FEBRUARY 1990

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

FEBRUARY 1990

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

Joseph Delisio v. Mathies Coal Company, Docket No. PENN 89-8-D. (Judge Fauver, December 29, 1989)

Secretary of Labor, MSHA v. Morgan Corporation, Docket No. SE 89-50-M. (Judge Koutras, February 7, 1990)

Secretary of Labor, MSHA v. Walker Stone Company, Docket No. CENT 89-129-M. (Default decision of Chief Judge Merlin, January 17, 1990)

Secretary of Labor, MSHA v. Mettiki Coal Corporation, Docket No. YORK 89-6. (Judge Fauver, January 12, 1990)

Secretary of Labor, MSHA v. Mettiki Coal Corporation, Docket No. YORK 89-10-R, YORK 89-26. (Judge Fauver, January 12, 1990)

Motion for reconsideration was denied in the following case:

Secretary of Labor, MSHA and UMWA v. Mid-Continent Resources, Inc., Docket No. WEST 87-88. (Commission Order of December 19, 1989)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BOBBY G. KEENE	:	
v.	:	Docket No. VA 86-34-D
S&M COAL COMPANY, INC. TOLBERT P. MULLINS, and PRESTIGE COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), is before us on remand from an opinion of the United States Court of Appeals for the District of Columbia Circuit, affirming in part and reversing in part our prior decision in this matter. Secretary of Labor on behalf of Bobby G. Keene v. Tolbert P. Mullins, etc., 888 F.2d 1448 (1989), aff'g in part & rev'g in part, 10 FMSHRC 1145 (September 1988). At issue before the Court were the liability of Prestige Coal Co., Inc. ("Prestige") as a successor-in-interest to S&M Coal Co., Inc. ("S&M") for S&M's discriminatory discharge of Keene and the individual liability of Tolbert P. Mullins for offering to reemploy Keene under allegedly illegal and unsafe conditions.

The Court affirmed the Commission's conclusion that Prestige was not a successor-in-interest to S&M (888 F.2d at 1453-54), but held that the Commission erred in ruling that Mullins' offer of rehire was not a separate act of unlawful discrimination for which Mullins was personally liable (888 F.2d at 1450-53). The Court's action leaves standing the Commission's vacation of that portion of the judge's remedial order regarding Prestige and reverses the Commission's vacation of that portion of the order regarding Mullins.

Accordingly, the judge's conclusion that Mullins as an individual discriminated against Keene in violation of the Act in his refusal to reemploy Keene is reinstated. That portion of the judge's order requiring Mullins jointly and severally with S&M to pay Keene costs and back pay and to pay a civil penalty is reinstated. S&M and Mullins are ordered to pay Keene the costs, back pay and interest awarded by the judge and to pay the civil penalty assessed by the judge. Interest is to be calculated according to the formula set forth by the Commission in Secretary on behalf of Bailey v. Arkansas-Carbona, 5 FMSHRC 2642 (December 1983), and, as applicable, Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988)(see also 54 Fed. Reg. 2226 (January 19, 1989)).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 16, 1990

JOHN A. GILBERT	:	
	:	
v.	:	Docket No. KENT 86-49-D
	:	
SANDY FORK MINING COMPANY, INC.	:	
	:	
	:	
	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of JOHN A. GILBERT	:	
	:	
v.	:	Docket No. KENT 86-76-D
	:	
SANDY FORK MINING COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("the Mine Act" or "Act"), is on remand to us pursuant to an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing our prior decision in this matter. John A. Gilbert v. FMSHRC, 866 F.2d 1433 (1989), rev'g, John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (August 1987). This case involves discrimination complaints filed against Sandy Fork Mining Co., Inc. ("Sandy Fork") by complainant John A. Gilbert on his own behalf (Docket No. KENT 86-49-D) and by the Secretary of Labor on Mr. Gilbert's behalf (Docket No. KENT 86-76-D). Both complaints are based on the same set of circumstances and allege that Sandy Fork discharged Gilbert in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), because of his refusal to perform work that he believed to be hazardous. In his decision below, Commission Administrative Law Judge Gary Melick denied the Secretary's motion to dismiss Gilbert's own discrimination complaint on

jurisdictional grounds and concluded that Sandy Fork had not discriminated against Gilbert in violation of the Act. 8 FMSHRC 1084 (July 1986)(ALJ).

The Commission subsequently granted petitions for discretionary review filed by both Gilbert and the Secretary. In our prior decision, we affirmed on substantial evidence grounds the judge's conclusion that Sandy Fork had not discriminated against Gilbert in violation of the Act, but we reversed the judge's denial of the Secretary's motion to dismiss Gilbert's own complaint. 9 FMSHRC 1327 (August 1987). Gilbert appealed to the Court, which reversed and remanded with instructions to the Commission to consider certain issues. In light of the Court's decision, we now decide those issues, sustain Gilbert's complaints, and remand this proceeding to the judge for resolution of remedial matters.

I.

In upholding the judge's conclusion that Gilbert had not been illegally discharged, we determined that, even assuming that Gilbert had engaged in a protected work refusal on August 6, 1985, Sandy Fork did not take any adverse action against him because of that work refusal. 9 FMSHRC at 1334-35. We further found that substantial evidence supported the judge's determination that at the time of his August 7 work refusal, Gilbert did not entertain a reasonable, good faith belief that he would be required to work under hazardous conditions. 9 FMSHRC at 1335. In reaching that conclusion, we noted that "Sandy Fork's supervisors and managers did not react to Gilbert precipitately or manifest retaliatory intent." 9 FMSHRC at 1335. Accordingly, we unanimously affirmed on substantive grounds the judge's dismissal of Gilbert's complaints.

In addition, a majority of the Commission held that the judge had erred in denying the Secretary's motion to dismiss Gilbert's individual complaint on jurisdictional grounds. The majority concluded that the express language of section 105(c)(3) of the Mine Act provides that a complainant may file a private action only after the Secretary informs the complainant of her determination that a violation has not occurred. 30 U.S.C. § 815(c)(3); 9 FMSHRC at 1337. The majority declared invalid the clause in former Commission Procedural Rule 40(b) permitting the filing of individual actions when the Secretary has not made a determination of violation within 90 days. 1/ The Commission therefore

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1/ Former Commission Procedural Rule 40(b) provided:

> A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

29 C.F.R. § 2700.40(b)(1986). This rule was amended on November 23, 1987, to delete the underlined phrase.

reversed the judge's denial of the Secretary's motion and dismissed Gilbert's private discrimination complaint. 9 FMSHRC at 1338-39. Commissioners Doyle and Nelson dissented from this aspect of the decision. They found the Mine Act to be silent as to the consequences of the Secretary's failure to make a determination of discrimination within the 90-day statutory period, that former Rule 40(b) was a reasonable construction of the Mine Act, and that it should not be invalidated. 9 FMSHRC at 1340-44.

The Court reversed the Commission's decision with respect to the merits of Gilbert's discrimination complaints and also with respect to the retroactive application to Gilbert of the Commission majority's holding that individual complaints may be brought under section 105(c)(3) only after the Secretary rejects a miner's initial complaint. The Court remanded to the Commission questions in both areas for further consideration. 866 F.2d at 1434-35.

II.

A. The merits of Gilbert's discrimination complaint

We note initially that the Court endorsed several important principles of Commission discrimination law. Citing Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983) and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981), the Court agreed with the Commission that section 105(c) of the Act "protects a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." 866 F.2d at 1439. The Court subscribed as well to the Commission's view that in analyzing whether a miner's fear is reasonable, the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. 866 F.2d at 1439, citing Secretary on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983) and Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982). The Court also approved Commission holdings that to be accorded the protection of the Act in engaging in a work refusal, a miner need not objectively prove that an actual hazard existed and, further, that a good faith belief simply means an honest belief that a hazard exists. Id., citing Secretary on behalf of Hogan & Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1072-73 (July 1986); Pratt, supra, 5 FMSHRC at 1533-39; Haro, supra, 4 FMSHRC at 1943-44; and Robinette, supra, 3 FMSHRC at 810.

To determine whether substantial evidence supported the Commission's conclusion that Gilbert's August 7 work refusal lacked the required basis of a good faith, reasonable belief in a hazard, the Court adopted Commission guidelines for assessing a miner's "good faith." 866 F.2d at 1440. First, the Court indicated that, where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief in the safety or health hazard at issue and, second, when a miner has expressed a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger. 866 F.2d at 1440, citing Secretary on behalf of Dunmire & Estle v. Northern Coal

Co., 4 FMSHRC 126, 133 (February 1982); Bush, supra, 5 FMSHRC at 997-98; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom. Brock ex rel. Parker v. Metric Constructors Inc., 776 F.2d 469 (11th Cir. 1985); Hogan & Ventura, supra, 8 FMSHRC at 1074. Applying these principles, the Court found that the record did not support the Commission's determination that on August 7 Gilbert did not entertain a good faith, reasonable belief that he would be required to work in a hazardous area. 866 F.2d at 1140-41.

The Court presented its view of the evidence. Among other things, the Court noted that Gilbert was working in an area of the mine in which it appeared to him that the prevailing roof conditions placed his safety in jeopardy; that he left work on August 6 with management's permission; that when he returned to work on the morning of August 7 he learned from other miners of a roof fall that had occurred overnight in the area where he had been working; and that when he inquired of management representatives what had been done to address the unsafe conditions, they "refused to address his concerns." 866 F.2d at 1440-41. The Court found that Gilbert's "initial fears" on August 6 were reasonable and that on August 7 "he made a good faith attempt to communicate his reasonable fears to management." 866 F.2d at 1441.

The Court, however, stopped short of outright reversal of the Commission's decision, stating that it was not "clear" whether "management addressed Gilbert's concerns [on the morning of August 7] in a way that his fears reasonably should have been quelled." 866 F.2d at 1441. See also 866 F.2d at 1441 n.11. The Court explained:

> In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stone-walled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith.

866 F.2d at 1441.

There is no question on this record that mine management was aware of the roof problems in the area where Gilbert was working and was taking steps to address the problems. As the judge found, and as we noted, when Gilbert brought the conditions that he perceived to be hazardous to the attention of his section foreman on August 6, the

foreman responded that he would add more cribs to support the roof and that he would stand by and watch while coal was cut. 8 FMSHRC at 1089; 9 FMSHRC at 1330. Gilbert then went outside the mine and repeated his concerns to the general mine foreman, who told Gilbert that he would not insist that he resume work and that Gilbert should go home and return the next day to meet with Phipps, the general manager, and Begley, the mine superintendent.

When Gilbert returned on August 7, Phipps and Begley were underground conducting an examination of the roof, and Gilbert was told by another miner that a roof fall had occurred in the mine during the night. After Phipps and Begley emerged from the mine, Gilbert talked separately with each of them.

Gilbert talked first with Phipps. Both Gilbert and Phipps testified that Gilbert told Phipps that he was afraid of the roof. Tr. I 39-40; III 89-92. Gilbert asked Phipps what management was going to do about the roof and how the roof would be supported. Tr. II 39-40. Gilbert testified that Phipps responded that "they [were] supporting what they could." Tr. I 39-40. Similarly, Phipps stated that "primarily" he told Gilbert that the mine roof was all the top that the mine had. Tr. II 127. Both Phipps and Gilbert testified that Phipps asked Gilbert if he had any ideas for dealing with the roof (Tr. I 40; III 91), and Gilbert testified that he offered a few suggestions (Tr. I 40). Phipps further stated that he did not try to "convince" Gilbert that the roof was safe and that, although management was pursuing several approaches for alleviating the roof problems, he did not discuss those initiatives with Gilbert at that time. Tr. III 127-28.

Gilbert then engaged Begley in a similar brief conversation. Gilbert and Begley also agreed that Gilbert told Begley that he was afraid of the roof. Tr. I 40-41; II 109. Gilbert testified that Begley replied that "that's all they can do ... that's all the top they [had]." Tr. I 41. Begley stated that he did not recall telling Gilbert anything about the top on the morning of August 7. Tr. II 111-12. Begley's recollection was that he and Gilbert discussed Gilbert's possible job transfer rather than roof problems. Id. After these two conversations, Gilbert left the mine.

The Court rejected the judge's and Commission's determinations that in leaving the mine at this point, some five hours before his shift was scheduled to begin and before he had been told the specific area of the mine to which he would be assigned, Gilbert acted precipitately and unreasonably. 866 F.2d at 1140. Instead, the Court has directed us to determine whether management explained to Gilbert that the problems in his general work area had been corrected, or had indicated that he would be assigned to another area of the mine free of safety problems, or had suggested that the situation was unsettled and that he should wait until the start of his assigned shift before inquiring further about safety conditions in his area. 866 F.2d at 1441.

Based on the testimony summarized above, we conclude that Gilbert's safety concerns were not addressed in a manner sufficient to reasonably quell his fears. Given the Court's belief that Gilbert did

not act precipitately and its finding that he entertained a good faith, reasonable belief in a hazard, we are constrained to conclude that Gilbert's departure from the mine on August 7 constituted a discriminatory discharge in violation of section 105(c)(1) of the Act. Accordingly, the judge's conclusion to the contrary is reversed.

B. Retroactive application of changed Commission policy

As noted, the Commission majority concluded that the judge erred in denying the Secretary's motion to dismiss Gilbert's private complaint. In essence, the majority held that the provision of former Commission Rule 40(b) permitting a miner to file a discrimination complaint prior to the Secretary's determination that no discrimination had occurred conflicted with what the majority viewed as the express enforcement schemes set forth in section 105(c) of the Act and, accordingly, was invalid. The Court took issue with the majority's retroactive application to Gilbert of this new Commission policy. The Court did not consider the prospective validity of the new policy but, rather, held that the majority had not explained the basis for retroactively applying the new policy to Gilbert. 866 F.2d at 1441-42.

Citing Loc. 900, Int'l U. of Elec. Wkrs. v. NLRB, 727 F.2d 1184, 1194-95 (D.C. Cir. 1985) and Retail, Wholesale & Dept. Store U. v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972), the Court identified five factors that are to be applied in determining whether a new rule developed in an adjudication should be given retroactive effect. Those factors are:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

866. F.2d at 1442.

The Court discerned nothing in the record or the Commission's decision to overcome the first four factors, all of which, in the Court's opinion, militated strongly against application of the Commission's new policy to Gilbert. 866 F.2d at 1442-43. The Court indicated that the Commission had not examined whether the "statutory interest" in the application of the new policy to Gilbert, notwithstanding his reliance on the old policy, was of sufficient magnitude to overcome the other four factors, and it remanded the matter to the Commission for the purpose of carrying out such a statutory interest analysis. 866 F.2d at 1443.

In discussing retroactive application of new agency policy in SEC v. Chenery, 332 U.S. 194, 203 (1974), the Supreme Court, in relevant part, stated:

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design.... If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

The "statutory interest" criterion referred to by the Court herein is drawn from Chenery, supra, and is a flexible concept. In applying it in retroactivity contexts, courts have explained it in terms of statutory "purpose" and "design" (e.g., Retail, Wholesale & Dept. Store U., supra, 466 F.2d at 392), "overriding Congressional interest" (Clark-Cowlitz Jt. Operating Agency v. FERC, 826 F.2d 1074, 1085 (D.C. Cir. 1987)), "significant policy concern of ... legislation" (NLRB v. Wayne Transp., etc., 776 F.2d 745, 751 (7th Cir. 1985)), and "statutory intent" (Stewart Capital Corp. v. Andrus, 701 F.2d 846, 849-50 (10th Cir. 1983)).

With respect to prospective application of the Commission's new policy, all Commissioners adhere to their respective views as expressed in the prior Commission decision in this matter. With respect to retroactive application of that policy, all Commissioners conclude that, under all the circumstances presented, any practical or legal "mischief" in allowing Gilbert's private action to go forward would not be sufficient to overcome the Court's determinations with regard to the first four retroactivity criteria. We note that the Secretary first moved to dismiss Gilbert's action and it is the Secretary who, as the primary prosecutor under the section 105(c) enforcement schemes would be the primary victim of the "mischief" that she originally asserted resulted from a "two-tracked" proceeding such as this. Yet, as the Court noted, the Secretary "appeared to concede [during oral argument in this and a related case before the Court] that the government had no case that it wished to pursue in defense of the Commission's retroactive application of the new rule." 866 F.2d at 1443.

Thus, in light of the Court's opinion, Gilbert's private complaint must be reinstated.

IV.

On the foregoing bases, we reverse the judge's conclusion that Sandy Fork did not discriminate against Gilbert in violation of section 105(c)(1) of the Act and we reinstate Gilbert's discrimination complaints. We remand the matter to the judge for determination of all outstanding remedial issues.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 16, 1990

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 89-129-M
WALKER STONE COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on January 17, 1990, finding Walker Stone Company, Inc. ("Walker Stone") in default for failure to answer the Secretary of Labor's civil penalty proposal and the judge's order to show cause. The judge assessed civil penalties of $178 as proposed by the Secretary of Labor. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On January 26, 1990, David S. Walker, Walker Stone's president, wrote a letter to Judge Merlin asserting that on October 20, 1989, Mr. Walker had contacted an attorney for the Department of Labor requesting an extension of time for filing an answer to the Secretary's penalty proposal until after a ruling from an administrative law judge in another pending case.

Judge Merlin's jurisdiction over this case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Walker Stone's January 26 letter was received by the Commission on January 29, 1990. We will treat Walker Stone's letter as a timely petition for discretionary

review. E.g., Blue Circle Atlantic, 11 FMSHRC 2144 (November 1989).

The record discloses that on May 25 and 31, 1989, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued seven citations to Walker Stone. Upon notification by MSHA of civil penalties proposed for the alleged violations totaling $178, Walker Stone filed a "Blue Card" request for a hearing before this independent Commission. On August 24, 1989, counsel for the Secretary filed the Secretary's penalty proposal with the Commission. When no answer to the penalty proposal was filed, the judge, on November 1, 1989, issued a show cause order directing Walker Stone to file an answer within 30 days or show good reason for its failure to do so. As noted, Walker Stone's president claims to have asked the Secretary's attorney, on October 20, 1989, for a delay in filing the answer.

The party against whom the Secretary seeks a penalty must file an answer with this Commission within 30 days after service of the Secretary's proposal for penalty. 29 C.F.R. § 2700.5(b) & .28. Thus, Walker Stone misdirected its request for an extension of time for filing its answer. The administrative law judge, not counsel for the Secretary, regulates the course of this review proceeding. We note, however, that Walker Stone is proceeding pro se and appears to confuse the roles of the Department of Labor and this independent adjudicatory Commission in this proceeding. For this reason and because Walker Stone claims that prior to issuance of the show cause order it sought an extension of time for filing its answer, we believe that the operator should have the opportunity to present its position to the judge. E.g., Amber Coal Co., 11 FMSHRC 131, 132 (February 1989).

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether final relief from default is appropriate. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 21, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 88-194-R
ROCHESTER AND PITTSBURGH COAL CORPORATION	:	

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

DECISION

BY THE COMMISSION:

At issue in this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), is whether Rochester and Pittsburgh Coal Corporation ("R&P") violated 30 C.F.R. § 90.103(a) by failing to compensate a Part 90 miner at not less than the regular rate of pay received by that miner immediately before his exercise of the Part 90 option. 1/ Commission Administrative Law Judge William Fauver held that R&P violated the standard and, based on the parties' stipulation that the Secretary's petition for civil penalty be adjudicated in the contest proceeding, the judge imposed a penalty of $78.00. 10 FMSHRC 1313 (September 1988)(ALJ). For the reasons that follow, we affirm Judge Fauver's decision.

1/ Section 90.103(a) essentially restates section 203(b)(3) of the Mine Act, 30 U.S.C. § 843(b)(3), and provides:

> 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 option under § 90.3 (Part 90 option; notice of eligibility; exercise of option).

At the time of the events at issue, Leonard Edwards had been employed at the Greenwich Colliery No. 2 South Mine, an underground coal mine operated by R&P, for over 15 years. In August 1979, while working as a longwall shear operator, Edwards was informed by the Department of Labor's Mine Safety and Health Administration ("MSHA") that a chest X-ray taken on January 23, 1979, indicated that he had "enough pneumoconiosis" to render him eligible under the Mine Act for transfer to a less dusty area of the mine. Exh. G-1. 2/ Edwards testified that he showed the letter to his section foreman, who requested a copy for R&P's files. Later in 1979, he began work on the cross-belt at the same rate of pay he had received as a longwall shear operator. He worked at this latter task until April 1985, when, as the result of a work force reduction and realignment, he was scheduled to be transferred to the North Mine as a shear operator. Not wishing to transfer, Edwards was allowed to remain at the No. 2 South Mine, and was reclassified as a general laborer with a reduction in rate of pay from $14.41 to $13.31 per hour. He then gave a copy of the MSHA letter of August 1979 to John Bobenage, mine superintendent, who authorized that his rate of pay be restored to $14.41 per hour, effective April 15, 1985. Exh. OX-2, Tr. 12.

About March 1, 1988, when possible further employee realignment was rumored, Edwards sent to MSHA his "Exercise of Option to Transfer" form. 3/ The form bears Edwards' signature and a partly obliterated date of 4-12-85. Edwards testified that he had signed and dated the

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2/ Section 90.3(a), which essentially restates section 203(b)(2) of the Mine Act, 30 U.S.C. § 843(b)(2), states:

> Any miner employed at an underground coal mine or at a surface work area of an underground coal mine who, in the judgment of the Secretary of Health and Human Services, has evidence of of the development of pneumoconiosis based on a chest X-ray, read and classified in the manner prescribed by the Secretary of Health and Human Services, or based on other medical examinations shall be afforded the option to work in an area of a 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. Each of these miners shall be notified in writing of eligibility to exercise the option.

3/ Section 90.3(d) states in relevant part:

> The option to work in a low dust area of the mine may be exercised for the first time by any [eligible] miner ... by signing and dating the Exercise of Option Form and mailing the form to the Chief, Division of Health, Coal Mine Safety and Health....

form in April 1985 but had decided not to send it to MSHA. He subsequently scratched over that date when he actually mailed the form in March 1988. He testified that on Monday, March 14, 1988, he informed Bill Garay, an R&P foreman, that he was invoking his Part 90 rights. On that same date, R&P also received MSHA's notification, dated March 10, 1988, of Edwards' exercise of option. R&P informed MSHA by letter of March 18 that Edwards, as a Part 90 miner, would be assigned "outby the face area" and would be sampled for respirable dust as required. Exh. OX-4, G-6. Edwards' regular rate of pay was reduced from $15.81 to $14.75 per hour effective March 16, 1988. Exh. OX-3.

Acting on a complaint by Edwards, MSHA issued a section 104(a) citation to R&P on April 21, 1988, alleging a violation of 30 C.F.R. § 90.103(a) for reducing the regular rate of pay received by Edwards immediately before exercise of his Part 90 option. Exh. G-4. R&P contested the citation, and a hearing was held before Judge Fauver on June 7, 1988.

John Bobenage, superintendent of the No. 2 Mine during 1985, testified that his restoration of Edwards' higher rate of pay in April 1985 was based on Edwards' assertion, confirmed by his supervisor, that he was a Part 90 miner. Tr. 46-52. Donald Marino, manager of labor relations for R&P, testified that he was not aware until early March 1988 (but prior to receiving MSHA's notice of Edwards' Part 90 status) that Edwards was not a Part 90 miner. Marino further stated that Edwards had been mistakenly overpaid at a higher rate since April 1985, based on R&P's "false assumptions" as to Edwards' Part 90 status. Tr. 56-74.

Michael Kaschak, responsible for R&P's respirable dust sampling of Part 90 miners at the Greenwich mines, stated that he had been aware since 1985 that Edwards was not a Part 90 miner. He testified that he had not discussed the matter with R&P officials until March 6 and 7, 1988, when he informed William Garay, mine foreman, and Richard Endler, mine superintendent since July 1987, that Edwards was not a Part 90 miner. Tr. 92. Garay testified that he had questioned Edwards' rate of pay in January 1987. Tr. 109. Endler testified that, following discussions with R&P management officials, he concluded, on March 10 or 11, 1988, that, since Edwards was not a Part 90 miner, his rate of pay for the preceding three years was a mistake and should be reduced. He signed the pay rate change authorization form on March 16, 1988. Tr. 115-17, Exh. OX-3.

