FEBRUARY 1988

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

FEBRUARY 1988

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

Secretary of Labor, MSHA v. Birchfield Mining Inc., Docket No. WEVA 87-272. (Judge Melick, December 29, 1987)

Greenwich Collieries v. Secretary of Labor, MSHA, Docket No. PENN 85-188-R, etc. (Interlocutory Review of Judge Maurer's Partial Summary Decision of December 7, 1987)

Review was denied in the following case during the month of February:

Secretary of Labor, MSHA on behalf of Richard W. Haviland v. Occidental Chemical Co., and International Chemical Workers Union, Docket No. SE 87-44-DM, SE 87-89-DM. (Judge Broderick, December 30, 1987)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1988

HARLAN L. THURMAN	:	
	:	
v.	:	Docket No. SE 86-121-D
	:	
QUEEN ANNE COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Commission Administrative Law Judge Avram Weisberger dismissed a discrimination complaint filed by Harlan L. Thurman. 9 FMSHRC 419 (March 1987) (ALJ). We granted Thurman's petition for discretionary review, which he prepared without assistance of counsel. For the reasons that follow, we conclude that the judge's findings are supported by substantial evidence and are consistent with applicable law. Accordingly, we affirm.

Prior to March 1986, complainant Thurman had been employed continuously for three years on the nighttime maintenance shift at the underground coal mine of Queen Anne Coal Company ("Queen Anne"). As part of a four-person supply and maintenance crew, Thurman remained on the surface at the beginning of each shift in order to load supplies on the belt conveyor and to transport them into the mine for the other crew members to unload. Upon completion of this task, Thurman would reverse the belt conveyor for the crew's eventual exit and crawl unaccompanied to the working section to complete his shift. Once Thurman entered the mine, no employee remained on the surface at the mine entrance to be within telephone contact of the miners below. 1/

1/ According to the testimony of Queen Anne's president, Bob Swisher, it had been the practice for eight or nine years to have only a night watchman on the surface while the non-production night shift was underground. He testified that the telephone communication system for the mine had been approved by the Department of Labor's Mine Safety and Health Administration, but admitted that the night watchman, who was five miles away near the locked gate of the mine property, was not in telephone communication with the miners underground. Tr. 168, 173-77,

According to Thurman's testimony at the hearing, he was harassed persistently by the two other crew members and the shift foreman, Crawford Harness, during his three-year period of employment. While the greater part of Thurman's complaints concerned episodes of personal harassment, 2/ Thurman also testified to two occasions of being directed by Harness to work alone in an adjacent underground section and another when Harness operated a continuous mining machine to make a crosscut without anyone remaining on the surface.

On March 6, 1986, Thurman began his shift as usual at 4:30 p.m., but left early at 10:30 p.m. without notifying the other members of the crew. The next morning, Friday, March 7, he appeared at the mine office and told Emory Haggard, the bookkeeper and one-third owner of Queen Anne, "what had been going on and some of the stuff that had been happening." Tr. 32. In response, Haggard arranged for Thurman to meet with Bob Swisher, the mine president, the following Monday, March 10.

Thurman and his wife met with Swisher as scheduled. Upon hearing some of Thurman's complaints, Swisher agreed to Thurman's request to arrange a meeting with all the crew members on Thursday, March 13. At this latter meeting, Thurman repeated the allegations of harassment and other complaints that he had presented to Swisher on March 10, including his concern about the lack of an outside person. Tr. 31, 35. The other crew members admitted to a few episodes of so-called "horseplay," but denied the allegations of harassment. Tr. 256, 290, 322. In response, Swisher admonished the crew members that he would not tolerate any horseplay. Tr. 77-78, 156.

Near the close of the meeting, Swisher repeated a story that he had told the Thurmans on March 10 about a fatal accident involving another mine employee, who was killed when he applied a blow torch to a fuel storage tank he had failed to flush. According to Swisher, the miner had been suffering from emotional problems. Swisher testified that he told the story in order to relate his personal efforts in helping the miner to return to work prior to the accident and to demonstrate how much he personally cared for the welfare of his employees. Tr. 150-52.

At the conclusion of the meeting on March 13, Swisher suggested to Thurman that he return to work on the night shift and it was the understanding of all in attendance that Thurman intended to do so.

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190. 30 C.F.R. § 75.1600-1 requires a mine operator to have a telephone or equivalent two-way communication facility located on the surface within 500 feet of all the main portals. At least one of the communication facilities must be located where a responsible person on duty at all times when miners are underground can hear the communication facility and respond immediately in the event of an emergency.

2/ The personal harassment recounted by Thurman included such episodes as tying his clothes in knots, pouring dish washing liquid on his clothes, locking him into the mine property, putting grease on the seat of his truck, placing logs under the wheels of his truck, and breaking a headlight on his truck. Tr. 42-43.

Shortly after leaving the meeting, however, Thurman returned to Swisher's office to request a lay-off slip and to tell Swisher and the mine superintendent, Demp Lindsay, that he could no longer work underground with the men on the shift. He stated that he feared for his life because Lindsay and Harness had been friends for 20 years, drank together, and were "a clique." Tr. 107-08. Swisher refused to issue Thurman a lay-off slip because work was available. Nevertheless, Swisher instructed Lindsay to try to find Thurman a job on Queen Anne's day shift. Tr. 187, 246. Lindsay was not successful in persuading anyone on the day shift to switch to the night shift, but he did inform Thurman shortly thereafter of an underground job opening on the day shift at the nearby S&H Coal Company. S&H is owned in part by Swisher, and Thurman had worked there previously. Tr. 246-47. Thurman did not return to work at Queen Anne after he left in the middle of his shift on March 6, nor did he seek employment at S&H. He subsequently obtained other non-mining employment.

After departing Queen Anne, Thurman filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). 30 U.S.C. § 815(c)(2). After investigation, MSHA determined that a violation of the Mine Act had not occurred and declined to prosecute a complaint on Thurman's behalf. 30 U.S.C. §§ 815(c)(2) & (3). Thurman then filed a complaint on his own behalf before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3).

Following an evidentiary hearing, Administrative Law Judge Weisberger concluded that Thurman had failed to establish a prima facie case of discrimination. The judge found that Thurman's complaints about the lack of an outside person and the operation of a continuous mining machine contained allegations of safety violations and were protected activities. 9 FMSHRC at 422. He further found that the balance of Thurman's complaints were either allegations of personal harassment or were not safety-related and, thus, were not complaints protected by the Mine Act. Id. However, the judge determined that Queen Anne had not taken any adverse action against Thurman that was in any part motivated by his safety complaints, since there was no evidence that Thurman made any complaints about these conditions to MSHA or management prior to his leaving work on March 6. 9 FMSHRC at 423-24. He further found that Swisher's suggestion to Thurman on March 13 that he return to his section was not a constructive discharge. 9 FMSHRC at 423. The judge also rejected Thurman's apparent argument that Queen Anne's practice of operating without an outside person continued to be an adverse action, concluding that the failure to provide a miner with a safe work place may be a violation of the Act but does not, without more, constitute discrimination. 9 FMSHRC at 424. Therefore, the judge dismissed Thurman's discrimination complaint.

On review, Thurman essentially challenges the judge's factual findings. The Commission's role in reviewing a judge's decision is to determine whether his factual findings are supported by substantial evidence and whether the judge correctly applied the law. 30 U.S.C. § 823(d)(2)(A)(ii). See, e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1628 (November 1986). After reviewing the record, we conclude

that the judge's decision is supported by substantial evidence and is consistent with applicable Commission precedent.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co v. Marshall, 633 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

We first consider whether Thurman engaged in protected activity. While a reading of the record reveals that Thurman's most emphatic complaints involved allegations of personal harassment, Thurman did communicate to Swisher his concern about the lack of an outside person at the meetings on March 10 and 13. Tr. 30-32. He also informed Swisher of the episode when Foreman Harness had operated the continuous mining machine while no one remained on the surface. Tr. 198-99. These concerns focused on the safety implications of operating a shift without a responsible person on duty at a surface communication facility to respond to the miners underground in the event of an emergency as required by 30 C.F.R. § 1600-1 (note 1, supra). Therefore, we affirm the judge's conclusion that these allegations of safety violations were protected complaints and conclude that Thurman established the first element of a prima facie case of discrimination.

As to the second element of a prima facie case, however, we agree with the judge that Thurman failed to show that there was adverse action by Queen Anne motivated in any part by his safety complaints. When Thurman voluntarily walked off his shift on March 6, he did so without notice or contemporaneous explanation to the other crew members or to mine management. Subsequent to his leaving, the operator responded supportively to Thurman's complaints. When Thurman appeared at the mine office the next day, arrangements were made for a meeting with Swisher. On March 10, Swisher heard Thurman's complaints for the first time and agreed to Thurman's request for a meeting with all the miners on the shift. At that meeting on March 13, Swisher admonished the other crew members against "horseplay" and offered to put Thurman back to work on

the night shift. After Thurman returned to Swisher's office to request a lay-off slip, Swisher instructed the mine superintendent to try to place Thurman on Queen Anne's day shift. When that effort failed, the mine superintendent informed Thurman of a position on the daytime production shift at nearby S&H Mine.

These actions do not reveal a retaliatory motive by the operator. The record indicates that when confronted with Thurman's complaints Swisher responded in good faith to remedy what he thought was essentially an unfortunate interpersonal conflict among his employees. Thurman was not fired, demoted or transferred as a result of his complaints to Swisher. To the contrary, Swisher attempted to accommodate Thurman's requests. Therefore, we conclude that substantial evidence supports the judge's finding that there was no adverse action on the part of Queen Anne resulting from an impermissible motive of retaliation against Thurman for engaging in protected activities. 3/

Finally, even if Thurman's actions in leaving Queen Anne's employment on March 13 are analyzed from the standpoint of a continuing complaint, a work refusal, or a constructive discharge, the result would be the same. The evidence reveals that the operator reacted to Thurman's concerns in a reasonable and supportive manner. Although the effort to find a position for Thurman on Queen Anne's day shift failed, the operator offered alternative employment at S&H. As far as this record indicates, such employment would have served to resolve Thurman's conflict with his co-workers at the Queen Anne mine and also should have alleviated his concern about working underground without an outside person, absent any indication of a similar violative condition on the S&H daytime production shift.

Further, our review of the record suggests an unwillingness on Thurman's part to consider or accept any of the operator's efforts in response to his complaints, with the possible exception of his desire for reassignment to the day shift as an outside person. Tr. 129-30. The record suggests that Thurman's personal dissatisfaction with the members of his crew and mining in general was a strong motivation for his leaving Queen Anne's employment. Id. When he requested his lay-off slip, Thurman told Swisher that he "could not work with those men." Tr. 66, 79. Also, Lindsay, the mine superintendent, testified that when he informed Thurman of the day-shift position at S&H, Thurman requested a letter of recommendation for non-mining employment and told Lindsay that he was through with mining. Tr. 223.

3/ Thurman also suggests on review that Swisher's tank explosion story was meant as a threat on his life. As noted, Swisher testified that he told the story to demonstrate his concern for his employees. Nothing in the record suggests that Swisher's telling of the story was an impermissible interference or adverse action motivated in any part by Thurman's complaints. In addition, there is no evidence in the record to suggest that Swisher's offer to Thurman that he return to the night shift was calculated to force him to quit or was impermissibly motivated by his complaints.

We do not intend to diminish the significance of the violative condition at the Queen Anne mine suggested by this record. The obligation imposed on an operator by the requirement of 30 C.F.R. § 75.1600-1 that there be an outside person to respond to miners underground in the event of an emergency is an important requirement and any violation of the standard has serious safety implications. However, the present matter is a discrimination case, not an enforcement proceeding brought by the Secretary of Labor for a violation of this mandatory standard. Given the judge's finding of the absence of any wrongful action under section 105(c) of the Mine Act by the operator for Thurman's safety-related activities, a finding supported by substantial evidence, the dismissal of Thurman's discrimination complaint must be affirmed.

For the foregoing reasons, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1988

SOUTHERN OHIO COAL COMPANY	:	
	:	
v.	:	Docket Nos. WEVA 86-35-R
	:	WEVA 86-48-R
SECRETARY OF LABOR,	:	WEVA 86-102
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act") and presents three issues: (1) whether substantial evidence supports Commission Administrative Law Judge William Fauver's finding of a violation of 30 C.F.R. § 75.200; (2) whether the violation, alleged in a section 104(d)(2) withdrawal order, was caused by Southern Ohio Coal Company's ("Socco") "unwarrantable failure" to comply with section 75.200; and (3) whether the judge erred in failing to modify a second section 104(d)(2) withdrawal order to a section 104(a) citation. For the reasons that follow, we affirm the judge's finding of a violation of section 75.200, reverse the finding of unwarrantable failure, and modify the section 104(d)(2) withdrawal orders to citations issued pursuant to section 104(a).

I.

Socco's Martinka No. 1 Mine is an underground coal mine located in Fairmont, West Virginia. On the evening of October 10, 1985, David Workman, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine, during which he observed a recently excavated "boom hole" in the roof. 1/ The boom hole, located at the intersection of a crosscut and an entry, extended approximately three feet into the roof and was 15½

1/ A "boom hole" is an area of the mine where a portion of the roof has been intentionally cut away in order to increase height or clearance. June 18 Tr. 134.

feet long by 19½ feet wide. The hole was cut earlier that day by a continuous mining machine in order to prepare the area as a belt transfer or dumping point. As a result of the excavation, four "brows" or edges were created, one on each side of the boom hole. 2/ After excavating the boom hole Socco had installed bolts in the roof of the boom hole. The bolts that were in the brows were those that had been placed in the roof of the intersection prior to the excavation of the boom hole.

In Inspector Workman's view, two of the four brows of the boom hole were not adequately supported because roof bolts were located too far from the edges of the brows. The four bolts on one of the brows were 2', 2'5", 2'5", and 2'5" from its edge, while the four bolts on the other brow were 1'2", 2', 1'8" and 2'2" from its edge. The inspector testified that in this mine bolts average 12 to 14 inches from the edge of a boom hole brow and that he uses a two-foot standard as the point at which he considers bolts to be too far from the edge. June 19 Tr. 74, 77-78. The inspector further stated that the condition of the brows should have been observed by Socco's personnel during one of the required preshift or on-shift examinations conducted after the boom hole was cut. As a result of his observations the inspector issued an order of withdrawal to Socco (Order No. 2564613) pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 3/ The order alleged a violation of section 75.200 and that the violation was caused by Socco's unwarrantable failure to comply with that standard. 4/ Socco abated the

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2/ "Brows" are the adjacent roof or sides of the boom hole that have not been cut away. Govt. Exh. 6, p. 2.

3/ A section 104(d)(2) withdrawal order is issued subsequent to an issuance of a section 104(d)(1) withdrawal order upon findings by an inspector of a violation of any mandatory health or safety standard caused by the unwarrantable failure of the operator to comply. Section 104(d)(2) of the Mine Act states:

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

30 U.S.C. § 814(d)(2).

4/ Section 75.200, which restates section 302(a) of the Mine Act, 30

section 75.200 violation by installing additional bolts closer to the edges of the two brows.

Socco contested the order, asserting that it was not in violation of section 75.200 and that, in any event, the violation was not the result of its unwarrantable failure to comply with the regulation. Following an evidentiary hearing, the judge credited the testimony of the inspector and the miners' representative that the two brows should have been bolted closer to the edge to provide adequate support. 8 FMSHRC at 2011. The judge concluded that their testimony was sufficient to establish that the two brows were not adequately supported. 8 FMSHRC at 2012.

In concluding that the violation of section 75.200 was the result of Socco's unwarrantable failure to comply, the judge determined that debris from the excavation prevented the roof bolters from getting the roof bolting machine into position so as to install the bolts; that the foreman and roof bolters knew or should have known that additional bolts were needed closer to the brows' edges; and that there was no justification for leaving the job incomplete. 8 FMSHRC at 2013. In addition, the judge concluded that the "inadequate bolting pattern" should have been observed during one of the required preshift or on-shift examinations. 8 FMSHRC at 2013-14.

II.

Socco contends that the finding of a violation of section 75.200 is not supported by substantial evidence, since it did not violate any provision of its roof control plan and, in any event, it adequately supported the brows. Socco asserts that there is no common understanding within the mining industry as to how close to the edge the brows of a boom hole should be bolted. Furthermore, it submits that the witnesses for both parties agreed that the brows were stable at the time the order was issued and that the roof was above-average.

The fact that Socco did not violate its roof control plan is not controlling for purposes of determining the existence of the violation

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U.S.C. § 862(a), provides in part:

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

(Emphasis added.)

at issue. Section 75.200 requires both compliance with a roof control plan approved by the Secretary and that the roof be supported or otherwise controlled adequately. An operator's failure to comply with either requirement violates the standard. See North American Coal Corp., 3 IBMA 93, 103 (April 1974); Zeigler Coal Co., 2 IBMA 216, 222 (September 1973).

Here, the violation of section 75.200 is predicated upon the standard's requirement that the roof and ribs be supported or otherwise controlled adequately. Liability under this part of the standard is resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the adequacy of particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987). Cf. Ozark-Mahoney Co., 8 FMSHRC 190, 191-92 (February 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983). Measured against this test, we hold that substantial evidence supports the judge's conclusion that two brows of the boom hole were not supported adequately.

In concluding that Socco violated section 75.200, the judge credited the testimony of the inspector and the miners' representative. The inspector testified that the brows, being approximately 2 feet wide by 15½ feet long on each side, needed additional bolting closer to the brow edges. June 18 Tr. 143. In reaching this determination, the inspector stated that he was influenced by the mine's history of roof falls and the fact that the roof material in this area of the Martinka No. 1 mine was slate, which lacks interlocking qualities. June 18 Tr. 134, 139, 142, 150, 159. 5/ The inspector was concerned that the weight of the slate on the brows, without additional support, could reasonably be expected to cause the brows to loosen, crack and fall. In this regard, the inspector stated that the cutting of the boom hole by the continuous mining machine had already subjected the roof to excessive vibration. June 18 Tr. 167. He testified that in situations such as the one cited roof bolts are "always [put] right along the edge of the brow" in order to provide adequate support. June 18 Tr. 143.

The testimony of the roof bolter who served as miners' representative during the inspection corroborated that of the inspector. The miners' representative stated several times that Socco's foremen instruct the roof bolters of the mine to bolt as close to the brows' edges as possible, because "that is where they're supposed to be." June 18 Tr. 184. See also June 18 Tr. 179, 189. Testimony by Socco's safety director lends further support for the inspector's views. He stated that the average distance of bolts from the brow edges of other boom holes that he had observed was "around one foot, four inches" (June 19

5/ Slate is "[a] fine-grained metamorphic rock which breaks into thin slabs or sheets." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1024 (1968).

Tr. 29-30). This distance is consistent with the inspector's belief that brows must be bolted within two feet of their edges to provide adequate support.

In view of the inspector's testimony, the testimony of the miners' representative that brows should be bolted as close to their edges as possible, and the safety director's acknowledgement that most brows observed by him had been bolted closer to their edges than the cited brows, we conclude that substantial evidence supports the judge's finding that the brows were not supported adequately and, consequently, that Socco violated section 75.200.

III.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), petition for review filed, No. 88-1019 (D.C. Cir. January 11, 1988), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), we concluded that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, the Act's legislative history and judicial precedent. We stated that whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable". Only by construing unwarrantable failure by a mine operator to mean aggravated conduct constituting more than ordinary negligence, can unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme. See Emery, at 2001. Applying these principles to the case at hand, we hold that substantial evidence does not support the judge's finding that the violation of section 75.200 was the result of Socco's unwarrantable failure to comply.

Witnesses for both parties agreed that the roof control plan for the Martinka No. 1 mine did not address specifically the support required for the brows of boom holes, and that MSHA had not issued any policy memoranda on the proximity of roof bolts to the edges of brows. In addition, all witnesses, including the Secretary's, agreed that the brows appeared stable at the time that the order was issued.

Witnesses for Socco testified that at the Martinka No. 1 mine the support required for boom hole brows is determined on a case-by-case basis. The section foreman who supervised the excavation stated that the roof appeared to be hard, solid and stable, with no flaking or other adverse conditions, and that after he installed the bolts in the interior of the boom hole he recommended no additional bolting of the brows. June 19 Tr. 42-45, 46, 54. Socco's safety director agreed with the section foreman's evaluation of the roof conditions, testifying that the roof in the area was above average and was stable with no deterioration. June 19 Tr. 18, 29-30, 34, 38-39. The afternoon shift foreman at the time the order was issued also testified that the roof was solid, that the brows were firm, and that no additional bolting of the brows was necessary. June 18 Tr. 208, 211. Furthermore, the

inspector and the roof bolter serving as the miners' representative also testified that the brows were stable at the time the order was issued. June 18 Tr. 157, 182.

Although the judge found that the brows were not bolted closer to their edges because debris prevented the roof bolters from getting the roof bolting machine into position, the undisputed testimony of Socco's personnel establishes that Socco failed to rebolt the cited brows, not because of the presence of the debris, but because Socco's supervisors uniformly believed that the brows were stable and needed no additional support to protect persons from roof falls. Given this testimony, the fact that the roof control plan does not specify how close to the boom hole brows roof support must be placed, and the agreement of all witnesses regarding the stability of the brows, we conclude that Socco's decision that bolting the brows closer to their edges was unnecessary, did not constitute aggravated conduct exceeding ordinary negligence. Cf. Emery, 9 FMSHRC at 2004-05.

This conclusion rests solely upon the testimony offered by the parties relating to the particular boom hole and brows observed by the inspector. It is apparent from the record, however, that a more inclusive approach to the issues of roof support for the brows of boom holes at this mine is desirable if future similar controversies are to be avoided. Section 75.200 requires the Secretary to approve and the operator to adopt a roof control plan "suitable to the roof conditions and mining system of each coal mine." Approval by the Secretary and adoption by Socco of specific provisions for the support of a boom hole and its brows in the roof control plan of the Martinka No. 1 Mine will significantly enhance the miners' safety and lessen the chances for disagreement regarding what constitutes adequate roof support. As we have pointed out, coordination between the Secretary and the operator in developing conclusive and suitable plans is of paramount importance to insure the safety of the miners and to implement the policy of the Mine Act. Cf. Jim Walter Resources, Inc., 9 FMSHRC 903, 909 (May 1987).

IV.

The final issue concerns a second withdrawal order (No. 2706704) that was issued by Inspector Workman pursuant to section 104(d)(2). The parties stipulated that the cited conditions constituted a violation of section 75.200 and that the violation was of a "significant and substantial" nature. 30 U.S.C. § 814(d)(1). Therefore, the only issue to be decided by the judge was whether the violation was caused by Socco's unwarrantable failure to comply. 8 FMSHRC at 2016. The judge found that there was no evidence to support the allegation of unwarrantable failure, but did not modify the section 104(d)(2) order to a section 104(a) citation. 8 FMSHRC at 2021.

