of the accident as first, second and third. These particular blocks are marked as Nos. 1, 3 and 4, respectively, in the diagrams (Exhibits P-11, 12 and 13).

<sup>4</sup>Block B measured 51 inches wide across the top, but tapered down to a width of only 34 inches at the bottom. It was laying on top of a block of wood, 6 inches by 6 inches, that extended only 10 inches lengthwise under Block B. The wooden had been placed under No. 3 in order to make it level for proper splitting.

Cayea proceeded to split the third block of granite (Block No. 4 in diagrams Exhibits P-12 and 13). He began using the half-rounds and wedges as he had done before, but realized that he needed additional wedges. Cayea jumped down from the block of granite he was working on, and walked along the ground in front of Block A in order to retrieve the wedges he needed. When Cayea came next to Block A, it suddenly tipped over on top of him. It appears that Block B had suddenly shifted and fell onto Block A which tipped over and fell onto Cayea. Cayea sustained serious injuries to both legs, which were subsequently amputated.

On March 15, 1993, Edward M. Blow, an MSHA Inspector, inspected the subject site to investigate the accident that had occurred on March 12. Prior to becoming an MSHA Inspector, Blow had worked for a granite company for 25 years. One of the jobs he performed was splitting rocks. Blow opined that Block B had been split from the longer block, but had not immediately fallen, as it had been connected by frozen material. Blow opined that because the bottom of Block B extended 24 inches beyond the support provided by the wooden block, and the top of Block B extended 41 inches beyond that support (see Exhibit P-13), the frozen bond between Block B and the earth was released causing Block B to tip over, and hit Block A causing it to fall on Cayea.

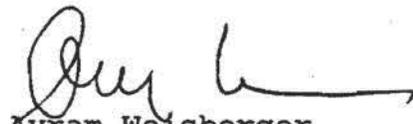
Blow issued a citation alleging a violation of 30 C.F.R. § 56.3400, which provides that, "Prior to secondary breakage operations, material to be broken, other than hanging material, shall be positioned or ed to prevent movement which would endanger persons in the work area. Secondary breakage shall be performed from a location which would not expose persons to danger."

In essence, it is Petitioner's position that the first sentence of Section 56.3400 was violated because neither Blocks A nor B were blocked to prevent a movement, which endangered Cayea. Petitioner also alleges that the second sentence of Section 56.3400, supra, was violated because Cayea's work was not being performed from a location which would not expose him to danger.

The blocking requirements of the first part of Section 56.3400, supra, apply "prior to secondary breakage operations." The safe location requirements of the second sentence of Section 56.3400 pertain to the performance of "secondary breakage." The regulations do not define the term "secondary breakage". However, the plain language of Section 56.3400 supra, makes it obvious that its intent is to protect miners from the hazards associated with being endangered by materials to be broken that were not positioned or ed to prevent movement. This hazard was clearly present in the

splitting stage at issue, at least to the same degree as that presented in the other breaking operations that preceded the one at issue. The plain language of Section 56.3400, supra, further manifests an intention to protect miners from being exposed to danger from secondary breakage being performed from a location exposing them to danger. Clearly such a danger existed in the instant splitting operation at least to the same degree as that presented in the operations that had been performed up to this point.<sup>5</sup> Although there was some material, i.e., a wooden block, placed under Block No. 3, it was not of a sufficient length under the base of Block B to have prevented it from falling and knocking over and Block A, which then led to Cayea's injuries. I thus find that Respondent violated Section 56.3400, supra.

Within the framework of the above evidence, I find that the violation was significant and substantial. I find that a penalty of \$157 is appropriate.

  
Avram Weisberger  
Administrative Law Judge

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/ml

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<sup>5</sup>The removal of a loaf from the ground or quarry is the initial step in the operation which is followed by the splitting of the loaf at the quarry site, and then further splitting at the finishing yard. The latter breaking operation performed by Cayea was thus secondary. (Reference is made to the common meaning of the word secondary as set forth in Webster's New International Dictionary, as pertinent, as follows: "2a: immediately derived from something original, primary, or basic ... . f.1: not first in order of occurrence or development... . 3a: of or relating to the second order or stage in a series."

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

JAN 30 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-308-M  
Petitioner : A.C. No. 42-01975-05505  
v. :  
 : Docket No. WEST 94-309-M  
LAKEVIEW ROCK PRODUCTS, INC., : A.C. No. 42-01975-05506  
Respondent :  
 : Mine: Lakeview Rock Products,  
 : Inc.