In his decision, Judge Fauver found that in April 1985, when Edwards produced a copy of the 1979 MSHA letter, R&P restored his pay cut since "[b]oth Edwards and mine management apparently assumed that Edwards was a Part 90 miner in April 1985." 10 FMSHRC at 1314. He further determined that Edwards' pay-rate cut on March 15, 1988, occurred after he had exercised his Part 90 transfer option and after R&P had been notified by both Edwards and MSHA of that exercise of option. Id. Citing Matala v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir. 1981), and Mullins v. Andrus, 664 F.2d 297, 305, 310 (D.C. Cir. 1980), the judge held that the "regular rate of pay," as used in Part 90, is the rate that the miner was actually and regularly being

paid immediately before the exercise of the Part 90 option, and not the rate to which he had a right, or "should have been" receiving. 10 FMSHRC at 1316. Accordingly, he concluded that when a miner becomes a Part 90 miner, the operator may not go back several years from that date to change the miner's rate of pay to one the operator decides the miner "should have been" receiving immediately before he became a Part 90 miner. To permit such retroactive changes, the judge concluded, "would have a chilling effect on the exercise of Part 90 rights." 10 FMSHRC at 1316. In the instant case, since R&P received MSHA's notice of Edwards' Part 90 status on March 14, 1988, the judge determined that R&P violated section 90.103(a) by reducing his regular rate of pay on March 15, 1988. 10 FMSHRC at 1317.

On review, R&P argues that by falsely claiming Part 90 status in April 1985, Edwards attempted to abuse the intent of the Mine Act and, under a "bad faith" exception recognized by the court in Mullins, supra, is not entitled to the regular rate of pay received by him immediately prior to transfer. Alternatively, lacking a showing of bad faith, R&P argues that it is entitled to correct Edwards' regular rate of pay because it resulted from a mistake. 4/ We disagree.

The Secretary contends that the record fails to show bad faith on Edwards' part. The Secretary asserts that, absent such a showing, the miner is entitled, upon transfer, to the same rate of pay as he actually and regularly received prior to transfer. She further asserts that her interpretation is consistent with section 203(b)(3) of the Act, the underlying purpose of Part 90, and the interpretation of those provisions by the courts. Sec's br. at pp. 7, 8.

The term "regular rate of pay," as used in section 203(b)(3) of the Mine Act and in section 90.103(a) (n.1 supra), has been clearly defined by the District of Columbia and Fourth Circuit Courts of Appeals. Mullins defines that term as "the rate at which the transferring miner was actually and regularly compensated when the transfer occurred, irrespective of job classification." 664 F.2d 297. See also, Matala, supra, 647 F.2d at 429.

R&P first contends that these decisions do not control because Edwards abused the intent of the Act in falsely claiming Part 90 status. R&P notes that Mullins recognizes an exception to the Mine Act's pay-rate maintenance protection in cases of bad faith, "when a miner attempts to abuse the intent of the Act...." 664 F.2d at 310 n. 113.

The express intent of the relevant sections of the Mine Act and the Part 90 regulations is to afford the option of transfer to a less dusty area of the mine, at no less than the regular rate of pay received immediately before the transfer, to any miner who shows evidence of the

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4/ R&P also argues that Edwards had subsequent X-rays in 1983 or 1984 and in 1988, the results of which are unknown to the operator and which might indicate that the initial X-ray was misread or that his condition has improved. We agree with the Secretary that this argument is entirely speculative, lacking any evidence of record to support it.

development of pneumoconiosis. The record demonstrates that, in August 1979, Edwards had been informed by MSHA that he had a sufficient degree of pneumoconiosis to be eligible for Part 90 rights and needed only to send in the exercise of option form to MSHA. Why, after signing and dating the form in 1985, Edwards did not send it to MSHA, or why the mine superintendent personally approved Edwards' status as a Part 90 miner based solely on the MSHA letter of eligibility, is not explained in the record. We agree that had Edwards falsely claimed Part 90 medical eligibility, the "bad faith" exception carved out in Mullins might well apply. However, the evidence of record indicates that, at most, this is a case of technical non-compliance with Part 90 procedures rather than abuse of the intent of the Act, or bad faith, on Edwards' part. We believe the record supports the judge's conclusion that Edwards' pay restoration in April 1985 resulted from a mistaken assumption by both parties that Edwards was a Part 90 miner.

We next address R&P's argument that it should be allowed to correct a Part 90 miner's rate of pay that was calculated erroneously. The Secretary contends that this case does not involve the correction of a clerical error but represents an attempt to decrease Edwards' pay rate only after he had exercised his option. In our view, this case is distinguished from that of a newly discovered, recently occurring inadvertent clerical error. Edwards had been compensated at the rate of pay, now questioned, for almost three years prior to March 1988. His restoration to that rate of pay had previously been questioned but then personally approved, in April 1985, by the mine superintendent. The person responsible for R&P's Part 90 sampling program had known since 1985 that Edwards was not a Part 90 miner, and Edwards' supervisor had questioned his pay status as early as January 1987. R&P, therefore, was in the position to correct this situation at any time during the three-year period prior to March 1988.

Instead, by reducing Edwards' rate of pay only after he had exercised his part 90 option, R&P finds itself diametrically opposite the consistent judicial and Secretarial interpretation of the pay-rate protection provisions of the Mine Act and Part 90. Recently, the D.C. Circuit has reaffirmed a liberal view of the transfer and pay rate protections of the Mine Act and Part 90 in Secretary v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989). In its decision, the court emphasized that the Secretary's interpretation of the Mine Act is entitled to deference, stating:

> Confronting diverse readings of the statutory text, we are obliged to defer to the Secretary's miner-protective construction of the Mine Act so long as it is reasonable.

867 F.2d at 1437.

In the instant case, we find the Secretary's interpretation of section 90.103(a) reasonable, and consistent with the judicial precedent set out in Mullins and Matala, supra. Accordingly, we hold that substantial evidence supports the conclusion that R&P violated 30 C.F.R. § 90.103(a) when it reduced the regular rate of pay being received by

Edwards immediately prior to the exercise of his Part 90 option.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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FEB 5 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 88-112-M A.C. No. 14-00111-05511
v.	:	Lone Star Quarry and Mill
LONE STAR INDUSTRIES, INC., Respondent	:	

DECISION

Appearances: Charles A. Mangum, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner;
Michael T. Heenan, Esq., Smith, Heenan & Althen, Washington, D.C., for the Respondent.

Before: Judge Morris

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

After notice to the parties a hearing was held in Kansas City, Missouri.

The parties filed post-trial briefs.

Summary of the Case

Citation No. 2870909 charges respondent with violating 30 C.F.R. § 56.11001, which provides as follows:

§ 56.11001 Safe access.

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

The citation reads as follows:

A safe means of access was not provided into the #3 clinker cooler dust chamber. An employee was entering the shut down #3 clinker cooler dust chamber that was undergoing repairs to take some measurements. A permanently disabling injury occurred on 12-4-87 at about 1440 hours, when an employee's right leg became entangled in the #2 and #3 clinker cooler dust screw conveyor and was severed about mid-thigh.

Citation No. 2870908 charges respondent with violating 30 C.F.R. § 56.12016, which provides as follows:

> § 56.12016 Work on electrically-powered equipment.
>
> Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The citation reads as follows:

> The electrical power for the #2 and #3 clinker cooler dust screw conveyor was not turned off, locked and tagged out. A permanently disabling injury occurred on 12-4-87 at about 1440 hours when an employee's right leg became entangled in the screw conveyor and was severed at about mid-thigh.

Issues

The issues are whether respondent violated the regulations.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The quarry mill involved in these citations is a moderate to large operation. On an annual basis there are 200,000 to 300,000 man hours at the mill.

2. The operator's prior history is contained in a computer printout for the 24 months prior to the accident in question. The computer printout may be received in evidence as Exhibit P-1.

3. The company abated the alleged violations within a reasonable time.

4. The imposition of the proposed civil penalties will not affect the company's ability to continue in business.

(Tr. 13, 14)

The Evidence

ELDON E. RAMAGE, an MSHA inspector for 11 years, has extensive training in mining. He has been a certified electrician and safety coordinator in the metal and nonmetal industry. He has experience in hazard recognition. In addition, he has conducted some 3000 MSHA inspections.

The witness has inspected Lone Star many times at the Bonner Springs plant where the company operates an open pit quarry; cement is produced.

In December 1987 he learned of an accident at the plant and he conducted a subsequent investigation. The investigation report was received in evidence as Exhibit P-2.

During the inspection of the scene Mr. Ramage was accompanied by management representatives Green, Metzker and Krause.

Lone Star's cement producing process is illustrated by Exhibit R-1. A limestone slurry initially enters a kiln. The chamber, which rotates, in turn discharges its clinkers into a cooler. The clinkers flow from the kiln to the cooler through a clinker dust chamber. Clinker dust accumulates in the dust chamber and a slide, or chute, permits the dust to fall into a screw conveyor located at ground level.

This 16-inch screw conveyor, 49.83 feet in length, is driven by a 25 hp electric motor. It rotates at 60 r.p.m.

On the day of this accident temporary scaffolding had been erected to perform maintenance work in the clinker dust chamber. Exhibit P-3(a) shows the position of the scaffolding in the dust chamber. Repair and maintenance occurs about once a year when the kiln is shut down.

On this repair and maintenance day four workers were using impact tools to install grates in the dust chamber. These workmen had entered the dust chamber from the top via a ladder.

At the bottom of the dust chamber there are four inspection doors located just above the auger (Exhibit P-3(a)). The above described doors are not posted with any directions that they should not be used for access to the chamber.

In the above situation Lone Star's engineer Ronald E. Roebuck entered the dust chamber through the second inspection door from the left. Light and extension cords, as well as air lines, had been taken into the dust chamber through one of the

inspection doors. The repairmen working in the dust chamber had gained access through the top of the chamber. Due to the closeness of the shroud to the side of the dust chamber, Roebuck (who was a big man) apparently decided to enter through the inspection door of the dust chamber. 1/ By entering the chamber through the inspection door he could ascend to the temporary scaffolding where the repairmen were working. He could then go into the air duct area to obtain some measurements.

When he entered Roebuck did not deenergize and lock out the screw conveyor. As he was attempting to climb up the metal slide or chute to the scaffolding something caught on the chute. He lost his footing and slid back down through the feed opening below the inspection door he had just entered. This permitted his right foot to pass through the opening into the rotating screw conveyor. His right foot became entangled in the rotating screw which pulled his foot and leg into the conveyor. His right leg was severed about mid-thigh.

Fellow employees heard Roebuck's screams for help and they went to his assistance. To reach Roebuck they descended from the scaffold to the bottom of the dust chamber and exited via an inspection door. Roebuck was then sitting outside the chamber and a fellow employee immediately went to the burner floor and shut off the conveyor.

Discussion

In The Hanna Mining Company, 3 FMSHRC 2045 (1981) the Commission considered the "safe access" regulation and ruled that "the standard requires that each 'means of access' to a working place be safe." In addition, the Commission observed that "(t)his does not mean necessarily that an operator must assure that every conceivable route to a working place no matter how circuitous or improbable, be safe." 3 FMSHRC at 2046.

The regulation in contest here is generally listed under the category of "Travelways." Accordingly, it is appropriate to consider whether a travelway was involved here. Section 56.1 defines a travelway as "a passage, walk or way regularly used and designated for persons to go from one place to another."

1/ Roebuck did not testify and the inspector indicated Roebuck did not give him any reason as to why he entered through the inspection door (Tr. 40).

As a threshold matter the record here fails to disclose that a route via the inspection door was regularly used by employees. I recognize that this incident occurred during a repair and maintenance mode. (In fact, due to excessive heat generated by the process, workers cannot enter the clinker cooler when it is operational.)

After extensive testimony on the issue of whether employees regularly went through the inspection doors, respondent moved to strike portions of the testimony of the inspector (Tr. 81-82). The judge reserved his ruling until the conclusion of the case and at that point he ruled that no credible evidence supported the view that workmen used the inspection door to enter the dust chamber (Tr. 110-111).

It is further apparent that the inspection door was not designated as an entry door. The ordinary definitions of "designate" are "to point out the location," or to "indicate." 2/ The testimony, scale drawings and photographs do not show that the inspection doors were designated as entry doors. (Exhibits P-4, P-5, P-6 and P-7 are photographs of the inspection doors.)

With the Commission's mandate in Hanna it is necessary to further review the evidence to determine whether an inspection door presented a reasonable means of access.

As a threshold matter it is apparent these four inspection doors were to be opened to inspect the flow of material entering the screw conveyor (Tr. 75). No evidence indicates they are access doors to be used by workers to enter the dust chamber.

At the hearing there was no testimony as to the size of the opening. The only evidence is contained in the scale drawing (Exhibit P-3(a)). This exhibit indicates a door was 3 feet high by 2 feet 8 inches wide. Entry from the bottom of the chamber would be, at best, difficult for any person.

When Roebuck entered the dust chamber he had to physically pass over the enclosed screw conveyor. He would then be entering the chamber onto a sharply inclined dusty or gritty chute. The testimony does not disclose the angle of the chute. However, Exhibit P-3(a) shows the scaffolding and the chute.

2/ Webster's New Collegiate Dictionary, 1979, at 305.

The point where Roebuck's leg slipped into the screw conveyor was normally guarded by a grizzly. It was apparently not guarded on this occasion. However, the failure to guard the conveyor does not convert this route to a travelway. It is uncontroverted that the grizzly was not a man guard nor was it designed to prevent a person from being caught in the screw auger (Tr. 94-95).

It is true that air lines and hoses had been passed through the door opening to the workmen on the scaffolding but that fact, in and of itself, would not convert this inspection door and route into a passageway.

It is further true that Roebuck's fellow workers came down from the scaffold and reached him through the inspection door. However, this was in response to his calls for help and after he had been injured.

The Secretary argues that a violation of § 56.11001 was established by the very absence of a safe travelway into the dust chamber (Brief at 5). Indeed, she argues the accident would not have occurred if respondent had designated a safe passage for employees to regularly use.

The evidence does not support the Secretary's argument. Entry through the top of the dust chamber was not shown to be unsafe. In fact, the four workmen entered through the top and performed their maintenance work from the scaffold (Tr. 74). The testimony is unclear but access through the top involved a three foot by four foot opening (Tr. 89).

The regulation requires an operator to furnish safe access. It does not require an operator to assure that every conceivable route to a working place be safe.

The Secretary further argues that the accident itself establishes that the means of access used by Roebuck was unsafe.

The Secretary's arguments are rejected. It is well established that an accident, in and of itself, does not prove a violation of a regulation. Texas Industries, Incorporated, 4 FMSHRC 352 (1982).

In sum, on the evidence presented here I conclude the entry through the inspection door was not a means of access within the meaning of the standard. Further, there was no reasonable possibility that a miner would use this route as a means of reaching a work place.

Citation No. 2870909 should be vacated.

Citation No. 2870908

This citation charges respondent with violating 30 C.F.R. § 56.12016, cited, supra.

During the hearing the Secretary was granted leave to allege, in the alternative, that the operator violated 30 C.F.R. § 56.14029. 3/

The uncontroverted facts indicate that Roebuck entered the dust chamber without turning off and locking out the screw auger. The uncontroverted facts further establish that no repairs or maintenance was being performed on the screw auger at the time.

Both of the regulations cited here forbid repairs or maintenance on moving machinery except where motion is necessary to make adjustments. In the instant case the screw auger was moving but no repairs or maintenance were being performed on it. The cited regulations are not applicable in this factual situation.

For a case illustrating this principle, see the well-reasoned decision of Judge James A. Broderick in United States Steel Corporation, 4 FMSHRC 906 (1982).

The matter of taking measurements (as Roebuck intended to do) and the workmen installing grates cannot be stretched to include a repair or maintenance of the screw auger.

Various other cases demonstrate the proper application of the standards: Cf. Greenville Quarries, Inc., 9 FMSHRC 1390 (1987) (Koutras, J); North American Sand & Gravel Co., 2 FMSHRC 2017 (1980), (Moore, J); Brown Brothers Sand Co., 3 FMSHRC 734 (1981) (Cook, J).

The Secretary argues that the cited standards are designed, in part, to prevent the hazard of human entanglement in moving

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3/ The standard reads as follows:

> § 56.14029 Machinery repairs and maintenance.
>
> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery blocked against motion, except where machinery motion is necessary to make adjustments.

machine parts. In support of her view she relies on Adam Stone Corporation, 7 FMSHRC 692 (1985) and Price Construction, Inc., 7 FMSHRC 661 (1985).

I agree with the Secretary's statement concerning the purpose of regulations. However, such regulations are not applicable to the facts in this case.

The Secretary states the standards should be broadly construed to include those situations where employees are required to crawl, step or jump over moving machine parts to reach a destination. I decline to construe the regulation as requested. If such a regulation is appropriate the Secretary can enact it through her rule-making authority.

For the foregoing reasons Citation No. 2870908 should be vacated.

ORDER

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

1. Citation 2870909 and all proposed penalties therefor are vacated.

2. Citation 2870908 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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FEB 5 1990

GERALD SMITH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 89-218-D
	:	MADI-CD-89-04
PYRAMID MINING, INC., Respondent	:	Hall No. 2 Mine

DECISION

Appearances: Henry E. Hayden, Esq., Hayden & McKown, Hartford, Kentucky for Complainant; Patrick D. Pace, Esq., Rummage, Kamuf, Yewell, Pace & Condon, Owensboro, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Gerald Smith under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging unlawful discharge by Pyramid Mining, Inc. (Pyramid) in violation of section 105(c)(1) of the Act.[1/]

[1/]Section 105(c)(1) of the Act provides as follows:

> 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In his Amended Complaint Mr. Smith alleges that he was unlawfully discharged on May 5, 1989, for the following reasons:

> In 1989 at various times prior to his dismissal in May 1989, the Plaintiff had given the Defendant notification of various safety problems that existed in regard to his employment. Specifically, the Plaintiff complained numerous times about the brakes and air-conditioner on his loader and about fuel spills on the loader, emergency brakes being inoperative, and rear tires on the loader being dangerously worn. In addition, the Plaintiff had complained to the Defendant regarding the fact that he was not allowed to take breaks and was required to work many shifts straight through, 16 hours.

In order to establish a prima facie violation of section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence that he engaged in protected activity and the adverse action taken against him was motivated in any part by the protected activity. In order to rebut a prima facie case, the Respondent must show either that no protected activity occurred or that the adverse action was in no part motivated by the miners protected activity. Secretary of Labor on behalf of Pasula v. Consolidation Coal Company, Inc. 2 FMSHRC 2786 (1980), rev'd on other ground sub nom. Consolidation Coal Company v. Marshall 663 F.2d 1211 (3rd Circuit 1981).

While the Complainant herein has clearly established that he engaged in activities protected by the Act by reporting potential safety and health hazards to Pyramid management he has failed to sustain his burden of proving that his discharge was motivated in any part by those protected activities. It is undisputed that pursuant to a written request by Pyramid to all of its employees on or about March 31, 1989, (Complainant's Exhibit No. 2) for, among other things, "a report of any item not in proper operating condition such as brakes, horns, fire extinguishers, seat belts, back-up alarms, tire or track conditions and temperature and pressure gauge conditions on equipment", the Complainant submitted a typewritten list setting forth the following complaints or defects: "temperature gauge works part time, fuel pressure gauge doesn't work at all, air conditioner doesn't cool, brakes are no good, left ladder bent, back tires are slick, transmission is out" (Complainant's Exhibit No. 2).

Pyramid maintains on the other hand that Smith was discharged on May 5, 1989, for threatening its employees. In particular Mine Superintendent Harold Meredith, the official who actually discharged Smith, testified that he was told on May 3rd, by his Manager of Processing and Transportation, Randy Heintzman, that he had been told that the lives of both he and Safety Director Plummer had been threatened by Smith. Meredith specified in writing the reasons for Smith's discharge as follows:

> Gerald has from time to time made threats to fellow employees also supervision. This problem has been an on going thing for several weeks Gerald has been called in the company office to discuss this problem several times. I feel to insure the safety of employees who work with Gerald to discharge him at this time. (Respondent's Exhibit No. 1)

Superintendent Meredith obtained his information indirectly from Heintzman who, in turn, had received his information from Smith's immediate foreman, James S. Williams. Williams testified that he had known Smith for about nine years while working at the Hall No. 1 Mine. According to Williams it was around May 1, 1989, that Smith came to his house bringing a doctor's excuse for an absence. Williams testified that Smith was at his house for about an hour or an hour and ten minutes and during the course of his visit threatened to "blow Heintzman's head off".

During the conversation, according to Williams, Smith also admitted that he had "gone after" Safety Director Plummer at an area gas station but that Plummer had "pulled out" before he got to him. Smith was apparently angry that Plummer had called his doctor to verify a previous excuse and discovered that, in fact, Smith had not actualy seen the doctor. Williams testified that he believed the threats were serious because of Smith's "nature" and his prior experience. Williams also testified that Smith carried weapons in his truck including a .44 Magnum handgun and a 3 1/2 foot long stick. Williams testified that he was also aware of prior threats by Smith to beat or shoot a co-worker, Roger Dunning, in 1985 or 1986. According to Williams, Smith had also shown him the 3 1/2 foot long stick on prior occasions while threatening to "put knots on the head" of former Assistant Superintendent Hatten.

Smith denies making any such threats. According to Smith's theory at hearing Williams fabricated these threats as a means of getting rid of him and thereby of ingratiating himself with Pyramid management. Smith continues to maintain

that the actual reason for his discharge was his protected safety complaints.

I do not find however that Smith's testimony is credible. He has failed to discredit the testimony of Williams that he indeed made the threats attributed to him. In addition the motive he attributes to Williams for his allegations that Williams fabricated the threats is not credible. Clearly if Pyramid needed a pretext for discharging Smith after his safety complaints it had ample grounds to do so in early April 1989, when Smith was caught submitting a bogus medical excuse after taking several days off for personal business. The fact that Smith was not discharged at that time when ample grounds existed to do so only serves to corroborate managements position that it did not entertain a retaliatory motive based in his safety complaints when it later discharged him for threatening its employees.

Pyramid has, moreover, clearly established through credible testimony that Smith indeed threatened both management personnel and hourly workers immediately before his discharge and on prior occasions. It is also relevant and corroborative of Smith's ability to carry out such threats that Smith admitted owning five handguns, including the .44 Magnum apparently seen by Williams, and that he sometimes kept a handgun in his truck while at work.

Under the circumstances I find that Smith has failed to sustain his burden of proving that his discharge was motivated in any part by his protected activities.

ORDER

Discrimination Proceeding Docket No. KENT 89-218-D is DISMISSED.

Gary Melick
Administrative Law Judge

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FEB 5 1990

ALLEN ELLSWORTH, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 89-33-D
FREEMAN COAL MINING COMPANY, Respondent	:	VINC CD 88-10 Crown II Mine

DECISION

Appearances: H. Carl Runge, Esq., Runge & Gumbel, P.C., Collinsville, Illinois for Complainant; Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Allen Ellsworth under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," alleging unlawful discharge by the Freeman United Coal Mining Company (Freeman) in violation of section 105(c)(1) of the Act[1]/. More particularly the Complainant alleges that his discharge on August 4, 1988, was the direct result of his refusal to perform work which he believed to have been unsafe.

[1]/ Section 105(c)(1) of the Act provides as follows:

> 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be

The record shows that the Complainant had been employed by Freeman as a miner since 1976. At the time of his discharge on August 4, 1988, he was classified as a rock duster but had been more recently assigned to shovel coal spillage around the beltline for several shifts. The beltline ran down the center of the entry suspended from the mine roof. The mine height in this area was 6 to 8 feet and there was approximately 6 feet of clearance on each side between the belt and the ribs. There was also a space beneath the suspended belt of between 18 to 48 inches.

On the midnight shift on August 4, 1988, the Complainant was initially assigned by his foreman, Roger Johnson, to shovel coal spillage on the east side of the belt with another miner. Two other miners were shoveling on the west side of the belt. According to Ellsworth, while shoveling the beltline during the previous night his shovel was momentarily caught in the belt. Ellsworth testified that although he was scared by this incident he never reported or complained of it to anyone nor did he refuse to work because of the incident. He further testified that he was aware at this time of a publication by the Federal Mine Safety and Health Administration (MSHA) warning as follows:

> SAFETY TIP
> Remember: Never put any part of your body in a position where it could be caught by a belt conveyor. Belt conveyors should be stopped when performing any type of cleaning or mechanical work. If any guards are removed, they must be replaced immediately. (Exhibit C-1)

Ellsworth testified that he was also aware at that time of miners being killed after being caught in moving belts. In spite of this knowledge Ellsworth did not complain that the practice of shoveling coal onto the beltline was in itself unsafe.