We agree with Socco's contention that the judge erred in failing to modify the order. In Consolidation Coal Co., 4 FMSHRC 1791, 1793-94 (October 1982), the Commission noted that sections 104(h) and 105(d) of the Mine Act expressly authorize the Commission to "modify" any "orders" issued under section 104. 30 U.S.C. §§ 814(h), 815(d). The Commission pointed out that allegations of violation can survive vacation of an

order, and that "modification is ... the appropriate means of assuring that they do [survive]." 4 FMSHRC at 1794 n.9. In United States Steel Corp., 6 FMSHRC 1908, 1915 (August 1984), the Commission noted that "[i]f ... the judge determines that modification to a section 104(d)(1) order or citation is not possible then the violation should have been reduced to a section 104(a) citation." Thus, even without a finding of unwarrantable failure, the violation in this case survives. The order cannot be modified to a section 104(d)(1) order or citation, and as a result, must be modified to a section 104(a) citation.

V.

Accordingly, regarding Order No. 2564613, we hold that substantial evidence supports the findings of the judge that Socco violated section 75.200, but we reverse the judge's finding that the violation was caused by Socco's unwarrantable failure to comply and modify the order to a section 104(a) citation. Regarding Order No. 2706704, we modify the section 104(d)(2) order to a citation issued pursuant to section 104(a).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 86-371
U.S. STEEL MINING COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding involving U.S. Steel Mining Company, Inc. ("USSM"), arises under the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq. (1982) (the "Mine Act" or "Act"). The issue is whether USSM's Winifrede Central Shop (the "Shop"), a facility for the repair and maintenance of electrical and mechanical coal mining equipment, is subject to the provisions of 30 C.F.R. § 77.1713(a), a mandatory safety standard requiring examinations of surface coal mines. 1/ Deciding the case on the basis of the parties' stipulations, Commission Administrative Law Judge Gary Melick held that the facility was covered by the standard and assessed a civil penalty of $50.

1/ 30 C.F.R. § 77.1713(a) provides:

> Daily inspection of surface coal mine; certified person; reports of inspection.
>
> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

8 FMSHRC 1962 (December 1986)(ALJ). For the reasons set forth below, we affirm the judge's decision in result.

As noted, the parties stipulated to the relevant facts. USSM operates the Shop in Winifrede, West Virginia. The Shop's function is to repair and maintain electrical and mechanical equipment from three of USSM's coal mining facilities: the No. 50 Surface Mine, the Morton Underground Mine, and the Winifrede Central Cleaning Plant. The Shop, which is composed of a one-story electrical shop building and a one-story automotive repair building, is located approximately eight and one-half miles from the No. 50 Surface mine; five miles from the Morton Mine; and one-half mile from the cleaning plant. Sixteen employees usually work at the Shop, during which time they are subject to the hazards inherent in moving heavy equipment, performing electrical work, and engaging in various grinding, cutting, sharpening, and welding tasks. In addition, work areas of the Shop contain flammable and caustic liquids. The Shop has USSM supervision separate from that of any of the other three facilities. The Shop also has a separate Department of Labor, Mine Safety and Health Administration ("MSHA") mine identification number. From March 3, 1984, until March 3, 1986, the Shop was cited by MSHA for twenty-one violations of mandatory surface coal mine standards under 30 C.F.R. Part 77.

On March 3, 1986, an MSHA inspector conducted an inspection of the Shop and found that examinations of the active working areas of the Shop had not been made during each working shift. The inspector issued to USSM a citation alleging a violation of section 77.1713(a). Subsequently, the Secretary petitioned this Commission for the assessment of a civil penalty. The parties agreed to waive a hearing and to submit the matter for decision on the basis of stipulated facts.

USSM did not dispute that the Shop's active working areas were not inspected during each working shift in accordance with section 77.1713(a). Rather, it argued that the Shop is an entity separate from and independent of the mining facilities that it services and that the standard is "not intended to apply to independent service facilities such as the Shop." USSM Br. 5. USSM cited an MSHA policy memorandum in effect when the citation was issued, providing that surface work areas of underground mines are exempt from the examination requirements of section 77.1713 and that the standard applies only to active working areas of surface mines, to active surface installations at surface mines, and to preparation plants not associated with underground mines. MSHA Policy Memorandum No. 85-46, "Application of 30 C.F.R. 77.1713," at 1-2 (April 8, 1985). 2/ USSM argued that the Shop does not fall into any of these categories. In response, the Secretary contended that the Shop is itself a surface coal mine and therefore subject to the standard. USSM Br. 4-5; Sec. Br. 2-5.

In his decision, the judge noted that the standard applies to "surface coal mine[s]," and that it "[m]ore specifically... applies to

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2/ This policy memorandum expired on April 8, 1986. On January 27, 1987, it was reinstated as MSHA Policy Memorandum 87-1C.

'each working area and each active surface installation [of such surface mines]'." 8 FMSHRC at 1964. The judge observed that the Shop is "used to repair and maintain electrical and mechanical equipment from, among other places, the nearby (only 8.5 miles away) No. 50 Surface Coal Mine." He concluded that "it may reasonably be inferred that the ... Shop [is] an 'active surface installation' of the No. 50 Surface Coal Mine" and as such is subject to section 77.1713(a). Id. Therefore, the judge concluded that USSM had violated the cited standard.

On review, USSM argues that the standard is not intended to apply to independent service facilities such as the Shop. USSM argues that it is as logical to view the Shop as a surface facility of its nearby underground mine as it is to view it as a surface facility of its nearby surface mine. It contends that as such a surface facility of an underground mine, it is exempt from the examination requirements of section 77.1713(a) pursuant to the Secretary's policy memorandum. USSM asserts that the "plain intent" of the policy memorandum is that "the requirement for examinations not be extended to facilities not located at surface coal mines." Petition for Discretionary Review 3. (Emphasis in original). While the Secretary argues that the Shop could be deemed an active surface installation of the No. 50 Surface Coal Mine, the main thrust of the Secretary's contention on review is that the Shop itself is a surface coal mine subject to the examination requirements of the standard. Sec. Br. 4-7, 7-9.

Based on the stipulated facts, we agree with the Secretary that the Shop itself is a separate surface "coal mine" within the meaning of the Act and the cited standard and, as such, is subject to the cited standard's examination requirements. Because we conclude that the Shop itself is a surface "coal mine," there is no need to further consider whether the Shop is an "active surface installation" of other mines.

The applicable legal framework is clear. "Coal mine," is defined in relevant part as "lands ... structures, facilities, equipment, machines, tools, or other property ... on the surface ... used in, or to be used in ... the work of extracting [coal] from [its] natural deposits ... or the work of preparing coal." 3/ This definition, while not

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

> "[C]oal ... mine means.... (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers under-

without bounds, is expansive and is to be interpreted broadly. See, e.g., Dilip K. Paul v. P.B. - K.B.B., Inc., 7 FMSHRC 1784, 1787-88 (November 1985), aff'd sub nom. Dilip K. Paul v. FMSHRC, 812 F.2d 717, 719-20 (D.C. Cir. 1987), cert. denied, ___U.S.___, 107 S.C. 3269 (1987); Oliver M. Elam, 4 FMSHRC 5, 6 (January 1982). Part 77 contains mandatory safety standards applicable in relevant part to "surface coal mines" (30 C.F.R. § 77.1) and section 77.1713 requires inspection of surface coal mines at least once during each working shift. Here, the parties have stipulated that the Shop is a surface facility that exists and functions to repair and maintain electrical and mechanical equipment used in or to be used in USSM's underground and surface coal mines and its coal cleaning plant. The Shop has a separate federal mine identification number and has a history of regulation and citation by MSHA as a separate facility under Part 77. Stipulations 3, 4, 9; Exh. A. (USSM concedes that "the Shop is subject to inspections under the Act." Petition for Discretionary Review 2.) Given these stipulations regarding the nature of the Shop and its regulatory history, we hold that the Shop consists of "lands ... structures, facilities, equipment, machines, tools, or other property ... on the surface ... used in, or to be used in ... the work of extracting [coal] ... or the work of preparing coal" and, therefore, is a surface coal mine subject to the examination requirements of section 77.1713(a).

In light of this conclusion, it is unnecessary to further determine whether the judge correctly found that the shop is an "'active surface installation' of the No. 50 Surface Coal Mine." 8 FMSHRC at 1964. Further, it is unnecessary to gauge the effect, if any, of MSHA's policy memorandum upon the interpretation of section 77.1713.

> ground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities....

30 U.S.C. §802(h)(1).

Accordingly, we affirm in result the judge's conclusion that the provisions of section 77.1713(a) apply to the Shop. USSM has not otherwise challenged the judge's findings and conclusions. Therefore, on the foregoing bases, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 26, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of JOHN W. BUSHNELL	:	
v.	:	Docket No. WEVA 85-273-D
CANNELTON INDUSTRIES, INC.	:	

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

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint filed by the Secretary of Labor on behalf of John W. Bushnell pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §801 et seq. (1982)("Mine Act" or "Act"). The complaint alleges that Cannelton Industries, Inc. ("Cannelton"), discriminated against Bushnell in violation of section 105(c)(1) of the Mine Act when, after a job transfer that occurred as part of a company-wide work force reduction and realignment, he was paid at a rate lower than the rate he was receiving immediately prior to his transfer. 1/ This job transfer occurred several years after his initial

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1/ Section 105(c)(1) provides in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine... because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. §815(c)(1).

30 C.F.R. Part 90 contains mandatory health standards published pursuant to section 101 of the Mine Act. 30 U.S.C. § 811. Under

transfer without loss of pay to a low dust job pursuant to 30 C.F.R. Part 90. Commission Administrative Law Judge William Fauver determined that Cannelton unlawfully discriminated against Bushnell when it failed to compensate him at the same rate of pay after his transfer as he had received before the transfer. Judge Fauver awarded Bushnell back pay of $161.14 plus interest on that sum and assessed Cannelton a civil penalty of $25 for the violation of section 105(c)(1) the Act. 8 FMSHRC 1607 (October 1986) (ALJ). We conclude that Cannelton's failure to retain Bushnell's previous rate of pay when Bushnell was transferred to a lower paid position for reasons unrelated to dust exposure, as part of a legitimate work force realignment, did not violate rights granted by the Mine Act or Part 90. Accordingly, we reverse.

I.

The parties waived an evidentiary hearing and stipulated to the facts. 8 FMSHRC at 1607-1608. When this case arose in 1984, Bushnell had been employed by Cannelton for approximately 17 years as a miner at its Pocahontas No. 3 and No. 4 underground coal mines in West Virginia. In 1972 Cannelton was informed that Bushnell had evidence of pneumoconiosis and was eligible for transfer to a low-dust job pursuant to section 203(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977)("Coal Act"), and 30 C.F.R. Part 90 (1972). 2/ However, Bushnell deferred the exercise of his transfer rights until 1980 when he was placed as a Part 90 miner in the low-dust surface position of dispatcher. From September 1980 through September 16, 1984, Bushnell earned $113.28 for an eight-hour shift as a dispatcher.

The parties stipulated:

> On September 17, 1984 the work force of the Pocahontas Nos. 3 and 4 mines was reduced due to economic conditions. The remaining employees were realigned in accordance with [Cannelton's] labor agreement. ... On September 17, 1984 [Bushnell]

Part 90, a miner who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis (Black Lung disease) is given the option to transfer, without loss of pay for such work, to another position in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3"). 30 C.F.R. §§ 90.3 & 90.103. See generally Gary Goff v. Youghiogheny & Ohio Coal Co., 7 FMSHRC 1776, 1778-82 (November 1985) ("Goff I").

2/ Section 203(b) of the Coal Act, 30 U.S.C. § 843(b) (1976), providing for the transfer of miners evidencing pneumoconiosis, was carried over in 1977 as section 203(b) of the Mine Act. 30 U.S.C. § 843(b) (1982). The original Part 90 regulations implementing the Coal Act's statutory transfer right were replaced by the current Part 90 regulations in 1980. The present Part 90 regulations also supersede section 203(b) of the Mine Act. 30 U.S.C. §811(a); 30 C.F.R. §90.1.

was realigned from his dispatcher position to general inside laborer as part of the general realignment noted above.

Stipulations No. 6 & 11 (p.2)(July 15, 1986). It is undisputed that the transfer was not exposure-related, was the result of a bona fide work force reduction and realignment, and was not motivated by Bushnell's Part 90 status. There is no evidence in the record that the new position subjected Bushnell to dust levels in excess of those permitted under Part 90. When Bushnell was transferred, his company occupation code was changed and his pay was reduced to that of the laborer's position, $104.78 for an eight-hour shift. On October 1, 1984, the Pocahontas mines were closed and the remaining employees, including Bushnell, were laid off. Bushnell incurred lost wages totaling $161.14 as a result of his transfer to the laborer's position.

Bushnell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been illegally discriminated against in contravention of his Part 90 pay protection rights. Following MSHA's investigation of the complaint, the Secretary of Labor filed a discrimination complaint with this independent Commission on Bushnell's behalf pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. § 815(c)(2).

In his decision, Judge Fauver focused upon a portion of the Part 90 regulations providing that "[w]henever a Part 90 miner is transferred, the operator shall compensate the miner at no less than the regular rate of pay received by that miner immediately before the transfer." 30 C.F.R. § 90.103(b). The judge noted that the Part 90 regulations define "transfer" as "any change in the occupation code of a Part 90 miner." 30 C.F.R. §90.2. The judge construed the "whenever" in section 90.103(b) to include all transfers of Part 90 miners, including transfers not resulting from dust exposure considerations. He stated: "[W]henever a Part 90 miner has a change in his occupation code, the regulation require[s] that he be paid at no less than the regular rate of pay received prior to that change." 8 FMSHRC at 1608. Reasoning that Bushnell was a Part 90 miner whose occupation code had been changed without retention of the rate of pay received previously, the judge held that Cannelton's failure to maintain Bushnell's rate of pay after transfer was "contrary to the plain language of the regulation" and "constitute[d] interference with a protected right." 8 FMSHRC at 1609.

II.

The question presented is whether Bushnell's transfer to a lesser paying position during Cannelton's reduction in force and realignment violated section 105(c)(1) of the Mine Act by infringing upon any right conferred by the Part 90 regulations. It is clear that a Part 90 miner, upon exercising his option to work in a low dust area of a mine, enjoys the right to be paid in the new position at a rate not less than the regular rate of pay received immediately before his exercise of that option. We conclude, however, that the pay protection provisions of the Mine Act and the Part 90 regulations do not grant Part 90 miners a vested pay entitlement that insulates them against all negative business

and economic contingencies affecting their employers. We hold that the reduction in Bushnell's pay after his transfer to the laborer's position under the circumstances presented in this case did not violate the Act.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of prohibited discrimination under section 105(c) of the Act, a complaining miner bears the burden of proving (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 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 (3rd Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Constr. 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 Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

We have held that section 105(c)(1) of the Act bars discrimination against or interference with miners who are "the subject of medical evaluations and potential transfer" under the Part 90 regulations. Goff I, supra, 7 FMSHRC at 1780-81. We have emphasized repeatedly the importance of the rights and protections conferred by Part 90 and related provisions of the Act (Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, et al., 9 FMSHRC 891 (May 1987); Gary Goff v. Youghiogheny and Ohio Coal Co., 8 FMSHRC 1860 (December 1986) ("Goff II"); Goff I, supra), but we have also recognized that their extent is not unlimited and that "[c]laims of protected activity and discrimination in this context must be resolved upon the basis of a careful review of the structure of miners' rights and operators' obligations contained in the pertinent statutory and regulatory texts." Mullins, supra, 9 FMSHRC at 896. Accordingly, we look first to the language of the statute and the implementing regulations.

Section 101(a)(7) of the Mine Act states that mandatory standards promulgated by the Secretary may provide that "where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and

reassigned." 3/ Section 101(a)(7) further provides: "Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to this transfer." Finally, that section states: "In the event of [such] transfer of a miner..., increases in the wages of the transferred miner shall be based upon the new work classification."

As we stated in Goff I, "Part 90 implements this statutory mandate by providing for the transfer of miners who, as a result of exposure to the health hazard of respirable dust, have developed pneumoconiosis." 7 FMSHRC at 1778 n.3. In most instances, the Part 90 program allows eligible miners the option of transferring to an area of a mine where the average concentration of respirable dust is continuously maintained at or below 1.0 mg/m^3, a concentration below the maximum level specified in the general respirable dust standards. 30 C.F.R. §§90.3 & 90.100. The Part 90 regulation protecting miners from pay loss upon such transfer, 30 C.F.R. §90.103, provides in relevant part as follows:

> (a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the [transfer] option under §90.3 ....
>
> (b) Whenever a Part 90 miner is transferred, the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.
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> ....
>
> (d) In addition to the compensation required to be paid under paragraphs (a) [and] (b) ... of this

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3/ In relevant part, section 101(a)(7) provides:

> Where appropriate, [any mandatory health or safety standard promulgated under this subsection] shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to this transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based on the new work classification.

30 U.S.C. §811(a)(7).

> section, the operator shall pay each Part 90 miner the actual wage increases that accrue to the classification to which the miner is assigned. [4/]

On review, the Secretary emphasizes the language of section 90.103(b) of the Part 90 regulations and argues that the pay protection provision of the Act and the regulations apply "whenever a Part 90 miner is transferred." S. Br. 11-12 (emphasis added). The Secretary asserts that "[a]ll transfers, including those resulting from economic factors, entitle Part 90 miners to the pay protection provisions of that section." S. Br. 12 (emphasis added). The Secretary interprets the pay protection provision of section 101(a)(7) and Part 90 as vesting permanently when a miner exercises the Part 90 transfer option. Thus, in the Secretary's view, when Bushnell exercised his Part 90 rights by transferring to a less dusty job, he gained protection from any future reduction in his pay resulting from a subsequent job transfer irrespective of the reason for the subsequent transfer.

This argument reaches beyond the language and the intent of the Mine Act and of the Secretary's own regulations. First, the words of section 101(a)(7) of the Act condition pay protection upon an exposure-related transfer. Section 101(a)(7) states: "Any miner transferred as a result of [respirable dust] exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer." (Emphasis added.) Thus, the express language of the Act limits compensation protection to transfers resulting from the removal of miners from dusty work environments. Section 101 provides no basis for the Secretary's position that all subsequent, nonexposure-related transfers are subject automatically to statutory pay protection. The word "whenever" in 30 C.F.R. §90.103(b), supra, upon which the Secretary's argument turns, must be read in its proper context. Section 90.103(a) refers to exposure-related transfer upon exercise of the Part 90 transfer option. Hence, the "whenever" in subsection (b) of section 90.103 refers back to Part 90 dust exposure-related transfers only. The judge's and Secretary's ascription of a more global meaning to the "whenever" in section 90.103(b) is not supported by a plain reading of

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4/ As mentioned earlier (n.2, supra), the present Part 90 standards supersede section 203(b) of the Mine Act, which, carried over from the Coal Act, specifically afforded miners evidencing pneumoconiosis the option of transferring to a low-dust area and further provided that "[a]ny miner so transferred shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer." 30 U.S.C. §843(b)(3).

30 C.F.R. §90.103 also requires that "section 203(b) miners" as of January 31, 1981, were to be compensated at no less than the regular rate of pay that they were entitled to receive under section 203(b) of the Act immediately before the effective date of the present Part 90 regulations (section 90.103(c)), and that section 203(b) miners are also entitled to receive the wage increases accruing to the positions to which they are transferred (section 90.103(d)).

the underlying statutory and regulatory texts.

The pertinent legislative and regulatory histories also demonstrate that the basic purpose of the wage saving provisions is to provide immediate financial protection to the wages of miners transferred for health reasons. In enacting section 203(b) of the Coal Act, the predecessor provision to section 101(a)(7) and Part 90, Congress emphasized the health-related nature of the provision. A key House report states: "The committee considers this section ... equal in importance to the dust section for decreasing the incidence and development of pneumoconiosis." H. Rep. No. 563, 91st Cong., 1st Sess. 20 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1050 (1975); See also Id. at 1071-72 & 1199. The legislative history of the Mine Act also reveals Congress' intent to link the wage saving provision to health-based transfers. The Conference Committee made clear that a miner is immediately protected against reduction in compensation if it is determined that reassignment is necessary to avoid material impairment of health or function:

> [A] miner who is reassigned to a different job classification will suffer no reduction in compensation if such reassignment is the result of a medical examination indicating that such miner may suffer material impairment of health or functional capacity by further exposure to a toxic substance or harmful physical agent. After reassignment, however, such miner will be entitled only to the same dollar rate increase applicable to his new job classification. The conferees intend this provision to encourage miner participation in medical examination programs by insuring that miners who do participate in such programs shall suffer no immediate financial disadvantage if a medical examination results in a job reassignment.

Conf. Rep. No. 461, 95th. Cong., 1st. Sess. 42 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd. Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1320 (1978) (emphasis added). Not only does this history militate in general against the Secretary's interpretation of permanently vested pay protection but it also indicates that, in tying wage increases to the new job classification, the Mine Act imposed a limitation on Part 90 miners' pay rights.

Despite the Secretary's arguments on review that the wage saving provisions of Part 90 apply to all subsequent, nonexposure-related transfers of Part 90 miners, his official comments in promulgating the Part 90 regulations lend support to our contrary conclusion. In those comments, the Secretary noted the causal connection between a miner's removal from exposure to a hazardous substance and the pay protection provision of section 101(a)(7). The Secretary stated: "By adopting section 101(a)(7) Congress recognized that miners may be forced to

choose between continued exposure to hazardous substances or significant wage reduction if work in cleaner environments is sought. To correct this situation, section 101(a)(7) explicitly states that a reassigned miner retain at least the previous rate of pay received, and specifically addresses the issue of subsequent wage increases." 45 Fed. Reg. 80,760, 80,767 (December 5, 1980). Of equal significance, the Secretary acknowledged Congress' intent that the wage saving provision provide immediate protection against financial disadvantage.

> [R]ather than extending the full protection of wage increases to the miner's preassignment job classification, Congress purposefully placed a special limit on wage increases received by the miners: "... increases in wages of the transferred miner shall be based upon the new work classification." The Conference Committee Report reflects Congressional concern that miners who participated in programs authorized under section 101(a)(7) and are reassigned jobs should not suffer "an immediate financial disadvantage."

Id.