**DECISION**

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Gregory M. Simonsen, Esq., Kirton & McConkie,  
Salt Lake City, Utah, for Respondent.

Before: Judge Amchan

**Factual Background**

On November 3, 1993, MSHA representative Richard Nielsen, accompanied by his supervisor William Tanner, conducted an inspection of Respondent's sand and gravel pit in Salt Lake City, Utah (Tr. 21 -23). The penalties for seven citations or orders are at issue before me, the most significant of which involves the safety of a highwall at the pit.

**Citation/Order No. 4120702: Loose ground on the highwall**

At 1:10 p.m., on November 3, 1993, Inspector Nielsen issued Citation/Order No. 4120702, pursuant to sections 104(a) and 107(a) of the Act. The citation/order states:

Loose ground was observed on the nearly vertical highwall at the upper bench where the bulldozer was pushing material to feed the crusher. The dozer operator was operating adjacent to the high wall where loose rocks could fall into the cab of

the dozer. The loose rocks were large enough to cause fatal injuries. The highwall was about 15 meters (50 ft) high. This was an imminent danger.

(Citation/Order No. 4120702, block 8).

The citation/order alleged a violation of 30 C.F.R. §56.3131, which provides:

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated materials shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall of material hazard to persons shall be corrected.

MSHA proposed a \$2,400 penalty for this citation/order<sup>1</sup>.

Inspector Tanner observed the cited condition first and called it to Inspector Nielsen's attention (Tr. 61, 90). Although Nielsen issued the citation and testified at hearing regarding the highwall, the record is very unclear as to the degree, if any, of his first-hand knowledge of its condition.

Nielsen testified that he recommended that a special assessment be made for the citation/order for the following reasons:

... I didn't feel that due care was taken to control the loose ground or to control where people were working in relation to the loose ground, and it was an obvious thing that could be seen from even the lower levels that there was loose ground on this high wall and that some kind of action should be taken (Tr. 58).

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<sup>1</sup>Citation/Order No. 4120702, insofar as it is an imminent danger order issued pursuant to section 107(a) of the Act, is unreviewable due to Respondent's failure to contest it within 30 days, Local Union 2333, District 29, United Mine Workers of America (UMWA) v. Ranger Fuel Corporation, 12 FMSHRC 363 (August 1990); ICI Explosives USA, Inc., 16 FMSHRC 1794 (ALJ Merlin August 1994). However, the penalty assessment for the order is reviewable, ICI, supra.

However, he later testified that he did not observe the cited condition and that his opinions were based entirely on photographs taken by Mr. Tanner and his conversations with his supervisor (Tr. 61, 71, 91).

Inspector Nielsen also testified that on the basis of photographs taken by Mr. Tanner that there were loose rocks lying on the edge of the quarry wall that were not stripped back (Tr. 131). However, it appears that this opinion is based solely on Nielsen's interpretation of the photograph, rather than first-hand observation (Tr. 132). When asked how he knew that the rocks in the highwall were not resting at an angle of repose (an angle at which soil or rocks will not slide or fall), Nielsen stated:

That would be a judgment call from the inspector, but looking at the photos, you can see that there are areas where if jarring or weather or other factors entered into that material, that it could and very likely would fall. (Tr. 138)<sup>2</sup>.

In sum, Inspector Nielsen demonstrated no first-hand knowledge regarding this alleged violation and I therefore accord his testimony in this regard no weight. The factual questions regarding this condition require a credibility resolution between the testimony of Inspector Tanner, on the one hand, and Pit Manager Scott Hughes, on the other.

Inspector Tanner testified that material in an area directly above that where Respondent's bulldozer was operating on November 3, 1993, was "really, really loose" (Tr. 166-67, Exh. 5B). He told Nielsen to issue the imminent danger order because some of that material, primarily large boulders, could have fallen "at any minute, at any second" (Tr. 174, 208).

Mr. Tanner did not climb the highwall to examine the area he considered loose out of concern for his safety (Tr. 183). He may never have been closer to the highwall than 150 feet away (Tr. 62). The inspector stated that he could tell from the photographs he took that material on the highwall was cracked and loose (Tr. 183-86). This is not apparent to the undersigned.

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<sup>2</sup>The undersigned concludes that it is not obvious from the photographic exhibits in the record that any of the material in the highwall was loose, unconsolidated, or in danger of falling.