It is within this framework that Ellsworth claims he subsequently refused to perform his assigned work on August 4, 1988. During his shift that night Foreman Johnson had to assign one of the four shovelers to another job. Noting that the west side was further behind the east side in the clean-up effort Johnson assigned two miners to clean the west side leaving Ellsworth alone on the east side.

Cont'd Fn.1
instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Ellsworth protested stating that it was unsafe to shovel alone on one side of the belt. He complained that if he fell into the belt, no one would be close by to help him.

At hearing Ellsworth clarified his concerns that no one was working his side of the belt. He testified that if other miners had been working within 1 1/2 crosscuts on his side that would have been an acceptable distance away. The miners shoveling on the west side of the beltline at this time were within 1 1/2 crosscuts but in order to pull Ellsworth from the belt would have had to also pass beneath the belt. The cutoff switch to the belt was however also on the west side about 100 feet from where the miners were shoveling at the time of Ellsworth's work refusal.

Foreman Johnson testified that when Ellsworth refused to shovel on the east side Ellsworth requested an evaluation by a union safety committeeman. Johnson then called Kenneth Miller, the shift mine manager, on the mine telephone and reported the problem. Miller instructed Johnson to assign Ellsworth to shovel with the others on the west side of the belt until he arrived.

When Miller arrived at the area about a half hour later, Johnson explained that Ellsworth thought it was unsafe to shovel by himself. Miller and Johnson then inspected the east side of the belt where Ellsworth refused to work. They found nothing abnormal or unsafe about the entry or area. Miller then spoke to Ellsworth, who repeated his fears that "it was unsafe for him to shovel on the east side of the belt alone and that he was afraid if he got tangled into the belt, there wouldn't be anyone to help him". Miller explained to Ellsworth that the area did not violate any safety standards and that many other miners travel by themselves, examiners walk and examine the belts by themselves and classified belt shovelers shovel by themselves. Ellsworth still refused.

Miller then left the area and later returned with the union safety committeeman, David Owens. After inspecting the work area, Owens requested to talk privately with Ellsworth. After 25 to 30 minutes of private discussion Owens reported that he found nothing hazardous or unsafe about the job. Miller then gave Ellsworth a direct work order to return to the east side of the belt and shovel. Ellsworth refused and continued to maintain that it was unsafe. Miller gave Ellsworth 4 or 5 direct work orders to shovel on the east side of the belt each of which he refused, reading to Miller from the collective barganing agreement and demanding that a state or federal inspector decide if it was safe.

David Webb, then mine superintendent, testified that he was awakened by a telephone call from Miller at approximately 3:50 on the morning of August 4th, and proceeded to the mine

to meet Miller. After reviewing the situation Webb proceeded underground to meet with Ellsworth. He recalled that there was a calm and unexcited interchange between he and Ellsworth during which he asked Ellsworth to get onto the golf cart and exit the mine. Ellsworth declined and showed Webb a copy of Article 3 section I (n)(3) of the collective bargaining agreement claiming that he was entitled to call a federal or state inspector to the scene. Webb explained that those provisions did not apply in circumstances where the union safety committeeman does not find a hazard. According to Webb, Ellsworth then offered to leave the mine but only on condition that he be paid for the complete shift. Finally union vice-president Fox arrived and convinced Ellsworth to leave the mine in exchange for a meeting with management at 9:00 later that morning. Ellsworth then left the mine.

The meeting convened around 9:00 or 9:30 that morning at which Ellsworth was advised by Webb that his refusal to leave the mine after a direct order constituted gross insubordination and that he was being suspended with-intent-to-discharge. Webb testified that Ellsworth was discharged because of his gross insubordination in disobeying orders to leave the mine and because of Ellsworth's refusal to obey orders to shovel coal.

Kenneth Fox the union committeeman and local union vice-president testified that he was called by Webb to meet with Ellsworth in the early morning of August 4. He discussed the provisions of the collective bargaining agreement with Ellsworth and Ellsworth continued to maintain that he had the right to call a state or federal inspector to examine the alleged hazardous condition. Fox testified that he told Ellsworth that the agreement did not grant him that right once the safety committeeman determined that the challenged procedure was not unsafe. Ellsworth finally agreed and acknowledged to Fox that "I might have messed up and I better get out of the mine".

In order to establish a prima facie violation of Section 105(c)(1) of the Act Mr. Ellsworth must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom Consolidation Coal Co., v. Marshall 6663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). A miner's "work refusal" is protected under Section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of hazardous condition. Miller v. FMSHRC 687 F.2d 1984 (7th Cir. 1982); Robinette, supra. "Good faith belief" means an honest belief that a hazard exists. The purpose of the requirement is to remove

from protection under the Act, work refusals involving fraud or other forms of deception. In evaluating this requirement consideration may be given to evidence suggesting the likelihood of a pretext or ulterior motive for the employee's actions. See Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (1986). In the Hogan and Ventura case the Commission explained that the miner's belief in the hazard must also be reasonable and noted that irrational or completely unfounded work refusals are excluded from statutory protection. The miner's perception of a hazard must also be evaluated from the viewpoint of the refusing miner at the time of the refusal. Hogan and Ventura, supra.

In this case I find that Mr. Ellsworth's work refusal was neither made in good faith nor reasonable. In this regard the evidence shows that Ellsworth was classified as a rock duster but that he had been working on at least one shift before the shift at issue shoveling loose coal onto a conveyor. Ellsworth acknowledged that none of the miners, including himself, like to shovel coal and that he was concerned because he had seen other miners not classified as rock dusters performing what he considered to be his work. Indeed at the beginning of his work shift on August 4 one of Ellsworth's co-workers had warned Foreman Johnson that Ellsworth was "upset" at having to shovel coal rather than perform his regular job rock dusting. Ellsworth had also recently asked his union committeeman whether Freeman's practice of allowing others to perform his job of rock dusting while he had to shovel violated the collective bargaining agreement. It may reasonably be inferred from this evidence that Ellsworth indeed had an ulterior motive for his refusal shortly thereafter to shovel coal for alleged "safety" reasons.

I also note that Ellsworth had shoveled coal along the beltline for the entire previous shift and continued to do so during the shift at issue without any comment or complaints that the practice in itself was unsafe. The fact that Ellsworth continued in his work refusal after examination of conditions, at his request, by his union safety committeeman who found no hazard also supports the conclusion that Ellsworth was not acting in good fatih.

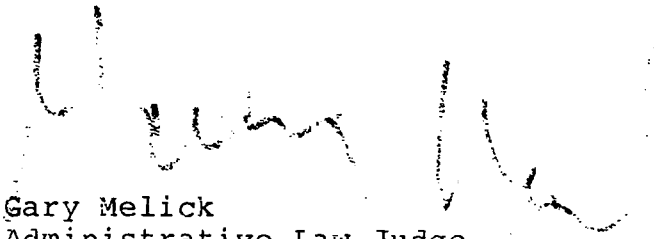
In addition, evaluation of alternative rescue methods shows that closely equivalent, if not preferable methods existed to aid Ellsworth. The stop switch for the belt was located on the west side and the miners working on the west side were within 1 1/2 crosscuts, a distance acceptable to Ellsworth. Assuming one miner would cut the power to the belt the other miner could legally pass beneath the belt to perform a rescue. Arguably it would be safer to have a miner on the west side with access to the cut-off switch than to

have only two miners on the east side. The apparent refusal of Ellsworth to consider alternative safety measures is also indicative of a lack of good faith.

In any event even if Ellsworth's Complaint was made in good faith, section 105(c) of the Act does not enable miners to avoid difficult or distasteful tasks even when the avoidance is based on a good faith concern for safety alone. The work refusal must also be reasonable and must involve a condition or practice which creates a safety hazard beyond the hazards inherent in the mining industry or occupation itself. UMWA/Simmons v. Southern Ohio Coal Co., 4 FMSHRC 1584, 1589 (Judge Broderick, 1982). See also Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983). Thus the mere act of proceeding underground and shoveling coal under the noted circumstances can result in a good faith concern for safety in many people. However for a person accepting employment as a miner, refusal to work because of such a concern may be unreasonable. In this case the evidence shows that it was customary practice for miners to shovel coal as Ellsworth was asked to do, to inspect the beltline alone and to travel alone adjacent to the beltline. Indeed the Complainant himself had previously traveled the beltline as a mine examiner alone without complaint. In addition Ellsworth's own union safety committeeman found the job not to be hazardous. Under all the circumstances I cannot find that Ellsworth's work refusal was reasonable. Accordingly Ellsworth's work refusal was not protected by the Act and his subsequent discharge based upon his refusal to work was therefore not in violation of the Act.

ORDER

Discrimination Proceeding Docket No. LAKE 89-33-D is DISMISSED.



Gary Melick
Administrative Law Judge

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Harry M. Coven, Esq., Gould & Ratner, Eigth Floor, 222 North LaSalle Street, Chicago, IL 60601 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

FEB 5 1990

BERNARD J. GARNEK, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 89-213-D
SHANNOPIN MINING COMPANY Respondent	:	PITT CD 89-16 Shannopin Mine

ORDER OF DISMISSAL

Before: Judge Melick

Complainant in effect requests approval to withdraw his complaint in the captioned case for the reason that the parties have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed. The hearings scheduled to commence on February 13, 1990, are accordingly cancelled.

Gary Melick
Administrative Law Judge

Distribution:

Bernard J. Garnek, P.O. Box 76, Bobtown, Pennsylvania 15315 (Certified Mail)

Joseph Mack, III, Esq., Thorp, Reed & Armstrong, One Riverfront Center, Pittsburgh, PA 15222 (Certified Mail)

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Falls Church, Virginia 22041

FEB 7 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 89-117
	:	A.C. No. 15-11018-03530
v.	:	
	:	Mine No. 1
BRUSH CREEK COAL INC., Respondent	:	

DECISION

Appearance: G. Elaine Smith, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
No appearance on behalf of Brush Creek Coal, Inc.

Before: Judge Melick

At hearings scheduled to commence on January 17, 1990 at 2:00 p.m., in Johnson City, Tennessee no representative of the Respondent appeared.

Thereafter on Janaury 22, 1990 an Order to Show Cause was issued to provide Respondent an opportunity until February 1, 1990 to explain its failure to send a representative to appear at the scheduled hearings. To date no response to the show cause order has been filed.

Accordingly the Respondent is in default.

ORDER

Brush Creek Coal, Inc., is directed to pay civil penalties of $90 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEB 7 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 89-79
	:	A.C. No. 12-00332-03501
v.	:	
	:	Minnehaha Mine
TANKS UNLIMITED, INCORPORATED, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for the Petitioner;
Henry Y. Dein, Esq., Indianapolis, Indiana, for the Respondent.

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act).

Pursuant to notice, a hearing was convened in Indianapolis, Indiana on January 3, 1990. At that hearing, the respondent, by counsel, admitted all the allegations contained in the petition with regard to Citation Nos. 3038257 and 3038259, including the fact of violation and all the special findings that the inspector included in the two citations.

The remainder of the hearing concerned the financial status of the corporation as it exists at this time. Mr. Leroy Dunkin, the President of the corporation, was called and testified to the effect that because of the two accidental deaths involving the company since 1987, including the one herein involved, the corporation is out of business and broke.

As a result of the earlier fatal accident, criminal proceedings were instituted against both the corporation and Mr. Dunkin, personally. As a result of those proceedings, the corporation, through its officers, entered a plea of guilty and a

$13,500 fine was paid. The legal expenses of that proceeding approached $80,000, for both the corporation and its officers, exhausting the corporate treasury. Approximately $500 is left at the present time.

The settlement of this case that the parties proposed was that respondent would pay the $500 civil penalty that has been assessed for Citation No. 3038257 in its entirety out of the remainder of the corporate assets and that an additional $500 of the $3000 assessed for Citation No. 3038259 would be paid by Mr. Dunkin, personally.

I approved that motion at the hearing and pursuant to the Rule of Practice before this Commission, this written decision confirms the bench decision I rendered at the hearing, approving the settlement.

WHEREFORE IT IS ORDERED that the respondent, and by agreement, Mr. Leroy Dunkin, personally, are responsible for and shall pay the approved civil penalty of $1000 within 30 days of this decision. Upon receipt of payment in full by the Secretary, this case is dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., U.S. Department of Labor, Office of the Solicitor, 230 Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Henry Y. Dein, Esq., 748 East Bates St., Suite 202, Indianapolis, IN 46202 (Certified Mail)

/ml

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FEB 8 1990

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

AMENDMENT TO CORRECT CLERICAL ERROR IN DECISION

The Decision dated January 30, 1990, is AMENDED to change the amount of penalties in the Order to read "$475" instead of "$525."

William Fauver
Adminstrative Law Judge

Distribution:

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

Mr. Wallace Harris, Jr., Safety Director, Harlan Cumberland Coal Company, General Delivery, Grays Knob, Kentucky 40829 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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Falls Church, Virginia 22041

FEB 9 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 89-96-M
	:	A.C. No. 31-01568-05507
v.	:	
	:	Daybook Mine
MAYLAND STONE COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Ken Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor; Lloyd Hise, Jr., Esq., Spruce Pine, North Carolina, for Mayland Stone Company, Inc.

Before: Judge Broderick

The above case was called for hearing on February 6, 1990, in Asheville, North Carolina. The Secretary made a motion on the record that a settlement agreement between the parties, whereby Respondent would pay the amount originally assessed, $600, be approved by the Commission.

Respondent operates a crushed stone facility. It employs 10 persons on one shift. During 1988, 80,550 man hours were worked at the mine. During the two years prior to the violation involved in this proceeding, Respondent had 7 paid violations of mandatory standards, including one violation of the berm standard, 30 C.F.R. § 56.9300, which is involved herein. The violation in this case was serious and was caused by Respondent's negligence. I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $600 within 30 days of the date of this order.

James A Broderick
James A. Broderick
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

FEB 15 1990

GOEBEL SWINEY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 90-26-D
SUN GLOW COAL COMPANY, INC. Respondent	:	PIKE CD 89-14
	:	No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, Goebel Swiney, requests approval to withdraw his complaint in the captioned case. He no longer desires a hearing concerning this matter. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11.

The hearing presently scheduled on February 13, 1990, in Abingdon, Virginia is cancelled and the case is dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

Goebel Swiney, Box 102, Elkhorn City, KY 41522 (Certified Mail)

Louis Dene, Esq., Dene & Associates, 138 Court Street, NE, P.O. Box 1135, Abingdon, VA 24210 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 16 1990

ROCHESTER & PITTSBURGH COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 89-115-R
	:	Order No. 2891302; 2/23/89
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 89-116-R
	:	Citation No. 2891303; 2/23/89
	:	Docket No. PENN 89-117-R
	:	Citation No. 2891304; 3/2/89
	:	Docket No. PENN 89-118-R
	:	Order No. 2889678; 3/1/89
	:	Docket No. PENN 89-119-R
	:	Order No. 2889679; 3/1/89
	:	Greenwich Collieries No. 2
	:	Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 89-127
v.	:	A.C. No. 36-05031-03553
	:	Main Complex Mine
ROCHESTER & PITTSBURGH COAL COMPANY, Respondent	:	Docket No. PENN 89-236
	:	A.C. No. 36-02404-03761
	:	Greenwich Collieries No. 2

DECISION

Appearances: Joseph A. Yuhas, Esq., Greenwich Collieries, Ebensburg, Pennsylvania, for the Contestant/Respondent;
Mark V. Swirsky, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Maurer

Statement of the Case

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to challenge five citations, two section 104(d)(2) orders and one imminent danger withdrawal order issued by the Secretary of Labor (Secretary) against the Rochester and Pittsburgh Coal Company (R&P) and for review of the civil penalties proposed by the Secretary for the related violations.

Pursuant to notice, these cases were heard in Indiana, Pennsylvania on July 18 and 19, 1989. Both parties have filed post-hearing briefs which I have considered along with the entire record in making this decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accepted on the record:

1. Greenwich Collieries No. 2 Mine and the Main Complex preparation plant are owned by Pennsylvania Mines Corporation and managed by Respondent Rochester and Pittsburgh Coal Company.

2. Rochester and Pittsburgh Coal Co. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citations and orders were properly served by duly authorized representatives of the Secretary of Labor upon an agent of Rochester and Pittsburgh Coal Company at the 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 statements asserted therein.

5. The assessment of a civil penalty for those dockets that have civil penalty consequences will not affect Rochester and Pittsburgh Coal Company's ability to continue in business.

6. The parties stipulate to the authenticity of each other's exhibits, but not to the exhibits' relevance nor to the truth of the matters asserted within the exhibits.

7. The subject citations and orders were abated in good faith by Rochester and Pittsburgh Coal Company.

8. The annual production of Respondent is approximately 10, 554, 743 production tons.

Docket Nos. PENN 89-115-R, -116-R and -117-R

Inspector Samuel J. Brunatti issued an imminent danger order under § 107(a) of the Act, and two citations under § 104(a) of the Act. The order and both citations contained in the above referenced three dockets are all related to the same factual situation.

On February 23, 1989 he issued Order No. 2891302 at the Greenwich No. 2 Mine ("Greenwich").

The 107(a) order stated:

> The current of air ventilating the face of the No. 3 room M-16 active working section was not sufficient to dilute and render harmless and carry away flammable, explosive, noxious or harmful gases in that when checked with a MX 240 calibrated methane detector 1 foot from the roof, face and rib on the right side 1.7% to 2.2% of methane was detected a violation of 30 C.F.R. 75.301. The Joy continuous miner which was energized was in the immediate area. This condition occurred due to surveyors removing part of the back check between the intake and return, thus allowing the air to short circuit before ventilating the face effectively. Two air sample bottles were collected in the affected area 1 foot from the roof, face and rib.

The order was subsequently modified. The modification stated:

> Order No. 2891302 is being modified under Section 1 No. 8 to include the statement "This is a violation of 30 C.F.R. 75.302-1b2" after the sentence. This condition occurred due to surveyors removing part of a back check between the intake and return.
>
> This order has been previously terminated.

On the same date, the inspector issued Citation No. 2891303. The citation stated:

> The current of air ventilating the face of the No. 3 room M-16 active working section was not sufficient to dilute and render harmless and carry away flammable, explosive, noxious or harmful gases in that when checked with a MS-240 calibrated methane detector

1 foot from the roof, face, and rib on the right side 1.7% to 2.2% of methane. The Joy continuous miner which was energized was in the immediate area. This condition occurred due to surveyors removing part of a back check between the intake and return, thus allowing the air to short circuit before ventilating the face effectively. This citation was a factor that contributed to the issuance of imminent danger Order No. 2891302 dated 2-23-89; therefore no abatement time was set.

A subsequent modification to the citation stated:

Based on additional information provided by the operator at a close-out conference Citation No. 2891303 is being modified under Section II, 10 B to permanently disabling 10 D to 2 and No. 11 to B low.

This citation has been previously terminated.

On March 2, 1989, seven days after the initial order and citation were issued, the inspector issued Citation No. 2891304. The citation stated:

The check curtain installed between the No. 3 room intake and the No. 4 room return in the M-16 active working section was not installed to minimize air leakage and permit traffic to pass thru without adversely affecting face ventilation in that the surveyors had removed a portion of the check to pass thru and shoot sights which resulted in a accumulation of methane at the face of the No. 3 room. This citation was a factor that contributed to the issuance of an imminent danger Order No. 2891302 dated 2-23-89; therefore, no abatement time is set. This condition was observed on 2-23-89 by this writer.

A subsequent modification to the citation stated:

Citation No. 2891304 is being modified under section III No. 17 action to terminate to include the statement: This action to abate the condition was done on 2-23-89 at 10:15 a.m.

No. 18A is modified to show the date as 3-2-89 and 18B is modified to show the time as 0740.

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

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

Section 3(j) of the Act defines "imminent danger" as:

> "Imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The Greenwich No. 2 mine liberates in excess of 1,000,000 cubic feet of methane in a 24 hour period. Accordingly, by section 103(i) of the Act is therefore required to be inspected by MSHA every five days. Inspector Brunatti, an MSHA ventilation specialist, was making such a section 103(i) spot inspection on February 23, 1989, and again on March 2, 1989, when he wrote the order and citations at bar.

At approximately 9:00 a.m., on the morning of February 23, 1989, Inspector Brunatti arrived at Room 3 on the M-16 section and immediately noticed methane readings of .4% to .5% on the methane monitor of the continuous mining machine which was parked about 25 feet from the mining face in that room. The mining machine was not being used to mine coal at that time, but it was energized. He felt that these were unusually high readings for a machine sitting there parked. He proceeded to take methane readings with his hand-held methane detector from that point up to the face. The closer he got to the face, the higher the readings got. He obtained readings in excess of 4 percent at one point, with the readings stabilizing at about 2.2% to 2.3%. At this point he determined he had to issue an imminent danger order.

Bottle samples for methane were also taken, which were later analyzed by the MSHA laboratory at Mount Hope, West Virginia, and indicated methane levels of 1.56% and .53%.

Earlier that morning, at approximately 8:30 a.m., Mr. William LaBelle, the section foreman, had made a methane check at the face of the No. 3 room, in the same area where the inspector subsequently checked and from which the inspector collected the bottle samples. His examination revealed methane levels of .3% to .4% at that time.

Apparently, the underlying reason for these fluctuations in methane readings was that surveyors were working on the M-16 section that morning advancing sights. As an allegedly necessary part of performing this task, the surveyors had temporarily lowered the back check curtain between Rooms 2 and 3 in the fourth crosscut from the face, between locations X3260 and X3261 on Joint Exhibit No. 1 for approximately two minutes. It was also purportedly necessary to raise and lower the line curtain stretching from near location X3326 on Joint Exhibit No. 1 to the second crosscut in Room 3 three times for durations of 5 to 30 seconds each time.

The parties agree and the record certainly substantiates that the direct cause of the excessive methane accumulation at the Room 3 face was the disruption of ventilation caused by this activity of the surveyors.

R&P argues that the inspector's determination that an imminent danger order should be issued was based almost entirely on the fact that the methane had accumulated in an amount greater than 1.5%. Inspector Brunatti admitted that was MSHA policy.

The Secretary argues that a concentration of 1.5 volume per centum or more of methane per se warrants a finding of "imminent danger", and points to section 303(h)(2) and (i)(2) of the Act which provide that any time the air at any working place or the air returning from any working section contains 1.5 volume per centum or more of methane "all persons, except those referred to in section 104(d) of [the] Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place [or split] shall contain less than 1.0 volume per centum of methane."

The Secretary also cites the former Department of Interior Board of Mine Operations Appeals decision that the issuance of an imminent danger withdrawal order under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Coal Act), which was a virtually identical predecessor to section 107(a) of the Mine Act, was mandated by the presence of the factors set forth in section 303(h)(2), i.e., the detection of 1.5% methane. Pittsburgh Coal Company, 2 IBMA 277 (1973).

In that decision, the Board adopted the rationale of the administrative law judge that:

> If Congress has determined by statute that a 1.5 volume per centum reading is sufficient to require the drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger. Congress in 303(h)(2) has intentionally left no room for doubt or discretion in what it viewed as an imminent danger. Considering the nature of the gas, the perilous conditions created by it, and insignificant quantum of energy necessary to cause an ignition - there is a sufficient basis to characterize a 1.5 per centum concentration as one of imminent danger. ... It can reasonably be inferred that the withdrawal requirement of 303(h)(2) presumes the existence of a condition of imminent danger. Pittsburgh Coal Company, 2 IBMA 281, 282 (1973).

While I am mindful that the Commission has previously stated in Pittsburg & Midway Coal Mining Co., 2 FMSHRC 787, 788 (1980), that it will examine anew the question of what constitutes an "imminent danger" under the Act; until it does, the legal analysis of the former Board concerning the issuance of imminent danger withdrawal orders under the conditions set forth in section 303(h)(2) is persuasive to me and I will accordingly follow the precedent of that case. Two other Commission judges have previously reached the same conclusion. See Consolidation Coal Co., 4 FMSHRC 1960 (1982) and Jim Walter Resources, Inc., 9 FMSHRC 538 (1987).

Furthermore, as the Commission recently stated in upholding the issuance of another imminent danger withdrawal order in Rochester & Pittsburgh Coal Co. v. Secretary of Labor, 11 FMSHRC 2159, 2164 (1989); "[s]ince he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists". The Commissioners quoted the United States Court of Appeals for the Seventh Circuit concerning the importance of the inspector's judgment:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added).

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975).

Inspector Brunatti was faced with a situation where methane readings obtained from his hand-held detector were fluctuating between a peak reading in excess of 4% right at the face to .4% 25 feet outby. According to his testimony, which I credit fully, the readings became stable near the face at 2.2% to 2.3%. Based on this evidence and the fact that methane's explosive range begins at a 5% concentration, I cannot find that the inspector abused his discretion or authority in this instance.