Thus, we find nothing in the language, purpose, or history of the Mine Act or Part 90 supporting the pay protection right claimed by Bushnell. Here, there is no dispute that Bushnell's September 17, 1984 transfer to the laborer's position (1) occurred several years after his initial Part 90 transfer to the dispatcher's position, (2) was not exposure-related, (3) represented an otherwise legitimate job realignment pursuant to Cannelton's collective bargaining agreement and was carried out in the context of layoff and mine closure affecting all of Cannelton's miners at the Pocahontas mines, and (4) did not result in exposure to respirable dust in excess of the level specified in Part 90. For the reasons articulated above, we cannot conclude that the immediate pay protection right enjoyed by Bushnell when he was initially transferred to the dispatcher's position obtained when he was transferred subsequently to the laborer's position.

We further note that the stipulated record is devoid of any evidence that Cannelton's business actions were tainted by any intent to discriminate, retaliate, or interfere with any legitimate statutory or Part 90 rights available to Bushnell. Cf. Mullins, 9 FMSHRC at 899. Thus, the sole and undisputed reason for Bushnell's reassignment to the laborer's position was the reduction in force and realignment of Cannelton's employees due to adverse economic conditions. Accordingly, we hold that Bushnell's transfer did not violate section 105(c)(1) of the Act.

III.

In sum, we conclude that Cannelton did not violate section

105(c)(1) of the Mine Act by failing to compensate Bushnell at a pay rate equal to his previous pay rate when it transferred him from the position of dispatcher to the position of general inside laborer during the realignment of employees. Therefore, we reverse the decision of the judge, vacate the back pay award and the civil penalty assessed, and dismiss the complaint of discrimination.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 3 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 87-120 A. C. No. 36-06873-03536
v.	:	No. 1 Mine
TARGET INDUSTRIES, INC., Respondent	:	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
J. E. Ferens, Esq., Waggoner & Ferens, Uniontown, Pennsylvania, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for two alleged violations of the mandatory safety standards. The general issues before me are whether Target Industries, Inc., (Target) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to a specific citation or order.

The case was heard in Pittsburgh, Pennsylvania, on June 24, 1987. Supplemental evidence in the form of depositions was submitted into the record on January 22, 1988. Both parties have waived the filing of post-hearing briefs.

STIPULATIONS

The parties stipulated to the following:

1. The Target No. 1 Mine is owned and operated by the Respondent, Target Industries, Inc.

2. The Target No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to § 105 of the Act.

4. The citation, order, terminations and modifications, if any, involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits but not the relevance or the truth of the matters asserted therein.

6. The alleged violations were abated in a timely fashion.

7. The total annual production of the respondent is approximately 120,000 tons of coal. The respondent employs approximately 31 employees at this mine.

8. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

9. The imposition of the proposed civil penalties will have no effect on the respondent's ability to remain in business.

DISCUSSION

Section 104(d)(1) Citation No. 2687303, issued at 9:15 a.m. on December 9, 1986, cites a violation of 30 C.F.R. § 75.303 and alleges the following condition or practice:

> There were no dates recorded on date boards along the main belts from the belt drift opening to the 2 Left and 3 Left working section to indicate such belts were examined on 12-8-86 for the afternoon shift. The day shift belt examiner stated he had completed his examination from no. 20 crosscut no. 1 belt to the 2 Left section along main belts. The record book on the surface indicated no violation or hazardous conditions were observed for 12-9-86. The following conditions were observed by the writer in the belt entry float coal dust from the drifting opening inby to 2 Left & 3 Left section, belt rollers contacting loose coal, coal dust, guarding removed from no. 3 tail roller and take up roller at no. 3 drive.

Section 104(d)(1) Order No. 2687304, issued at 10:00 a.m. on December 9, 1986, cites a violation of 30 C.F.R. § 75.400 and alleges the following condition or practice:

> Float coal dust was observed on rock-dusted surfaces from the belt drift opening to the feeder in 2 Left and 3 Left working sections. Float coal dust was observed on all belt drive structures (No. 2, No. 3, No. 4, and No. 5). Loose coal was permitted to accumulate and contact the belt and belt roller (bottom) between the air lock doors no. 1 belt, on the overpass top structure, and several locations along the no. 2 belt conveyor system. Loose coal and coal dust was shoveled from under the tail roller of no. 3 tail and piled against the coal rib to depth of 2 ft. The tail roller of no. 2 belt was also contacting coal dust. A program was not available indicating a regular clean up and removal of accumulation of loose coal, coal dust, float coal dust, and other combustible materials.

MSHA Inspector Charles Pogue testified as to his background and experience, and he confirmed that he inspected the mine on December 9, 1986, and issued the Section 104(d)(1) Citation and Order which are the subjects of these proceedings.

He testified that accompanied by Mr. John Pesarsick, the mine superintendent, he left the surface and proceeded to inspect the belt lines. Starting his inspection, he went through the set of air-lock doors at the drift mouth opening. At that point, he found an accumulation of loose coal and coal dust, approximately four to six inches in depth, contacting the belt rollers and the bottom belt. They proceeded inby this location on down the No. 1 belt. The further they walked along the belt toward the number 2 belt drive, the darker the belt became with coal dust. It was black in color. Once they got up to around the number 2 belt drive, the belt became very black, and there were accumulations on the belt drive. At the No. 2 drive, he continued inby, finding additional accumulations of loose coal, coal dust and float coal dust, particularly at a second set of air-lock doors and at an underpass on the No. 2 belt line. Inby those air-locks and underpass, he found approximately seven frozen belt rollers and an additional 10 to 12 rollers that were contacting accumulations of coal. At the No. 3 belt drive there were accumulations of loose coal, coal dust and float coal dust approximately 12 to 15 feet in length and 4 to 8 inches in depth.

As he walked the belt he was also looking at the date boards which are located along the belt for date, time and initials that would indicate the belt had been examined on the afternoon shift of December 8, 1986.

Belt conveyors on which coal is carried are required to be examined after each coal-producing shift has begun by 30 C.F.R. § 75.303. Inspector Pogue determined from Mr. Pesarsick that coal had indeed been run on the afternoon shift of December 8, but he was unable to find any date boards along the belt line that had been signed by a belt examiner or fire boss on the afternoon of December 8, 1986, to indicate that the belt had been examined, as required. Section 75.303 also specifically requires the examiner to place his initials, the date and the time at all such places he examines. Because the date boards he observed were not so initialed, dated, and timed and because of the conditions the inspector observed on the belt line, he came to the conclusion that the belt line had not been examined on the afternoon of the eighth and that therefore there had been a violation of 30 C.F.R. § 75.303.

The inspector testified that along the No. 1 belt, between the air locks where he entered and the No. 2 drive there were 3 date boards and beyond the No. 2 drive, a further undetermined number along the No. 2 belt line. He couldn't remember how many, but he did state that none he saw were initialed on the afternoon of December 8, 1986. He did, however, concede that he was unsure of whether or not he had observed each and every date board in existence on the belt lines. He also checked the mine examiner's book on the surface. The examiner who has inspected the belt conveyors is also required by 30 C.F.R. § 75.303 to record the results of his examination in a book on the surface. There is no indication of any hazardous conditions such as coal dust accumulations on the belt line reported as observed on December 8. To the contrary, the entry for the dayshift on the eighth of December indicated that no hazards had been observed, and there was no entry at all for the afternoon shift, at least according to the inspector. Mr. Pesarsick recalls that the book stated "none" under "hazardous conditions" for the afternoon shift of the 8th and that it was signed by John Kent, who had made the examination. Neither the book itself or a copy was produced at the hearing.

Mr. Pesarsick testified that he likewise did not see John Kent's initials on any of the date boards that he passed on the No. 1 belt line up to the No. 2 drive, but he states that he was not specifically looking for them.

Mr. Fisher, the dayshift fire boss, also testified. On the morning of December 9, he had been in the mine doing the preshift examination and after the coal-producing shift started, he walked the belts out. He started at the back of the mine, coming forward whereas Mr. Pesarsick and Inspector Pogue had started at the front of the mine and walked back. The three met at the No. 2 drive. Mr. Fisher states that he

saw John Kent's initials on two date boards that day. One was right there at the No. 2 drive and the other was at the underpass on the No. 2 belt. He stated that he erased Kent's initials and date from the two date boards and replaced them with his own just prior to meeting up with Mr. Pesarsick and Inspector Pogue at the No. 2 drive. I do not credit this testimony, however, because it seems highly unlikely that Kent would have initialed all (both) the date boards on the No. 2 belt as Fisher states, but none of the three boards on the No. 1 belt if he had in fact examined both belt lines. Hence, even if I were to credit Fisher's testimony and find that Kent did examine the No. 2 belt line, it only makes the case stronger that he did not examine the No. 1 belt line. Either way, there is a violation of the cited standard.

Even Superintendent Pesarsick conceded that it was possible that the examination wasn't done on the afternoon of the eighth based on the conditions he observed along the No. 1 belt line on the morning of the ninth.

The fact that the date boards along the No. 1 and No. 2 belt lines were not initialed, dated and timed by John Kent, the belt examiner on the afternoon shift of December 8, 1986, is therefore unrefuted in the record and standing alone is a violation of 30 C.F.R. § 75.303. Moreover, the preponderance of circumstantial evidence compels the conclusion that the No. 1 belt line between the air locks and No. 2 drive and the No. 2 belt line to No. 3 drive were not examined on the afternoon shift of December 8, 1986, also a violation of § 75.303.

I specifically find that an onshift examination was not conducted on the No. 1 and No. 2 belt lines between the belt drift opening and No. 3 drive on the afternoon shift of December 8, 1986, in that an obvious accumulation of loose coal and coal dust existed along those belt lines and this condition had not been reported or recorded in the book provided for this purpose on the surface. In my judgment, this condition which was discovered on the morning of December 9 had existed on the afternoon of December 8 as well. Furthermore, I find that none of the date boards on the No. 1 or No. 2 belt lines were initialed, dated or timed for the afternoon shift of December 8, which I find to be an additional circumstance supporting the allegation that the examination was not performed in those areas that afternoon. This latter fact is, of course, a violation of the cited section in its own right, albeit perhaps a "technical" one.

A violation is "significant and substantial" if (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonable

likelihood that the hazard contributed to will result in injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In this regard, Inspector Pogue testified that the belt examiner's purpose in walking these belts is to detect hazardous conditions and to report them and/or correct them. If these conditions go unfound or uncorrected, a mine fire or explosion could result from, for instance, the accumulation of combustible materials contacting the belt structure. Specifically, he observed accumulations of loose coal, coal dust and float coal dust present on the structure of the belt drives and on electrical equipment. Since the examination wasn't made in these areas, these conditions were not reported to mine management, and were permitted to exist and exacerbate. If a fire were to start, it would be reasonably likely to spread to the extent where it could cause serious injury. Under the circumstances, I find that the violation was "significant and substantial" and serious.

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply. Inspector Pogue, when asked by the Solicitor why he issued this violation as an unwarrantable failure replied:

> Because it is the obligation of the operator to insure that examinations of the belt entry are made after the coal producing shift begins, for each coal producing shift . . . [S]o that the operator can be aware of conditions in the belt entry, any hazardous conditions that may exist in the belt entry.

This is clearly insufficient cause, in and of itself, to issue an "unwarrantable failure" citation. Nor does my examination of the record turn up any better cause to term this violation an "unwarrantable failure."

I therefore find that the violation was not caused by "unwarrantable failure." In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed

to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). And most recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC ____, slip op. at 1, WEST 86-35-R (December 11, 1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. There is no evidence in this record that will support a finding that the operator exhibited aggravated conduct that exceeded ordinary negligence. For the purpose of assessing the penalty, I find that negligence to be "moderate."

Accordingly, I will modify the Section 104(d)(1) citation to a citation issued pursuant to Section 104(a) of the Act, and assess a penalty accordingly.

Turning now to the violation of 30 C.F.R. § 75.400 alleged in Order No. 2687304, the cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Inspector Pogue described the violative conditions and areas. He testified that beginning at the air-lock doors at the drift mouth opening there was approximately four to six inches of dry coal dust contacting the belt rollers and the bottom belt. Proceeding inby up the No. 1 belt entry to the No. 2 belt drive, it got blacker as he went further. At the No. 2 belt drive was the first location that he saw accumulations on the belt drive. Proceeding inby on the No. 2 belt line, he came to an area where there were accumulations of dry loose coal and float coal dust on the top of an undercast measured by him to be 12 inches deep and ten feet in length contacting the belt roller and belt in that location. At No. 3 drive, he found further accumulations of loose coal, coal dust and float coal dust four to eight inches deep for a length of 12 to 15 feet. At the No. 3 tail piece, he found coal thrown up against the rib, but this had apparently just been done by Mr. Fisher, preparatory to getting it cleaned up.

Mr. Pesarsick agreed that the coal accumulations along the No. 1 belt "needed some taking care of" and that the

"air-lock needed shoveling," but generally disagreed with the alleged severity of the problem. He was also aware, because Mr. Fisher told him, of the coal spill at No. 3 tailpiece. Mr. Fisher concurred that there were "some" accumulations along the No. 2 belt as well.

I think it is a fair statement to say that the operator does not disagree that there was a violation, but disagrees with the alleged severity of that violation and strongly disagrees with the "unwarrantable failure" allegation.

I find that the violation of 30 C.F.R. § 75.400 is proven as charged. I also find that it was a "significant and substantial" violation of the mandatory standard. Mathies Coal Company, supra. The record amply demonstrates that the violation presented a discrete safety hazard, i.e., explosion and fire. I accept Inspector Pogue's testimony that there were ignition sources present along the belts in proximity to the cited accumulations, and that had there been a mine fire or explosion, persons inby these locations could have suffered serious injury, possibly death. As an example, I note that the stuck or frozen rollers found by the inspector would be capable of creating enough frictional heat to ignite the combustible accumulations. I also note that the Commission has previously recognized the explosive character of float coal dust. Old Ben Coal Co., 1 FMSHRC 1954 (1979).

With regard to the issue of unwarrantability, the inspector opined that these accumulations took a minimum of 5 days to build up under normal mining conditions and that therefore the operator knew or should have known of the violative condition in his mine. Therefore, at least to the inspector, this amounted to an "unwarrantable failure" to comply with the mandatory standard.

I disagree. My reasoning relies in part on the integrity of the mine examiner's book on the surface. There was an entry from the day before the inspector's visit; the day shift entry for the eighth. That entry did not make a note of any of the conditions which the inspector observed on the morning of December 9. This apparent discrepancy is explained by the operator, at least as to the accumulations around the air-locks and underpass as being caused by high air pressure on the belt lines causing such accumulations to build up quicker than normal. As to the other parts of the belt where there were accumulations, the operator credibly explained these as spills, which could have occurred since the last belt examination. One such spill, at the No. 3 tailpiece, was reported to mine management and clean-up ordered before the inspector saw it. This situation is not congruent with the aggravated conduct test announced in Emery Mining Corp., supra.

I will, therefore, modify this Section 104(d)(1) order to a Section 104(a) citation and assess an appropriate civil penalty.

In assessing the civil penalties herein, I find that both violations were serious and resulted from the operator's ordinary negligence, which I rate as "moderate." I have examined the operator's history of previous violations and take note here of the stipulations concerning operator size, good faith abatement and the effect civil penalties would have on the operator's ability to remain in business. I conclude that a civil penalty assessment of $200 for each violation is appropriate under all the circumstances.

ORDER

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

(1) Citation No. 2687303, issued December 9, 1986, under Section 104(d)(1) IS MODIFIED to delete the finding that the violation was caused by the operator's "unwarrantable failure" to comply with the standard. The citation is therefore hereby converted to one issued under Section 104(a), and a civil penalty of $200 is assessed.

(2) Order No. 2687304, issued December 9, 1986, under Section 104(d)(1) IS MODIFIED to delete the finding that the violation was caused by the operator's "unwarrantable failure" to comply with the standard. The order is therefore hereby converted to one issued under Section 104(a), and a civil penalty of $200 is assessed.

(3) Target Industries, Inc., is directed to pay a civil penalty of $400 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEB 9 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 87-95
	:	A. C. No. 23-01432-03524
v.	:	
	:	Randolph No. 1 Strip
UNIVERSAL COAL & ENERGY COMPANY, INC., Respondent	:	

DECISION

Appearance: Charles W. Mangum, Esq., Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri, for the Secretary;
N. William Phillips, Esq., Phillips & Spencer, Milan, Missouri, for the Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) filed, on September 11, 1987, a Petition for Assessment of Civil Penalty for an alleged violation by Respondent of 30 C.F.R. § 77.205(b) on April 16, 1987. Pursuant to notice the case was heard in Jefferson City, Missouri, on November 17, 1987. Larry G. Maloney testified for Petitioner and Chris Duren, John Sulltrop, Earl Read, and Michael Sinicropi testified for Respondent.

Petitioner filed its Posthearing Brief on January 4, 1988, and Respondent filed its Findings of Fact and Memorandum on January 6, 1988. The Parties' Reply Briefs were filed on January 20, 1988.

Stipulations

Respondent filed, on November 16, 1987, the following stipulations which were signed by Counsel for both Parties:

1. That jurisdiction over this proceeding is conferred upon the Federal Mine Safety and Health Commission by section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

2. That the condition for which Petitioner seeks an assessment of civil penalty involved Respondent's mine known as the Randolph No. 1 Strip which is located near the town of Higbee, Howard County, Missouri.

3. That the size of Respondent's Randolph No. 1 Strip mine is based on 66,410 production tons in 1986.

5. That on April 16, 1987, Larry G. Maloney, an inspector for the Mine Safety and Health Administration, conducted an onsight inspection of the Randolph No. 1 Strip mine. (Sic)

7. That as a result of the April 16, 1987 inspection, referred to in paragraph number 5., Respondent was issued Citation Number 2817510 alleging violation of the mandatory safety standard found at part 77.205(b) of Title 30, Code of Federal Regulation.

10. That Respondent was granted until April 20, 1987 to abate the violation alleged in citation number 2817510.

12. That on April 20, 1987, Larry G. Maloney Conducted a follow-up inspection of Respondent's Randolph No. 1 Strip and issued a section 104(b) Withdrawal Order Number 2817515

At the hearing, the Parties further stipulated that the imposition of a civil penalty in these proceedings will not effect the ability of the Respondent to continue in business, that Respondent is a small operator, and that Respondent's history of past violations is evidenced by Petitioner's Exhibit 1.

Issues

The issues are whether the Respondent violated 30 C.F.R. § 77.205(b), and if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether the alleged violation was the result of the Respondent's unwarrantable failure. If section 77.205(b), supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (the "Act").

Citation

Citation 2817510, issued on April 16, 1987, alleges a significant and substantial violation in that "Coal spillage had accumulated on the bottom floor of the preparation plant. It had accumulated to a depth of approximately 10" over the entire floor (approx 40' square). Piles of spillage had accumulated to a depth of approx 4 ft. blocking the stairs on the southeast corner. The plant had not been in operation since 4/9/87 but was in the process of being operation." (Sic.)

Regulation

30 C.F.R. § 77.205(b) provides as follows:

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

Findings of Fact and Conclusions of Law

I

Larry G. Maloney, a mine inspector employed by the Mine Safety and Health Administration, testified that on April 16, 1987, when he inspected Respondent's coal processing plant, he observed an accumulation of coal in the lowest or (sump level) that completely covered the whole area to a depth of approximately 10 inches. In addition, it was essentially his testimony that the accumulation of coal at a stairway located in the southeast corner of the sump area had piled to a depth of approximately 4 feet. It further was his testimony that a person attempting to climb over this pile to go to the stairway would be subjected to a possibility of slipping on the coal accumulation as it was uneven. He also said that there were cracks or crevices in the coal accumulations which would cause unsecured footing.

Chris Duren, Respondent's pit supervisor and supervisor of mechanics and John Sulltrop, Respondent's safety director, testified, in essence, that the southeast stairway would not be used when the plant is in operation as it is located directly underneath a conveyer belt, and one using this stairway would be subject to debris falling from the belt. Duren and Sulltrop also indicated that most of the tools are located in the central office which is more accessible to the stairway at the northwest corner rather than the southeast corner. They also indicated that the former stairway is the one nearest a winch line beam.

I find, based on the uncontradicted testimony of Maloney, that on the date in question there was an accumulation of coal in the sump area which created a stumbling or slipping hazard. Also, I find, based upon the testimony of Maloney and Duren, that although work is not performed in the sump area on a daily basis, nontheless, as part of the normal operation of the plant workers are required to go to that area to lubricate, clean up, or open valves. Also, I find that although it may have been more efficient for a worker in the sump area to utilize the stairway of the northwest corner, the stairway at the southeast corner is clearly a means of access to the sump area from the level above it. Hence, I find that it has been established that Respondent violated section 77.205(b), supra.

II

In analyzing whether the violation herein is of such a nature as to fall within the purview of section 104(d)(1) of the Act as significantly and substantially contributing to a safety hazard, I am guided by the Commission decision in Mathies Coal Company 6 FMSHRC 1 (January 1984).

In Mathies Coal Co., supra, the Commission set forth the elements of a "significant and substantial" violation 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. (6 FMSHRC, supra, at 3-4.)

As discussed above, infra, I have already found that a mandatory safety standard, i.e., 30 C.F.R § 75.205(b), has been violated. Accordingly, the first element of Mathies, supra, has been satisfied. In evaluating whether or not the additional elements set forth in Mathies, supra, have been met, I find that the only evidence in the record on this issue consists of the testimony of Maloney. In essence, it was the testimony of Maloney that the nature of the violation herein was significant and substantial, inasmuch as the uneven coal accumulation in the sump area contained cracks and crevices and as a result created a hazard whereby one walking over such a surface could slip and suffer permanent disability due to a severely twisted ankle, or a broken leg. He also opined that an injury to one's head or body could occur as result of slipping or falling against hazardous

objects located in the sump area such as medal handrails, pumps, and support beams. Inasmuch as this testimony was not contradicted or diluted upon cross examination, I adopt it and find that the nature of the violation herein is to be considered significant and substantial within the purview of section 104(d) of the Act.

III

According to Respondent's witnesses on April 9, 1987, a screen located above the sump area, on the highest level of the plant, became plugged causing coal to overflow and fall to the sump area. In addition a water pump had broken causing the remaining water pumps in the circuit not to operate, thus shutting down the entire processing plant operation. It was further the testimony of Respondent's witnesses that from April 9, 1987, through April 16, 1987, the date of Maloney's inspection, the processing plant was not in operation and no one went to work in the sump area. Further, inasmuch as the pumps were not in operation, there was no way to provide water pressure to clean out the accumulation of coal in the sump area by having it washed out.