As the photographic exhibits do not necessarily corroborate Mr. Tanner's conclusions, it is necessary to examine the basis for his opinions regarding the stability of the materials on the highwall. In this regard, Respondent's counsel him asked the following question:

Q. ... do you have any specific information that would bear upon - - that would indicate to you that this material was not - - that you have circled in these pictures was not of the type that was embedded into the mountain?

A. The only thing I go by is my experience and my education.

\* \* \* \*

A. I did not go up there, no and I'm not about to.

(Tr. 187-88).

Mr. Tanner's training and experience fall short of qualifying him as an expert in matters of soil stability and ground control. He has a Bachelor of Arts degree from Marshall University in Huntington, West Virginia, and has attended four courses of undetermined length and content relating to the issues in this case. These courses covered the subjects of ground control, wall and rock stability and underground ground control. They were conducted at the MSHA Academy in Beckley, West Virginia, and in Michigan (Tr. 155-56).

Respondent's pit manager, Scott Hughes, has been mining at the same site since the late 1970's (Tr. 215, 230). He testified that the highwall consisted of conglomerated rock, or "basically a bunch of rocks glued together" (Tr. 231-32). He stated further that he blasted the rock in the area cited by Tanner and then inspected to determine whether there was any loose material (Tr. 236). After blasting, Hughes contends he had a bulldozer attempt to pull out the rocks protruding from the wall and could not even wiggle them (Tr. 236). He therefore concluded that it was safe for the bulldozer to scrape away dirt to lower that section of the highwall (Tr. 237).

Comparing the testimony of the Inspector Tanner and Pit Manager Hughes, I conclude that the Secretary has failed to meet its burden of proving that there was loose or unconsolidated material in the highwall that posed a hazard to

Respondent's employees. I therefore vacate the penalty proposed for Citation/Order No. 4120702<sup>3</sup>.

Citation No. 4120693: Failure to Wear Seat Belt

On the morning of November 3, 1993, Inspectors Nielsen and Tanner observed the driver of one of Respondent's front-end loaders operate his vehicle without wearing his seat belt (Tr. 42-43, 144-45, 156-57). The driver told Nielsen that he did not always wear his seat belt because it hurt his back (Tr. 43)<sup>4</sup>.

Nielsen issued a section 104(d)(1) citation alleging a "significant and substantial" (S & S) violation of 30 C.F.R. § 56.14130(g), due to Respondent's "unwarrantable failure" to comply with the regulation and "high" negligence. A civil penalty of \$1,800 was proposed for this citation.

The S & S allegation was based in part on the fact that the front-end loader was operating in areas in which the berm on the side of the road was inadequate and was feeding a crusher in an area where there was no bumper block (Tr. 29-39, 144-46). I conclude that the record establishes an S & S violation of the standard pursuant to the criteria set forth by the Commission in Mathies Coal Co., 6 FMSHRC 1 (January 1984). Specifically, I find that given the area in which the front-end loader was operating, an injury due to the driver's failure to wear a seat belt was reasonably likely. It was also reasonably likely that the injuries sustained would have been of a reasonably serious nature.

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<sup>3</sup>Inspector Tanner also stated that as he interprets the cited standard, it prohibits miners from working underneath any overhang where blasting has occurred recently (Tr. 205). Section 56.3131 does not so provide explicitly and the record does not establish that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that working beneath the highwall in this case violated the standard, Ideal Cement Company, 12 FMSHRC 2409 (November 1990).

<sup>4</sup>I find it unnecessary to determine whether Pit Manager Scott Hughes told Nielsen that he left the use of seat belts up to his employees (Tr. 50, 226). I do not find credible Scott Hughes' testimony that the driver had just gotten back into his vehicle and had not had a chance to put on his belt before the citation was issued (Tr. 223-24).

On the other hand, I conclude that the Secretary has not established an "unwarrantable failure" to comply with the regulation or "high" negligence. I credit Scott Hughes' testimony that Respondent's policy was that drivers were to wear seat belts and that this policy was verbally communicated to its employees (Tr. 223-24, 226-27).

While employee misconduct or disregard of company safety rules is no defense to an MSHA citation, it may be relevant to the degree of negligence imputed to the operator and the size of the civil penalty assessed, Mar-Land Industrial Contractors, Inc., 14 FMSHRC 754 (May 1992). I affirm this violation as a section 104(a) citation and conclude that it was due to the ordinary negligence of Respondent. Considering the six criteria in section 110(i) of the Act, a civil penalty of \$600 is appropriate.