In any event, it is undisputed that there was in excess of 1.5 volume per centum of methane accumulated at the face area of Room 3, Section M-16, the mining machine in proximity to this face was energized and the miners had not been withdrawn from the area. Therefore, I find that an "imminent danger" existed at that time and the withdrawal order was properly issued.

Turning now to the two related section 104(a) citations and their associated civil penalties, I will consider them separately. At the hearing, I raised the possibility of whether they should be merged. Upon re-reading the record, I am now convinced that is inappropriate, as they do in fact charge separate violations.

Citation No. 2891303 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.301 which provides in pertinent part as follows:

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

R&P answers first that a methane level of 1.56% or even 2.2% is not harmful, but only potentially harmful. The inspector also testified that a 1.56% methane level would not be a problem if it was a constant 1.56% in a controlled area. However, here the methane levels were fluctuating widely and clearly were not under control. At one point, the inspector noted a peak methane reading of 4%, dangerously close to the lower end of the explosive range of methane, which is defined as 5% to 15%. I find these fluctuating levels of methane above 1.5% to be a harmful quantity of a harmful gas.

Secondly, R&P cites Secretary of Labor v. Freeman United Coal Mining Co., 11 FMSHRC 161 (1989) for the proposition that

"disruptions in mine ventilation inevitably occur and that the key to effective compliance lies in expeditiously taking those steps necessary to restore air quantity or velocity to the required level." Freeman at 165.

It is not disputed that the activity of the surveyors in lowering ventilation curtains was the cause of the fluctuating methane levels at the face. More particularly, with regard to the instant citation, the lowering of the line curtain in Room 3 going outby from the face and from location X3326 towards the second crosscut contributed along with the lowering of the back check between locations X3260 and X3261 to the methane accumulation found at the face by the inspector. But here, unlike the situation in Freeman, the section foreman knew the surveyors were on the section, a known gassy section, and presumably knew that there was a likelihood that their activities would disrupt his ventilation. Despite this, he took no action to monitor the methane levels at the face while the surveying was being done and took no action to abate the methane accumulation until after the inspector detected the condition.

I concur with the Secretary that first, this situation was not the type of disruption in mine ventilation contemplated by the Commission in Freeman; and second, that the regulations governing permissible methane levels do not tolerate occasional excursions of that methane level above 1.5 volume per centum for the operational convenience of the mine operator.

For the foregoing reasons, I find a violation of 30 C.F.R. § 75.301 to be proven as charged. Since I have previously found an imminent danger existed as a result of this disruption of ventilation, a condition "which could reasonably be expected to cause death or serious physical harm", it follows that this is a "significant and substantial" violation as well under the test announced by the Commission in Mathies, 6 FMSHRC 1 (1984).

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $1000, as proposed by the Secretary.

Citation No. 2891304 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.302-1(b)(2) which provides in pertinent part as follows:

> (b) When line brattice is used:
>
> * * * * * * *
>
> (2) Check curtains required in conjunction with the line brattice shall be so installed to minimize air leakage and permit traffic to pass through without adversely affecting face ventilation.

On the morning in question, the surveyors, Messrs. Luther and Cymbor, had proceeded into the section and were advised that mining had not yet commenced that morning. Mr. Luther then notified the shuttle car operator that they would advance the sights in the No. 3 entry since no production was taking place. They then proceeded to a crosscut between the No. 2 and 3 rooms and prepared to take a back sight with the transit. Mr. Cymbor lowered the back check about one foot for approximately two minutes while Mr. Luther got the sights. This was enough to interfere with the ventilation of the face in Room 3 and cause or contribute to cause an excessive level of methane (a peak value of 4%) to accummulate.

As previously noted herein, at the same time that these high levels of methane were detected by the inspector, an energized continuous mining machine was in close proximity (approximately 25 feet) to the high methane area. I therefore conclude that this was a "significant and substantial" violation of the cited standard. See Mathies, supra. Furthermore, I find, in accordance with section 110(i) of the Act, the civil penalty of $1000 proposed by the Secretary is appropriate to the violation.

R&P's allegations that there was no violation of 30 C.F.R. § 75.302-1(b)(2) because: (1) The regulation applies only when coal is being cut, mined or loaded from the working face and; (2) the temporary disruption in ventilation precludes under the circumstances, a finding of violation, are rejected.

The phrase "cut, mined or loaded" does not appear in the cited standard. It speaks to "when line brattice is used". Line brattice use is required for all working faces, whether or not coal is being cut, mined or loaded. 30 C.F.R. § 75.302 contemplates that the line brattice will provide adequate ventilation to the working face for the miners and remove or dilute noxious and explosive gases and the regulation contemplates this ventilation of the working face whether the miners are actually engaged in coal production or not at any particular minute.

The second allegation in defense is again based on the reliance by the operator on the Freeman case and again, as in the previous citation, I find the Commission's reasoning in Freeman to be inapplicable here. This is a totally different fact situation. Most importantly, what was done here to disrupt the ventilation was done intentionally with no provision to lessen or even monitor what effect their activity would have on the methane hazard on the section.

Docket Nos. PENN 89-118-R and -119-R

On March 1, 1989, MSHA Inspector Kenneth J. Fetsko issued Section 104(d)(2) Order Nos. 2889678 and 2889679 at R&P's Greenwich No. 2 Mine. Subsequently, the Secretary filed a petition seeking civil penalties in the amount of $850 each for the two violations.

Inspector Fetsko testified at length at the hearing of this case and at the conclusion of his testimony, the parties proposed a settlement of the case which I approved on the record.

Concerning Order No. 2889678, the Secretary moved to downgrade the classification of the paper from a section 104(d)(2) order to a section 104(a) "S&S" citation and lower the proposed civil penalty from $850 to $350. With regard to Order No. 2889679, the Secretary moved to amend it to a section 104(a) "non-S&S" citation and lower the proposed penalty to $150 from $850.

I approved the settlement and its terms will be incorporated into my final order herein.

Docket No. PENN 89-127

On November 30, 1988, MSHA Inspector Charles S. Lauver issued Citation No. 2889402 at R&P's Main Complex, alleging a violation of 30 C.F.R. § 77.405(b). The condition or practice alleged to be a violation of that standard is stated as:

> The 555 Ford tractor/backhoe/loader being repaired in the truck garage has not been blocked securely in position. The left front wheel and spindle has been removed and the left front of the machine is being held up by the hydraulic bucket.
>
> 30 C.F.R. § 77.405(b) provides:
>
> (b) No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

Respondent argues in the first instance that no work was performed under the cited equipment, and therefore no violation of the mandatory standard was committed. The Secretary counters this by arguing that although no one saw him do it, the mechanic who removed the wheel, brake drum and spindle must have at some point placed a portion of his body underneath a portion of the axle. At least this is the opinion of the inspector. He

testified that at a minimum, the mechanic would have his arm, possibly his shoulder under a part of the machine when he was reaching in to take the ball joints out of the spindle.

Mr. Froum, the mechanic who actually performed the work, testified that he did not remove ball joints. The removal of the aforementioned parts simply required knocking out a kingpin with a hammer and punch as well as removal of a few bolts. The axle on which Mr. Froum was working was only eight inches to a foot above the floor and he simply leaned over the equipment and knocked out the kingpin. He testified that he did not go under the axle nor was any part of his body under the equipment at any time during the entire process. I find his testimony to be generally credible and the inspector to be generally unfamiliar with the equipment and the process of removing the wheel and spindle assembly.

I therefore find the Secretary has failed to prove a necessary element of the violation and the subject citation must be vacated. As an aside, I am also satisfied by Mr. Froum's testimony that the equipment in the configuration the inspector found it in could not have fallen in any event.

Citation No. 2889405 alleges an "S&S" violation of 30 C.F.R § 77.202 and states:

> There is a fine layer of dry float coal dust on electrical boxes and all other surfaces in the energized motor control center in the old plant.

30 C.F.R. § 77.202 states:

> Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

The float coal dust was being drawn into the motor control center from an outside coal stockpile through the intake for the pressurizing fan. The fan was used to pressurize the room to keep dust from coming in when the door was opened, but it was also apparently drawing in dust from outside.

The primary issue, which the Secretary of course has the burden of proof on, is whether the accumulation of coal dust was present in dangerous amounts.

It is not enough to prove merely that there was some coal dust on some electrical boxes inside a control room. Several Commission judges have previously held that whether an accumulation is "dangerous" depends on the amount of the accumulation and the existence and location of sources of ignition. The greater the concentration, the more likely it is to be put into suspension or propogate an explosion. See, for example, Pittsburg & Midway Coal Mining Co., 6 FMSHRC 1347, 1349 (1984) and Mettiki Coal Corporation, 11 FMSHRC 331, 343 (1989). I also agree with and adopt that rationale.

The inspector testified that there was a "very fine layer of dust" in the room, "too thin a layer to measure". The dust was located on the outside covers of electrical boxes and other surfaces in the room. There is no evidence in the record that any dust was inside any of the energized electrical boxes, as the inspector testified he didn't look in any of the boxes. The inspector also did not observe any dust in suspension even though he and another man walked around the room inspecting it. The dust has to be in suspension before an electrical spark will cause an explosion.

Mr. Wilkins, an electrician and electrical foreman at the facility testified that even if the electrical equipment malfunctioned and created an arc, sparks could not escape from the energized electrical boxes, as they were NEMA approved and protect the outside environment from the arcs resulting from the equipment starting and stopping.

Therefore, I find that the minimal amount of coal dust herein cited as present on the outside of the electrical box covers does not pose a hazard and I conclude that the Secretary has failed to establish that the coal dust present in the room existed in "dangerous amounts". According, the citation must be vacated.

Citation No. 2889408, issued on December 6, 1988, alleges a violation of 30 C.F.R. § 77.1301(c)(2) in that:

> Dry brush and leaves have accumulated against the detonator magazine creating a source of fire.

30 C.F.R. § 77.1301(c)(2) provides:

> (c) Magazines other than box type shall be:
>
> * * * * * * *
>
> (b) Detached structures located away from powerlines, fuel storage areas, and other possible sources of fire.

R&P does not dispute the fact that the dry brush and leaves were accumulated against the back of the detonator magazine, but does dispute that they were a source of fire within the meaning of section 77.1301(c)(2).

The inspector testified that he found a pile of dry leaves, approximately two feet high, piled half-way up the back of the magazine. He felt it was a fire hazard. More particularly, he felt this pile of dry leaves and brush was as much a source of fire as a fuel storage area. Neither one being in and of themselves a source of fire, however, they would both fuel a fire.

The magazine in question is a steel box, approximately four feet high, four feet wide and four feet deep. It is raised off the ground on either eight inch concrete blocks or steel skids. The floor of the box is steel and the interior of the box is lined with four inches of hardwood. Inside were several hundred blasting caps.

I am unconvinced that the leaves and brush posed any hazard to the blasting caps inside the magazine. I believe that even in the unlikely event the leaves were set on fire by some outside source of ignition such as lightning, the blasting caps inside the hardwood-lined steel magazine would not be affected. R&P's safety inspector at the Main Complex opined that the summer sun beating down on the magazine day after day has more of an adverse affect on the contents than would a leaf fire.

In any event, it is clear that the leaves and brush are not themselves a source of fire. It is also clear to me that leaves and brush do not pose comparable hazards to the contents of a magazine as do powerlines and fuel storage areas. The leaves and brush are not an ignition source in themselves nor a source of fire as contemplated by Section 77.1301(c)(2). Therefore, the accumulation near the magazine did not constitute a violation of the cited standard and the citation must therefore be vacated.

ORDER

1. Section 107(a) Order No. 2891302 and Citation Nos. 2891303 and 2891304 are hereby affirmed. The contests of that order and those citations are accordingly denied.

2. Section 104(d)(2) Order No. 2889678 is hereby modified to an "S&S" section 104(a) citation and affirmed.

3. Section 104(d)(2) Order No. 2889679 is hereby modified to a "non-S&S" section 104(a) citation and affirmed.

4. Section 104(a) Citation Nos. 2889402, 2889405 and 2889408 are vacated and Civil Penalty Proceeding Docket No. 89-127 is therefore dismissed.

5. Rochester & Pittsburgh Coal Company is ordered to pay the sum of $2500 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 20 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-119-M A.C. No. 41-00071-05516
v.	:	
	:	Midlothian Quarry
TEXAS INDUSTRIES INC., Respondent	:	

DECISION

Appearances: E. Jeffery Story, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner; Bobby M. Williams, Texas Industries, Inc., 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 Texas Industries, Inc., (Texas Industries) with two violations of regulatory standards and proposing a civil penalty of $1,100 for the violations. The general issue before me is whether Texas Industries violated the cited regulatory standards and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 3281061 alleges two separate violations of regulatory standards (30 C.F.R §§ 56.14101(a) and 56.14100(b)) and charges as follows:

> The service brake system on the electrical powered scooter was inoperable. This scooter belonged to the lab department and was traveling through an area where all the over-the-road type equipment entered and left the plant area. There was also foot travel through this area. (56.14100(b)) The fast petal [sic] speed selector would not return to neutral it had to be pulled up to stop the scooter.

The regulatory standard at 30 C.F.R. § 56.14101(a) provides in relevant part as follows:

> (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

The regulatory standard at 30 C.F.R. § 56.14100(b) provides that: "[d]efects on any mobile equipment, machinery and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Respondent Texas Industries admits the violations as charged but denies that the violations were "significant and substantial" and maintains that the proposed penalties are excessive.

Melvin H. Robertson an electrical inspector for the Federal Mine Safety and Health Administration (MSHA) was performing a regular inspection on March 14, 1989, at the Texas Industries Midlothian Plant. According to Robertson the operation includes both a limestone mine and a cement production facility. During the course of his inspection he observed an electric scooter similar to a 3-wheel battery powered golf cart driving at "high speed" estimated to be about 10 to 15 miles an hour.

Robertson waived for the vehicle to stop but the driver waived back and kept on driving. Rudy Hall the Texas Industries Safety Director was also present and yelled for the operator to stop. The vehicle then turned back to where the men were standing. Robertson then asked the vehicle operator if he had any brakes and the operator responded "well they're not too good". Robertson then asked the operator to apply the foot pedal and he observed that it went down to the floor. Robertson again asked the operator whether he had any brakes and the operator responded "no". Robertson also noticed that the driver leaned over inside of the vehicle and asked why he had done so. The driver responded "well, the foot pedal hangs down on it so I had to pull it up by hand". Upon determining that the vehicle had a functioning parking brake Robertson directed the operator to drive the vehicle to the shop and take it out of service.

Robertson further testified that in his opinion it was highly likely for injuries to occur and it was reasonably likely that those injuries would be fatal. He observed that the cited cart was traveling to the shop and warehouse area passing through an area of other vehicular traffic including

"18 wheelers", a street sweeper, and 1 1/2 ton pick-up trucks. Robertson also observed pedestrian traffic in the same area. According to Robertson no tests were performed on the brakes since the operator agreed to remove the vehicle from service for repairs. See 30 C.F.R. § 56.14101(b).

Robertson found the operator chargeable with moderate negligence in regard to these violations. In talking to the supervisor of the lab department Robertson learned that the brakes had recently been installed and adjusted on the cited cart. According to Robertson the mine operator was also unaware that it was required to perform preshift inspections on the cart.

Rudy Hall, testifying on behalf of Texas Industries, acknowledged that he was present with Inspector Robertson at the time the cited cart passed by. Hall observed that after shouting at the driver the vehicle came to a full stop before returning. Hall testified that it was he who first observed that the speed selector was depressed down to the floor and initiated the inquiry into its problem when the driver stated that "it sticks sometimes". Hall maintains that it was he who directed the vehicle to the stop.

Hall further testified that the area in which the scooter was operating was not "highly dangerous". He observed that the speed limit in the area was enforced at 15 miles per hour. While there were admittedly other vehicles in the area including "18 wheelers," Hall observed that the vehicles were usually lined up and only "inching" forward.

Hall also testified that after the scooter was repaired he performed a test without using the brakes and found that by using only the speed selector the vehicle came to a stop from maximum speed in 95 feet. Hall also noted that he had run into a wall with a similar scooter and with the spare tire acting as a bumper the vehicle merely bounced off. He also noted that the vehicle even when operating at its maximum speed of 15 miles per hour can be turned 180° to avoid hazards. While conceding that there was a potential for a scooter with defective brakes to run into a moving vehicle Hall nevertheless thought this was unlikely. Hall also conceded that if a pedestrian would be struck by a scooter traveling at 15 miles per hour that person could be killed. He nevertheless thought that the chance of hitting a pedestrian was "unlikely". Hall observed that no additional parts were needed to repair the scooter and that only adjustments were made.

I find in this case that the necessary elements of a "significant and substantial" and serious violation exist based upon the credible testimony of Inspector Robertson alone. See Mathies Coal Co., 6 FMSHRC 1 (1984). In reaching this conclusion I have not disregarded the opinions of Mr. Hall. However on the facts of this case the greater weight is to be given that of the disinterested and expert testimony of the MSHA inspector. In addition while I do not accept Inspector's Robertson rationale, I accept his finding of only moderate negligence. In evaluating all of the criteria under section 110(i) I find that civil penalties of $200 and $100 respectively for Citation No. 3281061 Part A and Citation No. 3281061 Part B are appropriate.

ORDER

Texas Industries, Inc., is directed to pay civil penalties of $300 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 23 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 89-198
	:	A. C. No. 46-01456-03826
v.	:	
	:	Docket No. WEVA 89-199
EASTERN ASSOCIATED COAL CORPORATION, Respondent	:	A. C. No. 46-01456-03824

DECISION

Appearances: Glenn Loos, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Eugene P. Schmittgens, Jr., Esq., Eastern Associated Coal Corporation, St. Louis, Missouri, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. § 75.400. Pursuant to notice, the cases were heard in Clarksburg, West Virginia, on December 12, 1989. Thomas David Doll, John Edward Palmer, Rick Milliron, Linda Byers, and James Merchant testified for Petitioner. Gary Marvin McHenry, William Salosky, Roger Boggess, David A. Tennant, and John Kucish testified for Respondent. Proposed Findings of Fact and Briefs were filed by Respondent and Petitioner on January 31 and February 1, 1990, respectively. A Reply Brief was filed by Respondent on February 12, 1990. Petitioner did not file a Reply Brief.

A. Docket No. WEVA 89-198

Findings of Fact and Discussion

I.

On February 8, 1989, Doll inspected the Three North Tipple at Respondent's Federal No. 2 Mine, and observed an accumulation of hydraulic oil under the hydraulic tub, and car spotter

(Tipple). He also observed a trench with up to 4 inches of oil in it. He indicated that the puddles of oil in front of the tub were approximately 3 feet by 4 feet, and measured to be 4 inches deep. He estimated that 20 to 25 gallons of oil had accumulated. He issued a section 104(d)(2) Order alleging a violation of 30 C.F.R. § 75.400. At the hearing, Respondent conceded the fact of the violation. I find, based on the testimony of Doll, that Respondent herein did violate section 75.400, supra, as alleged in the Order.

II.

Doll listed ignition sources for the accumulation of oil, such as motors, wires, and cables. He indicated that the oil was flammable and that some ignition sources were "real close" (Tr. 153), and that the cables for the motor on the tub and the motor on the car spotter were "within inches" of the oil (Tr. 153). He indicated that the cables could have arced or sparked, and started a fire. Essentially he indicated that ignition of the oil was "highly likely" if the "situation was not taken care of" (Tr. 153). He indicated that in the event of a fire, a serious injury was quite likely in the nature of a possible burn or smoke inhalation. Essentially, based upon these factors, Doll concluded that the violation herein was significant and substantial.

Although, based on Doll's testimony, it can be concluded that ignition of the oil could have resulted, I find that it has not been established that such an event was reasonably likely to occur. Although Doll listed various ignition sources, such as a motor, wires, and cables, there is nothing in the record to indicate that this equipment was in such a condition as to make sparking or arcing an event reasonably likely to occur. Further, due to Roger Boggess' experience as a maintenance foreman, I place some weight on his opinion that a spark would not ignite the oil, and that a sustained fire would be needed. Further, John Kucish, who was the production foreman in charge of the section on February 8, indicated that the area in question was adequately rock-dusted. Also, he and Boggess indicated that there was a fire suppression system over the top of the power unit of the car spotter, and that there were various items to extinguish fires in the area. Taking all these factors into account, I conclude that it has not been established that the violation herein was significant and substantial, as that term was defined in Mathies Coal Company, 6 FMSHRC 1 (1984).

III.

James Merchant, a tipple man who has worked for Respondent for 21 years, testified that on and off for the last 2 to 3 years there have been problems keeping oil in the tipple. He indicated that he usually puts in 20 to 25 gallons of oil a shift. He testified that approximately 6 months prior to Doll's inspection on February 8, 1989, he attached belting to drain the oil that

was leaking from the electrical motors. He also dug a sump hole to muck the oil. He indicated that more than a year ago, and "a number of times" (Tr. 202), he had told Boggess that he was out of oil in the middle of the shift. He also indicated that he had shown the leaking to Kucish. He indicated that when he told Kucish of the oil coming out of the tipple, on "a number of times" (Tr. 202), he was told by Kucish that it would be worked on over a week end. Merchant indicated that about a week before February 8, he reported the condition to Kucish. According to Kucish, in November 1988, Merchant had reported leaks to him, and he in turn called the evening and day shift people who informed him that the tipple "was being maintained in a workman-like manner" (Tr 245). Kucish testified that the afternoon and day shift men were taken off their jobs 2 weeks later, and when he observed the boom hole (tipple site) in December, it was in such an "unworkman like" condition that he shut it down. Kucish testified that when he was informed by Merchant of the leak on January 31, or February 1, 1989, he called Boggess. Boggess in turn informed a mechanic who subsequently told him that he did not find any substantial leaks (Tr. 251). David A. Tennant, the maintenance superintendent, indicated that on January 31, "some maintenance" was performed (Tr. 262). When Kucish was informed of a leak the week prior to February 8, he informed Boggess and subsequently, on a Saturday, February 4, cylinders or jacks were cleaned and repacked, an operation which Boggess termed to be "routine maintenance" (Tr. 251) He indicated that he had been told there had been a leak, and some oil was on the ground. No leak was found. The following day Kucish went to the areas in question, to make a visual examination, and indicated that were no "visual leaks" (Tr. 232).

According to Merchant, on February 6 and February 7, the tipple was not leaking any less, and he had to put in three to five gallon cans of oil each shift. Boggess indicated that he was not notified of any leaks on those days, and there is no evidence that Merchant notified Kucish of any leaks or oil accumulations on those days. Neither was such reported in any preshift examination on those dates.

On February 8, the accumulation of oil, observed by Doll, was estimated by him to be 20 to 25 gallons, and was measured by him in areas to be 4 inches deep. After the condition was cited by Doll, the area and equipment were cleaned, and "drips" were found (Tr. 242, 250). Kucish and Boggess opined that the drips were not sufficient to cause the spillage that was observed on February 8.[1/] The tipple was cleaned and looked at by Boggess, but he could not find any reason for the oil accumulation. Some plumbing was eliminated to correct the dripping.

1/ Tennant indicated that no cracks were found leaking oil, but there was a leak on one of the fittings that was part of the plumbing of the hydraulic system. He indicated that the leak was not sufficient to account for the oil accumulation.

At the conclusion of Petitioner's case, Respondent made a Motion for a Directed Verdict with regard to the issue of unwarrantable failure, and the Motion was denied. In order for it to be found that the violation herein was the result of Respondent's unwarrantable failure, it must be established that Respondent's conduct herein reached a level as to be considered to be "aggravated conduct." (Emery Mining Corp., 9 FMSHRC 1997 (1987)). Although, as established by Merchant, the equipment in question had been leaking off and on for 2 to 3 years, and had been reported to Kucish on "a number of times," I accept the testimony of Respondent's witnesses that twice within 8 days prior to February 8, maintenance work had been performed on the equipment in question. I accept the testimony of Kucish that when he observed the area on the day after the work had been performed on February 4, there were no "visual leaks". (sic). Although Merchant indicated that on February 6-7, 1989, the equipment was not leaking less, there is no evidence that the condition was reported to management on these days. I thus conclude, taking the above into account, that Respondent herein did not exhibit any aggravated conduct, and hence the violation herein did not result from its unwarrantable failure.