In order to find, as argued by Petitioner, that the violation herein was caused by Respondent's unwarrantable failure, I must find that the accumulation of coal in the sump area resulted from Respondent's aggravated conduct which constitutes more than ordinary negligence (Emery Mining Corp., 9 FMSHRC ____, (Slip op., Dec 11, 1987)). Petitioner, in its brief, argues that the coal accumulation in the sump area was ultimately caused by and not corrected due to Respondent's "lack of reasonable care." I conclude that although Respondent's actions herein might constitute "lack of reasonable care," they do not reach the level of aggravated conduct and thus can not be characterized as being encompassed in the term "unwarrantable failure" (Emery Mining Corp. supra). Moreover, Petitioner's augment is based upon testimony from Earl Read, who was Respondent's Plant Foreman in the time period in issue, which tends to indicate that Respondent had previously had problems with the secco screen (Tr. 207-208). Petitioner also cited Read's statement of June 16, 1987, and his testimony which tends to indicate that "the Company" and Read's supervisor, Guy Schippia, were not willing to replace screens and pumps. However, both Duren and Read testified that from April 9, to April 16, they were waiting for pump parts that had been ordered. This belies a finding that Respondent's action was "aggravated conduct."

Further , since the plant was not in operation between April 9 and April 16, and no one went down to the sump area in that time period, I find that it was not "aggravated conduct" for

Respondent to have opted to wait for the plant's returned operation in order to clean out the area with high pressure water which is the customary method of cleaning out the sump area.

IV

In assessing a civil penalty in this matter, I have carefully considered the criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The Parties have stipulated to the Respondent's history of previous violations, size of its' business, and the effect of a penalty assessed on its ability to continue in business. I adopt the Parties' stipulations.

The remaining statutory factors are in issue. Based on the testimony of Duren (Tr. 147-148) that Respondent had problems with the pump system prior to April 9, and Read's testimony that Respondent previously had problems with the screen, I find Respondent negligent to a moderate degree in that it had not, prior to April 9, fixed the portion of the system that caused the spillage in the sump area. Also, Respondent was negligent in a less than moderate degree in allowing the coal accumulation to remain from April 9 to April 16.

I find that until the abatement of the citation was commenced, there is no evidence that any of Respondent's employees actually entered the sump area where the coal had accumulated. Indeed, the processing plant was not in operation between April 1 and April 16, 1987. It was the testimony of Read, in essence, that because the plant was not in operation then there would not have been any reason for any employee to go to the sump area. Also, I note that although there was an accumulation of coal 4 feet high beside the stairway in the southeast corner of the sump area, there was no such accumulation or blockage by the stairway at the northwest corner, which is the one closest to the area on the floor above where the tools were kept. As such, I find that the gravity of the violation herein was low.

The condition giving rise to the violation herein was initially observed by Maloney on April 16, 1987. At that time, he proposed to Respondent that the condition should be abated by April 20, and according to Maloney's testimony Respondent did not object. When Maloney returned on April 20, the accumulation of coal was still in evidence. Maloney then issued a withdrawal order predicated upon Respondent's failure to abate. This order was terminated on April 27, 1987, when the original condition giving rise to the violation was abated. In mitigation, Duren testified that subsequent to Maloney's inspection on April 16, Respondent's work force was taken off the pit area and sent to the plant to repair the screen and pump and clean up the accumulation of coal in the sump area. According to Duren the pump was repaired on April 16, and according John Sulltrop, Respondent's safety director at that time, the plant was in operational

condition by quitting time at 3:30 p.m. on April 14. However, Respondent's workers, with one exception, refused to work overtime to clean the sump area. The one worker who remained, worked with Read and Sulltrop until 7:00 p.m. to flush out the system. In addition, according Respondent's President Michael Sinicropi, some coal was run through the system from the yard on April 17, with the intention of cleaning up the sump area on Monday morning April 20. However, according to Sinicropi, Respondent's employees were on strike Monday morning and Respondent needed some time to clarify its legal position whether it could hire nonunion personnel to clean the sump area. Subsequently, on April 20, Respondent contacted two nonunion employees who arrived at the mine Tuesday morning April 21, and cleaned out the sump area. Taking into account all of the above circumstances, as established by the uncontradicted testimony of Respondent's witnesses, I find that Respondent acted in good faith in abating the violation herein.

Taking into account all the statutory factors discussed above, especially Respondent good faith and low level gravity of the violation herein, I conclude that a civil penalty of $200 is appropriate.

ORDER

It is ORDER that Respondent pay the sum of $200, within 30 days of this Decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 9 1988

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 87-34 A.C. No. 15-13469-03580
v.	:	Docket No. KENT 86-143 A.C. No. 15-13469-03567
GREEN RIVER COAL COMPANY, INC., Respondent	:	Green River No. 9 Mine
GREEN RIVER COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 86-150-R Citation No. 2216772; 8/20/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 86-151-R Citation No. 2216773; 8/20/86 Green River No. 9 Mine

DECISION

Appearances: Flem Gordon, Esq., Gordon and Gordon, P.S.C., Owensboro, Kentucky for Green River Coal Company, Inc.;
Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", to challenge citations and withdrawal orders issued to Green River Coal Company, Inc. (Green River) by the Secretary of Labor and for review of civil penalties proposed by the Secretary for the violations alleged therein.

Citation No. 2216776, issued pursuant to section 104(a) of the Act, charges a violation of the standard at 30 C.F.R. § 75.200 and alleges as follows:

> The roof in the No. 1 entry cut-through at Spad No. 3600 was not supported and persons had been traveling through this area. This citation is issued as part of a 107(a) order therefore no abatement time is needed.

The cited standard provides in relevant part that "the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs".

Inspector James Franks of the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at the No. 9 Mine on August 26, 1986, with this colleague, Inspector Larry Cunningham, when he discovered in the intake escapeway to the No. 1 Unit an area of unsupported roof in a cut-through. The cut-through area, was 10-feet wide and 15 to 18 feet long and was totally without roof support. Franks opined that when coal had been loaded-out from the subject area the scoop or loader had pushed piles up to the sides creating a hill across the entry. There were machine tracks on top of the pile and it was "well worn, not a one-shot deal". Based on this evidence Franks opined that miners had been regularly using the cited area as a passageway. Franks also thought there was a "strong possibility" that pumpers had been in area because there was water in the cut-through. Bill Blaylock, the union representative at the scene, also told Franks that the cut-through had been completed for more than a week and "had been reported".

Franks also testified that there was an 18 inch streamer hanging from the roof at one end of the cut-through signifying that the area was "dangered off" but there was no such warning on the other end of the cut-through. According to Franks the cited area could properly have been "dangered off" in accordance with the roof control plan thereby avoiding a violation of the cited standard, however Franks opined that in order to do so a streamer must be suspended from both ends of the dangerous unsupported area (Government Exhibit 4 page 4 paragraph 12). Franks explained that if only one end of the unsupported danger area is "dangered off" with a streamer then persons approaching from the opposite side would not be adequately warned. Franks also testified that it had been MSHA's practice for at least 15 years to require both sides of such an area to be "dangered off".

Within this framework of undisputed evidence it is clear that there was a violation of the cited standard and that the violation was "significant and substantial" and serious. Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). In summary, the evidence shows that a significant area of unsupported roof existed in a cut-through area some 15 to 18 feet long. It is undisputed that miners were passing beneath this unsupported roof in spite of the placement of an 18 inch streamer signifying a dangered-off area. The violation was further aggravated by the fact that the cited area was used as an escapeway and that the roof in the area had a history of instability and falls. Indeed,

according to Franks there were several roof falls on the same unit on the very day of his inspection. I find that such an unsupported area of roof in a mine having a recent history of roof falls and with miners continuing to travel beneath that roof under the circumstances constituted a "significant and substantial" and serious violation. Mathies Coal Co., Supra.

The fact that one entrance to the "cut-through" could be entered without warning that it was "dangered-off" also supports a finding of operator negligence. In addition, the fact that miners had been traveling beneath the unsupported roof in apparent disregard of the existing warning streamer shows a lack of supervision, training and/or discipline. See Secretary v. A. H. Smith Stone Co., 5 FMSHRC 13 (1983). For this additional reason I find that the violation was the result of operator negligence.

Citation No. 2216493 issued on May 2, 1986, pursuant to section 104(d)(1) of the Act[1]/ alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.200 and charges as follows:

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

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

There is a violation of the roof control plan dated November 27, 1985, in that timbering on the No. 5 unit in the intake is 1,330 feet outby the unit belt tail and in the return it is 910 feet outby the belt tail. The plan requires timbering to be within 250 feet to the corresponding location of the tail piece (page 14).

Respondent does not dispute that the intake and return were not timbered as alleged in the citation but initially maintained that the roof control plan in effect at the time the citation was issued did not require timbering of the intake and return entries. Additional evidentiary development was permitted post-hearing by way of depositions and, at continued proceedings on January 20, 1988, the Respondent withdrew its defense and admitted the violation as alleged.

It is undisputed that the violative conditions had existed for more than two weeks and that the cited entries were subject to mandatory weekly inpections by the mine operator. The operator has withdrawn its defense and now presents no excuse or justification for its failure to have provided required timbering in more than 3,000 feet of the mine in direct contravention of the specific provisions of its own roof control plan. Under the circumstances I find the violation was the result of an inexcusable omission or failure to act of an aggravated nature and that it was therefore due to the "unwarrantable failure" of the operator to comply. See Emery Mining Corporation v. Secretary 9 FMSHRC ___, Docket No. WEST 86-35-R (December 11, 1987).

It is undisputed that a roof fall in the cited area could interrupt the ventilation at the working faces and cause a methane buildup. With the relatively high methane emissions at this mine (more than 1 million cubic feet every 24 hours) it would be reasonably likely to expect reasonably serious injuries to the underground miners. Furthermore the intake was also one of the mine escapeways and a roof fall resulting from the untimbered roof could reasonably be expected to prevent this intended use with fatal consequences. The violation was accordingly serious and "significant and substantial". Mathies Coal Co., Supra.

Section 104(d)(1) Order No. 2216772, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.316 and charges as follows:

The intake air course for the No. 3 unit was not separated from the return air course of the No. 7 unit with

permanent stoppings (the brattice had been knocked out at this location) at Spad No. 6159 in the main north-west entry.

In the amended order the Secretary alleges that these facts constitute a violation of the operator's ventilation plan under 30 C.F.R. § 75.316. In particular the Secretary maintains that the operator violated paragraph A, page two, of the ventilation plan which reads as follows:

> Permanent stopping- (concrete blocks, dry stacked and sealed on pressure side or sealed and held in place with mortar and/or block bond or equivalent shall be erected between the intake and return air courses in entries and shall be maintained to and including the third connecting cross cut outby the faces of the entries on the return side and shall be maintained to the unit tailpiece on the intake side. Mandoors shall be constructed of metal. Metal brattices may be used in face area).

MSHA Inspector James Franks testified that during a spot inspection on August 20, 1986, several miners complained that the operator was knocking out brattices and thereby affecting the intake air. Investigating the complaint, Franks walked the intake air course to the No. 3 unit and, near Spad 6159, observed that brattice had indeed been knocked out. According to Franks, the cited condition could short circuit the intake air for the No. 3 unit and the return air from the No. 7 unit could contaminate the No. 3 unit. Fire and smoke on the No. 7 unit would proceed to the No. 3 unit if there were lower air pressure in the No. 3 unit.

In addition, Franks observed that the relatively high methane concentration that existed in the No. 3 unit might not be properly diluted and removed because of the cited condition. He observed that the No. 3 unit had a more serious history of methane. Franks further observed that, depending on the resistance of the air, there was a reasonable likelihood of an accident leading to serious injuries e.g. suffocation from smoke or a methane explosion or ignition. There was a history of ignitions and one mine fire at the No. 9 mine. Five or six men were performing repair/maintenance work on the No. 3 unit when the order was issued.

Franks also thought that the violation was result of high operator negligence. The brattice had admittedly been knocked out intentionally for the purpose of creating a supply road after the regular supply road had become impassible because of water and mud.

Grover Fischbeck, the Green River Safety Supervisor, acknowledged that the permanent stopping blocks had been knocked out at Spad 6159 and only a curtain remained. According to Fischbeck

the supply road was impassible and it was therefore necessary to carry supplies through the No. 3 intake.

Within this framework of evidence it is clear that this violation is also proven as charged and that it was "significant and substantial" and serious. Mathies Coal Co., supra; Secretary v. Monterey Coal Company, 7 FMSHRC 996 (1985). Even assuming, arguendo, that management had initially intended for the stoppings to have been knocked-out only between shifts, it is apparent from the evidence that the condition remained while miners were working on the unit, contrary to that alleged intent. In addition, because the violative condition was intentionally created by management and not corrected before miners were exposed to the dangers, the violation was the result of inexcusable aggravated conduct constituting more than ordinary negligence and was therefore due to "unwarrantable failure". Emery Mining Corporation, Supra.

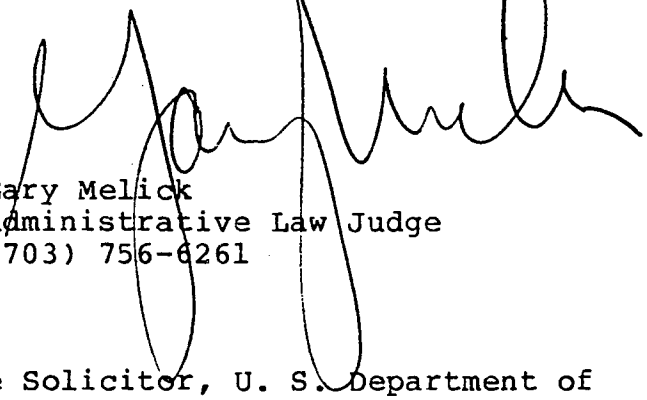
Order No. 2216773, as amended, also issued pursuant to section 104(d)(1) of the Act, also alleges a violation of the ventilation plan (Exhibit 7 page 2 paragraph A) under 30 C.F.R. § 75.316 and charges that "[t]he intake air course was not separated from the return air course with permanent stoppings. Brattice had been knocked-out) on the No. 7 unit 007 main north entries at Spad No. 6509."

It is again undisputed that the permanent stopping had been knocked out at Spad 6509 as alleged. According to Inspector Franks there was no measurable movement of air at the last open crosscut in the No. 7 unit. There was also one percent methane at the face area and the unit was continuing to produce coal in the presence of Robert Carter, the face boss. Franks observed that with the ventilation short-circuited, methane concentrations could reasonably be expected to build-up with the associated risk of fire or explosion. According to Franks there was a greater likelihood for the short circuit to occur on the No. 7 unit than on the No. 3 unit although it was quite possible for the No. 3 unit to be contaminated because of air being short-circuited into the No. 3 unit. In regard to gravity and negligence both Franks and Fischbeck relied upon their testimony on these issues provided with respect to Order No. 2216772. Under the circumstances I similarly find that the violation herein was "significant and substantial", serious and due to the "unwarrantable failure" and high negligence of the operator.

In determining the appropriate civil penalties to be assessed I have also considered that the violative conditions in these cases were abated in accordance with the Secretary's directions, that the operator has a significant history of violations and that it is of moderate size.

ORDER

Green River Coal Company, Inc., is directed to pay the following civil penalties within 30 days of the date of this decision: Docket No. KENT 86-143: Citation No. 2216493 - $750; Docket No. KENT 87-34: Citation No. 2216776 - $400; Order No. 2216772 - $500; and Order No. 2216773 - $400. The Contest Proceedings Docket Nos. KENT 86-150-R and KENT 86-151-R are denied and dismissed.



Gary Melick
Administrative Law Judge
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FEB 10 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 87-54
	:	A.C. No. 41-02803-03527
v.	:	
	:	Palafox Mine
FARCO MINING COMPANY, Respondent	:	

DECISION

Appearances: V. Denise Howard, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Arturo Volpe, Esq., Wilson, Volpe, Freed & Hansen, Laredo, Texas, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. the "Act," charging Farco Mining Company (Farco) with three violations of regulatory standards.1/

The general issues before me are whether Farco violated the cited regulatory standards and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial". If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

1/ At hearing the Secretary moved to withdraw and vacate Citation No. 2839107 for the reason that he was satisfied upon further investigation that the deceased miner had in fact received the training required under 30 C.F.R. § 48.27(a) and accordingly he now believed there was no violation of the standard. The motion was granted at hearing and the citation accordingly vacated.

The facts surrounding the death of Pedro Leija at Farco's Palafox Mine on October 4, 1986, are set forth in the investigative report authored by Theodore Caughman a senior special investigator for the Federal Mine Safety and Health Administration (MSHA). The report was admitted into evidence without objection (Exhibit R-2) and states in relevant part as follows:

> On Saturday, October 4, 1986, a crew of men consisting of two utilitymen, one laborer, one welder, and a preparation plant operator, arrived at the mine to perform maintenance work on components related to the preparation plant facility. The crew was under the supervision of Perfecto Cervera foreman. After the foreman assigned duties, he went to the substation and locked out the power providing power to the raw coal storage bin crusher facility. Maintenance work to be performed this day consisted of changing the main hydraulic pump on the Stamler Belt Feeder Conveyor, replacing and/or repairing flights in the conveyor of the Stamler and replacing or installing picks (bits) on the crusher roller. Also, a number of conveyor belt idler rollers were to be replaced in the raw coal overland feeder belt that removed the coal after it had been run through the crusher. These activities continued until about 3:00 p.m., when Cervera checked on the progress of the work being performed. Arturo Valdez, utility, and Pedro Leija, laborer and victim, had just completed installing all the available picks (bits) at the site on the breaker roller, the hydraulic pump had been repaired, and the belt idler rollers had been replaced. Arturo Valdez, welder, and Danny Munoz, preparation plant operator, were in the process of installing a missing flight in the chain conveyor which transports the coal from the raw coal storage bin to the crusher roller. Perfecto told Valdez he could go home, and Valdez left. Perfecto instructed Leija to gather up the tools they had been using, clean them and put them in the tool box. He then told Munoz and Lozano that he was going to restore the power to the Stamler so the conveyor could be operated to see if additional flights needed to be replaced or if any others were missing. He then went to the substation and restored power to the Stamler. On his way back, he stopped at the warehouse and picked up two buckets of picks (bits) for the crusher roller since all the spare ones at the crusher had been installed. He returned to the raw coal storage bin crusher facility, set the two buckets of bits in the area where they were normally stored, and told Lozano and Munoz that the

power had been restored. He also told them that he and Jose Luis Aguilar, utilityman who had been cleaning surface areas, were going to the clear water pond to prime the clear water pump so water would be available when the preparation plant was put in operation. At this time Leija, victim, was about 125 feet away, near the tool box, cleaning the tools he had gathered. Lozano and Munoz were working on the flights, and Cervera and Aguilar traveled to the clear water pond. After arriving at the pond, Cervera sent Aguilar to obtain a bucket to fill with water so the pump could be primed. Aguilar traveled by foot to the tool box area, where Leija had been working, got a bucket and walked back toward the clear water pump. When he was at the tool box area he did not observe Leija, although he did see the tools he had been cleaning still in the bucket of cleaning solvent. Meanwhile, Munoz and Lozano had finished installing the flight they had been working on and Lozano started walking around the coal storage bin to engage the hydraulic controls so the conveyor chain could be rotated and Munoz energized the Stamler crusher electrical system. As the machinery started, Lozano looked up toward the crusher assembly and saw Leija being pulled into the crusher. Lozano yelled at Munoz to shut off the machinery. Munoz ran around the end of the crusher to where Lozano was, found out Leija was in the crusher, and using the emergency stop switch on the raw coal belt conveyor that transports the coal from the crusher, stopped the machine. Help was summoned and Leija was pronounced dead at the scene by the Webb County Coroner. The body was removed from the crusher assembly by the Laredo Fire Department Paramedics and transported to Jackson Funeral Home in Laredo, Texas.

As a result of its investigation, MSHA issued several citations under section 104(a) of the Act, two of which remain at issue. Citation No. 2830087 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1607(bb) and charges as follows:

> The entire length of the chain conveyor of the Stamler coal cracker was not visible from the starting switch that was used and a positive audible or visible warning system was not installed and operated to warn persons that the conveyor was to be started. This violation observed during the investigation of a fatal accident which occurred on October 4, 1986.

The cited standard provides in relevant part that "[w]hen the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started".

Farco maintains that the cited standard is not applicable to the facts herein because the "Stamler Belt Feeder - Conveyor" was not a "conveyor" nor was it "loading and haulage equipment" to which, it argues, the cited standard is limited, citing the caption to the subheading to section 77.1607, i.e. "Loading and Haulage Equipment: Operation". The term "conveyor" is defined in A Dictionary of Mining, Minerals, and Related Terms, U. S. Department of Interior (1968) as "[a] mechanical contrivance generally electrically driven, which extends from a receiving point to a discharge point and conveys, transports, or transfers materials between those points." The term "conveyor-type feeder" is defined therein as "[a]ny conveyor, such as apron, belt, chain, flight, pan, oscillating, screw, or vibrating, adapted for feeder service."

The machine here at issue is labeled "Stamler Belt Feeder-Conveyor" and incorporates, by the Respondent's own evidence, a 3-speed conveyor (Exhibit R-4). It is also undisputed that the machine functions as a conveyor in that it has flights which drag coal from a bin through the crusher. Since the equipment is labeled by its manufacturer to be a conveyor and performs the functions of a conveyor one may reasonably infer that it is a conveyor.

Further, even assuming, arguendo, that the cited equipment must come within the scope of the subtitle "Loading and Haulage Equipment" it is clear that it performs such functions. The term "haulage" is defined as the "drawing or conveying, in cars or otherwise, or movement of men, supplies, ore and waste, both underground and on the surface." A Dictionary of Mining Mineral and Related Terms, supra. It is not disputed that there is a bin or hopper mounted on the machinery into which coal is loaded. The coal is then drawn or conveyed to the crusher by the conveyor. The coal is crushed and then further conveyed to a storage area. Within this framework of evidence it may reasonably be inferred that the cited equipment performs a haulage function within the meaning of the subtitle "Loading and Haulage Equipment: Operation". Farco's argument that the cited equipment was not therefore haulage equipment is accordingly rejected.

Farco further argues that the cited equipment was purchased in full compliance with "Federal and State legislation" and therefore presumably it should not be responsible for any violation of Federal law. Even if this were true however the

evidence shows that following its purchase it was modified by the installation of a large bin over the hopper area, thereby obstructing the view from the start-stop switch to the area of the breaker roller. The contention accordingly has no merit. With regard to the specific violation charged herein, it is undisputed that the cited crusher-conveyor was not equipped with an audible or visible warning system. The evidence also shows that the coal crusher-conveyor at issue was activated by a start-stop switch from which the crusher roller upon which the deceased in this case was working could not be seen (Exhibit R-2, p.3, Tr. 40 and 69). Accordingly the violation is proven as charged.

The failure to have complied with this regulatory standard was clearly a causative factor in the death of Mr. Leija. It may reasonably be inferred therefore that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Co. 6 FMSHRC 1 (1974). The violation was also the result of operator negligence. By having a large bin erected (thereby obstructing sight between the on-off switch and crusher) on equipment known by Farco to meet Federal safety standards, Farco should have been on notice of potential safety violations and of this violation in particular.