I assess this penalty primarily on the basis of the gravity of the violation, which I regard as quite high, and the negligence of Respondent. Although, as Mr. Hughes contends, it is not reasonable to expect Respondent to fire a competent driver every time one is observed without a seat belt, there are effective means of discipline short of discharge.

A graduated punishment scheme, including verbal and written warnings and monetary penalties, might well achieve nearly universal compliance with company safety rules. Since Scott Hughes was aware that his drivers failed to wear seat belts prior to the issuance of this order (Tr. 222-23), his negligence in not implementing a more effective disciplinary system warrants assessment of a civil penalty of \$600.

Order Nos. 4120704 and 4120705: Were records made available to the Secretary?

Inspector Nielsen issued Order Nos. 4120704 and 4120705 pursuant to 30 C.F.R. §56.12028 and §56.18002(b), after asking Respondent for records pertaining to the continuity and resistance of its electrical grounding systems, and workplace examinations. According to Nielsen and Tanner, Respondent initially told them they had to have an appointment to see these records (Tr. 72, 76, 175). Both inspectors also testified that the company records were brought to the closing conference at the end of the inspection on November 4, 1993, but that they were unable to look at the records due to confrontational behavior on the part of Glenn Hughes, Respondent's owner (Tr. 74, 199).

The cited regulations provide that the records shall be made available to the Secretary or his duly authorized representative. They do not require that the records be

maintained at the mine site and do not specify how long after a request the records must be produced. Had these records been made available on November 4, at the closing conference, it would be necessary to decide whether the records were made available within a reasonable amount of time following the request. However, since I credit the inspectors' testimony that they were prevented from examining the records, I conclude that Respondent violated the standards.

The Secretary proposed penalties of \$700 for each of these two orders. Pursuant to the criteria in section 110(i) of the Act, particularly the good faith factor<sup>5</sup>, I assess a civil penalty of \$500 for each of these orders. Regardless of its disagreement with the inspectors as to the requirements of the standard, Respondent was obligated to allow MSHA to inspect its continuity and workplace examination records. Its interpretation of the standard's requirements can be appropriately handled through the Act's review procedures. Therefore, its unwillingness to allow for review of the records at the closing conference warrants the characterization of "unwarrantable failure" and the penalties assessed.

Citation No. 4120692: Absence of a bumper block

Inspector Nielsen issued Citation No. 4120692 to Respondent because he observed no bumper block in front of the crusher plant (Tr. 23). Respondent's front-end loaders were travelling up a ramp to the crusher plant with material. Nielsen was concerned that the loaders would hit the feed plant and weaken it (Tr. 24).

The citation was issued pursuant to 30 C.F.R. §56.9301, which requires that berms, bumper blocks or other restraining devices be provided at dumping locations where there is a hazard of overtravel or over-turning. Respondent's defense to this citation is that the plant extended eight to ten feet above the ground level at the crushing plant and that it was so firmly embedded into the embankment that its equipment could not push it over (Tr. 219-20).

I affirm the citation because the standard is intended to prevent not only a single instance of overtravel, but also the potential of repeated bumping of such structures which could ultimately produce injury. Exhibit No. 2-A indicates that the portion of the plant protruding above the embankment was subject to damage from repeated contact with heavy equipment.

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<sup>5</sup>One of the six statutory criteria is "the good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

Such contact could, at some point, cause the structure to break and cause a vehicle to go over the embankment. Therefore, I affirm the citation and assess a civil penalty of \$50, which was proposed by the Secretary.

Citation No. 4120694: Inadequate berm on side of ramp

Inspector Nielsen observed one area of the ramps travelled by Respondent's equipment where the berm on the side measured 16 to 24 inches in height, and another area in which there was no berm at all (Tr. 29-30). MSHA's regulations at 30 C.F.R. §56.9300 require that berms or guardrails be provided and maintained on roadways with a sufficient drop-off to cause a vehicle to overturn or endanger miners in equipment.

There was a sufficient drop-off in the areas cited that a berm was required (Tr. 33-36, 243, Exh. No. 3-B). When berms are required they must be mid-axle height of the largest vehicles that usually travel the roadway (section 56.9300(b)). The ramps cited by Nielsen were regularly travelled by front-ends loaders with a mid-axle height of 36 inches (Tr. 31-32).