Inasmuch as Petitioner has not established that the condition of any equipment in the area was such as to have made it likely for the accumulation to have been ignited, I conclude that the gravity of the violation herein is to be considered moderate. Further, taking into account Merchant's testimony, that I accept, that the leak had existed on and off for 2 to 3 years, and was reported by him to Kucish on numerous times, and taking into account the large quantity of oil that was observed on February 8, I conclude that Respondent was highly negligent in not having taken steps to ensure that an accumulation would no longer occur. Although maintenance work was performed on February 4, and examined one day later by Kucish, and observed not to have any visible leaks, there is no evidence that Respondent examined the area on February 6-7, to ensure that its work on February 4 was successful, and there was no longer any accumulation of oil. For these reasons, I conclude that Respondent was highly negligent herein. I conclude that a penalty of $900 is proper for the violation found herein.

B. Docket No. WEVA 89-199

Findings of Fact and Discussion

I.

Thomas David Doll, an MSHA Inspector, inspected Respondent's Federal No. 2 Mine on February 1, 1989. He indicated that he observed oil running down the side of a shuttle car on the 17 Right 3 South Section, and that oil was leaking behind the

wheel unit of the shuttle car. He indicated that the grease from the wheel unit was "in spots" up to a-half inch thick (Tr. 24), and that there was a grease build-up in the cable reel which was probably a quarter to a-half inch in thickness. Doll indicated that the oil and grease was mixed with some coal dust, and that the oil is combustible when the water in it separates. He indicated that the wheel was saturated, and throwing grease against the shuttle car. He indicated that grease is combustible, and opined that the material that had accumulated was combustible. John Edward Palmer, who was the representative of the Mine Worker's Union, and accompanied Doll on the inspection, corroborated the latter's testimony by indicating that there was a "lot" of coal, grease, and oil around the cable reel components. Rick Milliron, who was the shuttle car operator on February 1, 1989, indicated that in general he does not clean behind the wheels of the unit. He indicated that, when Doll inspected the unit, there was grease and oil on the whole unit.

Gary Marvin McHenry, Respondent's safety supervisor, who accompanied Doll on the inspection, indicated that the only "accumulations" he found were behind the wheel unit (Tr. 85). He said there were "small amounts" of oil mixed with rock dust and dirt (Tr. 86). William Salosky, who was the section foreman on February 1, indicated that when he observed the shuttle car after the Order was issued, the only accumulations were behind the wheel. He described the condition as being "A small amount of grease, and mostly mud from the shuttle car road" (Tr. 110). Roger Boggess, Respondent's maintenance foreman, opined that the oil in question does not burn easily, and that a spark hitting it would not cause it to ignite. He termed the event of a fire occurring as being very unlikely, and indicated that to get the oil to burn, a person would have to hold a flame to it. However, he indicated on cross-examination that gear box oil is not fire resistant. David A. Tennant, Respondent's maintenance superintendent, indicated that the oil in question is flammable in a pure state, but that if it is mixed with water, mud or coal dust, its flash point is higher. He indicated that the oil in question had rock dust in it, and thus was not easy to ignite.

I reject Respondent's argument that an impermissible accumulation is limited to those accumulations that are extensive and significant, and that the latter term includes only accumulations that can lead to fires or explosions. I find that Respondent has not rebutted or contradicted Doll's testimony that, in essence, in some areas the grease was 1/2 inch thick. Accordingly, I conclude, based upon the above testimony of witnesses who observed the shuttle car on February 1, that there was an accumulation of oil and grease as set forth in the section 104(d)(2) Order issued by Doll on February 1. This Order alleges Respondent violated 30 C.F.R. § 75.400. In essence, as pertinent, section 75.400,

supra, prohibits the accumulation inter alia of "combustible materials." The word "combustible," is defined in Webster's Third New International Dictionary, 1986 edition (Webster's), as "1. capable of undergoing combustion or of burning - used esp. of materials that catch fire and burn when subjected to fire. . ."

I accept the opinion of Doll that oil and grease are materials that are capable of burning. The testimony of Boggess that the oil in question does not burn easily, does not contradict Doll's opinion. Further, the balance of Respondent's witnesses, in essence, testified that the accumulations of oil and grease herein contained mud and rock dust, which raise its flash point, and makes it difficult to ignite. Hence, the testimony of Respondent's witnesses is not sufficient to predicate a finding that the materials in question were not capable of burning at some point. Inasmuch as the materials were nontheless capable of burning or catching fire when subjected to fire, I conclude that the accumulations of the materials in question were combustible as that term is defined in Webster's. Accordingly, I find that Respondent herein did violate section 75.400, supra.

II.

According to Doll, in essence, he concluded that the violation herein was significant and substantial due to the presence of friction or cables as ignition sources, which led him to conclude that it was highly likely that a fire would occur if the violative condition was not corrected. He indicated that in the event of a fire, an injury would be highly likely due to smoke inhalation occasioned by the burning of grease, coal, and other toxic smokes from the burning of cable covers. He indicated that anyone in the face area, including the shuttle car operator, loader operator, miner operator, and bolters would be subject to the path of smoke from the resulting fire. In this connection, I note that Salosky conceded on cross-examination that grease and oil in the wheel compartment could become a fire hazard "at some point." (Tr. 113).

Although there certainly were potential ignition sources in the areas as testified to by Doll, there is insufficient evidence that the condition and location of these sources was such as to indicate that there was a reasonable likelihood of an ignition occurring. Further, I accept the reasoning of Respondent's witnesses that mud and coal dust present in the accumulation of grease and oil would decrease the combustibility of the accumulations. Thus I find that although the accumulations herein did contribute to a hazard of a fire, it has not been established that there was a reasonable likelihood of a fire occurring. I thus conclude that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Company, supra).

III.

Doll indicated that he considered the violation herein to be the result of Respondent's unwarrantable failure, as it either knew or should have known that the violation existed. He indicated that the area in question is fire bossed daily on each of the three shifts, and in addition, persons are constantly in the area. He thus opined that inasmuch as the accumulated material was visible, it should have been observed and cleaned up. In addition, he indicated that on January 18, he issued two citations alleging violations of section 75.400, supra, concerning equipment on the section. He indicated that when he issued the citations, he discussed with Bill Lenley, the assistant foreman, that something had to be done to keep the section equipment cleaner. Thus, he concluded that Respondent was aware that it had a problem with cleaning various equipment.

Palmer corroborated Doll's testimony by indicating that the accumulation of grease and oil could have been seen "plain as day." (Tr. 64). Milliron indicated that on February 1, he sprayed the shuttle car in question with a cleaning substance, and washed it off. He indicated that he did not clean behind the wheels, and did not use any wedge, which he usually would use to scrape off material that is visible.

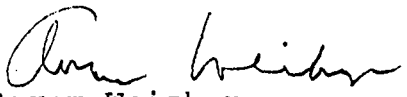
I find that Doll did not use the correct standard in concluding that the violation herein was the result of Respondent's unwarrantable failure. The proper standard has been set forth by the Commission in Emery Mining Corp., supra at 2004, as requiring the establishment of the existence of "aggravated conduct." Applying this test to the facts as set forth above, I conclude that it has not been established that there was any aggravated conduct on the part of Respondent. The fact that Doll had, 2 weeks prior to the date in question, issued a violation of section 75.400, supra, for equipment on the section, and told the foreman that something had to be done to keep the section cleaner, does not per se establish that there was aggravated conduct with regard to the specific violative condition herein. I find that Milliron's failure to clean behind the wheel was negligence, but not aggravated conduct. Accordingly, I conclude that the violation herein was not the result of Respondent's unwarrantable failure. Accordingly, Respondent's Motion for Directed Verdict, with regard to the issue of unwarrantable failure, which was made at the conclusion of Petitioner's case, is hereby GRANTED.

Taking into account the fact that it has not been established that there were ignition sources present in such a condition as to make it likely that the oil and grease would have been ignited, I conclude that the gravity herein of the violation was moderate. I accept the testimony of Petitioner's witnesses that the accumulations herein of oil and grease were readily visible. I conclude that Respondent should have known of the accumulations, and as such

was negligent herein to a significant degree. Considering the criteria of section 110(i) of the Act, I conclude that a penalty of $750 is appropriate for the violation found herein.

ORDER

It is ORDERED that Order Nos. 3100463 and 31004677 be AMENDED to section 104(a) Citations, and to reflect the fact that the violations therein were not significant and substantial, and were not the result of Respondent's unwarrantable failure. It is further ORDERED that Respondent herein shall pay $1,650, within 30 days of this Decision, as a civil penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 26 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 89-130
	:	A. C. No. 15-15348-03544
v.	:	
	:	Docket No. KENT 89-132
DAY BRANCH COAL COMPANY INC., Respondent	:	A. C. No. 15-15348-03546
	:	Docket No. KENT 89-144
	:	A. C. No. 15-15348-03547
	:	
	:	Day Branch Coal Co., No. 4

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner,
Mr. James Trosper, Safety Director, Day Branch Coal Company, for the Respondent.

Before: Judge Fauver

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

At the hearing, the parties moved to settle the following citations for the penalty amounts shown:

Citation	Civil Penalty
3172960	$213
3166462	$195
3167520	$136
3166465	$136
3166466	$136
3180305	$ 20
998707	$ 20

The motion was approved, and those amounts will be included in the order below.

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

FINDINGS OF FACT

1. Respondent operates an underground coal mine, known as Mine No. 4, which produces coal for sale or use in or substantially affecting interstate commerce.

Order No. 3166381

2. On January 10, 1989, MSHA Mine Inspector Robert W. Rhea found that miners had worked or traveled under unsupported roof in the face of the Number 2 room of the 003 section. Loose coal had been scooped up and stored across the 20-foot-wide face of the Number 2 room. The last row of permanent roof support was installed 50 feet outby the face.

3. Inspector Rhea discussed this condition with the mine foreman in the Number 2 room of the 003 section on January 10, 1989. The inspector and the foreman could not determine the miner or miners who had traveled under the unsupported roof, how the loose coal had come to be scooped to the face and ribs, and who had rock-dusted the ribs and floor. The loose coal seen by Inspector Rhea and the foreman would not have occurred naturally. Because scoop tracks were clearly visible on the mine floor under the unsupported roof, Inspector Rhea and the mine foreman agreed that the loose coal had probably been scooped toward the face and ribs by the battery-powered scoop.

4. Inspector Rhea issued Order No. 3166381 under § 104(d)(2) of the Act, citing a significant and substantial violation of 30 C.F.R. 75.202. The inspector also charged the operator with high negligence.

Citation No. 3166382

5. During the inspection on January 10, 1989, Inspector Rhea observed that caution boards or other warning devices were not in place in the Number 3 room on the 003 section to warn miners that they had reached the end of permanent roof support. The coal seam in this area was too low for the miners to walk upright. Since the miners had to work on their hands and knees, their ability to see where the unsupported roof began was particularly impaired. Inspector Rhea issued Citation No. 3166382, citing a significant and substantial violation of 30 C.F.R. § 75.208.

Citation No. 3166383

6. Inspector Rhea observed, in the Number 1 room on the 003 section, that the last row of permanent roof supports was installed 15 feet from the face. He believed the roof control plan required roof supports up to four feet of the face, and therefore issued Citation No. 3166383, citing a significant and substantial violation of 30 C.F.R. § 75.220.

Citation No. 3166384

7. In the Number 2 and Number 5 rooms of the 003 section, Inspector Rhea found that 30-inch support timbers were used to support a 36- to 38-inch roof. The undersized timbers were balanced on half-round split posts. Someone had tried to hide the unsteady footing of the timbers by packing mud around the split post bases. The remaining gap between the timber and the roof was stuffed with three or four wooden wedges. The inspector issued Citation No. 3166384, citing a significant and substantial violation of 30 C.F.R. § 75.206(e).

Citation No. 2843066

8. On December 21, 1988, MSHA Inspector Russell and two miners rode a scoop to leave the mine; the scoop traveled at about four miles per hour. The coal seam was between 36 and 38 inches high along the roadway the scoop traveled, which was the primary escapeway from the mine. Because of the height of the coal, Inspector Russell had to ride on the scoop lying on his back, facing the roof. In that position, he observed that the heads of 20 or 25 roof bolts had been cut off by the scoop at some prior time, and the roof plates had fallen from the roof. Inspector Russell was able to count the number of breaks to the outside. Once outside, he calculated the number of sheared-off roof bolts and missing roof plates, based on the number of breaks he had passed, the number of feet between breaks, and the placement of roof bolts and plates required by the approved roof control plan.

9. Inspector Russell issued Citation No. 2843066, citing a significant and substantial violation of 30 C.F.R. § 75.202.

Citation No. 3166461

10. On January 19, 1989, during an electrical inspsection, MSHA Inspector Elija Myers found that the water deluge system installed on the Number 2 underground conveyor belt drive was inoperative when tested.

11. Inspector Myers issued Citation No. 3166461, citing a significant and substantial violation of 30 C.F.R. § 75.1100-3.

DISCUSSION WITH FURTHER FINDINGS

Section 110(i) of the Act provides six criteria to consider in assessing a civil penalty. One of these is the operator's compliance history. I have previously ruled that the operator's history of payments of civil penalties which have become final is part of its compliance history. This operator has a very poor history of payments of final civil penalty assessments. An updated copy of Government Exhibit 1 shows that, in the 24 months preceding the order and citations in these cases, Respondent was assessed civil penalties of $14,457.00, but paid only $6,700.05. This record of significant noncompliance with final assessments will be considered in assessing civil penalties for the violations found in these cases.

Order No. 3166381

The only eyewitness who testified as to facts concerning this order was the MSHA Inspector. The inspector found physical evidence that a miner or miners had worked or traveled 50 feet under unsupported roof. Loose coal was pushed against the face and ribs; the area was rockdusted; there were tire tracks of the coal scoop; there was no roof support and no evidence that timbers had been installed or dislodged. No timbers were present in an area of 20 x 50 feet.

Inspector Rhea discussed this situtation with the mine foreman, at the site where the condition was found. They agreed that the loose coal must have been scooped by the battery-powered scoop.

The inspector found high negligence because of the high duty everyone in a coal mine has not to work or travel under unprotected roof. As Inspector Rhea testified, "Unsupported roof, to me, is the most dangerous environment in a coal mine . . . . " Tr. 63.

The men and materials needed to abate this condition were immediately available; after the order was issued, the roof supports were in place within 30 minutes.

The evidence sustains the inspector's finding of high negligence and an "unwarrantable" violation (which the Commission has ruled to be "aggraved" conduct beyond ordinary negligence).

Because of the plain danger of going under 50 feet of unsupported roof, the inspector also found a "significant and

substantial" violation (which the Commission has interpreted as involving a reasonable likelihood of a serious injury). The operator offered opinion evidence that this was not a significant and substantial violation because the roof in the mine was generally stable and the inspector did not find abnormal roof conditions at the site. The inspector testified that going under unsupported roof in an underground coal mine is highly dangerous, and if done in his presence he would issue an imminent danger order. The evidence sustains the inspector's finding that the violation was significant and substantial.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $1,500 is appropriate for this violation.

Citation No. 3166382

The inspector observed that caution boards or other warning devices were not in place to warn miners of unsupported roof. The need for the warning devices was especially great because the miners were working in coal so low they had to crawl to do their work. Respondent acknowledged that there should have been a caution board at the edge of unsupported roof to warn mine personnel of the unsupported area (Tr. 50), but sought to excuse the absence of the caution boards on the basis of assumed roof stability. This position is inconsistent with the statement of Day Branch's safety director that he had seen or heard of roof falls in areas that previously had been considered "stable" (Tr. 55).

Roof stability is not recognized in the regulation as an exemption from compliance. The regulation acknowledges only one exception to the posting of warning devices to mark the beginning of unsupported roof i.e. when roof supports are being installed. This exception does not apply to the situation found by the inspector because mining of the area had been completed and the roof-bolting machine had already been moved outby the last open crosscut.

The inspector found this violation to be "significant and substantial" because of the high degree of risk in going under unsupported roof. The evidence sustains the inspector's finding.

The manpower and materials required to abate this violation were immediately available. Once the violation was cited, it took only five minutes to hang the caution board to mark the beginning of unsupported roof.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $300 is appropriate for this violation.

Citation No. 3166383

The inspector found noncompliance with Day Branch's roof control plan. The last row of permanent roof supports had been placed 15 feet from the face of the Number 1 Room. The roof control plan required supports four feet from the face.

Timbers were the sole method of roof support in this room. The plan called for installation of two rows of timbers at the face of the Number 1 Room as the continuous miner retreated. At the time the condition was cited, the continuous miner had already been backed outby the last open crosscut in the Number 3 Room; there was no equipment in the Number 1 Room.

There was evidence that miners had been working in the room, in that the face had been cut some time prior to the inspection, probably on the previous shift. The inspector found, from the condition of the coal face and the absence of any equipment in the room, that work in the room had been completed and that the mining cycle would be complete when the crosscut had been cut through. There was no evidence that efforts were under way to install the missing timbers.

At the hearing, the parties agreed to amend this citation to delete the last phrase of the condition or practice cited, i.e. "immediately after the continuous miner had been withdrawn from the face" (Tr. 8), because it "is inapplicable in view of the roof control plan that was in effect at the time this was issued" (Id.).

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $300 is appropriate for this violation.

Citation No. 3166384

The inspector observed support timbers installed on unstable footing in Rooms 2 and 5 of the 003 section. These presented dangerous and inadequate roof support. Day Branch miners had used 30-inch timbers to support a roof 36-38 inches high. If the undersized timbers had to be used, solid footing could have been created for them by setting them on flat materials such as header boards, which are six inches wide, three inches thick, and 24 inches long (Tr. 41). Instead, split cylindrical posts were placed on the mine floor, and the timbers were installed on top of them (Tr. 39). The cylindrical surface of the split posts

was used for the footing of 15 to 20 timbers. In addition, the 15 to 20 timbers were installed with three to four cap wedges stuck between the top of a timber and the roof (Tr. 39, 45). Mud from the wet floors in the rooms had been piled up against the timbers, hiding the split posts on which the timbers rested (Tr. 46). The inspector discovered this violation when he brushed up against timbers, dislodging serveral (Tr. 40, 42). Had the operator's preshift examiner felt a few of the timbers to check their stability, he would have readily discovered that they had been set improperly. It is important to note that these timbers were the sole means of roof support in these rooms.

The effect of the insecure and improperly installed roof timbers was that the roof was virtually unsupported. This created a significant and substantial violation.

The 003 section of the mine was an active section. There was evidence that miners had been working in the area. The improperly installed timbers were just inby the last open crosscut.

The manpower and materials necessary to correct the violation were immediately available. Longer timbers were stored in a break about 150 to 200 feet away. Once cited, the violation was corrected within 15 minutes.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $300 is appropriate for this violation.

Citation No. 2843066

The route traveled by the inspector as he left the mine on December 21, 1988, was the primary travelway and escapeway. Miners traveled this entry regularly. Its safe condition should have been of particular concern to Day Branch. The regulations require that the area be examined every eight hours.

The cited defects in the roof bolt supports were easily detectable. The bolt shafts where the 20 or 25 bolt heads had been sheared off were shiny and readily visible. Where the bolt heads had been sheared off, the large square head plates had fallen from the roof.

The roof bolt defects compromised the roof support system. The compromised protection made a roof fall reasonably likely. In the event of a roof fall, serious injury to miners could reasonably be expected.

The evidence sustained the inspector's finding of a significant and substantial violation.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $325 is appropriate for this violation.

Citation No. 3166461

The regulation cited in this citation requires that fire fighting equipment be maintained in a usable and operative condition. The deluge system which Inspector Myers found to be inoperative is an automatic fire-suppression system consisting of thermally-controlled water sprays installed near the belt drive. If the temperature near the belt drive reaches 212 degrees, the water sprays should activate to cool overheated parts or to put out fires. The heat sensors are located at the belt power rollers which drive the belt.

The deluge system was equipped with a test switch. When operative, the test switch will override the thermal controls and turn the water sprays on. When Inspector Myers pressed the test switch, he found that the deluge system was not connected to a power source. Without power, the entire system was inoperative.

Inspector Myers determined that the violation was reasonably likely to contribute to a fire accident and smoke or fire injuries. There was a definite danger of fire near the conveyor belt drive because of accumulations of grease, oil and loose coal. The belt was fire-resistant, but not fireproof. If it overheated, it would burn.

The deluge system was required to be checked once a week, with a record of the weekly examinations. Inspector Myers found no record that the system had been checked.

There was no other automatic fire suppression system in place near the belt drive. Nor was there conventional fire fighting equipment at hand. Because miners were not stationed to work at the belt drive at all times and because established air currents would have carried smoke out of the mine, a fire at the belt drive could have burned undetected for a substantial period, long enough to become out of control.

The evidence sustained the inspector's finding of a significant and substantial violation.

Considering all the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $325 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.

2. Respondent violated the cited safety standards as alledged in the order and citations involved herein.

ORDER

WHEREFORE IT IS ORDERED that:

1. The order and citations involved in these proceedings are AFFIRMED.

2. Respondent shall pay the above assessed penalties of $3,906 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Nashville, TN 37215 (Certified Mail)

Mr. James Trosper, Safety Director, Day Branch Coal Co., Inc., P.O. Box 204, Cawood, KY 40815 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 27 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 89-37-M A. C. No. 14-00164-05506
v.	:	
WALKER STONE COMPANY, INC., Respondent	:	Kansas Falls Quarry and Mill

DECISION

Appearances: C. William Mangum, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner;
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing and Troup, Junction City, Kansas, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for 11 alleged violations of safety standards under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

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

FINDINGS OF FACT

1. Respondent owns and operates the Kansas Quarry and Mill, which is a surface limestone mine engaged in mining and selling limestone with a regular and substantial effect on interstate commerce.

2. Respondent is a medium size mine operator.

3. After receiving each citation involved in this case, Respondent made a good faith effort to abate the cited condition promptly either by correcting the condition or by removing the cited equipment from service.

Citation 2651713

4. On October 13, 1988, a guard was not in place over the four V-belt drive pulleys of the 353 natural-gas drive engine for the first set of rolls. The pulleys project from the sides of the motor. The moving parts may be contacted by persons using the elevated walkway around the engine. The pulleys are located about two feet from the floor. If an individual contacted the unguarded moving parts, the accident could result in a fatal or permanently disabling injury.

Citation 2651714

5. On October 13, 1988, a 110 volt metal fan serviced by a #14 AWG conductor cable and located in the #1 crusher control room was not grounded. Grounding provides fault protection. Serious injuries could result from shock or fire.

Citation 2651715

6. On October 13, 1988, a 110 volt electrical metal heater with a fan motor mounted on metal was not grounded. The heater was located in the #1 crusher control room. Grounding provides fault protection. Serious injuries could result from shock or fire.

Citation 2651716

7. On October 13, 1988, part of a conveyor belt was not visible from the #1 crusher control room, where the belt controls were, and there was no warning system to warn people when the belt would start. If a person became entangled in the conveyor, the accident could result in a fatal or permanently disabling injury.

Citation 2651717

8. On October 13, 1988, exposed moving parts on the tunnel conveyor tail pulley adjacent to a walkway were not guarded. The tail pulley was in a poorly lighted area about 2 1/2 feet from the floor. If a person became entangled in the unguarded pulley, the accident could result in a fatal or permanently disabling injury.

Citation 2651718

9. On October 14, 1988, signs prohibiting smoking and open flames were not posted on two diesel fuel tanks near the shop

and on a diesel fuel tank near the electrical control building. There was some dry vegetation and diesel fuel spillage around the tanks which created a fire or explosion hazard. In the event of fire or explosion, serious injuries could occur.

Citation 2651719

10. On October 14, 1988, a 440 volt square D fuse switch and a starter switch which controlled the #1 crusher conveyor belt were not grounded. There was a grounding conductor leaving the starter switch to the motor, but it was not connected at the switch. If a wire connection, fuse clip, or other switch gear part faulted, the incident could result in a fatal shock or serious injuries.

Citation 2651720

11. On October 18, 1988, a principal 110 volt switch mounted on the outside of the electrical building was not labeled to show that it controlled the 110 volt starter switch for the #1 crusher motors. The unit controlled by the switch could not be readily identified by its location. In an emergency, delay caused by confusion in trying to locate the right switch to de-energize the #1 crusher motors could contribute to serious injuries.

Citation 2652721

12. On October 18, 1988, the 440 volt 3 phase, 10 H.P. conveyor drive motor was not grounded. The flex metal conduit, which had been used as a grounding conductor, was pulled off the motor junction box. Injury from shock could be fatal.