Citation No. 2839108 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.404(c) and charges that "the Stamler Coal Crusher was not blocked against movement while repairs were performed, which resulted in fatal injuries to employee Pedro Leija on October 4, 1986."

The cited standard provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." It is not disputed that the cited machinery was not blocked against motion.

Farco maintains however that the deceased was performing an unauthorized task at the time of his death and should not have been working on the Stamler crusher when power was engaged. It concedes that motion of the Stamler is not necessary during replacement of the picks but maintains that that task had already been completed and the deceased was directed to work elsewhere before the next maintenance procedure, repair of the flights, was begun. The Secretary does not dispute that motion is necessary during repair of the flights and that the exception provided in the cited standard would apply to that specific procedure.

It is undisputed that the deceased and utilityman Arturo Valdez began replacing bits on the crusher roller at around 2:30 on the afternoon of October 4th. At around 3:00 that afternoon

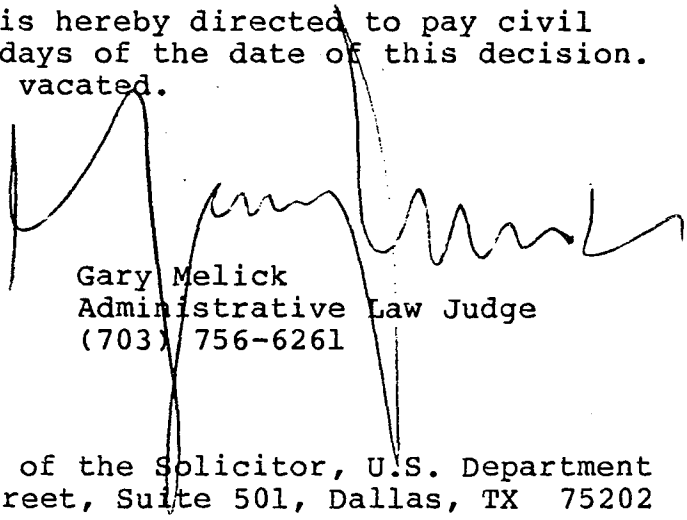
they had completed installing the bits that were available at the crusher. Foreman Perfecto Cervera then told Valdez that he was free to leave and told the deceased to gather up his tools, clean them and put them away. Cervera then restored power to the Stamler, apparently to permit the next repair process to begin, and obtained two buckets of bits from the warehouse. Cervera left these buckets at the Stamler work platform where they were ordinarily kept.

Following the accident it appeared that two bits were missing from the buckets, one having been installed on the crusher roller and another having been found on the floor below along with the tools necessary to change the bits. It may reasonably be inferred from this evidence that the deceased had returned to the Stamler unit without specific direction from his foreman to replace additional bits. Thus it is apparent that maintenance work was being performed by the deceased while power was engaged and the machinery was not blocked against motion--and motion was not necessary to the specific task he was performing i.e. the replacement of bits. While the credible evidence shows that Foreman Cervera had directed the deceased to perform other tasks and the work of changing bits may have been contrary to the deceased's instructions from his foreman, the law is well-established that an operator is liable for violations of the Act committed by its employees even if it is totally without fault. Thus on the issue of whether a violation existed, it is immaterial whether or not Farco officials knew that the deceased was replacing bits at a time when the power to the Stamler unit was not cut-off and when the machinery was not blocked against motion. Sewell Coal Company v. FMSHRC, 686 F.2d 1066 (4th Cir. 1982); Alabama By-Products Co. v. FMSHRC 666 F.2d 890 (5th Cir. 1982); Secretary v. Asarco Inc., 8 FMSHRC 1632 (1986); El Paso Rock Quarries, Inc. 3 FMSHRC 35 (1981). Thus the violation is proven as charged. In light of the fatality it may reasonably be inferred that the violation was also serious and "significant and substantial". Mathies Coal Co., supra.

However since the credible evidence demonstrates that foreman Cervera directed the deceased to perform work other than changing bits on the crusher roller after 3:00 p.m. and that he was unaware that the deceased had returned to work on this unit, Farco is chargeable with but little negligence in regard to this violation. In determining the appropriate civil penalties in this case I have also considered that the mine operator is relatively small in size and that it has a moderate history of violations. It appears that the instant violations were abated in full compliance with the Secretary's directions. Under the circumstances I find that the following civil penalties are appropriate: Citation No. 2830087, $1,000; Citation No. 2839108, $50.

ORDER

The Farco Mining Company is hereby directed to pay civil penalties of $1,050 within 30 days of the date of this decision. Citation No. 2839107 is hereby vacated.



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 12 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-15 A.C. No. 05-00300-03525
v.	:	L.S. Wood No. 3 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Lasher

This matter was initiated by the filing of a proposal for penalty by the Secretary of Labor under the authority of Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq. (1982)(herein the Act). Subsequent to the hearing the presiding Administrative Law Judge, John A. Carlson, passed away and this matter is before me for decision.

Procedural Background

Petitioner originally sought assessment of a penalty ($800.00) for an alleged violation of 30 C.F.R. § 75.200 which is described in the subject Section 104(d)(1) Citation No. 2213098, issued June 29, 1984, as follows:

> "Mining of coal in the reactivation of 2nd South and a portion of the bleeder has been in progress on a continual basis, for at least 45 days. The mining in this area of bleeder the mine was not performed under an approved roof control plan. A reply to a letter; dated March 29, 1984 to the operator, to clarify 2 items of the proposed roof control plan was not in receipt."

The alleged violation was designated "Significant and Substantial" on the face of the Citation.

The pertinent regulation (75.200) provides:

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

I infer from the underscored portions that the "review" contemplated is not casual since "falls" and "inadequacy of support of roof or ribs" are required to be considered. Such would seem to mandate an inspection of the mine as a prerequisite to the review.

Citation No. 2213098 in its original form was issued by MSHA Coal Mine Inspector Larry W. Ramey during an inspection of Respondent's L.S. No. 3 Wood mine at 8:15 a.m. on June 29, 1984. Respondent at that time was engaged in mining coal (T. 43). The time established for abatement was 7:00 a.m. on July 2, 1984.

MSHA Inspector Louis Villegos, at 11:10 a.m. on June 29, 1984, extended compliance time to 12 noon on July 3, 1984, with this "Justification for Action":

"Contact with the Roof Control Office in Denver, Colorado has been made by the operator via telephone. This extension will allow for delivery and approval of the proposed roof control plan." (emphasis added).

On July 10, 1984, at 1:35 p.m., Inspector Ramey again extended compliance time-- to 10:00 a.m. on July 12, 1984 - with the justification:

"(75.200) The operator has submitted a roof control plan to Denver, Colorado for approval. Therefore this extension

is granted the operator until Denver approves the roof control plan and the plan is delivered."

At 3:00 p.m. on July 10, 1984, Inspector Ramey issued a modification of Citation No. 2213098, which appears as Attachment "A" to this decision. Thus, the final theory of violation enunciated in the Citation (as finally modified) alleges a violation of the plan approved March 25, 1982, rather than mining without an approved roof control plan.

In apparent contradiction of the modified theory of violation, on July 12, 1984, Inspector Ramey once more extended abatement time- to July 19, 1984-- stating:

> "The operator has submitted a roof control plan to the District Office in Denver, Colorado for approval. Upon contact with Denver by telephone it was learned that the plan was still under review. Therefore this extension is granted the operator until Denver approves the roof control plan, and the plan is delivered." (emphasis added)

On July 19 Inspector Ramey issued a final extension to July 26, 1984 with this justification:

> "The operator has submitted a roof control plan to the District Office in Denver, Colorado for approval. The District Office is still in the process of reviewing the submitted plan. Therefore more time is granted to the operator until Denver approves the roof control plan and the plan is delivered." (emphasis supplied)

On July 31, 1984, the Citation was "Terminated" by Inspector Villegos with the notation that "The Roof Control Plan submitted by the operator appears adequate and has been approved."

General Findings

(1) The Respondent is an underground coal mine operator with a history of 56 violations during the 2-year period preceding the issuance of the subject citation on June 29, 1984. The alleged violation was "abated within a reasonable time" according to Petitioner's Narrative Findings for a Special Assessment" and I infer therefrom that Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violation.

(2) Production at the mine was shut down in December, 1982 (T. 109); the mine was down all of calendar year 1983 into early 1984 (T. 145). Mining or preparation for mining began in April, 1984 and was in progress at least by April 30, 1984 (Ex. R-33).

(3) In March, 1984, Respondent, at MSHA's suggestion, requested that the previously approved roof control plan be

"reinstituted". (T. 153-154, Ex. P-2) to allow secondary or pillar mining in the 2-South section and bleeder entries (T. 146-148; Ex. R-6). This area was considered "dangerous" to mine in by MSHA officials (T. 88).

(4) The last time a roof control plan for the mine had been reviewed and (even though the mine had been shut down for some five months) reapproved by MSHA was on May 4, 1983 (Ex. R-4).

(5) The pertinent May 4, 1983 roof control plan specifically addressed pillar extraction in Par. 2.12 and the accompanying diagrams. Par. 2.12 thereof provides:

> "Special roof-control precautions are mandatory during pillar-extraction operations and when bottom coal is taken as part of the pillar-extraction operation. These requirements are best shown graphically and are included in this roof-control plan as Figure 2.1" 1/

6. (a) During the hearing, Respondent's Vice President of Mine Operations, M.J. Turnipseed gave this explanation of paragraph 2.12:

> "Q. Well paragraph 2.12...
>
> A. Yes, this refers to when bottom coal was taken as part of the pillar extraction.
>
> Q. All right. And that is limited context in itself? There have to be the 2 conditions present?
>
> A. They have to have the bottom coal to extract and you have to be in pillars.

1/ Paragraph 2.12 of the 1982 plan is identical in all material respects other than referring to "figure 2.1 through 2.2" in the last sentence, to wit:

> "Special roof-control precautions are mandatory during pillar-extraction operations and when bottom coal is taken as part of the pillar-extraction operation. These requirements are best shown graphically and are included in this roof-control plan as Figure 2.1 through Figure 2.2."

Comparison of the 2 plans also reveals that there are no other material differences in them (See T. 100, 152).

Q. All right. Is there anything in the narrative about pillaring per se?

A. Not the exact sequence.

Q. There is some general precautions?

A. There's general precautions." (T. 224)

6. (b) Inspector Villegos testified however, that it was not his impression that the pillaring sequence contained in the 1982 plan (Ex. R-3) was to apply only to bottom coal and it was his opinion that it applied to both bottom and top coal (T. 228, 229-233).

6. (c) So also, Inspector Ramey convincingly testified in support of the opinion of Inspector Villegos:

"Q. First of all, let me ask you this. Based on your experience in coal mining and your experience as a coal mine inspector, do you have an opinion as to whether or not that paragraph applies only to bottom coal extraction?

A. I believe it's self explanatory. To say that these requirements are based on -- and are included in this roof control plan is figure 2.1 through figure 2.2. It details in illustrations on how you will pull bottom coal back after the top coal is pulled. As an experience, I used to be a section foreman on a pillar section and I'm fully aware of how you pull pillars.

Q. And that would include pillars that are in the coal seam that requires pulling top coal and bottom coal?

A. Yes, sir.

Q. In your history with the agency, have you ever seen the roof control plans for pulling pillars interpreted in any other way than the way you've just described?

A. No, I have not."

(T. 234-235)

6 (d) The two inspectors who conducted the inspection, Ramey and Villegos, used the 1982 plan in doing so and both found that the 1982 plan (Ex. P-1) was violated; their testimony was actually couched in the specific context of the plan approved in 1982 rather than the 1983 plan (Ex. R-4); why the 1983 plan was not used in the inspection was not shown. Thus, Villegos testified:

A. The date that appears is May 4, 1983.

Q. Okay. And, that was the plan that was, at least, approved subsequent -- or, apparently, approved subsequent to the '82 plan. Is that right?

A. Yes.

Q. Okay. And, why would you guys be using the '82 plan?

A. I have no idea. (T. 76)

6. (e) Inspector Villegos first testified that the significance of Paragraph 2.12 of the plan is that "additional" precautions are taken during the time bottom coal is removed and that removal of bottom coal presents special problems and hazards (T. 77-78).

6. (f) The interpretation given Paragraph 2.12 (which is found identical in both the 1982 and 1983 plans in all respects material herein) by Inspectors Ramey and Villegos was endorsed by 2 MSHA supervisors, Steve Miller and Lee Smith. After Mr. Miller's attention was directed to Paragraph 2.12, this dialogue, which I find persuasive occurred:

"Q. Will you read that to yourself and having done that, can you tell me if it was first of all in your opinion whether or not that paragraph applied only to bottom coal removal or applied [sic] to pillar removal when in fact it was not to be done in 2 layers, but only the top coal taken?

A. It's very definitely, Mr. Barkley, applies 99% to just regular pillar mining. We--the bottom coal aspect of it was not a--was not our primary concern here. Was not our concern. Let me just throw a little light in on this. Maybe it will help a little bit." (T. 251)

6 (g) Accordingly, the minority opinion of Mr. Turnipseed that under 1982 plan the broad pillar mining sequence pertained only to bottom coal (T. 224, 225) is rejected in view of the four convincing opinions weighted against it. The record also reveals that the majority interpretation was the one consistently applied in enforcement over the years (T. 229-231, 235, 237, 238-239, 242-243, 246-247, 252-253, 255-257).

7. As pointed out in Petitioner's brief, there is no dispute as to what cuts were taken in the pillars observed by the inspectors. Two pillars had been cut in half in order to provide access to pillars further inby (T. 45-51, 70-72). One of the two pillars was next to a caved-in area (T. 51) and accordingly was required to bear an excessive amount of weight (T. 52). Based on the persuasive testimony of the inspectors that the cuts made by

Mid-Continent were not in conformance with the pillar extraction sequence of the roof control plan (T. 52-54, 72-74, 215-216). I find that the 1982 roof control plan (last approved on May 4, 1983) was in fact contravened as alleged in the modification to the citation. To constitute a violation, however, this roof control plan would have had to have been in effect when the citation was issued.

Issues

The issue set forth in Petitioner's brief, which I do not find dispositive, is whether on June 29, 1984, and prior thereto, Respondent violated the "pillar removal sequence" of "the approved roof control plan" (RCP) by cutting roadways through two pillars, and if so, whether such violation constituted an "unwarrantable failure" of Respondent to comply with the subject safety standard within the meaning of such term in Section 104(d)(1) of the Act.

A preliminary but crux issue, however, is whether there indeed was an "approved roof control plan' in effect on June 29, 1984, which was subject to being violated by Respondent's mining method on that date.

Findings with Respect to Existence of Roof Control Plan

The roof control plan last in effect before the mine closed in December, 1982, was that approved on March 25, 1982, and which is referred to herein as the 1982 plan (Ex. P-1). As noted elsewhere, the mine was closed throughout 1983. Nevertheless, on May 4, 1983, MSHA, apparently routinely (T. 108, 110) reapproved this plan for a six-month period by letter from John W. Barton, District Manager to Respondent's Chief Engineer, Bradley J. Bourquin. This letter, which appears as a cover letter attached to what is referred to herein as the 1983 plan-- Ex. R-4--states:

> "The roof control plans for the subject mines have been reviewed by MSHA personnel. Since the plans appear adequate, they shall remain in effect for another six month period." (emphasis added) (See Attachment "B")

This approval thus expired by its own terms on November 4, 1983, a time prior to the mines reactivation and of course, prior to the issuance of the subject Citation. There is no evidence of a later approval of reapproval on or about November 4, 1983, or between November 4, 1983, and the time the Citation issued. The record is clear that there was no approved roof control plan in effect on June 29, 1984, when the Citation was issued (T. 85-86, 88).

By letter dated March 22, 1984, to MSHA District Manager John Barton, Mr. Turnipseed, requested to "reinstitute" the "last approved" 2/ RCP, to wit:

> "The L.S. Wood No. 3 Mine is being temporarily reactivated to mine coal from the 2 South section and a portion of the bleeder entries between No. 1 and No. 3 mine. The previous development was done in 1968 and the area was roof-bolted on 6 - foot centers. The area has stood well and the roof is in good condition. Mr. Mike Stanton, Roof-Control Specialist, MSHA, has examined the area and has knowledge of the conditions.
>
> Permission is requested to reinstitute the last approved roof-control plan in all new mining and accept the previously bolted areas as they were installed. The previously bolted areas are shown on the attached map."
> (Ex. R-6) (emphasis added)

This letter constitutes a recognition that the "last' approved plan was no longer in effect. It attaches a map showing the area where the "new" mining was to be conducted, i.e., an area previously developed in 1968.

Also, as will be seen subsequently, in MSHA's ultimate written approval of this plan by letter dated July 27, 1984, a significant-and-relevant-limitation on the method of pillar extraction was contained.

In his reply letter of March 29, 1984, Mr. Barton raised two questions relating generally to "outbursts" 3/ and pillar points:

> "The proposed plan of reactivation of 2 South and a portion of the bleeder entries in the subject mine has been reviewed by MSHA personnel. Before the plan can be considered for possible approval, the following items need to be clarified by you or your staff:
>
> 1. What method or methods will be taken to minimize the possibility of outbursts during the second mining in the bleeder entries? Please refer to 30 CFR, 75.201-2(a).

2/ As shown herein, the "last approved" plan was that approved on May 4, 1983 (Ex. R-4), which was essentially identical to the 1982 RCP approved on March 25, 1982 (Ex. P-1).

3/ Sections 8.1 through 8.4.7 of both the 1982 RCP (Exhs R-3 and P-1) and the 1983 RCP (Ex. R-4) provide for outburst control. Comparison of these provisions in the two plans reveals that they are identical.

2. What method or methods will be taken to insure that pillar points will not be formed and to insure that pillars will not project inby the breakline? Please refer to 30 CFR, 75.201-2(g). This item needs to be considered very carefully since second mining has been done on both sides of the bleeder entries...."

(emphasis supplied) (Ex. R-7)

Apparently, however, Section 8.2 of the 1982 RCP originally provided as follows:

8.2 All mining areas which meet all of the following criteria will be subject to this Code of Practice for Outburst Control unless specifically exempted, in writing, by the President of Mid-Continent Resources, Inc. in conjunction with one other Company officer.

Criteria for Outburst Control:

1) Workings in Coal Basin Seam, B-bed coal.
2) First mining of development headings utilizing continuous mining machine.
3) Workings more than 2500 in vertical depth.

According to Mr. Turnipseed, subparagraph 3 of Section 8.2 was scratched out -at some indeterminate time-- and both Respondent's Ex. 3 and Petitioner's Ex. 1 reveal this. (T. 160). According to Turnipseed, the significance of such is that under a "light cover" -- something less than 2000 feet of overburden-- outburst problems have not been experienced, that such problems occur only in the lower reaches in the mine, and that there was no need to take special precautions in the area referred to by District Manager Barton in his letter to Turnipseed dated March 29, 1984 (Ex. R-7) since such area "was not in an outburst-prone area" (T. 159, 160-161).

On April 4, 1984, Turnipseed met with MSHA officials to "clarify" the points raised in the Barton letter (T. 155, 156-158, 159).

With respect to his impression of this meeting Turnipseed testified:

"Q. During the course of the conversation on April the 4th 1984, with the MSHA people, did anyone indicate that you could not do what it was you were proposing to do in terms of pillar--portions of the bleeder return and the 2 south entry in the L.S. #3 Mine?

A. No. In fact, there was I felt like a meeting of co-operation working out the fine details which I've just given you. The outstanding points that had to be met.

Q. Was there any indication to you--or did you just dream up the fact that your request to have a plan reinstituted would be approved?

A. I didn't see any problem at all. It was done at MSHA's suggestion and with their cooperation.

Q. They suggested that you request that it be reinstituted?

A. Yes, in writing.

Q. And they gave you no indication that it would not be approved?

A. That's true.

Q. -- was there anything else that transpired that indicated to you that the plan had been approved?

A. I assumed that we just had an approved plan and all we had to do like in many other cases is wait for the letter to come through the mail. But in the meantime don't worry about it, it's okay.

Q. Is that a frequent practice with MSHA, where there is an approval and there is some delay and wait for the letter to arrive saying, "yes, you're approved?"

A. That happens quite frequently after a meeting of ironing out details, we get down to the final point, and we get an agreement. I carry away a set of notes much like this and they say, "you can expect your approval letter in the mail."

Q. But no telling how long it might take to get the approval letter?

A. Well, it's normally said that it's coming out promptly which can be anything up to a couple of weeks many times."
(T. 163-164)

I find, however, that there was no verbal agreement manifested by MSHA at the 4-4-84 meeting to reapproval or reinstitution of the 1982 plan although Mr. Turnipseed may have assumed that such was the case. Thus, his notes of the meeting did not reflect such (T. 188-190, 200-201), and there was no expression of such agreement by MSHA personnel (T. 197). Also, the parties discussed the matter further two days later on April 6, 1984 (T. 198).

When Respondent commenced production in April, 1984, it had not received any written (required) approval letter approving the new RCP (T. 198-199, 200-201). This has some mine safety significance since the plan for which Respondent sought approval

by its letter of March 22, 1984, was significantly different from the 1982 plan (T. 114-115, 154).

By letter dated July 26, 1984, addressed to Barton, Mr. Turnipseed enclosed the "revised" RCP:

> "Enclosed is the revised roof control plan as per the conversation between J.A. Reeves Sr. and Mr. Bill Holgate on July 26, 1984. The roof control plan specifically addresses MSHA's concerns pertaining to the right-left extraction procedures referenced in your July 20, 1984 letter.
>
> As you will find in the new roof control plan, the extraction methods recommended by Mr. Holgate are implemented in paragraph 2.13 and figure 2.2. I hope these proposed changes specifically address the concerns of MSHA.
>
> Mid-Continent Resources appreciates MSHA's interest and will continue to address any further issues which arise. Thank you." 4/ (emphasis added)

The first approval in writing 5/ of the new (1983) RCP appearing in this record is that reflected in the letter of July 27, 1984 from Barton to John Reeves, President of Respondent, which states:

> The roof control plan dated July 26, 1984, for the subject mine has been reviewed by MSHA personnel. This plan appears adequate for the roof conditions and system of mining being used, and is hereby approved. However, methods of pillar extraction depicted in Figure 2.2, pages 1 through 5, shall only be used when existing entries and crosscuts have heaved preventing pillar extraction as shown in Figure 2.1, pages 1 through 5.

4/ This letter is contained in the exhibits folder after Ex. R-7 without a separate Exhibit number. The second and fourth sentences of this letter indicate inferentially that there was no prior approval of the 1983 RCP and I so find (T. 165-166, Exs. R-7, R-8).