I affirm the citation as an S & S violation of the Act and assess a civil penalty of \$100. The frequency with which these ramps were travelled persuades me that it was reasonably likely that an accident could occur due to the absence and/or inadequacy of the berms. The fact that one of the loader operators was not wearing a seat belt persuades me that it was also reasonably likely that injuries that might occur would be of a serious nature (Tr. 36).

Citation No. 4120700: Records regarding defective back-up alarm

At 10:45 a.m. on November 3, 1993, the back-up alarm on one of Respondent's front-end loaders was not working (Tr. 39-41). The vehicle operator told inspector Nielsen that he was not aware that he was required to check the back-up alarm (Tr. 39-40).

Nielsen then issued Respondent Citation No. 4120700 alleging a violation of 30 C.F.R. §56.14100(d). That regulation requires that defects on such equipment that are not corrected immediately shall be reported to and recorded by the mine operator.

There is no indication as to how long this back-up alarm was not working. Pit Manager Scott Hughes testified that the alarm was working at the beginning of the workshift on November 3, and that the alarm was repaired that afternoon (Tr. 220-223, 257-58).

While Respondent may have been in violation of §56.14100(a), which requires a pre-shift inspection of its vehicles by the operator, it was cited for not having records of a defective condition. However, records are required under §56.14100(d) only for defects which are not corrected immediately. Since there is no evidence that the defective back-up alarm was not fixed immediately, I vacate Citation No. 4120700 and the \$50 penalty proposed therefor.

**ORDER**

**Docket No. WEST 94-308-M**

Citation No. 4120692 is affirmed and a civil penalty of \$50 is assessed.

Citation No. 4120694 is affirmed as a S & S violation and a civil penalty of \$100 is assessed.

Citation No. 4120700 and the penalty proposed therefor is vacated.

**Docket No. WEST 94-309-M**

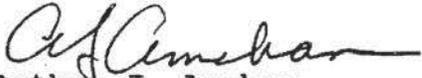
Citation No. 4120693 is affirmed as a S & S violation of section 104(a) of the Act and a civil penalty of \$600 is assessed.

The penalty proposed for Citation/Order No. 4120702 is vacated.

Order No. 4120704 is affirmed and a civil penalty of \$500 is assessed.

Order No. 4120705 is affirmed and a civil penalty of \$500 is assessed.

Respondent is ordered to pay the assessed civil penalties of \$1,750 within 30 days of this decision and order. Upon such payment these cases are dismissed.

  
Arthur J. Amchan  
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 30 1995**

BIRCHFIELD MINING, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 91-345-R
	:	Order No. 3751389; 3/14/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine No. 1
ADMINISTRATION (MSHA),	:	
Petitioner,	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-2076
Petitioner	:	A.C. No. 46-07273-03558
v.	:	
	:	Mine No. 1
BIRCHFIELD MINING, INC.,	:	
Respondent	:	

**DECISION**

Appearances: David J. Hardy, Esq., Jackson & Kelly, Charleston,  
West Virginia, for Contestant;

Patrick L. DePace, Esq., Office of the Solicitor,  
U.S. Department of Labor, for Petitioner,  
Arlington, Virginia.

Before: Judge Fauver

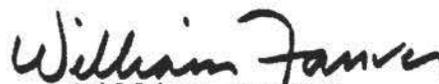
These cases involve a § 104(d)(1) order under the Federal  
Mine Safety and Health Act of 1977, 30 U.S.C. § et seq.

At the hearing the parties moved for approval of a  
settlement.

Having considered the reasons and documentation submitted, I  
conclude that the settlement is consistent with the purposes of  
the Act. Accordingly, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty of \$800.00 within 30 days of this decision. Upon such payment the cases are dismissed.

  
William Fauver  
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 31 1995

PEABODY COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 94-430-R
	:	Citation No. 3861948; 2/16/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Martwick Underground Mine
ADMINISTRATION (MSHA),	:	I.D. No. 15-14074
Respondent	:	
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1062
Petitioner	:	A.C. No. 15-14074-03664
v.	:	
	:	Martwick Underground Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Secretary of Labor;  
David R. Joest, Esq., Henderson, Kentucky for Peabody Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., the "Act", to challenge two citations issued by the Secretary of Labor against the Peabody Coal Company (Peabody). At hearing the parties moved for approval of a settlement of citation No. 3857222 proposing a reduction in penalty from \$168 to \$100. The settlement was approved at hearing upon consideration of the representations and documentation submitted and an order directing payment of the agreed penalty will be incorporated in this decision.