Citation 2651722

13. On October 19, 1988, 440 volt insulated cable wires entering a metal motor junction box were not bushed. The outer jacket on the cable was pushed back. The motor had been in this condition for at least several months. Injury from shock could be fatal.

Citation 2651724

14. On October 19, 1988, the diesel fuel delivery truck used to haul fuel to equipment in the four quarries did not have a door on the driver's side and had no seat belts. The truck travels about 10 to 12 miles per shift from the shop to the four quarries. Injury from falling out the door could be fatal.

DISCUSSION WITH FURTHER FINDINGS

Citation 2651713

On October 13, 1988, Inspector Larry J. Day observed that there was no guard over the V-belt drive pulleys of the alternator part of the 353 natural gas engine for a set of rolls. The engine was operating at the time and the pulleys were moving "at a very rapid pace." Tr. 43. Inspector Day also observed that the unguarded V-belt pulleys were within arm's reach of a walkway next to the engine and the fast-moving machine parts were exposed and would be accessible to persons on the walkway. Although Inspector Day originally checked the "Gravity" section of the citation as non-S & S, he testified that it should have been classified as an S & S violation. He explained that Respondent's plant foreman, Clifford Manning, pressured him not to issue any citations, and because he did not want to increase the foreman's anger, he marked a number of the citations non-S & S instead of S & S. Tr. 227-228. His testimony on this point includes the following:

> THE WITNESS: I would like to make a statement as to the inspection was quite intense, I did have a lot of pressure on me.
>
> It was very difficult to issue citations to the operator, and I went lenient on the S and S part because of the difficulty that I had of issuing any citations to the operator.
>
> I was trying not to be ambitious or aggravate the operator any further than what he was, and still try to do my job.
>
> * * *
>
> The difficulty was every time* I wrote a citation, the operator would say, well you can't cite me for that because I'll have it fixed before you leave today.
>
> For some reason, he had the interpretation that if he could fix this violation, that I shouldn't cite him for it.
>
> So this made it difficult to give him -- to issue citations. [Tr. 227-228]

* At page 228 of the transcript the reporter transcribed the word "everything," but the words used were "every time."

After reviewing each of his 11 citations at the hearing, the inspector testified that he would have changed four of them to allege gravity as S & S instead of non-S & S 2/.

In her brief, the Secretary requests that these four citations be affirmed as alleging S & S violations. However, inasmuch as the Secretary did not move to amend the citations at the hearing, her request is denied as being untimely.

Accordingly, the above four citations will be considered under "gravity" as used in § 110(i) of the Act, but not on the question whether they are S & S violations within the meaning of § 104(d)(1) of the Act. The citations that allege S & S violations will be considered under both "gravity" in § 110(i) and the question whether the violations were "significant and substantial" within the meaning of Section 104(d)(1) of the Act.

The Commission's test for finding an S & S violation is discussed in connection with other citations, below.

Civil penalty proceedings before the Commission and its judges are de novo, and the penalties assessed in such proceedings are to be based upon the six statutory criteria in § 110(i) of the Act rather than MSHA's classification/points system. Sellersburg, 5 FMSHRC 287 (1983), aff'd, 736 F2d 1147 (7th Cir. 1984); Black Diamond Coal Co., 7 FMSHRC 1117 (1985).

The reliable evidence shows that Inspector Day observed a serious violation. He testified that the unguarded V-belt pulleys were accessible from the nearby walkway and that accidental contact with them could cause serious injuries. The violation is serious within the meaning of "gravity" in § 110(i) of the Act, even though it is not alleged to be a "significant and substantial" violation within the meaning of § 104(d)(1) of the Act. It is a serious violation because the safety standard is an important protection for the miners, and because Respondent's conduct created a substantial possibility of serious injury. It is also serious because Respondent's conduct should be deterred.

Citation 2651714

On October 13, 1988, Inspector Day observed an ungrounded 110 volt metal fan serviced by a conductor cable in the number 1 crusher control room. The parties have stipulated that the fan

2/ Citations 2651713, 2651714, 2651715 and 2651719. Tr. 221-225, 404.

was not grounded and Inspector Day stated that there was no equivalent protection provided. The control room is small, about 8 X 10 feet, and the fan would be close to an operator inside the room. Inspector Day ran a continuity test on the fan from the motor to the frame and found no resistance. He explained that if the fan motor faulted, the frame of the fan would become energized.

In defense of this citation, Respondent states that the fan was approved for use by Underwriter's Laboratory, that it was not in use at the time of inspection, and that it was private property owned by the crusher operator and was used without knowledge or permission of the company.

Inspector Day, a certified electrician, testified that the Underwriter's Laboratory approval had no bearing upon whether the fan was properly grounded (Tr. 50) and the fan was not grounded. The fact that the fan was not in use at the time of inspection does not rebut the proof of a violation, so long as the fan was available for use. Citation 2651714 is one of the four citations discussed above which the inspector stated should have been classified as S & S instead of non S & S. The same ruling applies, denying the Secretary's request to amend the citation.

The fact that the fan was owned by an employee of Respondent and that Respondent did not expressly approve of its use does not rebut the proof of a violation. Respondent has not shown that it prohibited the use of the fan in its control room or that it instructed employees against the use of personal equipment. The fan was present at Respondent's mine site, its presence created a hazard, and until a citation was issued Respondent permitted at least one employee to have access to the fan while working.

I find that this is a serious violation within the meaning of the "gravity" factor in § 110(i) of the Act. It is serious because the safety standard (30 C.F.R. § 56.12025) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651715

On October 13, 1988, Inspector Day observed an ungrounded 110 volt metal heater located in the number 1 crusher control room. The parties have stipulated that the heater was not grounded. Inspector Day ran a continuity test on the heater and found that it was a good electrical conductor. The metal heater was the property of Respondent. The heater was on the floor of the crusher control room within arm's reach of any operator who would be in the room.

This citation is one of the four citations discussed above, which the inspector stated should have been classified as S & S instead of non-S & S. The same ruling applies denying the Secretary's request to amend the citation.

I find that this is a serious violation within the meaning of the "gravity" factor in § 110(i) of the Act. It is serious because the safety standard (30 C.F.R. § 56.12025) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651716

On October 13, 1988, Inspector Day issued Citation 2651716, alleging a violation of 30 C.F.R. § 56.9006, which provides:

> When the entire length of a conveyor is visible from the the starting switch, the operator shall visually check to make certain that all persons are in the clear before starting the conveyor. When the entire length of the conveyor is not visible from the starting switch, a positive audible or visual warning system shall be installed and operated to warn persons that the conveyor will be started.

Inspector Day testified that ten to twelve feet of a conveyor belt which was started from crusher control room number 1 was not visible from the crusher control room. Tr. 64, 403. Cliff Manning, the plant foreman, stated that approximately ten to fifteen feet of the conveyor was not visible from the control room. There was no audible or visual warning system to warn persons when the conveyor would be started. Employees performed greasing around the portion of the conveyor that was invisible from the control room. The conveyor was started once or twice a day.

The inspector marked this violation non-S & S on the citation. The Secretary's post-hearing request to amend the citation to allege an S & S violation is denied as being untimely.

I find that this is a serious violation within the meaning of "gravity" in § 110(i) of the Act. It is serious because the safety standard (30 C.F.R. § 56.9006) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651717

On October 13, 1988, Inspector Day issued Citation 2651717, alleging a violation of 30 C.F.R. § 56.14001, which provides:

> Gears; sprockets; chains, drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Inspector Day testified that the tail pulley for a conveyor belt located in a tunnel did not have a guard in place. Although a stop cord was located over the unguarded portion of the tail pulley, the presence of a stop cord does not replace the need for a guard. The safety standard makes no provision for the use of a stop cord in lieu of guarding.

The inspector marked this violation as non-S & S on the citation, because of infrequent exposure of personnel to the cited condition.

I find this violation to have a low degree of gravity.

Citation 2651718

On October 14, 1988, Inspector Day issued Citation 2651718, alleging a violation of 30 C.F.R. § 56.4101, which provides:

> Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.

Inspector Day observed two large diesel fuel tanks side by side that did not have signs prohibiting smoking posted on them or near them. A gasoline tank was located about 45 feet away from the diesel tanks. The gasoline tank did have a single "no smoking" sign posted on it, however the sign was not readily visible from all areas around the diesel tanks. Respondent's president, David Walker, stated that the diesel tanks were accessible from all directions to the plant and that the "no smoking" sign on the gasoline tank could not be seen from all approaches to the diesel tanks. Mr. Walker confirmed that readily visible "no smoking" signs were posted only after the citation had been issued and new signs were painted on the diesel tanks.

Inspector Day testified that a third diesel tank was located near an electrical control building. Tr. 82. The third diesel tank did not have any signs prohibiting smoking posted on it and although there was an old wooden building with a "no smoking" sign located near the third diesel tank, the sign could not be seen from the tank.

The evidence establishes that readily visible signs prohibiting smoking and open flames were not posted on or around three of Respondent's diesel fuel storage tanks. Inspector Day marked this violation non-S & S on the citation.

I find that this violation presented a low level of gravity.

Citation 2651719

On October 14, 1988, Inspector Day observed a 440 volt fuse disconnect switch in an electrical control building about four or five feet above a dirt floor. The switch was not properly grounded and no equivalent protection was provided. Respondent's plant foreman, Cliff Manning, confirmed that there was no grounding between the fuse box and starter switch. This condition was a violation of 30 C.F.R. § 56.12025 and presented a risk of electric shock.

The inspector marked this violation non-S & S on the citation. The Secretary's post-hearing request to amend the citation to allege an S & S violation is denied as being untimely.

I find that this is a serious violation within the meaning of "gravity" in § 110(i) of the Act. It is serious because the safety standard (30 C.F.R. § 56.12025) is an important protection for miners, Respondent's conduct created a substantial possibility of serious injury, and such conduct should be deterred.

Citation 2651720

On October 18, 1988, Inspector Day issued Citation 2651720, alleging a violation of 30 C.F.R. § 56.12018, which provides:

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

Inspector Day observed a large principal power switch mounted on the outside of an electrical control building. He saw three conductors running into the switch and a conduit running out of the switch into the earth. He could not readily identify which unit or units were controlled by the switch and there was no label on the switch to identify the unit it controlled. Plant foreman Clifford Manning confirmed that the unlabeled power switch might be confusing to some employees. Inspector Day eventually determined that the unlabeled power switch controlled the conveyor motors for the crusher.

The evidence establishes that a principal power switch was not labeled to show which units it controlled and that identification could not be made readily by its location.

Inspector Day marked this violation non S & S on the citation. I find that it presented a low level of gravity.

"Gravity" of a violation under § 110(i) and a "Significant and Substantial" violation under § 104(d)(1) of the Act

The term a "significant and substantial violation" derives from § 104(d)(1) and (2) of the Act, 3/ and not its civil penalty provision (§ 110(i)). The civil penalty provision simply uses the term "gravity of the violation," as one of six statutory criteria to consider in assessing a penalty.

Sections 104(d)(1) and (2) grant an administrative injunctive power to the Secretary of Labor quite different from the civil penalty authority in § 110(i). Sections 104(d)(1) and (2) authorize the Secretary to withdraw miners from a mine if a certain chain of violations occurs. The chain must begin with a

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

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

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

finding of a violation which, though not an imminent danger, 4/ is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard" and is also "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards . . . ." If a mine inspector finds such a violation, § 104(d)(1) requires that the inspector "include such finding in any citation given to the operator . . . . " It is this finding that begins a § 104(d)(1) chain that may lead to a § 104(d)(2) order withdrawing miners from the mine or a part of it.

This administrative injunctive power is strictly construed by the Commission, which has ruled that, to prove a "significant and substantial" violation, the Secretary must prove "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature" (Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981)).

The Commission has not stated how its definition of a "significant and substantial" violation differs from the Act's definition of an "imminent danger" (see n. 4, infra). However, inasmuch as § 104(d)(1) does not apply to an "imminent danger," the Commission's definition of an S & S violation must mean a level of gravity below an imminent danger.

"Gravity of the violation," as used in § 110(i), i.e. for civil penalty purposes, is not tied to the question whether a violation is or is not "significant and substantial" within the meaning of § 110(d)(1). "Gravity," for civil penalty purposes, is the seriousness of a violation. This includes the importance of the safety or health standard, and the seriousness of the operator's conduct, in relation to the Act's purpose of deterring violations and encouraging compliance with safety and health standards. Many types of safety or health violations are serious even though a single violation might not show a "reasonable likelihood" of causing injury or illness, or even fit into a probability-of-injury-or-illness mold. For example, some violations are serious because they demonstrate recidivism or an attitude of defiance by the operator. Others are serious because the safety and health standard involved is an important protection for the miners. Important safety or health standards are such that, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote

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

or even slight. 5/ Other mine safety and health violations are serious because they may combine with other violations or conditions to set the stage for a mine accident or disaster, even though individually, or in isolation, they do not appear to forecast injury or illness. Still others are serious because they involve a substantial possibility of causing injury or illness, if not a probability.

The term a "significant and substantial" violation within the meaning of § 104(d)(1) of the Act has been interpreted by the Commission in a number of cases.

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

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

The Commission has explained further that the third element of the Mathies formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining, Co., 6 FMSHRC 1834, 1986 (1984) (emphasis deleted). It has also stated that, in accordance with § 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984).

The Commission's definition of an S & S violation will be applied in considering the following three citations:

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

Citation 2651721

On October 18, 1988, Inspector Day observed a conveyor and conveyor motor mounted on a river bridge. He saw three conductors running into the motor and a broken conduit next to the junction box on the motor. The unit was not properly grounded. A metal framed walkway ran parallel to the conveyor. Inspector Day explained that two types of faults would probably result in the motor shutting off. Tr. 110. However, in the event of a "ground-to-face" fault the entire steel conveyor could become energized creating a hazard of electrocution. Tr. 110-113. Inspector Day further observed that the walkway adjacent to the conveyor was used regularly and he observed people on it often during the week he was there.

Failure to ground the metal framed motor constituted a violation of 30 C.F.R. § 56.12025. A discrete safety hazard of electrocution was contributed to by the violation. The location of the improperly grounded motor and the frequent use of the adjacent metal walkway by employees resulted in a reasonable likelihood that the violation would cause a serious injury. Inspector Day classified this violation as "significant and substantial." The violation meets the criteria set forth in Mathies Coal Co., supra.

Citation 2651722

On October 19, 1988, Inspector Day issued Citation 2651722, alleging a violation of 30 C.F.R. § 56.12008, which provides:

> 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.

Inspector Day observed that the wires from a 440 volt cable entered a metal motor junction box. The cable itself did not enter the box, but the cable jacket had been torn back so that only the wires entered the junction box. Inspector Day observed that there was no bushing inside the junction box or anywhere on the cable wires. Lack of adequate bushings could result in electric shock or fire with serious injuries.

Inspector Day's testimony regarding the condition of the wires is not contradicted. He classified this violation as significant and substantial. The violation meets the criteria set forth in Mathies Coal Co., supra. A violation of 30 C.F.R.

§ 56.12008 is established by the fact that insulated wires passing through the metal frame of junction box were not bushed. The violation contributed to a discrete safety hazard of electrocution, and created a reasonable likelihood of serious injuries.

Citation 2651724

On October 19, 1988, Inspector Day issued Citation 2651724, alleging a violation of 30 C.F.R. § 56.9002, which provides:

> Equipment defects affecting safety shall be corrected before the equipment is used.

The inspector observed an old dump truck that had been converted into a fuel delivery truck by mounting a large fuel tank on it. The door on the driver's side of the truck had been removed and no seat belt had been installed in the cab. The truck operated on rough gravel roads. The combined equipment defects of no door and no seat belt created a reasonable likelihood of a driver falling out of the truck and being run over by the truck or receiving other serious injuries from the fall.

Inspector Day classified this violation as significant and substantial. This violation meets the criteria set forth in Mathies Coal Co., supra. The lack of a seat belt and a missing door on the fuel delivery truck are equipment defects affecting safety in violation of 30 C.F.R. § 56.9002. The violation created a discrete safety hazard which was reasonably likely to cause a serious injury.

The Effect of Prior Inspections

With respect to five of the eleven the citations, Respondent contends that Inspector Day should not have issued a citation because earlier inspections by other MSHA inspectors (of the same conditions at this mine) did not result in citations. Specifically, in its post-hearing brief Respondent contends that Citations 2651716, 2651717, 2651720, 2651721, and 2651724 were for conditions that had previously been observed by other inspectors without issuing a citation.

The doctrine of collateral estoppel may not be invoked to prevent a mine inspector from issuing a citation for a condition he or she believes to be a violation of a safety or health standard. The fact that other MSHA inspectors may not have cited Respondent for the same conditions later cited by Inspector Day does not affect the validity of his citations. However,

Respondent's reliance on prior inspectors' lack of citations may have a bearing upon the question whether Respondent was negligent and, if so, to what degree. After careful consideration of the evidence concerning each violation found herein, I find that the degree of negligence should be changed from "moderate" to "low" for the following citations: Nos. 2651717, 2651720, 2651721, and 2651724. The inspector's finding of low negligence in Citation 2651716 is sustained by the reliable evidence. As to each of the remaining violations (Citations 2651713, 2651714, 2651715, 2651718, 2651719 and 1651722), I find that the violation could have been prevented by the exercise of reasonable care and was due to moderate negligence.

Considering all of the criteria for a civil penalty in § 110(i), I find that the following penalties are appropriate for the violations found herein:

Citation	Civil Penalty
2651713	$ 50.00
2651714	$ 50.00
2651715	$ 50.00
2651716	$ 20.00
2651717	$ 20.00
2651718	$ 20.00
2651719	$ 50.00
2651720	$ 20.00
2651721	$ 75.00
2651722	$100.00
2651724	$ 75.00

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated the cited safety standard alleged in each of the above citations.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citations 2651717, 2651720, 2651721, and 2651724 are modified to change the degree of negligence from "moderate" to "low." The above modified citations and the other citations herein are AFFIRMED.

2. Respondent shall pay the above-assessed civil penalties of $530 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 27 1990

LANCASHIRE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 89-147-R Order No. 2888399; 3/21/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 89-148-R Order No. 2888400; 3/21/89
	:	Docket No. PENN 89-149-R Citation No. 2891501; 3/21/89
	:	Docket No. PENN 89-192-R Citation No. 2891508; 4/17/89
	:	Docket No. PENN 89-193-R Citation No. 2891509; 4/17/89
	:	Prep Plant Mine ID 36-00838
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 90-10 A.C. No. 36-00838-03537
v.	:	Prep Plant
LANCASHIRE COAL COMPANY, Respondent	:	

DECISIONS

Appearances: Steven P. Fulton, James R. Haggerty, Esqs., Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania, for the Contestant/Respondent;
Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by the contestant (Lancashire) pursuant to section 105(d)

of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of the captioned orders and citations issued by MSHA mine inspectors. The civil penalty proceeding concerns proposals for assessment of civil penalties filed by MSHA seeking civil penalty assessments against Lancashire for the alleged violations of the mandatory safety and reporting standards which are the subject of the contested citations. Hearings were held in Pittsburgh, Pennsylvania, and the parties filed posthearing briefs which I have considered in the course of my adjudication of these matters.

Issues

An initial issue in these proceedings is one of jurisdiction. Lancashire contends that the mine in question does not fall within the statutory definition of a "mine" subject to MSHA's jurisdiction, that the mine was placed in a "permanently abandoned" status by MSHA in September, 1988, and was not "reopened" or "reactivated" for purposes of coal extraction processing or production, and that MSHA's alleged failure to inspect or regulate other mines similarly situated constitutes illegal "selective enforcement" against Lancashire.

Assuming that jurisdiction attaches, the next issues presented include the following: (1) whether Lancashire violated the cited mandatory standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the conditions or practices cited in the contested section 107(a) imminent danger order constituted an imminent danger; and (4) whether the section 103(k) order was properly issued.

Assuming the alleged violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of the adjudication of these cases.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

2. 30 C.F.R. § 77.200, 77.1712, and 45.4(b).

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

Stipulations

The parties stipulated to the following (Tr. 16; exhibit ALJ-1):

1. The subject work site, Lancashire Coal Company Preparation Plant ("the work site") is located in Elmora, Cambria County, Pennsylvania and is owned by the Inland Steel Company ("Inland"), which has an office in East Chicago, Indiana.

2. Inland has referred to the work site as the #15 Preparation Plant.

3. The work site is adjacent to a sealed mine facility which is owned by Inland and which is known as the Lancashire Coal Company No. 25 Mine ("Lancashire Mine #25").

4. No coal has been mined at Lancashire Mine #25 since June 3, 1983.

5. Until June 3, 1983, the Lancashire Mine #25 was an active, producing underground coal mine with surface coal preparation facilities located adjacent to it on the site ("the Lancashire Coal Company Preparation Plant").

6. On April 17, 1986, the underground mine shafts were sealed by the operator. At that time, the mine operator was Inland Steel Coal Company.

7. Since the mine shafts were sealed, the surface facilities have been inactive with the exception of a small water treatment facility.

8. On September 30, 1986, the MSHA classification of the mine was changed to a surface facility as a result of the underground openings being sealed.

9. During fiscal years 1987 and 1988, the work site was inspected by MSHA as a surface facility. Prior to March 20, 1989, the last MSHA safety and health inspection was April 1, 1988.

10. On September 6, 1988, the Hastings Field Office of MSHA declared the work site permanently abandoned (Joint Exhibit 1).

11. MSHA's internal classification for the work site as of September 6, 1988 was CG status -- one of several MSHA classifications which are set forth and explained in the Department of Labor Mine Safety and Health Administration Coal Mine Safety and Health ("CMS & H") User's Guide for Coal's Management Information System, October 1, 1986 (Exhibit R-1).

12. As a result of the action it took on September 6, 1988, MSHA ceased inspection activity at the work site.

13. After September 6, 1988, Lancashire took no action to indicate that it intended to resume the extraction, production, milling or processing of coal.

14. In late 1988, Lancashire sought bids from contractors to perform work dismantling and removing facilities and structural materials from the work site and reclaiming the area.

15. K & L Equipment Co., Inc. ("K & L"), owned by Kenneth Morchesky, was selected as the contractor and commenced work the week of February 20, 1989.

16. Purchase orders relating to the contract between Lancashire and K & L are set forth at Joint Exhibits 2 and 3.

17. On March 20, 1989, a fatal accident occurred at the work site. One of K & L's employees was killed during operations to raze a silo at the site.

18. On March 21, 1989, MSHA Inspector William D. Sparvieri, Jr. arrived at the work site to conduct an inspection. As part of his activities at the work site on March 21, 1989, Mr. Sparvieri issued the following citations and orders (exhibits R-2 through R-4):

a. Section 103(k) Order No. 2888399, 3:00 p.m.
b. Section 107(a) Order No. 2888400, 3:15 p.m.
c. Section 104(a) Citation No. 2891501, 3:30 p.m.

19. Order No. 2888399 was modified on March 27, 1989 at 7:45 a.m., and it was terminated on June 29, 1989, at 9:20 a.m.

20. Order No. 2888400 was terminated on June 29, 1989, at 9:30 a.m. Citation No. 2891501 was terminated on June 29, 1989, at 9:35 a.m.

21. Order Nos. 2888399 and 2888400, and Citation No. 2891501 were timely contested by Contestant.

22. On April 17, 1989, Inspector Sparvieri returned to the work site and served Citation Nos. 2891508 (1:55 p.m.) and 2891509 (2:00 p.m.) (exhibits R-5 and R-6).

23. Citation No. 2891508 was modified on May 1, 1989, at 9:50 a.m., and it was terminated on May 8, 1989 at 1:10 p.m.

24. Citation No. 2891509 was terminated on May 8, 1989 at 1:15 p.m.

25. Citation Nos. 2891508 and 2991509 were timely contested by Contestant.

26. The above-described orders and citations were served by a representative of the Secretary of Labor upon an agent of Lancashire at the dates, times, and places stated therein.

27. Lancashire stipulates that at the time Citation No. 2891508 was issued, it did not maintain in writing at the work site the information described in 30 C.F.R. § 45.4(a). Lancashire denies that it had any obligation to maintain such information.

28. Lancashire stipulates that it did not notify the Coal Mine Health and Safety District Manager prior to commencing the work which is at issue in this case. Lancashire denies that it had any obligation to give such notification.

29. MSHA admits that apart from the regulations codified in 30 C.F.R. Part 77, no agent from MSHA provided any notification to Lancashire that it must notify the Coal Mine Health and Safety Health and Safety District Manager prior to commencing the work which is at issue in this case.