5/ Written approval is required. Thus, 30 CFR 75.200-4 provides:

> "The appropriate District Manager shall notify the operator in writing of the approval of a proposed roof control plan. If revisions are required for approval, the changes required will be specified and the operator will be afforded an opportunity to discuss the revisions with the District Manager."
> (emphasis added)

All personnel required to install roof support, in accordance with the plan, shall be trained by a qualified supervisor designated by mine management before being made responsible for such work. This training shall ensure that such persons are familiar with the functions of the support being used, proper installation procedures, and the approved roof control plan.

As required by 30 CFR, 75.200, the approved plan must be reviewed by MSHA every six months. Should future conditions warrant, this plan may have to be changed.
(Ex. R-5)

Discussion

Contributing to the problem of sorting out this unusual record is that Respondent resumed production in the mine after it had been closed down for over a year and after the last approved plan had expired; that MSHA resumed enforcement activity by issuing Citations under the 1982 RCP during the same period that MSHA and Respondent were negotiating the "reinstitution" and reapproval of the 1982 RCP (T. 165); that the June 29, 1984, Citation as amended issued prior to the Barton letter of July 27, 1984, approving the new RCP and the method of pillar extraction depicted in Figure 2.2 thereof only upon the condition that such could be used "when existing entries and crosscuts have heaved", preventing pillar extraction as shown in Figure 2.1..."; that MSHA in its brief 6/ has abandoned its theory of violation that Respondent was operating without an approved RCP; that the two issuing inspectors used the old 1982 RCP as their enforcement guideline; that MSHA was aware that the mine was operating while it was negotiating with Turnipseed the conditions and provisions of a new RCP, i.e., the one ultimately approved on July 27, 1984 (Ex. R-5).

It should also be mentioned that Petitioner tried --- without recognizable objection from Respondent --- the matter on the basis of alternate or hypothetical (T. 19) claims of violation, that Respondent either mined without an approved roof control plan being in effect, or in the alternative, if a roof control plan was in effect the pillar removal sequence provided therein was not followed. Such alternate pleading, if not interposed for purposes of delay, harassment, etc., is properly recognized in Commission proceedings. See Commission Rule 1 (b)

6/ Immediately following the close of the evidentiary record, both parties on August 30, 1985, were given the opportunity to present oral closing argument, which Petitioner waived and of which Respondent availed itself. Respondent also was given the opportunity to file -- within 15 days of receipt thereof (T. 269-270)-a reply brief to Petitioner's post-hearing brief. It did so. The parties subsequently presented further oral argumen (contained in a separate transcript).

and Rule 8 (e)(2) of the Federal Rules of Civil Procedure. At the commencement of hearing, the presiding judge considered Petitioner to have made a motion to amend and, upon reviewing both the original Citation and the July 10, 1984 modification thereof (Attachment "A" hereto) specifically charging an infraction of the Roof Control Plan dated March 25, 1982, ruled that the modification was not a "substitution" of the theory of violation contained in the original Citation but was a supplemental allegation. Petitioner was allowed to proceed in the alternative.

Nevertheless, in both its final oral argument (Transcript of April 14, 1987, at page 5) and post-hearing brief, Petitioner abandoned--without significant explanation--- its theory that Respondent had commenced mining without there being an approved roof control plan in effect. In its brief and in final oral argument (T. 5-6) Petitioner also alleged that the roof control plan which was in fact contravened was the plan whose latest approval was on May 4, 1983 (Ex. R-4) rather than the plan approved on March 25, 1982 (Exs. P-1 and R-3) which was specifically referred to in the July 10, 1984 modification to the Citation. 7/ I note again and parenthetically that while this plan (the 1982 RCP) was the one used as the sole frame of reference in the inspector's testimony, the pertinent paragraph therein, 2.12, and the 10 diagrams referenced therein, do appear identical to their counterparts in the 1983 plan.

Although Respondent has argued that a roof control plan, being "an operator's document", remains in effect until disapproved by MSHA, the last approval of such plan by MSHA on May 4, 1983, had a specific six-month term and expired on November 4 (or November 3 at midnight), 1983. The understanding of the parties and I believe acquiescence by Respondent that it did not is strongly manifested by the chain of correspondence initiated by Respondent's letter to MSHA of March 22, 1984, proposing to

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7/ Thus, at page 1 of its Brief, Petitioner states:

> "This case involves an alleged failure to comply with the pillar removal sequence of a roof control plan. It was tried on two alternative theories that respondent either mined without an approved roof control plan or, in the alternative, if a roof control plan was in effect, the pillar removal sequence was not followed. Petitioner no longer adheres to the theory that a roof control plan was not in effect..."
>
> XXX XXX XXX
>
> Mid-Continent Resources operates the L.S. Wood mine. A roof control plan for the L.S. Wood mine had been reviewed and reapproved by MSHA on May 4, 1983 (Exhibit R-4)."

reinstate its old plan at a time when its mine had been down for well over a year. Without commenting on the wisdom of the May 4, 1983 "routine" approval of the plan at a time when the mine had already been down for a period of several months, the record is clear that no written approval of the proposed roof control plan issued from MSHA until July 26, 1984, nearly a month after the original Citation issued, and also after the final modification of the Citation issued. As this record clearly reveals, when the proposed plan was finally approved in writing (as required by 30 C.F.R. § 75.200-4) such approval contained limitations highly important to mine safety. 8/

In a matter involving a mine's ventilation plan, Ziegler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), as part of its analysis of mine safety law in general, the author of the Court's opinion, Judge Wilkey, noted the analogy between ventilation plans and roof control plans, observed that the reasoning of the decision might be applicable in many instances to such other plans as well, and upheld the enforceability of such plans once duly adopted (See footnotes 11 and 54).

In Jim Walter Resources, Inc., 9 FMSHRC 93 (1987), again involving a ventilation plan, the Commission set forth this excellent overview of plan enforcement:

> "Ventilation plans are approved by the Secretary and adopted by mine operator pursuant to section 75.316 and section 303(o) of the Mine Act. The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. Ziegler v. Kleppe, 536 F.2d 398, 406-407 (D.C. Cir. 1976); Carbon County Coal Co., 6 FMSHRC 1123 (May 1984). The process is flexible, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. Carbon County Coal Company, 7 FMSHRC 1367, 1370-71 (September 1985). The

8/ The Federal Mine Safety and Health Review Commission itself pointed out in Secretary v. Halfway, Inc., 8 FMSHRC 8, at p. 13 (1986): "Our decisions have stressed the fact that roof falls remain the leading cause of death in underground mines".

ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord. Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards. Ziegler, supra at 409; Carbon County, 7 FMSHRC at 1370; Penn Allegh.

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. In plan violation cases the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision."

(emphasis added)

Finally, in a matter also involving a ventilation plan, the Commission set forth some characteristics of such plans which would appear to be generally applicable to roof control plans. In this case, Secretary v. Penn Allegh Coal Company, 3 FMSHRC 2767 (1981), the Commission stated:

"We hold that ventilation and dust control plans are continuous in nature; a plan does not expire at the end of a six-month period simply because the parties have failed to finally resolve a suggested revision. In the present case, in light of our previous conclusion that the Secretary validly rescinded the mistaken approval of Penn Allegh's revision to the original plan, we conclude that the original plan remained in effect. This leaves the parties with the ability, in fact the duty, to negotiate in good faith over a resolution of the "flow-static" measurement controversy. At the same time it affords miners the protections of the plan previously adopted by Penn Allegh and approved by the Secretary."

Penn Allegh is the most analogous precedent to the unique facts presented here uncovered by my research. Nevertheless, after consideration of the record in the matter before me, I conclude that the situation here is distinguishable, and should be distinguished, from the general "continuous running" concept set forth in Penn Allegh, supra. To begin with unlike Penn Allegh the mine was closed for a period of over one year, overrunning two normal six-month plan review periods. The last six-month review approval period elapsed while the mine was closed. Both parties, if not actually recognizing the mine safety need for a new plan, at least accepted and engaged in the procedure of negotiating a proposed plan, which process commenced after the

last six-month period ran and before the mine reopened and commenced production. 9/ In submitting the proposed plan, Respondent in its letter of March 22, 1984, demonstrated its intention to mine in a specific different (T. 214) area of the mine which the record shows and MSHA felt "could be dangerous to mine in" (T. 88, 114, 115, 122, 154, 214-215). It is also specifically found that the plan submitted with Respondent's letter to MSHA of March 22, 1984, was a "proposed roof control plan" within the meaning of 30 C.F.R. § 75.200-4. See fn 5, supra.

Accordingly, these general conclusions are reached: (1) the decision in Penn Allegh that ventilation -and presumably roof control -- plans are continuous in nature is not an expression of an unflinching rule having universal application, (2) the precise holding of Penn Allegh, arising out of circumstances where the mine involved was in continuous operation, is not applicable here, and (3) in the instant case, and in situations where a mine is closed for a lengthy period and the 6-month periodic review required by 30 C.F.R. § 75.200 is no longer carried on, the viability of the previous plan ends.

It is therefore held that when the Citation and its modification issued, there was no approved roof control plan in effect. Since it expressly is Petitioner's sole theory of violation that a provision of an approved roof control plan was infracted, I find that no violation was proven. Jim Walters Resources, Inc., supra.

ORDER

Citation No. 2213098 and its modifications are vacated and this proceeding is dismissed.

Michael A. Lasher, Jr.
Administrative Law Judge

9/ From the record and pleadings it is not ascertainable whether Petitioner also is claiming that an operator, upon reopening a closed mine, can bring back to life its old plan, which was not reviewed and approved after a six-month period expired, by merely picking it up and following it, or--as it alleges in this case--by not following it.

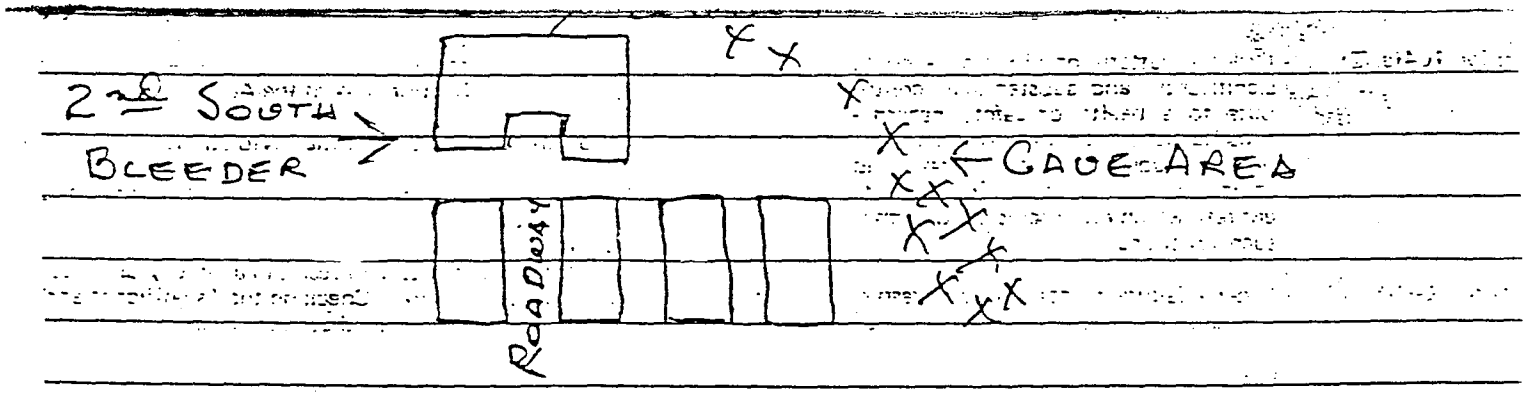
Distribution:

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

Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.O. Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

/bls

Citation No. 2213098 is modified to show that the operator was not complying with the approved roof control plan dated March 25, 1982. The operator had split through one block of coal, leaving only two fenders, and was using this block as a roadway to mine the 2nd block inby, a total of 25 feet had been mined from the 2nd block, and in addition two fenders had been left to the right of the 1st pillar split, the supt. Tom Scott said that he intended to go back and get these two fenders to the right of the 1st pillar split. Below is a diagram of the practice being used.



Attachment "B"

COAL MINE SAFETY AND HEALTH - District 9

May 4, 1983

Mr. Bradley J. Bourquin
Chief Engineer
Mid-Continent Resources, Inc.
Box 158
Carbondale, CO 81623

RE: L. S. Wood Mine, I.D. No. 05-00300
Dutch Creek No. 2 Mine, I.D. No. 05-00469
Roof Control Plans

Dear Mr. Bourquin:

The roof control plans for the subject mines have been reviewed by MSHA personnel. Since the plans appear adequate, they shall remain in effect for another six month period.

Sincerely,

/s/
John W. Barton
District Manager

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 16 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 87-84-M
	:	A.C. No. 31-00065-05508
v.	:	
	:	Fountain Mine
MARTIN MARIETTA AGGREGATES, Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
William E. Sharp, Jr., Esq., Martin Marietta Corporation, Bethesda, Maryland, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $20 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.16006. The respondent filed an answer denying the violation, and a hearing was held in Raleigh, North Carolina. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record during the hearing in my adjudication of this matter.

Issue

The issue presented is whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

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

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is in a business affecting commerce within the meaning of the Act.

2. The respondent is a large granite mine operator with a reported total work hours for 1986 in excess of three million man hours.

3. The payment of the proposed civil penalty by the respondent will not adversely affect its ability to continue in business.

4. A computer print-out of the respondent's history of past paid violations for the 2-years prior to the issuance of the violation in this case consist of four section 104(a) "single penalty" citations (Joint Exhibit-1; Tr. 11).

Discussion

The section 104(a) non-"S&S" Citation No. 2658034, issued by MSHA Inspector Floyd Patterson on December 9, 1986, cites a violation of 30 C.F.R. § 56.16006, and states as follows: "The compressed gas cylinders (Oxygen and Acetylene) on the welding truck were not protected by covers while they were being transported on the premises with the gauges and hoses attached."

Mandatory safety standard 30 C.F.R. § 56.16006 provides that "Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use."

MSHA's Testimony and Evidence

MSHA Supervisory Inspector Robert M. Friend, confirmed that he participated in the inspection conducted at the

respondent's mining operation by Inspector Floyd Patterson on December 9, 1986. He stated that he was with Mr. Patterson to evaluate him, and that Mr. Patterson has since retired. Mr. Friend identified a copy of the citation issued by Mr. Patterson, and he confirmed that he was present when it was issued (Tr. 14-16).

Mr. Friend confirmed that he observed the truck carrying at least three cylinders at various times during the course of the inspection, and he stated that the truck was used "for transportation throughout the plant." Mr. Friend stated that the cylinders were standing upright and were secured on the left side of the truck behind the driver, and he determined that they contained oxygen and compressed acetylene. He described the truck as a maintenance truck, with a utility type bed, and he estimated that he observed it at least three times, and when it was cited it was pulling into the shop. At no time did he observe the cylinders being used for welding (Tr. 16-18).

Mr. Friend confirmed that the cited cylinders had the regulators attached, and they were attached to the cylinders at the valve assembly in a vertical position in the same manner as most of the cylinders in use at the plant are attached. He confirmed that the valves were on, and that none of them were protected or guarded. He stated that one of the regulators extended beyond the side of the cab of the truck. He further stated that trucks of this kind are used throughout the plant and are sometimes driven under conveyors and bins, and that there is a possibility of rocks falling and striking the unprotected valves, which would result in a sudden release of acetylene, thereby presenting a fire hazard. There was nothing to protect the valves from being accidently struck (Tr. 19).

Mr. Friend was of the opinion that the unprotected cylinder valves posed a potential for an accident, but that Inspector Patterson, who issued the citation, was of the opinion that not many accidents occur as a result of unprotected valve covers. Since he believed that an accident was unlikely, he did not consider the violation to be "significant and substantial" (Tr. 20).

In response to further questions, Mr. Friend confirmed that the function of the cylinder valve is to reduce the cylinder gas pressure in the acetylene tank to a workable pressure, and that the valve is screwed to the cylinder by means of a wrench. He also confirmed that the cylinder gauge is a part of the regulator, that the hoses are used to connect the

acetylene torch, and that all of the valve assemblies, including the gauges and hoses, were unprotected. He stated that the terms "welding truck" and "maintenance truck" are used synonymously, and that the trucks are basically used for the same welding and maintenance purposes. The cited truck also carried other supplies and tools, and it was a general purpose truck (Tr. 23-25). However, when used for welding purposes, the cylinders are not removed from the truck, and anyone doing any welding work uses the cylinders while they are in place on the truck (Tr. 26).

Mr. Friend confirmed that additional gas cylinders were present in the plant shop, and that a citation was issued that same day because some valves were not turned off while the cylinders were left unattended. He confirmed that the respondent maintains a separate storage area for empty acetylene cylinders, refilling, etc., but he did not know where this area was located (Tr. 29).

Mr. Friend stated that the fact that the truck moves about the mine site with the cylinders aboard leads him to conclude that they are being "transported" within the meaning of the standard, even though they may not be used after the truck moves from one location to another. His opinion would not change even if the cylinders on the truck are used on a regular and routine basis every day (Tr. 30). He estimated that it would take 5 minutes to detach and reattach the cylinder regulators (Tr. 31).

Mr. Friend confirmed that the violation was abated after the respondent was instructed to remove the gauges and replace the cylinder caps before transporting the cylinders, and until such time as other guarding was provided. He did not know whether other cylinder guarding has been provided at the plant in question, but that respondent has provided such guarding at its other locations where similar citations have been issued under similar circumstances. These citations were abated after cylinder covers were manufactured on-site to protect the valves, and they are protected at all times while stored, transported, or in use in other than a safe location. Cylinder covers were required for the cited cylinders, and they were installed to achieve abatement (Tr. 31-34).

Mr. Friend stated that the type of cylinder covers he would accept as compliance with the standard in question would be a cover that is a part of the cylinder when it comes from the manufacturer, or one that is substantial and protects the entire valve assembly on all sides and the top, and he alluded

to a law that requires caps or covers on such cylinders while they are transported on the highways (Tr. 35).

MSHA's counsel explained that the law referred to by Mr. Friend requires that the cylinders themselves be capped when they are being transported. However, in this case, since the attached valves, gauges, and hoses, which constitute the valve assembly, were not protected and added to the potential hazard, the standard still requires that at least the valves be covered and protected. Although MSHA would accept a cap as a protection for the cylinder itself, once the cap is removed, and the valve is attached, it must be covered and protected on all sides and the top (Tr. 38-39).

Mr. Friend confirmed that the standard only requires protection for the cylinder valve, and that once the cap is removed and the valve, along with the gauges and hoses, are attached to the cylinder as one assembly or unit, the valve must be protected. In the instant case, the exposed and unprotected valves were attached to the cylinders as a unit, and the valves were not protected. Had the respondent provided some protection for the valves, which formed part of the units attached to the cylinders, it would have been in compliance with the standard (Tr. 40-42).

Mr. Friend identified 10 photographs of protected and covered compressed gas cylinders which he confirmed would be acceptable to MSHA as compliance with the standard, and he explained how they would afford protection for the valves (Tr. 43-46).

When asked to identify the other locations where the respondent has been cited for failure to provide protection for cylinder caps, Mr. Friend responded that the only one he could think of was the respondent's site at "Lemon Springs." He explained that he sent the photographs to the plant manager as examples of suggested methods for protecting the valves, and that the manager later informed him that the citation had been abated and asked him to visit the site to see what had been done. Mr. Friend confirmed that he did not visit the site, and had no knowledge as to whether or not the inspector who issued the citation has had time to visit the site and abate the violation, but he assumed that this was done (Tr. 47).

When reminded of the fact that Inspector Floyd's abated citation was terminated after the truck in question was parked, and the employees were instructed to remove the gauges

and replace the cylinder caps before transporting the cylinders, and until such time as other guarding is provided, MSHA's counsel asserted that MSHA would accept a cap as a suitable cover as long as it provided substantial protection for the valve on all sides and the top. Counsel conceded that the replacement of the cylinder cap to protect the cylinder, coupled with the removal of the valve assembly, still left open the question as to how to provide suitable protection for the valve with the gauges and hoses intact (Tr. 51). Respondent's counsel concurred, and stated "you've captured our dilemma exactly, your honor. Multiply this problem times a hundred and you see what we're faced with" (Tr. 53).

MSHA's counsel confirmed that the Lemon Springs site referred to by Inspector Friend is under the same sub-district enforcement jurisdiction as the subject Fountain site where the contested citation in this case was issued, and he suggested that the same photographs furnished to the Lemon Springs location should have been available to the Fountain plant manager. MSHA did not have available copies of any of the other citations referred to by Mr. Friend, and no additional information was forthcoming as to what may have been done at these other sites to provide any standard means of covering valves "across-the-board" (Tr. 53-55). Mr. Friend confirmed that the citation at the Lemon Springs location came "much after" the citation issued in this case, and he could not confirm whether that citation has been abated (Tr. 56).

The respondent's counsel expressed surprise with Mr. Friend's assertion concerning the Lemon Springs citation, and he stated as follows (Tr. 56):

> MR. SHARP: See, the reason I'm surprised, your honor, because it's my interpretation that Mr. Lennon's direction to all the plant managers through all Martin Marietta was, "wait until we find out what kind of fix we can make so everybody can make the same fix." Our welding tanks have the same basic configuration and the same basic protection configuration, so the fix we will have to make will be for everybody. That's what we were after. Mr. Lennon will give some testimony on that.

Respondent's Testimony and Evidence

Arthur P. Lennon, respondent's Personnel and Safety Manager, confirmed that after the citation was served on the

respondent, he contacted MSHA's Subdistrict Manager Fred Dupree in Knoxville, Tennessee, in order to obtain some guidance or guidelines as to precisely how the valves on the cylinders should be guarded. Mr. Dupree assured him that he would obtain some information for him and would contact him again. After the passage of 2 months, Mr. Lennon again contacted Mr. Dupree, and Mr. Dupree again advised him that he would send him some information. After the passage of two more months, Mr. Lennon received the photographs from Mr. Friend, but he has not received anything in writing from MSHA as to the exact cylinder regulator guarding criteria MSHA would accept for compliance with the standard in question (Tr. 58-59).

Mr. Lennon explained the scope of the respondent's operations Nationwide, and he confirmed that the trucks on which the cylinders are located are commonly referred to as "welding trucks." Although they are used for other purposes as well, the driver is usually a welder and his helper is usually an assistant (Tr. 60). Mr. Lennon further explained that the trucks are used for day-to-day maintenance in and around the quarry, which is the "plant," and the pit. He estimated that in the course of a day, the welding truck would be used on an average seven to ten times to perform welding work as required, and in that process, the cylinder regulators would have to be capped and re-capped each of those times (Tr. 61-63).