Order No. 3861948, issued pursuant to section 104(d)(2) of the Act, charges a violation of the mandatory standard at 30 C.F.R. § 75.507 and charges as follows: <sup>1</sup>

Power connection points which consist of the following are located in return air: belt drive motors, transformers, diesel equipment, and battery powered equipment. Return air is being coursed out the limited intake entries (beltline, supply road) of the second east panel off the northeast submain. This air has passed the working force on #1 unit. The air volume in the last open crosscut between entries No. 1 and No. 2 is 13,426 cubic feet per minute and the air volume at the return split located two crosscuts inby the

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<sup>1</sup> Section 104(d) of the Act provides as follows:

(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 citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issue 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 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.

return regulator is 11,786 cubic feet per minute. Chemical smoke was released at the #1 unit's check curtain and airlocks. The smoke traveled in an outby direction over power connection points. The airlock in #2 entry is off the mine floor approximately one foot and air is flowing outby through this air lock. The operator's records and ventilation map submitted to District 10 office indicate this condition exists.

The cited standard provides that "[e]xcept where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air."

Inspector Troy Davis of the Mine Safety and Health Administration (MSHA) issued the subject order on February 16, 1994, at the Peabody Martwick Mine. In the No. 1 unit he found that air from the face areas was leaking through "airlocks" or temporary brattices into the neutral entries, called "limited intake entries" by Davis. Davis used a smoke tube to verify that air from the faces was entering the neutral entries. It is undisputed that this air had passed at least one working face. Peabody does not dispute that these facts constitute a violation as alleged but maintains that the violation was not the result of its "unwarrantable failure". "Unwarrantable failure" has been defined as conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987).

The Secretary maintains that the violation was the result of Peabody's unwarrantable failure because the violative condition was "obvious and continued over a significant period of time". In particular, the Secretary cites a mine ventilation map submitted by Peabody to MSHA on January 28, 1994, and certified as accurate by Peabody officials on January 1, 1994, which shows a greater air volume in the last open crosscut of the unit (intake side) than in the unit's split return (where the unit's return air rejoins the main or submain return). According to Inspector Davis, someone at the mine should have examined these readings and detected a problem. As Peabody points out in its brief, however, Inspector Davis assumed in reaching this conclusion that the ventilation map air readings were all taken on January 1, 1994, and were certified by Peabody's registered professional engineer as being accurate as of that date. He further based this assumption on the engineer's undated certification that the map was "true and correct" . . . as required by 30 C.F.R. § 75.372 . . ." and a statement on the map that "mine workings are posted as of January 1, 1994".

However, James Roberts, the professional engineer who certified the maps, testified credibly that the air readings on

the ventilation map were not all taken on January 1, 1994, but could have been taken anytime between January 1, 1994, and January 28, 1994. Accordingly, the differences between the readings would not provide a valid measure of whether return air was entering the neutral entries. Moreover, Roberts notes that the certification on the map is not intended to mean that the air readings were all taken on January 1, 1994, but that the language on the map that "mine workings are posted to January 1, 1994" means only that the worked-out areas shown on the map are current as of that date. Roberts observed that, if such readings were to be used to determine whether return air was being coursed through the neutral entries, he would make sure that simultaneous readings were taken. However, he was never told that MSHA would try to use the readings in this manner.

It is clear from the credible testimony of Peabody's expert, James Roberts, that the Secretary's reliance upon the purported disparities appearing in the January 1994 ventilation map is misplaced. Accordingly, it cannot reasonably be inferred that Peabody had knowledge of the existence of the instant violation as early as January 1, 1994, when that map was "certified" and the evidence cannot, therefore, provide a basis for unwarrantability.

It is also noted that although a previous ventilation map submitted by Peabody in July 1993 had shown similar disparities as the more recent ventilation map, MSHA approved the map without comment or enforcement action against Peabody. It is for this additional reason inappropriate for the Secretary to now suggest that Peabody's inaction based on similar disparities in the air readings was the result of its "unwarrantable failure".