30. Assuming the accuracy of the proposed civil penalty assessments filed by MSHA, the parties adduce the following information concerning the six statutory civil penalty criteria found in Section 110(i) of the Act:

a. During the two-year period preceding the issuance of the subject citations, Lancashire had no violations.

b. Payment of the proposed penalties would not affect the operator's ability to continue in business.

c. The operator demonstrated good faith in attempting to abate the alleged violations after notification of them.

31. The parties stipulate to the authenticity and admissibility of each other's exhibits (with the exception of MSHA's Exhibits 7, 8, 9, 16, 25, 36, 37, and 38), but not necessarily to the exhibits' relevance nor to the truth of the matters asserted therein.

32. The Administrative Law Judge has jurisdiction over these proceedings. However, Lancashire denies that its activities at the subject work site are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

Bench Rulings

The presiding Judge made the following bench rulings during the course of the hearing in these proceedings:

1. MSHA's objection to the admissibility of an affidavit executed by retired MSHA Inspector Thomas J. Simmers (exhibit C-3), was overruled and denied, and the affidavit was received as part of the record (Tr. 19).

2. MSHA's objection to the receipt of any testimony regarding MSHA's enforcement actions concerning the Barnes & Tucker No. 20 Mine was overruled and denied (Tr. 9).

3. MSHA's motion to quash the subpoenas issued by Lancashire for the appearance and testimony of MSHA Inspector Niehenke and Brunatti (who appeared at the hearing) was overruled and denied (Tr. 9).

4. Lancashire's objections to the admissibility of several hearing exhibits offered by MSHA (see stipulation #31) were overruled and denied and the documents were received as part of the record (Tr. 24-41).

Discussion

The facts in these proceedings show that at approximately 2:15 p.m., on March 20, 1989, a fatal accident occurred at Lancashire's preparation plant when an employee of an independent contractor (K & L Equipment, Inc.) suffered fatal injuries while in the process of helping to dismantle a concrete coal storage silo. The victim, Robert Bell, had performed work cutting certain 5/8 inch steel reinforcing bands from the silo in question with a cutting torch. After completing this work, Mr. Bell left the area for a short time and returned to the silo area where he was next observed with the cutting torch kneeling at the base of the silo, where two or three of the steel reinforcing bands had been left intact. A section of the silo approximately 15 feet high and 30 feet wide collapsed, burying Mr. Bell in the debris which was in the silo. According to MSHA's accident investigation report, the debris included approximately 40 tons of coal which was in the silo.

As a result of the accident, MSHA Inspector William D. Sparvieri, Jr., who conducted the accident investigation, issued several citations to the contractor K & L Equipment, Inc., (which were not contested), and he also issued the contested citations and orders to Lancashire and served them at the mine office on Mr. Frank Falger, a supervisor who maintained an office at the mine site. The citations and orders in question are as follows:

Docket No. PENN 89-147-R. Section 103(k) Order No. 2888399, March 21, 1989, states as follows (exhibit R-2):

A fatal accident occurred on March 20, 1989, at the surface area of the mine site. This 103(k) order is issued to assure the safety of persons at the mine site. This area is closed to all persons except those needed to conduct an investigation. No persons are to enter this area and no work shall be performed in this area until the investigation is completed.

Docket No. PENN 89-148-R. Section 107(a) Imminent Danger Order No. 2888400, March 21, 1989, states as follows (exhibit R-3):

Structural damage has occurred in the raw coal silo and the screen house located next to the raw coal silo. Both structures at the present time are in an unstable condition and are a threat to persons in the immediate area. This condition was observed during a fatal accident investigation. To terminate this condition both structures need to be demolished. The operator shall submit in writing to MSHA a method describing procedures to be used to assure the safety of persons involved in the demolition of the two structures.

Docket No. PENN 89-149-R. Section 104(a) "S&S" Citation No. 2891501, March 21, 1988, cites an alleged violation of 30 C.F.R. § 77.200, and the condition or practice cited states as follows (exhibit R-4):

The raw coal silo and the screen house were not maintained in good repair to prevent accident or injuries to employees. At the raw coal silo several steel re-enforcing bands were removed causing an unstable condition which resulted in a fatal accident on 3-20-89. Loose materials, metal sheeting, was hanging from the screen house.

The condition was a contributing factor in the issuance of an imminent danger Order No. 2888400, issued 3-21-89, therefore no abatement time was set.

Docket No. PENN 89-192-R. Section 104(a) Non-"S&S" Citation No. 2891508, April 17, 1989, and modified on May 1, 1989, cites an alleged violation of 30 C.F.R. § 45.4(b), and the condition or practice is stated as follows (exhibits R-5 and R-5(a):

The operator did not maintain in writing at the mine office information required by section 45a (sic) of 30 C.F.R. for the independent contractor K & L Equipment Inc. at this mine. This violation was revealed during a fatal accident investigation. The accident occurred on 3-20-89.

Docket No. PENN 89-193-R. Section 104(a) "S&S" Citation No. 2891509, April 17, 1989, cites an alleged violation of 30 C.F.R. § 77.1712, and the cited condition or practice states as follows (exhibit R-6):

> The operator did not notify the MSHA District Manager prior to re-opening. An independent contractor, K & L Equipment Inc., was contracted for demolition work at the Lancashire Coal Company Preparation Plant. This violation was revealed during an investigation of a fatal accident that occurred on 3-20-89.

MSHA's Testimony and Evidence

MSHA Inspector William D. Sparvieri, Jr., testified as to his experience and training, and he confirmed that he conducted a fatal accident investigation on March 21, 1989. He explained what he found at the raw coal storage silo where the incident occurred, and the adjacent building which he identified as the screen house, and confirmed that some demolition work had been done at that structure (Tr. 41-48). He stated that the smaller of the two structures, which was the coal silo where the accident occurred, appeared to be unstable due to the fact that a large portion of its base was missing and the steel reinforcing bands which were around it had been cut and were hanging down, and the silo base did not appear to have any adequate support and was not in a safe condition. The screen house had pieces of tin and steel metal hanging from its sides, and since he did not know exactly how much work had been done on that structure to weaken its support legs, he was concerned about its safety (Tr. 50).

Mr. Sparvieri stated that after spending an hour at the site, he and fellow Inspector John Kuzar returned to their office so that Mr. Kuzar could make a phone call to their sub-district manager concerning the jurisdictional question raised by the mine supervisor who was at the site (Mr. Falger), and the contractor owner (Mr. Morchesky-K & L), who had raised the jurisdiction question during the investigation. Mr. Sparvieri and Mr. Kuzar then decided to issue a 103(k) order to insure the safety of the K & L personnel doing the demolition work around the structures in question, and they also decided to issue a section 107(a) imminent danger order because of the unstable condition of the silo and the screen house and to insure the safety of the personnel as well as other persons (Tr. 51). After receiving word from their sub-district manager Tim Thompson, they returned to the site and Mr. Sparvieri issued the two contested orders and a section 104(a) citation citing a violation of section 77.200, because he believed that the silo and screen house were no longer maintained in such a condition as to prevent an accident or injury to persons required to work around them. Even though the structures were being demolished, he nonetheless believed that they were required to be maintained in a safe condition pursuant

to section 77.200, "so that those people performing this work have less risk of injury" (Tr. 54). He believed that the loose materials hanging from the screen house should have been taken down, and that the bands which had been cut from the silo presented a question as to whether both areas were a safe location (Tr. 55). Since there were loose and overhanging materials above the people that were working on the structures, he did not believe they were being maintained in good repair to prevent these materials from falling on the people working below (Tr. 59).

Mr. Sparvieri confirmed that he based his "S&S" findings on the fact that the cited conditions could reasonably be expected to injure or kill someone if work were allowed to continue on both structures, and that the screen house overhanging materials, and the unstable silo, presented such hazards, particularly the silo, which had already collapsed, further weakening the structure (Tr. 60).

Mr. Sparvieri confirmed that he based his moderate negligence finding on the fact that the respondent knew that the conditions existed and should have known of the conditions by observation (Tr. 61). He identified a series of photographs of the structures and explained the conditions which he observed (Tr. 61-65; exhibits R-16 through R-26).

Mr. Sparvieri confirmed that after issuing the orders and citation on March 21, 1989, he returned to the site on March 29, 1989, after receiving a call from Mr. Falger on Sunday, March 26, 1989, informing him that the remainder of the silo had collapsed on its own, but that no one was injured and that he had posted a guard at the site. Mr. Sparvieri took additional photographs of the screen house, and parts of the silo had been cleaned up and removed from the area (Tr. 67, exhibits R-27 through R-30). He confirmed that during his intervening visits, the orders were modified to allow the operator and contractor to complete the demolition work (Tr. 69). He confirmed that Mr. Falger informed him that K & L had a contract with Inland Steel to remove the silo, the screen house, some smaller shed-type buildings, and some belts that led to the screen house and silo, and generally clean up the whole area (Tr. 70). Neither Mr. Falger or Mr. Morchesky ever told him that K & L had purchased the structures which were to be removed (Tr. 71). Mr. Sparvieri confirmed that he visited the site again on April 17, 1989, and after informing Mr. Falger that MSHA had decided that it had jurisdiction at the site, he issued two additional section 104(a) citations (Tr. 65-66).

Mr. Sparvieri stated that when he was initially assigned to conduct the accident investigation (exhibit R-7), Mr. Kuzar informed him that "there could be a jurisdictional question" (Tr. 71). Mr. Sparvieri then referred to MSHA's policy manual

(exhibit R-8) dated July 1, 1988, pgs. 6, and 9-10, which make reference to independent contractors, and he relied on item 3 dealing with the demolition of mine facilities, and he discussed the policy with Mr. Kuzar on March 21, 1989, when he issued the orders and citation (Tr. 72).

On cross-examination, Mr. Sparvieri confirmed that he had previously inspected demolition work performed by independent contractors, and that he referred to the policy because a jurisdictional question had been raised when he conducted the investigation of the accident. He conceded that the policy does not make reference to permanently abandoned mine sites, and he did not know when the facilities at the mine site were last inspected by MSHA. He assumed that the silo and screen house were in the same condition as they were at the time of his investigation, except for the silo bands which had been cut, and the support legs which were notched on the screen house. The materials which were hanging from the screen house appeared to have fallen off due to the conditions of the structure, and it did not appear that they were torn off (Tr. 75). However, he did not know if this were in fact the case (Tr. 76).

Mr. Sparvieri did not believe that one could simply look at the structures and come to the conclusion that they are in good repair while demolition work is taking place. He confirmed that the demolition work was stopped "midstream" because of the accident, and that this work would not necessarily leave the structures in bad repair. He conceded that the stripped pieces of steel could have occurred during demolition, and that when he returned on March 29, portions of the silo and other materials, such as the steel bands, were still there (Tr. 77).

Mr. Sparvieri confirmed that he estimated the height of the silo as approximately 65 feet, and that he did not measure the amount of the coal in the silo before or after the accident, and did not sample any of the debris which was in the silo (Tr. 80). Someone else estimated that the silo would hold 500 tons of coal, and he had no idea how much of the material in the silo was clay (Tr. 83). He confirmed that he noticed a brown tint in the material in the photographs, and he was told that the silo had a steel liner and that clay was used to backfill the area between the liner and silo block. When he returned and viewed the collapsed silo, he observed no steel liner in the silo, but did observe a color different from coal in some of the coal that had rolled out of the silo (Tr. 84).

Mr. Sparvieri confirmed that during his interviews, he was told that coal had to be removed with a front-end loader bucket to reach the accident victim, who was covered with coal, but he did not know how much coal had to be removed (Tr. 85). He also confirmed that he was told by people doing the demolition work that there was coal in the silo, and that they could see it

through an open window (Tr. 86). He estimated that the silo was one-third full of coal through observations through the silo opening, and the materials which were outside of the silo (Tr. 88). Lancashire's counsel agreed that the materials in the silo were enough to inundate the accident victim and suffocate him, and he conceded that there is a nexus between the materials in the silo and the death of the victim (Tr. 89).

Mr. Sparvieri confirmed that his accident report reflects that the mine operator did not notify MSHA that the mine was to be reactivated (Tr. 90). He also confirmed that K & L had done some demolition work at the Barnes and Tucker No. 20 preparation plant, and that Mr. Falger told him that this work had been done but that MSHA did not inspect that site (Tr. 92). He confirmed that he would inspect such a site if he were assigned to inspect it (Tr. 92). He also confirmed that once a mine site has been declared permanently abandoned, MSHA's duty to inspect it ceases, and he was not familiar with Lancashire's site prior to the accident (Tr. 94, 96).

Mr. Sparvieri confirmed that the silo and screen house were used in coal preparation, but he did not know any of the details. He confirmed that the actual mine opening which had been sealed was approximately a "few hundred" feet from the accident site, but that he did not know for certain (Tr. 98). He confirmed that during his conversations with Mr. Falger and Mr. Morchesky, they referred to the silo as a "coal storage silo," and that he was under the impression from the persons he talked to during his investigation that the silo was used at one time to store coal, and that no one ever told him that materials other than coal were added to the silo (Tr. 100). Lancashire's counsel stated that "there's no dispute that there was coal stored in there at some point" (Tr. 102).

Mr. Sparvieri confirmed that Mr. Falger informed him that K & L had the salvage rights to the materials from the structures which it was under contract to demolish, but did not state that K & L had purchased the property where the structures were located from Inland Steel (Tr. 104). He further confirmed that he was informed of the procedures followed by K & L in doing the demolition work by Mr. Morchesky and the people doing the work at the site, and that the silo bands were removed to weaken the structure as part of the plan to demolish it (Tr. 108). He was aware of no MSHA standard requiring MSHA's approval of a demolition plan, and he confirmed that the modified order permitting K & L to continue its work under "controlled conditions" was issued by another inspector (Tr. 110).

Mr. Sparvieri expressed his views on how the silo structure should have been demolished, and he confirmed that he could observe from a safe distance that some work had been done on the legs of the screen house with a cutting torch, and several K & L

employees informed him that they had notched the legs sometime during the day of the accident to weaken them so that the structure could be pulled down (Tr. 113-114).

Lancashire's Testimony and Evidence

Francis Falger, testified that he is employed by Inland Steel Company, Lancashire Coal Company, and has been so employed for 30 years. He explained that he was employed by Barnes & Tucker since 1960, and that when the property changed ownership from Barnes & Tucker to Inland Steel, he stayed on as an employee of Inland Steel. He stated that Barnes & Tucker operated several mines and cleaning plants, and the property was sold to Inland Steel in 1970, and Barnes & Tucker continued to manage it for Inland Steel for a fee. Inland Steel then closed the mine on November 13, 1981, and took the management from Barnes & Tucker. Inland reopened the mine in February, 1982, and started coal production, but then ceased production on June 3, 1983. He is the only employee at the site, and coal was last extracted on June 3, 1983, when the shafts were sealed sometime in 1984 (Tr. 137). He confirmed that his title is "supervisor" and that no coal milling or preparation takes place at the site, and that prior to the sealing of the shafts, MSHA conducted inspections at the site. The mine was placed in a permanently abandoned status in September of 1988, by Mr. Kuzar, and he explained how this was done (Tr. 138-140).

Mr. Falger confirmed that MSHA did not inspect the site from the time it was permanently abandoned until the time of the accident, and that Inland Steel and Lancashire took no actions to resume milling or coal preparation since the time it was abandoned other than providing security for the site, and treating the water pursuant to the requirements of the Pennsylvania Department of Environmental Resources (Tr. 141). He confirmed that he negotiated the demolition contract with K & L, and that the remaining new silo and preparation plant which were not torn down will eventually be torn down after the mortgage which is due in 1991 is paid (Tr. 143). He confirmed that Inland Steel intended to reclaim the property, and that demolition of the existing structures is one step in that direction (Tr. 143).

Mr. Falger confirmed that Mr. Morchesky represented K & L during the demolition contract negotiations, and he explained the scope of some of the work covered by some of the purchase contracts (Tr. 143-145). Mr. Falger confirmed that he did not notify MSHA when he entered into the contract with K & L "because we're permanently abandoned, and there was no coal production" (Tr. 149). He informed Mr. Morchesky that K & L's demolition work "does not come under MSHA" because the mine was permanently abandoned and that K & L's prior demolition work at the Barnes & Tucker No. 20 Mine was "the same thing" and was "not under MSHA"

(Tr. 150). Mr. Falger confirmed that the demolition work performed by K & L at the time of the accident was not for the purpose of reopening the mine or producing coal (Tr. 150).

Mr. Falger stated that prior to the accident, nothing was stored in the silo which was being razed, that it was constructed in the late 1950's or early 1960's, and when the new preparation plant was built in 1971, the silo was not in use. Mr. Falger denied ever telling Mr. Morchesky or any of his employees that coal was stored in the silo. He stated that MSHA had not inspected the silo or screen house for 3-years prior to last September, and when the site was inspected no one physically examined the structures which were located about a 5 to 10 minute walk from the new preparation plant (Tr. 152).

Mr. Falger stated that Mr. Sparvieri and Mr. Kuzar came to the site after the accident on the morning of March 21, 1989, and when he informed them that he did not believe that MSHA had jurisdiction because the mine had been permanently abandoned by MSHA, Mr. Kuzar responded "I don't know whether we do or not, but we're going to start our investigation anyway until we find out what's going on" (Tr. 154). Mr. Falger confirmed that he cooperated with the inspectors and explained the work that was being performed.

Mr. Falger stated that he observed the debris which was in the silo which collapsed, and he described it as having a "yellow, brownish cast to it," and that this did not surprise him because the bottom of the silo was lined with clay. He confirmed that Lancashire never intended to sell anything that was in the silo, that it had no commercial value, and he described it as "junk." He stated that if the material were run through a cleaning plant, "all that was there you can't come up with much" (Tr. 155). He could not recall whether any of the inspectors asked him about the contents of the silo (Tr. 155).

Mr. Falger stated that the closed Barnes & Tucker No. 20 Mine was located a "ten minute drive" from the accident site, and he confirmed that demolition work had been performed by K & L at that site within the last 3 years, and that "they had the same set up as we did." He explained that it was an underground slope mine and that the shafts and slope were sealed, but that he was not there when the work was being performed, and did not know if MSHA inspected the demolition work. However, he stated that MSHA Inspector Leroy Niehenke told him that he was at that site when the demolition work was taking place but did not inspect that work, and that he was there only to "check the electrical part of it" and was told by his boss not to go to the area where K & L was doing the actual demolition, and that he did what he was told (Tr. 157).

On cross-examination, Mr. Falger confirmed that he agreed to sell Mr. Morchesky all of the scrap material removed from the site after the structures were torn down for $55 a ton (Tr. 161). He confirmed that there was coal in the razed silo, but denied that the coal was stored there and that "all the coal that was in was just stuck on the bottom in clay," and that it was "whatever was left in the silo whenever they cleaned it out" (Tr. 165). He stated that the coal was left in the silo 20 years ago, that it was coal which was processed at the new preparation plant which was built in 1971, and that it was extracted and processed prior to 1983 (Tr. 165).

Mr. Falger confirmed that at the time Mr. Kuzar called him to inform him that the mine would be placed in a permanently abandoned status, he did not know that the demolition work would be done and no contract negotiations were ongoing with K & L at that time. He did know that the entire area would have to be reclaimed and the structures torn down, but that Inland Steel intended to hold the property until the leasing arrangement expired in 1991 (Tr. 176-177). Absent any buyers, he assumes that the new preparation plant will be torn down at that time (Tr. 179).

John Emerick, President, Coal Utilities Corporation, testified that he is a graduate of the Penn State University, and that he is a professional engineer in the State of Pennsylvania, and has been since 1961. He stated that he has been involved in the coal industry for 33 years, and has done surface mining reclamation work, including work for Inland Steel. He was familiar with the site in question, and was involved in the design of the silo when he worked as chief engineer for Barnes and Tucker from 1957 to 1969. He stated that the silo was constructed in approximately 1959, and he explained its construction. He stated that the silo could hold 1,100 tons of coal at full capacity, and confirmed that he visited the site as a consultant for Inland Steel shortly after the accident. He observed the debris which came out of the silo, and he described it as "a mixture of clay and coal," and he was not surprised with this mixture because all of the coal cannot be removed because of compaction inside the silo (Tr. 186).

In response to further questions, Mr. Emerick stated that the silo was used to store raw coal when the cleaning plan was not operating, or when the cleaning plant was processing more coal from the mine than it could handle (Tr. 186).

Supervisory MSHA Inspector John Kuzar confirmed that the Barnes & Tucker No. 20 Mine was located in his enforcement district, and that he was aware of the demolition work there in 1986 and 1987. He knew that Mr. Morchesky was doing the reclamation work at that site, but was not aware that he owned the K & L

Company. He explained that during part of the time the demolition work was being performed, his office was responsible for the mine, but that another supervisor from the Ebensburg office was responsible for it for part of the time. He stated that he had occasion to visit the site with another inspector who was checking the sealing of the shafts (Tr. 190-193). He confirmed that inspectors from his office were at the site to insure that the slope shafts were being sealed according to the sealing plan, and that during this same time, demolition work was taking place at the site (Tr. 194). When asked why the inspectors would not inspect the demolition work, Mr. Kuzar responded "probably because they weren't assigned to inspect the demolition work" (Tr. 195).

Mr. Kuzar further explained that he knew that some inspectors had looked at some of the Barnes & Tucker demolition work, but were under the impression that Mr. Morchesky had purchased the area where the demolition work was taking place for $1. Under the circumstances, they were of the opinion that MSHA did not have jurisdiction over that particular area (Tr. 197). He further explained that until the day before the hearing in these proceedings, he believed that MSHA lacked jurisdiction if the site were being reclaimed through state grants, or if the mine operator went out of business and sold the land (Tr. 198). His present understanding is that ownership of the property does not matter (Tr. 211). He now believes that MSHA was in error for not inspecting Mr. Morchesky's demolition work at the Barnes and Tucker No. 20 Mine (Tr. 212).

Mr. Kuzar explained the circumstances under which the orders in question were modified to allow the demolition work to proceed safely, and he confirmed that he was at the site to observe the screen house when it was taken down. He further confirmed that the silo came down "on its own accord" and that the screen house had to be pulled down with front-end loaders (Tr. 217, 222).

On cross-examination, Mr. Kuzar confirmed that the method used to tear down the screen house once the orders were issued did not differ significantly from the method which K & L intended to use prior to the accident (Tr. 227). He also confirmed that the screen house structure was difficult to tear down and that it "was pulled in every direction you could possibly pull it. They couldn't get it to come down. And when it came down, it didn't come the way they were planning on it coming down" (Tr. 227). Even though the structure could not be readily pulled down, the hazard presented concerned the workers who were exposed to materials hanging above them while they were engaged in the work of cutting the legs of the structure (Tr. 227).

MSHA Inspector Leroy Niehenke, testified that he is an electrical inspector, but also conducts regular mine inspections,

and he confirmed that Mr. Kuzar and Mr. Biesinger are his supervisors (Tr. 232). He confirmed that once a mine has been declared permanently abandoned, MSHA's duty to inspect it ceases. It was his understanding that the mine operator has a duty to reclaim and tear down the structures left at an abandoned mine. He confirmed that he was aware that a contractor was performing demolition work at the Barnes & Tucker No. 20 Mine during 1986 and 1987, but did not know at that time that it was Mr. Morchesky or K & L. The contractor was tearing down the preparation plant, and it took a year to complete the work. Although he performed at least one inspection at that site, he did not inspect the demolition work of the contractor because Mr. Biesinger told him not to. Mr. Niehenke denied that Mr. Biesinger told him that MSHA had no jurisdiction over the demolition work, and stated that Mr. Biesinger gave him "no reason whatsoever" for not inspecting the work (Tr. 235).

Mr. Niehenke confirmed that once a mine has been declared permanently abandoned, MSHA would not inspect the facility unless the operator took some action that indicated that he intended to resume coal production and processing (Tr. 235). He confirmed that he had issued citations at the No. 24-D Mine portal while shaft sealing was in progress, and that the mine at that time was "apparently" not permanently abandoned and the operator was in the process of sealing the shafts (Tr. 236). In his experience, he was not aware of any time that MSHA has asserted jurisdiction at an abandoned mine solely because of demolition work taking place at such a mine (Tr. 237). He confirmed that after the accident in question, he went to the site and spoke with Mr. Falger and agreed with his assertion that he had previously not inspected the demolition work at the Barnes & Tucker No. 20 Mine. He confirmed that he told Mr. Falger that he had not done so "because I received instructions from my supervisor not to inspect it" (Tr. 237).