Mr. Lennon identified the photographs in question, and he explained how the cylinders at the Fountain operation are located in the trucks and secured by chains across a small compartment where the cylinders are located (Tr. 63-64). He confirmed that he informed Mr. Dupree that he was seeking a standard MSHA approved method of protecting the valves, or regulators, so that it may be applied at all of the respondent's operations, and he expressed disappointment that nothing has been forthcoming from MSHA in this regard (Tr. 65). Mr. Lennon confirmed that he was unaware of the citation issued at the respondent's Lemon Springs operation, and that he informed his field engineers that he was attempting to work out a solution and to do nothing further until he found a positive solution to the problem of protecting the valves (Tr. 67).

Mr. Lennon conceded that the cylinder valves are not covered, and that they have never been covered as the truck is driven about the plant. He explained that the valve is covered by the regulator, and that it is part of the same

assembly, and that he simply refers to it as a regulator (Tr. 68). He confirmed that the closet in which the cylinders are stored does not go all the way to the top of the valve, and that the valve is exposed from the top and all three sides. He confirmed that the valves do not extend higher than the cab of the truck, and do not normally extend beyond the side of the body of the truck (Tr. 69).

On cross-examination, Mr. Lennon confirmed that the welding truck in question is used for welding most of the time, and that the cylinders remain uncapped at all times, and the valves and regulators remain uncovered, at all times, even while the truck is idle or parked overnight, and this has been the case for the 27 years that he has been in the business (Tr. 77-78). Mr. Lennon stated that he offered no suggestions to Mr. Dupree as to the type of valve cover that might be used at the Fountain operation, but that he has discussed the problem with Mr. Roy Benard, at MSHA's headquarters in Virginia, with a view to arriving at some solution for use by the respondent Nationwide, but has not heard from him further on the matter (Tr. 79).

With regard to the photographs furnished by Mr. Friend, Mr. Lennon stated that while they do give him some ideas as to the methods for covering the valves at the Fountain operation, there is no assurance that other MSHA inspectors in other areas will accept this as compliance at the respondent's other plants (Tr. 79). He confirmed that the respondent has not decided on any particular valve cover concept for submission to MSHA for its concurrence or acceptability, nor has he sought out Mr. Dupree or Mr. Friend further to determine whether they would accept any particular covering device, and the reason he has not done so is that it has not been the practice in the industry to cover cylinder valves and regulators at all times while they remain on welding trucks (Tr. 80).

MSHA's counsel expressed concern that Mr. Lennon's instructions to his field engineers not to do anything, may result in non-compliance with the standard at all of the respondent's operations (Tr. 75). However, Mr. Lennon confirmed that it was his hope that the hearing afforded the respondent with respect to the citation would provide some guidance for a solution to its problem, and that his instructions to his engineers were made with that in mind, rather than any notion of flaunting or not complying with the standard, and MSHA's counsel stated that he did not doubt that this was the case (Tr. 92).

Mr. Lennon pointed out that in the 9 years the plant has been in operation since 1977, and inspected twice a year, MSHA has not previously cited any violations for any unprotected cylinder valves on a welding truck. In response to Mr. Friend's assertions concerning the hazards connected with unprotected valves, respondent's counsel pointed out that MSHA's "accident and incident" reports from 1985 to the present, concerning welding-related accidents, reflect not one single incident industry-wide involving an unprotected valve (Tr. 96-98).

Arguments Presented by the Parties

The respondent's counsel asserted that the basis for contesting the citation is the respondent's desire for guidance concerning the interpretation and application of the cited standard. Counsel took the position that the cited cylinders were not being "transported" within the common understanding of that term, but were an integral part of the welding truck which was used in the regular course of welding in and around the plant as the need arose, and that it would be extremely inconvenient to cover and uncover the truck-mounted cylinders as the truck moved about from job-to-job at the site. Counsel took the position that the truck and the cylinders "are in use" as the truck goes from one work location to another, and that in this posture, the cylinders are not being transported (Tr. 7). Counsel also indicated that Mr. Lennon apparently misunderstood and believed that the Commission could afford the respondent some appropriate relief from the requirements of the standard as part of its contest in this matter by establishing some standard criteria for compliance to be used at all of the respondent's facilities (Tr. 108-109).

Respondent's counsel stated that the respondent has approximately 100 similar operations in 13 states, and that some 20-25 MSHA inspectors would be inspecting these sites over the course of a year. Counsel further asserted that the respondent is wiling to do whatever is reasonable to take corrective action at all of its facilities, but given the costs of compliance, and the need for compliance consistency at all of its operations, it needs to know what MSHA might accept as an acceptable cylinder valve cover to insure future compliance (Tr. 11).

Except for the protection provided by the configuration of the truck, the respondent concedes that at the time the citation was issued the cited cylinder valves were not capped or otherwise protected by some type of configuration built around them (Tr. 85). Respondent's position is that once the

work shift starts and the welding truck moves from location to another about the plant, the cylinders are "in use" rather than being "transported." However, in the event the truck left the site with the cylinders aboard to visit another site, and used the public highways, the clinders would be "in transportation," and would probably be required to be capped. Assuming the welding truck, with the cylinders aboard, simply drove about the plant for a day or two, without being used for welding, respondent's counsel and Mr. Lennon conceded that one could argue that the cylinders were being transported (Tr. 85-87).

The respondent asserted that it is inconvenient and impractical to require that all cylinders be covered or capped while the truck is moving about the quarry and pit on a rather continuous basis everyday, and that a standardized method of protecting the valves, short of dismantling the valve assemblies and capping the cylinders from job-to-job, must be found.

MSHA's response is that the respondent should be able to come up with a solution to provide the required valve protection at all of its operations, and that the burden is on the respondent to demonstrate its intentions to at least attempt to come up with a suitable valve cover for its use Nationwide. In the instant case, MSHA's counsel suggested that if the respondent had fabricated an acceptable valve cover to abate the violation, and MSHA accepted it, unless there were some factual differences, MSHA would probably accept it as compliance at all of the respondent's operations (Tr. 83). Counsel pointed out that in this case, the respondent took the easy way out by parking the truck and capping the cylinder to achieve abatement, and that no cover was fabricated. Counsel assumes that subsequent to the termination of the citation, the respondent is capping the cylinders and dismantling the valve assembly when they are not in actual use and being driven around in the truck (Tr. 83-84).

MSHA's counsel takes the position that on the facts of this case, the standard should be interpreted to include any movement of the cylinders while on the truck within the confines of the plant and quarry. Counsel asserted that the term "in use" applies while the cylinders are actually being used for welding at any particular time, and that otherwise, they would be "transported" while the truck is moving from location to location in and around the mine site (Tr. 8).

In response to the respondent's concern with regard to some standard guideline for determining an acceptable cylinder

cover, MSHA's counsel asserted that in the instant case, MSHA's district manager has informed the respondent as to what MSHA will accept for compliance in the enforcement district responsible for the respondent's mining operation, but that the district manager cannot speak for the other districts. Counsel suggested that the respondent seek a formal interpretation from MSHA's National headquarters in order to ascertain any acceptable guidelines for use throughout its operations (Tr. 13).

MSHA's counsel suggested that the respondent design a valve cover that it believes may have universal application at all of its operations, and submit it to MSHA for a review and evaluation, with a request for an official written opinion as to whether or not it may be acceptable for future compliance (Tr. 100). With regard to the Fountain plant operation, counsel confirmed that Mr. Friend advised him that he had discussed the alternative methods of covering the valves, as shown in the photographs previously discussed, with the plant manager, and respondent's counsel acknowledged that the photographs were in fact supplied to the respondent by MSHA (Tr. 102-103).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.16006, for failing to provide protection for the valves on the gas cylinders which were being transported on a welding truck used regularly at the respondent's plant. Although Inspector Floyd did not specifically refer to valves on the face of the citation, he referred to the uncovered cylinders, as well as the attached gauges and hoses, which the evidence shows included valves. The fact is that all of these devices constituted one identifiable unit which is readily attached and removed from the cylinder with a wrench. The credible testimony of Inspector Friend, who accompanied Mr. Floyd, and who also observed that the valves were exposed and unprotected, coupled with the respondent's admissions that the valves were not protected or covered, clearly establishes that this was the case. Further, the respondent has not suggested that it was in anyway confused or prejudiced by the failure of Mr. Floyd to specifically include the term "valve" in the citation.

Respondent's suggestions and arguments that the gas cylinders were "in use" rather than being "transported" on the welding truck in question, are rejected. Section 56.16006

requires that valves on gas cylinders be protected by covers when they are stored or being transported. If they are in use, they are required to be protected by a safe location. Although one may argue that gas cylinders which are on a truck while they are being used for welding are in a "safe location," this would depend on a particular factual situation, and I find no basis for concluding that at the time the welding truck was observed by the inspectors, the cylinders were being used for any welding work. It seems clear to me that the citation was issued after the inspectors concluded that the cylinders were being transported about the plant area in the welding truck as the driver went about his necessary maintenance duties. As a matter of fact, based on the respondent's admissions that such cylinders are routinely unprotected at all times, even when the truck may be idle or parked for days when not used for welding, one could conclude that during this time period, the unprotected cylinders were also stored within the meaning of the standard. See: Secretary v. Turner Brothers, Inc., 6 FMSHRC 1219 (May 1984).

It seems clear to me that the intent of the standard is to preclude the exposure of unprotected gas cylinder valves to the possibility of being struck, thereby unexpectedly releasing gas under great pressure, which may under certain conditions pose a fire or explosion hazard. Given the rather brief and general nature of section 56.16006, and balancing it against the hazards which it is intended to cover, I believe that any reasonable interpretation and application of the standard would lead one to conclude that the cited cylinders in this case were in fact being transported on the welding truck within the common understanding and meaning of that term.

Black's Law Dictionary, Revised Fourth Edition, and Webster's New Collegiate Dictionary defines the term "transport" to mean "to carry or convey from one place to another." The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, defines the term as "a mining term used to cover vehicular transport."

On the facts of this case, it seems clear to me that the cylinders in question were being transported on the welding truck within the meaning of the standard when the truck was being driven from location to location in and around the plant site in question. Inspector Friend observed the truck being driven about at least three times when he was at the site at the time of the inspection, and during all of this period of time the unprotected cylinder valves were aboard and were being transported. Accordingly, I conclude and find that MSHA has established a violation, and the citation IS AFFIRMED.

History of Prior Violations

MSHA's computer print-out for the 2-years prior to the issuance of the citation which was issued in this case reflects four "single penalty" section 104(a) Citations which have been paid. I conclude and find that the respondent has an excellent compliance record.

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

The parties have stipulated that the respondent is a large granite mine operator and that the payment of a civil penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

Good Faith Compliance

Abatement was accomplished within one-half hour of the issuance of the citation after the cited truck was parked, and the employees given instructions for future compliance. Under the circumstances, I conclude and find that the respondent exercised rapid good faith compliance in abating the violation.

Negligence

The inspector who issued the citation found that the violation was the result of a low degree of negligence on the part of the respondent. I agree, and adopt this finding as my conclusion on this issue.

Gravity

The inspector who issued the citation found that the violation was not significant and substantial, and that any injury as a result of the violation would be unlikely. Although Inspector Friend expressed an opinion that the violation may have been serious due to the fact that one of the valves was protruding from the side of the truck, I find no credible evidence to establish that the truck travelled in any area where there was a likelihood that the unprotected valve would be struck. Under the circumstances, I find no basis for changing Inspector Floyd's gravity finding, and I conclude and find that the violation was non-serious, and accept his finding in this regard.

Civil Penalty Assessment

MSHA's proposed civil penalty assessment of $20 for the violation in question IS AFFIRMED, and the respondent IS ORDERED to pay that amount to MSHA within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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William E. Sharp, Jr., Esq., Martin Marietta Corporation, 6801 Rockledge Drive, Bethesda, MD 20817 (Certified Mail)

Mr. Arthur P. Lennon, Personnel/Safety Manager, Martin Marietta Aggregates, P.O. Box 30013, Raleigh, NC 27622-0013 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 23 1988

BETHENERGY MINES, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 87-200-R
v.	:	Citation No. 2940495; 7/27/87
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 87-201-R Citation No. 2940496; 7/27/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. PENN 87-94 A. C. No. 36-00958-03662
v.	:	Docket No. PENN 88-38
	:	A. C. No. 36-00958-03702
BETHENERGY MINES, INC., Respondent	:	Livingston Portal 84 Complex

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for Contestant/Respondent;
Judith L. Horowitz, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

Statement of the Case

These consolidated proceedings concern proposals for assessments of civil penalties filed by the Secretary of Labor (Secretary) against BethEnergy Mines, Inc., (BethEnergy) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), seeking a total civil penalty assessment of $2,500 for three alleged violations of the mandatory safety standard found at 30 C.F.R. § 75.1704.

BethEnergy contested the civil penalty proposals and also filed separate notices of contest pursuant to section 105(d) of the Act challenging the validity of the two section 104(a) citations that were later modified to section 104(d)(2) orders and back again to section 104(a) citations (Citation Nos. 2940495 and 2940496 issued on July 27, 1987).

Pursuant to notice, these cases were heard in Pittsburgh, Pennsylvania, on June 24-25 and October 28, 1987. Additionally, on November 13, 1987, in order to supplement the record, the Secretary took the deposition of Inspector Lloyd Smith.

The parties have filed post-hearing proposed findings and conclusions as well as briefs in these matters which I have considered in the course of this decision.

Stipulations

The following general stipulations apply to this entire consolidated case:

1. The Livingston Portal of the Mine 84 Complex is owned and operated by BethEnergy Mines, Inc.

2. The Administrative Law Judge has jurisdiction over these proceedings, and both BethEnergy Mines, Inc., and the Mine 84 Complex are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The operator employs approximately 470 employees at the Mine 84 Complex. The annual production at Mine 84 Complex is approximately 1.2 million tons and the operator's annual production is approximately 5.25 million tons.

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

5. The computer printout may be admitted into evidence as a business record showing the operator's history of violations.

6. The imposition of the penalty proposed by the Secretary of Labor will not affect the respondent's ability to continue in business. Respondent does not stipulate the appropriateness of the imposition of any penalty or the validity of the procedures which resulted in the penalty proposed.

General Issues

The issues presented in Dockets PENN 87-200-R and PENN 87-201-R are whether the conditions or practices cited by the inspector constitute violations of 30 C.F.R. § 75.1704 and whether or not the violations were "significant and substantial." If the fact of violation is established in each of the above dockets, PENN 88-38 concerns the appropriate civil penalties to be imposed for each of the above violations, should any be found, after taking into account the requirements contained in section 110(i) of the Act.

Docket No. PENN 87-94 concerns yet a third allegation of a violation of the same mandatory standard and whether the same was "significant and substantial" and "unwarrantable" as well as an appropriate civil penalty for violation, should one be found.

Applicable Statutory and Regulatory Provisions

The cited standard, 30 C.F.R. § 75.1704, which is also codified as § 317(f)(1) of the Act, provides as follows:

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

"Working section" is defined in the Act and regulations at 30 U.S.C. § 878(g)(3) and 30 C.F.R. § 75.2(g)(3), respectively, as follows:

> 'Working section' means all areas of the coal mine from the loading point of the section to and including the working faces.

"Working face" is defined in the Act and regulations at 30 U.S.C. § 878(g)(1) and 30 C.F.R. § 75.2(g)(1) as follows:

> 'Working face' means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle.

Docket No. PENN 87-94

This docket concerns Section 104(d)(2) Order No. 2686234, issued by MSHA Inspector Lloyd D. Smith at 12:10 p.m. on October 7, 1986. He cited a violation of the mandatory safety standard at 30 C.F.R. § 75.1704, and the condition or practice is described as follows on the face of the order:

> The intake air escapeway No. 3 entry of the 1 Right 4 Butt Section was not being maintained to ensure passage at all times of any person in that a means was not provided to cross over the 2 overcasts installed at the 2 right belt entry and track entry and the distance from the mine floor to the top of the overcast measured 7 feet in height.

Inspector Smith found that the violation was "significant and substantial" and that the negligence by the mine operator was "high."

Additional stipulations are relevant specifically to the subject order and were agreed to by the parties as follows:

1. The principal issue to be decided in this matter pertains to the existence of a violation of the cited standard, 30 C.F.R. § 75.1704, and whether such standard was applicable to the facts and circumstances present in 1 Right on October 7, 1986. Whether a violation existed depends on the resolution of the issue on whether 1 Right was a "working section," as defined by the Act and the mandatory standard.

2. The subject order, modifications thereto, and termination were properly served upon the mine by a duly-authorized representative of the Secretary of Labor upon agents of the respondent at the dates and times, places, stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevance of any statements asserted therein.

3. At the time the order was issued, no clean intervening inspection of the mine had taken place since the issuance of the citation which initiated the section 104(d) sequence.

4. Two overcasts were located in the mine passageway which would have served as an escapeway if 1 Right were a working section. The top of each overcast would have had to be climbed in order to continue traveling along the passageway.

MSHA's position is that the 1 Right 4 Butt section was a working section on October 7, 1986, and that 30 C.F.R. § 75.1704 is therefore applicable.

Production of coal had been halted in this section since December of 1985 because of an encounter with a gas well and was not resumed until after October 7, 1986--sometime in December of 1986. After the mining equipment from this section had been moved to the 2 Right section in early 1986, two overcasts were built over the track and belt in the entry that had previously been the escapeway for 1 Right section when it was actively being mined. These overcasts were approximately seven (7) feet high and the operator concedes that it would have made it more difficult to travel the entry that had previously been the escapeway.

In the four or five weeks prior to October 7, 1986, BethEnergy was working to prepare the 1 Right section to produce coal again. As of October 7, 1986, much of the mining equipment necessary to begin production of coal had been assembled in the section. A continuous miner, a roof bolter, shuttle car, belt conveyor and load center were present in the section on that day. The respondent points out, however, that not all the necessary equipment was there and operating or even operable. The load center was inoperable because of some undiagnosed problem and there was no bin or hopper at the end of the belt for the shuttle car to unload coal onto the belt. Furthermore, permissibility checks had to be done on the assembled equipment, ventilation had to be adjusted, rockdusting had to be done, waterlines established along the belt, etc.

One of the additional requirements goes to the crux of the violation herein--escapeways had to be established. BethEnergy's position is that since it was not intended that coal be mined that day and because coal production had previously ceased in December of 1985, the 1 Right section was not a "working section" on October 7, 1986, and would not be again until production was re-commenced. So, the argument goes that since the standard only requires escapeways be established from working sections there couldn't have been a violation here on that date because the requirement had not yet arisen. A condition precedent, i.e., the existence of a "working section" was not present. BethEnergy simply had not yet had time to establish the escapeway as they would have in the normal turn of events prior to re-commencing production in the 1 Right section.

On October 7, 1986, a crew headed by Mr. Stephen Mahlberg, was assigned to the 1 Right section, with instructions to "prepare the section to load coal." On that same day, Inspector Smith inspected the intake escapeway for 1 Right and found that there were two metal overcasts obstructing the intake escapeway. He thereupon issued the instant order that cited the respondent for a violation of 30 C.F.R. § 75.1704.

Mr. John DeMichier, at the time the manager for the Johnstown, Pennsylvania, subdistrict and now the manager for District 9, testified that once the operator has the components necessary for mining assembled in a section, it becomes a working section. Conversely, he also stated that it is not a working section until you have all of the equipment there for mining coal, and that includes having a load center to power the equipment as well as a means to transport the coal out of the section. Inspector Smith testified in a similar vein. Counsel for the Secretary contends in her brief that the agency's official policy is somewhat more expansive than Mr. DeMichier's understanding of it. According to her, MSHA's national policy is that a section is a working section when there is work preparing the section for production or disassembling a section even if all the components of mining are not present in the section.

At the second hearing in October 1987, concerning the consolidated companion cases, but the same basic legal issue, the definition of "working section" was again the main subject. Inspector William Brown testified on this point, disagreeing with Mr. DeMichier's testimony given at the earlier hearing. Inspector Brown opined that a working section came into being at such time as the "first event" took place that set the section up to mine coal, as long as you have a loading point. Once the "first event" takes place and you have a discharge point available, you have a "working section," even if it is months or even years before you actually remove any coal. District Manager Huntley agreed that whenever you do the first, however minor, task associated with mining coal in an area, an escapeway is required.

As set out earlier in the text of this decision, the definition of "working section" as applied to these cases, heavily depends in turn on the definitions of such terms as "working face," "mining cycle" and "loading point." Here again, there is widespread disagreement amongst the witnesses regarding the meaning of this terminology.

Everyone except Mr. Huntley agrees, however, that an escapeway is not required for a work area which is not contained in the space between the working section's loading point and the working faces. That tracks the verbatim language of the Act. BethEnergy takes the position that the terms "working faces" and "loading point" contained in the definition of "working section" indicate that coal production must have commenced and be ongoing in order for an area of the mine to properly be delineated a "working section." A working section does not exist until production begins.

The statutory definition of "working face" refers to, but does not define, the term "mining cycle." Nor is "mining cycle" defined in the Dictionary of Mining, Mineral and Related Terms (1968) published by the Department of the Interior. The word "cycle" is, however. In the coal mining context, it is defined as "the complete sequence of face operations required to get coal." This definition is similar to that offered by Mr. Mucho, the mine superintendent, who characterized the mining cycle as being supporting the roof, extracting the coal, and transporting it out of the mine. Mr. DeMichier's interpretation of the term essentially agreed with Mucho's. The following exchange took place at Tr. 113-114:

By Mr. Moore:

Q. Now, "mining cycle," what is your understanding of what a mining cycle is?

A. It generally consists of cutting, mining or loading the coal on a continuous miner, transporting the coal from the face from the continuous miner by means of a shuttle car or a mobile bridge conveyor and then supporting the newly-exposed roof with a roof bolt.

Q. From what you said, the mining cycle is the cycle that occurs at the faces where the coal is being extracted in terms of cutting cycles, the loading of the roof support cycle, and the transportation cycle; is that correct?

A. Correct.

Q. So, that is a ongoing process that occurs at the face where the coal is being extracted?

A. On an active producing working section.

Q. So, a mining cycle is what occurs on an active producing section?

A. Yes.

Other witnesses appearing on behalf of the Secretary espoused a much broader interpretation. Inspector Brown was asked for his definition at Tr. 382-383:

By Mr. Moore:

Q. What would be your definition of "mining cycle"?

A. You said the word right there, "cycle." "A cycle is a periodic repeated sequence of events,

regularly repeated, or a single complete execution of a periodic repeated phenomenon."

Q. What would you be reading from?

A. That comes from the dictionary of what a cycle is.

Q. Which dictionary would that be?

A. Webster's.

Q. Let's talk somewhat more specifically in terms of underground coal mining. In a continuous mining section, would you describe what a mining cycle is?