The Secretary next argues, as a basis for unwarrantability, that the violative condition was "obvious and continued over a significant period of time" based on records of a February 14, 1994, weekly examination and the February 14, 1994, and February 16, 1994, pre-shift examinations. The Secretary maintains that since Peabody's mine manager had reviewed and countersigned the February 14, 1994, air readings "due diligence dictates that, at the least, Peabody should have monitored its own weekly return split air readings with the pre-shift last open crosscut air readings taken on the same day to determine whether this violative condition was occurring." The Secretary maintains that such a comparison of air readings would also have alerted mine officials to the existence of this violative condition.

As Peabody observes, however, regulatory standards governing weekly and pre-shift examinations do not require or even suggest that air readings from different examinations should be cross checked. As Peabody also notes there is no evidence that such cross-checking is even an accepted industry practice or has ever been recommended by the Secretary. Indeed, the inspector himself

compared the weekly and pre-shift examination reports only after being alerted to the possibility of a violation due to his misinterpretation of the ventilation map.

Within the framework and circumstances of this case, I must agree with Peabody. It cannot, therefore, be said that Peabody was grossly negligent or was involved in an aggravated omission amounting to "unwarrantable failure" by failing to cross-check the cited weekly and pre-shift examinations on February 14 and 16, 1994.

The Secretary further argues that on the day of the inspection the inspector observed that the check and back-curtains for the neutral entries at the working section were standing toward the outby direction. According to the Secretary this is an "obvious physical indication" that return air was escaping into the neutral entries. Peabody counters, however, that the inspector acknowledged that it is not possible to distinguish intake and return air movement underground which is why he used chemical smoke to verify the violation. Peabody further notes, and it is undisputed, that the miners had already been taking corrective measures to tighten ventilation curtains before the inspector arrived. Accordingly, I cannot find that the position of the check curtains alone is sufficient to warrant a finding of aggravated circumstances amounting to "unwarrantable failure".

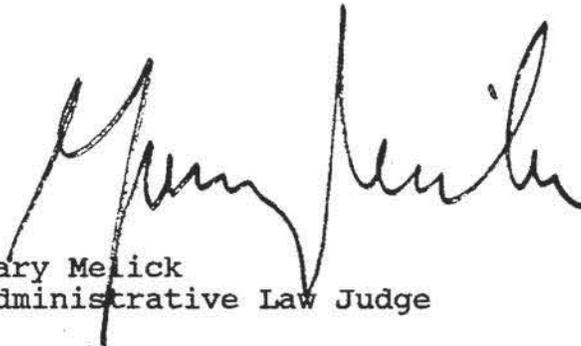
The Secretary, in support of his claim of unwarrantability, has argued, in addition, that the inspector found when he "arrived on the section, [that] there were men running around, dragging curtains, trying to tighten up air locks and stuff [sic] on the belt and supply road entries." The Secretary's unexplained position at hearing was that these remedial efforts were evidence of "unwarrantable failure". I disagree. Such remedial efforts to abate a problem before observed or cited by an inspector clearly indicates appropriate corrective action and not negligence.

Finally, the Secretary maintains that "unwarrantable failure" may be found on the "general history of this same violation" at the Martwick Mine. The Secretary relies on prior violations of the standard cited herein occurring on August 13, 1991, August 27, 1991, October 26, 1992 and April 7, 1993, i.e. four violations in the 30 months preceding the violation at issue. I note in particular that there had been no violations of the cited standard for the 10 month period preceding the date of the violation at issue. Under the circumstances I do not find that such a history warrants the aggravated findings necessary to constitute "unwarrantable failure". Compare Peabody Coal Company, 14 FMSHRC 1258 at 1263 (1992) wherein 17 violations of the cited standard in six and one-half months was appropriately considered as evidence of unwarrantability.

Under all of the circumstances, I cannot conclude that the Secretary has met his burden of proving that the violation herein was the result of Peabody's "unwarrantable failure" and, accordingly, the order herein must be modified to a citation under section 104(a) of the Act. I do find, however, that the violation was the result of moderate negligence. Consistent with the Secretary's position I further conclude that the violation was neither "significant and substantial" nor of high gravity. Considering the criteria under section 110 (i) of the Act, I conclude that a civil penalty of \$250 is appropriate for the violation herein.

**ORDER**

Citation No. 3857222 is hereby affirmed and Peabody Coal Company is directed to pay a civil penalty of \$100 within 30 days of the date of this decision for the violation therein. Order No. 3861948 is hereby modified to a citation under section 104(a) of the Act and Peabody Coal Company is directed to pay a civil penalty of \$250 for the violation therein within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge

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