A. A mining cycle is cutting coal, loading coal, transporting coal, roof bolting, erecting stoppings, moving up the belt, maintenance work, establish the ventilation.

Q. And, on a longwall section, what is a mining cycle?

A. Put in the pan line, putting the shields on sections, stage loader, tail gate, belt.

Q. So, you're saying that a mining cycle goes far beyond the cutting of coal, the loading of coal, the transporting of coal from the mine and supporting of the roof?

A. Correct.

Mr. Turyn, an MSHA safety and health specialist, essentially agreed with Brown. Mr. Huntley went even further. As far as he is concerned, everything that happens in a coal mine is part of the mining cycle.

I conclude that the "mining cycle" referred to in the definition of "working face" is that definition given by Mucho and DeMichier, as urged by respondent. However, I also agree with Mr. DeMichier that the fact of actual production of coal at any given point in time is not the determining factor in deciding whether there is a "working face" or for that matter a "working section." Furthermore, I agree wholeheartedly with the Solicitor that the definition of "working section" must not depend on divining the operator's intention to mine coal and I reject the notion put forward by BethEnergy that actual coal extraction need have commenced or re-commenced as the case may be.

Nevertheless, in order to have a working section, you must have a working face and that term is closely related to actual or at least imminent coal production at the face, i.e., roof bolting, cutting, loading and/or transporting coal out of the mine. The indisputable facts of this case are that no coal was produced in this section for one year between December of 1985 and December of 1986. Therefore, I find that on the date in question, October 7, 1986, there was no actual, imminent or even contemplated production of coal on the 1 Right 4 Butt section. In hindsight, it was two months later before any production was to take place.

The Secretary cites me to two cases, Windsor Power Coal Co. v. Secretary, 2 FMSHRC 671 (1980), an ALJ decision by Judge Melick; and Mid-Continent Coal and Coke Co. v. Secretary, 3 FMSHRC 2502 (1981), for the proposition that you can have a "working face" without the operator actually engaged in the act of extracting coal at the time the citation is issued. However, both of those cases involved temporary delays or halts in production that were found not to affect the ventilation requirements. Those two situations are factually unlike our case wherein we are faced with a year-long interruption of the mining cycle in that particular section.

The Secretary also cites Sewell Coal Co. v. FMSHRC, 686 F.2d 1066 (4th Cir. 1982) wherein a violation of 30 C.F.R. § 75.1704 was affirmed in a mine that had been struck, and therefore no coal had been produced for some months before the citation was written. That case does not give me much guidance either, however, because that operator apparently did not raise the issues that have been raised herein, nor did the Commission or the Court of Appeals address themselves to any of the issues raised in this case by BethEnergy. Rather, that case went off on the issue of an impossibility of compliance defense that the operator did raise, and which was rejected.

In my opinion, a reasonable interpretation of the facts in this record would go so far as to establish that as of October 7, 1986, BethEnergy had most of the equipment necessary to mine coal assembled in the section, they were working on the section on an intermittent basis to prepare it for mining again, and within two months, they would complete these tasks and resume mining in December of 1986 after a one-year hiatus.

It is axiomatic that escapeways need only be maintained from working sections. By definition, a "working section" in the context of 30 C.F.R. § 75.1704 must have a loading point 1/ and at least one working face.

I find as a matter of law that the 1 Right section as of October 7, 1986, did not have a working face and therefore was not a working section. It follows, therefore, that I conclude and find that the Secretary has failed to prove a violation of the cited standard. Accordingly, the order in question will be vacated.

Docket No. PENN 87-200-R

This docket concerns Section 104(a) Citation No. 2940495, which has had a checkered career. It began as a section 104(a) citation issued by MSHA Inspector William R. Brown at 9:30 a.m. on July 27, 1987. Later that same evening, Inspector Joseph F. Reid modified the citation to a section 104(d)(2) order and changed the negligence finding from "moderate" to "high." On October 23, 1987, the then order was again modified back to a section 104(a) citation with the negligence finding changed back to "moderate" from "high." It cites a violation of the mandatory safety standard at 30 C.F.R § 75.1704, and the condition or practice is described as follows on the face of the citation:

> The designated intake escapeway provided for the 53 Parallel section was not maintained to insure passage at all times of any person, including disabled persons. Persons were required to work in the 53 Parallel section.

Additional stipulations specifically relevant to this citation and Citation No. 2940496 were agreed to by the parties as follows:

1. The subject citations, modifications thereto, and terminations were properly served by a duly authorized representative of the Secretary of Labor upon agents of BethEnergy as to dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statement asserted therein.

1/ I also find that a hopper or bin had yet to be constructed on the belt to permit unloading of coal from shuttle cars. Without some such device in place, it would be impractical to load coal onto the belt to transport it out of the mine. I therefore also conclude and find that there was no loading point existent in the section on October 7, 1986.

2. At the time the citations were modified to orders to include allegations of unwarrantable failure to comply, no clean intervening inspection of the mine had taken place since the issuance of the citations upon which they were based.

The Secretary alleges that the 53 Parallel section was a working section for the purposes of 30 C.F.R. § 75.1704 on July 27, 1987.

On July 27, 1987, the mine was at the end of a month-long idle period when no coal was being produced, but men were at work in the mine doing maintenance and construction work. In the 53 Parallel area, the bottom was being graded in order to shorten travel time to the portal. Three miners were working on the grading job, operating a continuous miner and a shuttle car removing non-combustible material from the bottom and transporting it to gob rooms in the vicinity of the work. Additionally, two masons were working nearby on some overcasts.

Before I turn to the legal analysis of the status of 53 Parallel, there is a substantial factual issue whether the construction site in the 53 Parallel area was within the physical confines of a working section regardless of whether the 53 Parallel section was a "working section" or not.

A "working section" for any area of the mine, by definition, only exists between the "working face" and the "loading point." Conversely, if the area in question is not between the working face and the loading point, it is not within the working section and escapeways are not required for that area.

Inspector Brown identified the working face of 53 Parallel on the mine map, which was marked and received as Joint Exhibit No. 1. The working face he identified are the faces in what the operator calls A Left. This is because the 53 Parallel section had previously been mined up the straight, however, mining had ceased at these faces, stoppings were installed and they had become part of the return airway for A Left. Then the operator had begun mining at right angles to the straight and began calling this the A Left section. However, as the Secretary points out, the same section map was used for both 53 Parallel and A Left sections. In my opinion, it is not important which label we put on them, it is only important that we know from where the "working section," if there is one, begins. So, whether it be 53 Parallel or A Left, Inspector Brown marked Joint Exhibit No. 1 with a blue line labelled "Face WF" to indicate the working face. Inspector Brown considered this to be a working face because coal had been mined there previously and coal would be extracted from there again.

Inspector Brown also observed a disconnected feeder breaker at a point which he placed on Joint Exhibit No. 1 at "LP." He testified that it was this feeder breaker, just outby the grade job that was the loading point for the 53 Parallel section or the A Left faces, depending on which nomenclature you use. If this is correct, the grade job or construction site is clearly between the working faces and the loading point and would be within the physical area described as a "working section" if one legally existed.

However, the operator protests that the inspector is mixing apples and oranges in that the actual loading point (feeder breaker) for the A Left faces is at a point "M" on Joint Exhibit No. 1. Point "M" as opposed to point "LP" is clearly inby the grade job. The feeder breaker which was placed at point "LP" by Inspector Brown was not in fact a loading point for the A Left faces, but rather had previously been used when the former faces of the 53 Parallel section were being mined up the straight. The inspector used the existing face areas from A Left and the loading point from the old 53 Parallel section to make up a "working section" that conveniently enough included within it the construction job at issue.

Additionally, the inspector's placing of the feeder breaker at point "LP" is also contested. His testimony concerning the location of this equipment was contradicted by the mine superintendent, shift foreman and construction crew foreman. They place that feeder breaker at point "P" on the joint exhibit. However, I don't believe it is particularly relevant where that feeder breaker was located since it is not alleged that it was used by the A Left or 53 Parallel section, whatever you wish to call it, for the A Left faces.

Any "working section" that would exist in this area, by whatever name, must necessarily begin at the A Left faces, because there are no other working faces in the area. I find as a fact that the A Left faces were working faces and were located several crosscuts inby where Inspector Brown placed them on the mine map, as indicated by the thick black marker line on Joint Exhibit No. 1. There was also a loading point that was used for removing coal from the faces of A Left during production. That was a feeder breaker located at point "M" on the joint exhibit. I also find that the other feeder breaker, located at point "LP" or "P" on the map was not a loading point for coal coming from the A Left working faces and hence its exact position is irrelevant to the inquiry.

Therefore, I conclude that the five persons working in the area of the grade job were not located in an area that could be termed a "working section" that existed between the

working faces of A Left or 53 Parallel or A Left off 53 Parallel and its loading point. Escapeways for the grade job work area were therefore not required. Accordingly, Citation No. 2940495 will be vacated.

Docket No. PENN 87-201-R

This docket concerns Section 104(a) Citation No. 2940496, which like Citation No. 2940495, was originally issued as a section 104(a) citation, was modified to a section 104(d)(2) order and back again to a section 104(a) citation. It was issued by Inspector William R. Brown at 10:30 a.m. on July 27, 1987. He cited a violation of the mandatory safety standard at 30 C.F.R. § 75.1704, and the condition or practice is described as follows on the face of the citation:

> The designated intake escapeway provided for the 3 Right Longwall Section was not maintained to insure passage at all times of any person, including disabled persons. Persons were required to work in the 3 Right Longwall section.

On July 27, 1987, in the 3 Right area of the mine, a longwall retreat section was being prepared for mining. Although mining did not actually commence in that section until August 3rd or 4th, it is the Secretary's position that the 3 Right section was a "working section" on the day the citation was written, July 27.

The incident giving rise to this citation (as well as Citation No. 2940495) on that particular day was the discovery of a fall at the No. 74 stopping in the 53 Mains area in what was marked as an intake escapeway. It is undisputed that there was no way around the fall. Therefore, the issue once again becomes whether an escapeway is required for the 3 Right section, i.e., is it a "working section." The operator believed that no working section existed in 3 Right because all the equipment necessary for mining was not yet present in the section and also they contend that no loading point existed at that point in time.

On July 27, there were six men working on the section. They were in the process of moving the longwall, setting up the shields which provide support for the roof after the longwall begins to retreat. At this point in time, about one-half of the shields were installed. The pan line was established. There was a conveyor belt installed into the section, but not yet connected to any of the longwall mining equipment. Several components of the stageloader which places the coal onto the belt for transport out of the section were not yet

present. The head gate drive was still at the operator's Wilson shop and the shearer was located at the operator's Livingston shop at this time. Within approximately one week from this date, all these components and pieces would be brought together and coal production would commence on this section. Everyone agrees that at that juncture, the section becomes a "working section" and there is a requirement for an unobstructed intake escapeway from the working section. The harder question and the one presented for decision herein is whether 3 Right was a "working section" on July 27, 1987, one week prior to the commencement of production.

MSHA, for its part, does not rely on the relatively short time proximity of the single week that we have involved herein. For example, Inspector Brown testified that the 4C panel, which can be located on the joint exhibit, where the operator had not at that time even started to move longwall equipment in, was already a "working section." Apparently, the basis for this opinion is his understanding that any work done with a view toward producing coal creates a "working section" and gives rise to the escapeway requirement. Messrs. Huntley and Turyn agree with this notion, whereas Mr. DeMichier and Inspector Smith do not. DeMichier and Smith believe that a working section comes into existence prior to the production of coal but after assembling all of the equipment necessary for mining in the section.

The operator stands by its position that active coal production must have commenced for a working face, and, therefore, by definition, a working section to exist, but argues that even by the DeMichier/Smith interpretation, no working section existed in the 3 Right section on July 27, 1987.

Consistent with my opinion in Docket No. PENN 87-94, supra, I reject the Brown/Turyn/Huntley "first event" interpretation and the operator's "actual production" interpretation of the pertinent statutory and regulatory language.

As I stated earlier in this decision, in order to have a working section you must have a working face and that term implies at least imminent capability of coal production from that face. The DeMichier/Smith interpretation is closest to the mark in this regard in that using their test, the operator must at least have the equipment assembled that it needs to produce coal. The Secretary concedes that was not the case on the 3 Right section.

I therefore find that the 3 Right section was not a "working section" on July 27, 1987. Since escapeways need only be maintained from working sections, it follows that I

also conclude and find that the Secretary has failed to prove a violation of the cited standard. Accordingly, the citation in question will be vacated.

ORDER

1. Order No. 2686234 IS VACATED, and Civil Penalty Proceeding Docket No. PENN 87-94 IS DISMISSED.

2. Citation Nos. 2940495 and 2940496 ARE VACATED and the contests of those citations ARE GRANTED. Civil Penalty Proceeding Docket No. PENN 88-38 IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 23, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 87-283
	:	A. C. No. 46-01867-03720
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

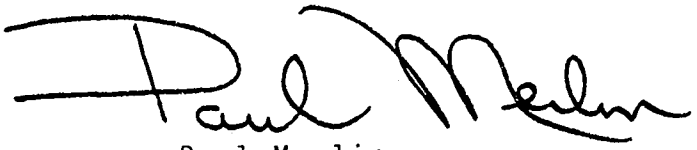
DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner.
Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

The Solicitor advises that upon further review she wishes to vacate the subject citation. Accordingly, she moves to vacate the citation and to dismiss the civil penalty proceeding in the above-referenced case.

Upon consideration, the motion is Granted, the citation is VACATED and this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

FEB 291988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-85-M A.C. No. 26-01488-05506
v.	:	Bonanza Materials Mine
BONANZA MATERIALS, INC., Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. Boyd Anderson, Manager, Bonanza Materials, Inc., Henderson, Nevada, pro se.

Before: Judge Cetti

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of $1,008.00 for nine alleged violations of certain mandatory safety standards found in Title 30 Code of Federal Regulations.

On September 24, 1986, MSHA Inspector Ronald Berry accompanied by Paul Price, an electrical engineer with MSHA, conducted an inspection of the Bonanza Materials Mine. As a result of that inspection MSHA issued to the operator the nine citations at issue in this proceeding. Seven of the citations charged the operator with improper grounding in violation of Title 30 C.F.R. § 56.12025. The remaining two citations charged the operator with electrical fitting and bushing violations proscribed by Title 30 C.F.R. § 56.12008.

This proceeding was initiated by the Secretary filing a petition for assessment of a civil penalty pursuant to Section 110(a) of the Mine Act. The respondent Bonanza Materials Inc.,

filed a timely answer contesting the existence of all the violations. After proper notice to the parties an evidentiary hearing on the merits was held before me on November 18, 1987.

Stipulations

At the hearing the parties entered into the following stipulations:

1. The respondent is the operator of the Bonanza Materials mine and is subject to the jurisdiction of the Mine Act.

2. The presiding judge has jurisdiction to hear and decide this case.

3. Respondent is a moderate size company having approximately 13,000 man hours per year.

4. Respondent has a moderate history having had seven assessed violations in the previous four years.

5. Respondent exercised good faith in its prompt abatement of the violations.

6. The imposition of the proposed civil penalties for the violations in question will not affect the ability of the respondent to continue in business.

7. If the existence of a violation is established the appropriate penalty is the original penalty proposed by the Secretary of Labor.

Issue

The existence of each of the violations alleged in the nine citations at issue.

Summary of Evidence

MSHA presented evidence that it inspected and investigated the electrical system including the grounding system in the plant's crushing area. Respondent has a high voltage electrical power coming into the main unit transformer located just outside the control room. The voltage is reduced from the power company voltage down to 440 volts and then distributed to different areas throughout the plant. The power goes through the control room where it is distributed to the individual motors that drive the crushers, conveyors and screens.

Citation No. 2674141

Mr. Price, an experienced electrical engineer, testified that he inspected the switch gears in the switch gear room located just below the control room. These switches and starters are used to distribute the 440 volt power to the individual motors in the plant. He found the starters and switches were not grounded properly because they did not have a grounding conductor that went "all the way back to the grounding source of the main transformer." He explained that although a metal conduit properly installed may be used as a grounding conductor the conduit involved in this citation did not have the special bonding lock nuts that assure the maintenance of the continuity of the grounding circuit. In addition the conduit was made of plastic and consequently could not be used for a grounding conductor since plastic will not conduct electricity.

On checking with an OHM meter it was found that there was no continuity to ground. There was no grounding circuit.

Respondent presented no contrary evidence.

Citation No. 2674142

The petitioner presented evidence that there was no ground on the 440 volt mud pump drive motor. This pump was located close to the ground in a wet area. There was no observable ground wire and on checking for continuity with an OHM meter it was found that there was no continuity.

Mr. Price testified that an employee standing on the earth in the wet area could be shocked in the event of a short circuit.

The operator presented no contrary evidence.

Citation No. 2674143

The Secretary presented evidence that the ground for the 440 volt screen conveyor drive motor was not hooked up. Mr. Price the electrical engineer testified that a ground wire in a three-phase system is typically a fourth wire which is hooked to the frame of the motor and grounds the current back to the incoming transformer. When a ground fault or short circuit occurs there is a large amount of current which instead of going through the motor and producing the desired result goes back to the source transformer. He explained that this is why it is called a short circuit.

Mr. Price observed that the ground wire inside the junction box was not hooked onto the motor frame. Consequently in the event of a short circuit virtually any piece of metal touching either the motor or the conveyor would be energized. However, if

the wire or other conductor is hooked back to the ground at the source transformer then the short circuit current travels on that ground conductor and trips the breaker. The breaker will trip even when there are only a few ohms resistance. If the system is properly grounded a short circuit will shut down the system without causing any hazard.

Respondent presented no contrary evidence.

Citation No. 2674144

The Secretary presented evidence that there was no ground wire or equivalent protection on the 440 volt drive motor for the cedar rapid screen. Mr. Price testified he observed there was no ground wire by simple visual inspection. He then determined that there was no equivalent protection by checking with an OHM meter.

Respondent presented no contrary evidence.

Citation No. 2674145

The Secretary presented evidence that there was no ground on the 440 volt cedar rapid screen rock conveyor drive motor. On opening the junction box at the motor the electrical engineer found there was no ground wire nor any other grounding conductor such as a conduit.

On checking with an OHM meter Mr. Price found that there was no equivalent protection.

Respondent presented no contrary evidence.

Citation No. 2674147

The Secretary presented evidence that there was no ground wire on the two 440 volt drive motors for the cone crusher. On opening the junction boxes of both motors and the compressor Mr. Price found there were no ground wires present. He stated that if there was a short in that area without ground wires the crusher itself and any metal that happen to be touching or attached to it could be become energized creating a shock hazard. With the three-phase system that was present the voltage could be 440 volts or 275 volts depending on where the ground fault is located. Either one of these voltages could be lethal.

Respondent presented no contrary evidence.

Citation No. 2674148

The Secretary presented evidence that the 440 volt drive motor for the bin belt was not properly grounded. The ground

wire was present but it was not continuous. It was an open ground wire and therefore not grounded. Mr. Price testified that if there were a short in the motor both the motor and the equipment that it was mounted on would be energized.

On cross examination the electrical engineer testified that a grounding wire or or other device is acceptable only if it "works". He checked with an OHM meter and it showed that there was no continuity.

Respondent presented no contrary evidence.

Citation No. 2674146

The Secretary presented evidence that the 440 volt power cable entering the metal junction box on the side of the rock conveyor for the cedar rapid screen was not equipped with the proper fitting required by 30 C.F.R. § 56.12008.

The electrical cable in question is a type of electrical cable that has metal conductors inside and an outer jacket of insulation. The cable entered the junction box through a hole in the side of the junction box. There was no fitting where the wire passed through the metal frame of the junction box. This lack of the proper fitting increases the chance of a short circuit.

Mr. Price testified that a proper fitting has to protect the wire or cable from the sharp edge of the box cutting into it and causing a ground fault and it must also provide strain relief for the many connections inside the junction box.

Respondent presented no contrary evidence.

Citation No. 2674149

This citation alleges a second violation of § 56.12008. The Secretary presented evidence that the 440 volt wires entering the junction box on the drive motor for the 3/8 crossbelt were not properly bushed where they entered the metal junction box on the motor. The conduit to the junction box was pulled out and the individual insulation on the individual wires of the conduit were contacting the frame. This individual insulation of each wire is quite thin and is very easily cut by the edge of the junction box if a little weight or pull is put on the conduit. It was quite easy to pull out one of the hot wires from the junction box and cause a short circuit that would energize the equipment.

Respondent presented no contrary evidence.

Discussion and Findings

The operator was charged with seven violations of 30 C.F.R. § 56.12025 which requires that all metal enclosing or encasings electrical circuits be grounded or provided with equivalent protection. The primary evidence presented by the Secretary to prove the alleged violations was the testimony of Mr. Price an experienced electrical engineer who accompanied ans assisted the MSHA inspector Ronald Burris in the September 24, 1986, inspection of Respondent's electrical system. The testimony of Mr. Price was persuasive and convincing. Based upon his unrebutted testimony, summarized above under the heading "summary of evidence" it is found that respondent was in violation of each of the grounding violation charged in Citation Nos. 2664141, 2674142, 2674143, 2674144, 2674145, 2674147 and 2674148.

In each instance it is found that the metal enclosing or encasing electrical circuit for equipment was not battery operated and was not grounded or provided with equivalent protection. In each instance it is found that there was a violation of the mandatory grounding requirements of 30 C.F.R. § 56.12025.

Citations 2674146 and 2674149 charges the operator with two violations of 30 C.F.R. § 56.12003 involving insulation and fittings of power wires and cables where they pass into or out of electrical compartments.

Section 56.12003 provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The unrebutted testimony of Mr. Price, MSHA's experienced electrical engineer, was persuasive and convincing. On the basis of his testimony summarized above under the heading "Summary of Evidence", it is found that there was a violation of the mandatory safety standard 30 C.F.R. § 56.12003 in each of the instances charged in Citation Nos. 2674146 and 2674149.

Accordingly, it is ORDERED that all the citations of the subject case are hereby affirmed.

Penalty

The seven stipulations entered into by the parties (set forth above) are accepted as established facts. And on the basis of these stipulations and the information placed in the record at the hearing it is found that the appropriate penalty for each of the nine violations is the original penalty proposed by the Secretary of Labor.

On the basis of the foregoing findings and conclusions and taking into account the requirements of Section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed in this proceedings.

Citation No.	Penalty
2674141	$112.00
2674142	112.00
2674143	112.00
2674144	112.00
2674145	112.00
2674146	112.00
2674147	112.00
2674148	112.00
2674149	112.00

ORDER

The respondent is ordered to pay the civil penalties in the amount shown totaling $1,008.00 within 30 days of the date of this decision. Payment is to be made to MSHA and upon receipt of payment these proceedings are dismissed.

August F. Cetti
Administrative Law Judge

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/bls

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