On cross-examination, Mr. Niehenke confirmed that his prior inspection at the No. 20 Mine was limited to an electrical inspection, and although electrical work may have taken place "around" the demolition area, it was not taking place "in the immediate area" (Tr. 238). He stated that it was his understanding that pursuant to MSHA's policy manual, if demolition work is being done at a mine which has been permanently abandoned, and MSHA was aware of it, the mine would be removed from its permanently abandoned status and placed in an active status. He confirmed that this policy was in effect even before the accident in question (Tr. 240).

Kenneth Morchesky, confirmed that he is the owner of K & L Construction, and that he also owns Laurel Land Development, which is a surface mining operation, and Cambria Metals Processing, which is a trucking business. He confirmed that he purchased the Barnes & Tucker site to "make my money from the

salvaging of the good items and to scrap the rest" (Tr. 247). He confirmed that he contracted to do the work at issue in this case, and that he was "to raze the silo in conjunction with removing certain pieces of junk at Inland Steel," and that this work was covered by purchase orders (joint exhibits 2 and 3). He confirmed that he knew about MSHA and the need for an MSHA ID number, but did not believe that he needed an ID number for the demolition work because he had done similar work at the No. 20 Mine without a number, and Inland Steel advised him that his work would not be covered by MSHA. Mr. Morchesky assumed that this was the case, and that he would be covered by OSHA (Tr. 249). Mr. Morchesky believed that MSHA was aware of his work at the No. 20 Mine because an inspector whose name he did not recall came to the site, and after a short discussion, he left.

Mr. Morchesky confirmed that he was served with citations in connection with his demolition work in question, and although he initially contested them, he paid the proposed civil penalty assessments because "it was cheaper to pay them rather than fight them" (Tr. 254, exhibit C-2). When asked about his prior statement in his contest letter of May 31, 1989, exhibit C-2, that an MSHA inspector at the No. 20 Mine site in 1986 informed him that a "scrap" job was not covered by his inspection duties, he conceded that the inspector made no such statement, and that he simply assumed that MSHA would not inspect his work because the inspector left and did not inform him that he would conduct an inspection (Tr. 257). He confirmed that the inspector did not specifically inform him that the "scrap" job was not covered by MSHA (Tr. 259). Mr. Morchesky denied that he told Mr. Falger about his conversation with the inspector, but that he "probably" did so when he was negotiating the demolition contract, and "probably told him that I wasn't covered by an MSHA inspector out there" (Tr. 260).

Mr. Morchesky confirmed that citations were issued to his Laurel Land Development Company in 1986, but denied that any of these citations were for demolition work that he was doing at the No. 20 Mine (Tr. 262-268). He confirmed that he purchased "certain pieces" from Barnes & Tucker, including an "old portal" and the ground where his office was located (Tr. 268). He also confirmed that MSHA inspected the mining work he was performing with his Laurel Land Development Company in the area of the No. 20 Mine, but that MSHA was "never around the stuff that was not affiliated with mining" (Tr. 270). He stated that he told Mr. Falger that the No. 20 Mine was not inspected and that his work for Lancashire "should be under the same rules and regulations." When Mr. Falger showed him the letter confirming that the site had been permanently abandoned, Mr. Morchesky said he stated to Mr. Falger "I wasn't inspected over there, I shouldn't be inspected by MSHA over here" (Tr. 271). He also stated that if he knew he would be regulated by MSHA, he would not have taken

the demolition job because "I just don't want to be under MSHA's guidelines and what have you" (Tr. 271).

Mr. Morchesky confirmed that there was coal in the area of the silo, as well as in the silo, but he did not know how much. He stated that he could see some coal through a crack in the window, and that it appeared to be up to that level. He anticipated that once the silo was weakened and started to topple, the weight of the screen house would crush the rest of it (Tr. 275-276).

Retired MSHA Inspector Thomas J. Simmers, who was unavailable for the hearing because of health reasons, executed a sworn affidavit, and it was received in evidence (exhibit C-3). It states as follows:

> 1. I worked for the Mine Safety and Health Administration (MSHA) for approximately 18 years. I retired from MSHA in April 1987.
>
> 2. I worked as an MSHA inspector for the last 15 years of my employment with MSHA. During that 15 year span I worked out of numerous field offices including the field offices in Hastings, PA; Johnstown, PA; Indiana, PA; Clearfield, PA; and Ebensburg, PA. Thus, I am familiar with MSHA inspection procedures.
>
> 3. Based on my experience, once a mine has been declared permanently abandoned, MSHA inspections of the facility cease. Inspections would not occur again at a facility that had been declared permanently abandoned unless the operator took action that indicated that it intended to resume production or processing of coal. I am unaware of any instances during my employment with MSHA when a mine that had declared (sic) permanently abandoned was inspected by MSHA when the operator did not take such action.
>
> 4. I recently had stomach surgery and am unable to attend a hearing in Pittsburgh, Pennsylvania, on October 24, 1989, due to my health.

In response to certain interrogatories, MSHA confirmed that retired Inspector Simmers and a State mine inspector had inspected the Barnes & Tucker No. 20 Mine in 1986-1987, and knew that Mr. Morchesky was performing work at that site, but did not know that he was doing business as the K & L Equipment Company. MSHA further confirmed that Mr. Simmers and the State inspector were under the impression that Mr. Morchesky had purchased the No. 20 preparation plant structure for $1 and was planning to reclaim the area, and that under these circumstances, they concluded that neither MSHA or the state had jurisdiction to inspect

Mr. Morchesky's operation. MSHA further confirmed that Inspector Davis also had knowledge of Mr. Morchesky's work at the No. 20 Mine, but did not believe that an MSHA inspection of his operations was appropriate because Mr. Morchesky had purchased the entire plant facility.

In response to my question as to whether or not the purchase of the old structures which were being demolished by Mr. Morchesky at the time of the accident made any difference with respect to MSHA's enforcement authority, MSHA's counsel stated that "it apparently doesn't make any difference" (Tr. 162).

Findings and Conclusions

The Jurisdictional Question

Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), defines "coal or other mine" as follows:

> (h)(1) "[Co]al or other 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 tailings 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 underground, 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. . . . (Emphasis added).

Section 3(h)(2) of the Act, 30 U.S.C. § 802(h)(2), provides the following definition of a "coal mine:"

> (2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities. (Emphasis added).

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

> Finally, the structures on the surface to be used in or resulting from the preparation of the extracted minerals are included in the definition of "mine." . . . [B]ut it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep, No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. & ADMIN. NEWS 3401, 3414.

Lancashire argues that once MSHA determines that a facility is a "coal or other mine," it is required to periodically inspect it, and has no discretion to discontinue these inspections. Since MSHA placed the mine in a permanently abandoned status in September 1988, Lancashire concludes that it correctly determined that it was no longer a mine subject to MSHA jurisdiction. By permanently abandoning the mine, Lancashire concludes further that MSHA made a determination that it was no longer a "coal or other mine" which would be required to be inspected periodically under the Mine Act.

Lancashire's argument seems to suggest that once MSHA places a "coal or other mine" in a permanently abandoned status, it has also permanently abandoned its enforcement authority or jurisdiction to resume inspections at the mine at anytime. I reject any such notion. MSHA's abandonment of the mine was based on its determination that all active coal mining activities had terminated, the mine shafts had been sealed, and there was no indication that active mining would resume in the near future. In my view, by placing the mine in a permanently abandoned status, MSHA, in its discretion, simply made a determination that the mine was no longer required to be inspected periodically.

MSHA's determination not to continue with its inspections at the mine site did not in my view, remove the mine from the statutory definition of "coal or other mine" found in the Mine Act. At the time that the inspections in question were conducted, and the violations were issued, the mine structures and equipment which remained from previous mining activities, including the new preparation plant, and the old plant silo and screen house, were still at the site and were clearly structures, facilities, equipment, or other property, used in, or resulting from, the work of coal extraction and preparation. Further, the land where the

mine is located was used in or resulted from the work of coal extraction and preparation.

During oral arguments at the hearing, Lancashire's counsel agreed that the silo and screen house structures were at one time part of the preparation plant facilities, and he did not dispute the fact "that the building resulted from preparation of coal" (Tr. 129, 181). Lancashire's contention is that once the mine operator ceased using these structures for coal preparation, MSHA could not resume its inspection of the mine site unless active coal production or preparation activities resumed. While it seems clear to me that at the time of the disputed inspections, the mine site fell clearly within the statutory definitional language of "coal or other mine," the question of whether or not the work activities which were taking place fell within the framework of the cited mandatory standards and can support the contested violations are matter to be determined by the facts on their individual merits.

In view of the statutory definitions of "coal or other mine" and "coal mine," i.e., "lands, structures, facilities, equipment, and other property used in, or resulting from mineral extraction . . . and/or the work of preparing the coal so extracted," it would logically follow that a preparation plant, or other supporting structures such as the silo and screen house in question, may reasonably be considered an important part of the coal extraction and processing scheme. When such structures are being constructed for the purpose of actively mining coal, MSHA has the authority to regulate such activities. Conversely, when such structures are being demolished for the purpose of removing them from an abandoned mine site, and there is no intent to replace them with new structures, or to resume the active mining of coal, one may logically conclude that these structures will no longer be used for coal extraction or coal preparation. However, these structures are nonetheless structures which are the result of the prior active mining of coal, including extraction and processing, and fall within the statutory definition of coal or other mine.

Lancashire's posthearing arguments at page 15 through 20, that the mine structures in question did not fall within the statutory definition of "coal or other mine" are rejected. Lancashire's reliance on former Judge Jon D. Boltz's April 21, 1981, decision in Kaiser Steel Corp., 3 FMSHRC 1052 (April 1981), in support of its statutory definitional analysis and conclusion that the mine structures in this case bear no rational relationship to "coal preparation" is likewise rejected. The Kaiser Steel Case, which was not appealed to the Commission, and does not reflect a binding Commission decision on me, concerned an impoundment dam located near a mine site, and whether or not the water from the dam "is used or to be used" in the "work of preparing the coal."

Although it is true that the old Lancashire silo and screen house preparation plant facilities which were being demolished at the time of the inspections in question were not currently being used in connection with any coal preparation work, and had not been used for years, the fact is that the silo was at one time used to store coal processed by the plant, and the screen house was used as well as part of coal preparation and processing. Under the circumstances, it seems clear to me that these old structures were in fact the result of coal preparation and processing, as those terms are normally understood. Indeed, since the coal from the previously active underground mine was processed through the old plant facilities, one may reasonably assume that a nexus existed between the coal being extracted from the underground mine, and the coal being prepared and processed through the surface preparation facilities and structures. The fact that the old silo and screen house had not been used since 1971, as testified to by Mr. Falger (Tr. 168-170), is immaterial. The applicable statutory definition of "coal or other mine" under which jurisdiction attaches in this case is not related to any time factor, and its application has consistently been given its broadest possible interpretation by the courts as well as the Commission.

In a case under the 1969 Coal Act, Jones and Laughlin Steel Corporation v. MESA, Docket No. PITT 76X198, former Chief Administrative Law Judge Luoma of the Department of the Interior decided on February 22, 1977, that a refuse pile on the mine operator's land was part of a coal mine and subject to the Act. The refuse pile consisted of material taken directly from the mine, such as waste from roof falls, construction material, etc. It apparently was largely slate but contained some coal. The refuse pile was approximately 50 years old and had not been used since 1967. Judge Luoma concluded that the refuse pile was a surface area of the mine, since it was "composed of material which resulted from, the work of extracting coal." (Emphasis added).

Alexander Brothers, Inc., 4 FMSHRC 541 (1982), another case arising under the 1969 Coal Act, involved the reclamation of coal from a refuse pile created during the operation of a mine which was closed in 1967 after being operated from the 1930's. The pile contained coal, rock dust, garbage, timber, wood, steel, dirt, tin cans, bottles, metal and general debris. Alexander Brothers removed and screened the materials to market approximately 20 to 25 percent of the coal which was in the pile and sold it to various brokers. The Commission determined that Alexander Brothers was engaged in the work of preparing coal and that the fact that it had nothing to do with the extraction of coal, and that the work in removing the debris from the coal differed from the ordinary preparation plant did not remove it from the jurisdiction of the Act.

Westwood Energy Properties, PENN 88-42-R, etc., decided in part by the Commission on December 20, 1989, involved a culm bank or refuse pile created as the refuse product of an underground coal mine and its preparation plant which operated from 1913 to 1947, and the preparation plant was destroyed and its remains became part of the refuse pile which was located on land owned by Westwood. After the underground mine was closed, another company operated a "fine" coal plant, separating fine coal from the waste material and selling it, and this operation was inspected by MSHA or its predecessor agency. Westwood constructed an electrical generating facility on the land in 1986, and it became operational in 1988. Westwood engaged a contractor to remove wood, metal, and other waste materials from the bank, and the coal materials from the bank were further processed and burned to produce steam which generated electricity by steam driven turbines, and the electric power which was produced was sold by Westwood to a power company.

Commission Judge James Broderick rejected Westwood's argument that its facility is outside the coverage of the Mine Act because it is a power plant burning fuel rather than an operation engaged in the production of a marketable mineral, Westwood Energy Properties, 11 FMSHRC 105 (January 1989). Judge Broderick found that "the culm bank clearly resulted from the working of extracting coal . . . and that a literal construction of the statutory language" defining a "mine" under section 3(h)(1) of the Act covered Westwood's culm bank. 11 FMSHRC 110. Judge Broderick stated in part as follows at 11 FMSHRC 115:

> I am persuaded that the sweeping definition of a coal or other mine in the Act, and the admonition in the Legislative History that the term be given the broadest possible interpretation brings Westwood's facility within its terms. Any doubt that the culm bank is or includes "lands . . ., structures, facilities, . . . or other property including impoundments, . . . on the surface or underground, used in, . . . or resulting from the work of extracting such minerals from their natural deposits . . ." must be resolved in favor of coverage.

The Commission concluded that Westwood's activities fell within the appropriate Mine Act definitions and were therefore within the Secretary of Labor's statutory authority, and it stated as follows at page 6 of its slip opinion:

> The parties agree that Westwood's culm bank is comprised of materials resulting from Westwood Colliery's extraction of anthracite coal from its underground coal mine. Accordingly, the culm bank literally falls within the statutory definition of

"mine" since "it result[s] from the work of extracting . . . minerals from their natural deposits . . . ." 30 U.S.C. § 802(h)(1). See Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986) (coal refuse pile is a "mine").

In view of the foregoing findings and conclusions, and after careful consideration of all of the arguments advanced by the parties, I conclude and find that the mine site where the reclamation or demolition work in question was taking place in this case is a "mine" within the definitional language found in sections 3(h)(1) and 3(h)(2) of the Act, and that at the time of the inspections in question MSHA had enforcement jurisdiction and authority over that mine facility. Lancashire's arguments to the contrary ARE REJECTED.

Section 104(a) "S&S" Citation No. 2891509, April 17, 1989, (Docket No. PENN 89-193-R

Fact of Violation, 30 C.F.R. § 77.1712

Lancashire is charged with an alleged violation of mandatory standard 30 C.F.R. § 77.1712, for failing to notify MSHA's district office prior to reopening the mine. Section 77.1712, provides as follows:

> Prior to reopening any surface coal mine after it has been abandoned or declared inactive by the operator, the operator shall notify the Coal Mine Health and Safety District Manager for the district in which the mine is located, and an inspection of the entire mine shall be completed by an authorized representative of the Secretary before any mining operations in such mine are instituted. (Emphasis added).

Lancashire takes the position that section 77.1712, is inapplicable to its decision to hire a contractor to demolish the surface structures in question. In support of its position, Lancashire argues that the language of the standard is intended to apply to situations where a mine is "reopened" for the purpose of resuming "mining operations." Lancashire's interpretation of the language "reopened for mining operations" is that the mine is being reopened for active extraction or preparation of coal, and it cites the Dictionary definition of "reopen" as follows: "To open or take up again. To start over; resume," Lancashire asserts that the reclamation work at issue in this case had nothing whatsoever to do with the reopening of the mine for active coal extraction or coal preparation, and that the work being performed by the contractor simply entailed the removal of surface structures, and confirmed the appropriateness of MSHA's decision to permanently abandon the mine. Lancashire concludes that MSHA has failed to prove by any competent evidence that the

mine was being "reopened" or that Lancashire intended to resume active "mining operations." Under these circumstances, Lancashire further concludes that it had no duty to notify MSHA prior to the performance of the reclamation work in question, and that a violation has not been established.

During the course of the hearing in response to my bench question concerning any MSHA policy guidelines which may be applicable to the facts concerning this issue, MSHA's counsel stated that the facts in this case are unique, and while MSHA's program policy manual discusses jurisdiction, counsel stated that "it's probably correct" that the precise factual situation in question is not specifically addressed in MSHA's policy manual (Tr. 132).

In its posthearing brief, MSHA argues that through its Part 45 Independent Contractor Program Policy Manual (exhibit R-8), it has explicitly stated its policy of inspecting demolition activities by independent contractors, and that the citation issued by the inspector is consistent with this policy. MSHA asserts that its policy manual interprets the word "reopening" in section 77.1712, "quite differently" than Lancashire. MSHA asserts that Part 45.3 of the manual lists the types of activities by independent contractors which require contractors to obtain MSHA identification numbers, and that certain of these activities, i.e., demolition of mine facilities, reconstruction of mine facilities, and earthmoving activities would typically be done after active coal production or processing has ceased. Further, MSHA cites a policy manual provision which states that "mine operators have compliance responsibility for all activities at the mine, regardless of whether or not the independent contractor in question has an MSHA identification number," and it concludes that the phrase "all activities" included the demolition work performed by K & L at the Lancashire site.

MSHA's reliance on its Part 45 manual policy in support of its conclusion that the phrases "reopening" and "any mining operations" clearly include, or are intended to include, demolition work in connection with a previously abandoned mine site within the meaning of section 77.1712, is rejected. The issue with respect to the application of section 77.1712, in this case lies not in whether or not an independent contractor has an MSHA identification number, but rather, whether the standard may be reasonably interpreted to apply in a factual situation where it seems clear to me that a previously permanently abandoned mine site is not being reopened for the purpose of resuming the active mining or preparation of coal.

MSHA's Part 45 independent contractor regulations are intended to facilitate MSHA's enforcement policy of holding contractors responsible for violations committed by them or their employees. Contractors performing "services or construction" at

a mine are not required to obtain an identification number by the regulations, but if they are engaged in the kinds of activities listed in MSHA's policy manual, they are required to obtain a number. However, pursuant to MSHA's policy found at page 10, of the manual in question, independent contractors are still responsible for compliance with MSHA's mandatory health and safety standards, regardless of whether or not they have an MSHA number. In my view, the policy list in question simply refers to examples of the kinds of "services or construction" activities which require a contractor to obtain an MSHA identification number. The list is obviously intended to assist MSHA and its inspectors to track the activities of a contractor at a mine site to insure compliance with any mandatory standards. If MSHA is concerned about a contractor performing such services at a previously abandoned mine site without its knowledge, I see no reason why it cannot include its policy guidelines as part of its Part 45 regulations, or otherwise require a contractor to obtain an identification number or to inform MSHA of these activities before beginning any work.

In my view, the fact that MSHA's Part 45 policy requires a contractor performing demolition work to obtain an MSHA identification number, and the fact that such work in connection with the mine structures which are the result of past coal extraction and preparation, support a conclusion that the situs of the work fits the statutory definition of "coal or other mine" for purposes of Mine Act and MSHA jurisdiction, does not ipso facto establish that the demolition work falls within the ambit of section 77.1712.

Neither party in these proceedings has made reference to MSHA's policy statements regarding section 77.1712. MSHA's current policy regarding this section is found in Volume V, Part 77 of its Program Policy Manual, pgs. 204-205, July 1, 1988, and it states as follows:

> 77.1712 Reopening Mines; Notification; Inspection Prior to Mining
>
> Failure of the operator to notify MSHA of the reopening of the mine before operations begin is a violation of this Section. Failure to have all the plans, programs and systems submitted during this inspection is not necessarily a violation. During a reopening inspection required by Section 77.1712, the inspector should ascertain that the operator is fully informed and aware of the applicable plans, programs, and systems required by Part 77.

MSHA's prior policy manual, chapter III, pgs. III-352-353, March 9, 1978, with respect to section 77.1712, included a listing of the "plans, programs, and systems" required by Part 77,

and they include the mandatory regulatory requirements for training programs, refuse piles, impoundment structures, ground control plans, mine maps, emergency communications, emergency medical assistance and transportation arrangements, and slope and shaft sinking plans. The past and present policy statements contain absolutely no references with respect to the meaning of the terms "reopening" and "mining operations," and they do not mention demolition or construction work.

MSHA's definition of a "permanently abandoned mine," which is found in its computerized coding system for tracking the status of a mine, category GC, defines such a mine as follows: "The work of all miners has been terminated and production activity has ceased and it is not anticipated that activity will resume in the near future" (emphasis added). In the course of pre-trial discovery, MSHA produced a list of 12 mine sites in District No. 2, which had at one time been placed in a permanently abandoned status after active coal mining ceased (Exhibit R-9). The information furnished by MSHA reflects that these mines were subsequently reactivated, but there is no information as to the nature of the activities which took place after the reactivations. During the course of the hearing, and in response to my inquiries as to the nature of the activities which were taking place at the time the mines were reactivated, MSHA's counsel stated he had not provided this information because "I wasn't asked that in discovery" (Tr. 21, 29). Counsel indicated that a witness was available to supply this information and that testimony would be adduced to further explain the activities which took place at these previously abandoned and reactivated mines (Tr. 21).

Inspector Niehenke testified that a mine operator has a duty to reclaim and tear down structures that are left at an abandoned mine, but that once a mine has been declared permanently abandoned, MSHA's duty to inspect it ceases. He further stated that pursuant to MSHA's policy manual, if demolition work is being done at a mine which had been permanently abandoned, and MSHA is aware of it, the mine would be removed from its permanently abandoned status and placed in an active status. In the case of the Barnes & Tucker No. 20 Mine, where demolition work was performed by Mr. Morchesky in 1986 and 1987, Mr. Niehenke confirmed that he conducted an electrical inspection at the site, but did not inspect the demolition work because his supervisor instructed him not to and offered no explanation as to why he should not inspect the demolition work.

Mr. Niehenke also alluded to an inspection and citations which he issued at the No. 24-D Mine Portal, and confirmed that shaft sealing work was being conducted at that time and that he was instructed to go to that site to inspect it. He further confirmed that the shaft sealing work was still in progress and had not been completed at the time of his inspection, and that

the mine had not "apparently" been placed in an abandoned status at the time of his inspection.

Mr. Niehenke confirmed that once a mine has been placed in a permanently abandoned status, MSHA would not inspect the facility unless the mine operator took some action that indicated that he intended to resume coal production and processing. He further confirmed that in all of his experience as a mine inspector he was not aware of any time that MSHA has asserted enforcement jurisdiction at an abandoned mine site solely because of any demolition work taking place at such a mine. The affidavit of retired MSHA Inspector Thomas J. Simmers also reflects his understanding that inspections would not resume at mine sites which had been permanently abandoned unless there some indication that the mine operator intended to resume the production and processing of coal. Inspector Sparvieri confirmed that MSHA's Part 45 policy manual does not address demolition work performed at a previously abandoned mine (Tr. 74-75).

No further testimony, evidence, or other information was forthcoming from MSHA with respect to the activities which were taking place at the previously abandoned and reactivated mines in question, and counsel does not address the matter in his post-hearing brief. Lancashire's counsel concludes that the obvious inference from this lack of testimony and evidence is that none of the listed facilities involved an attempt by MSHA to exercise enforcement jurisdiction over any activity even remotely similar to demolition work being performed at a permanently abandoned facility as part of the reclamation of that facility and merely enforces the conclusion that MSHA's position in this case is novel.

In connection with the jurisdictional question raised by Lancashire, the record includes an exchange of memorandums between MSHA's District No. 2 and MSHA's Arlington, Virginia headquarters and Associate Solicitor for Mine Safety and Health, Edward P. Clair (Tr. 31-40; exhibits R-36 through R-38). The jurisdictional inquiry was initiated by the district manager after the fatal accident and the jurisdictional question raised by Lancashire at the time of MSHA's accident investigation and inspections which followed (Tr. 33-35).

In his memorandum of May 2, 1989, (exhibit R-37), Mr. Clair states in part as follows:

> It has been asserted by Lancashire Coal and K & L that since the mine site was placed in CG status by MSHA on September 6, 1988, the Agency no longer has jurisdiction over the site. However, in our view, the cessation or abandonment of mining activity at a site does not necessarily preclude MSHA from reasserting jurisdiction in the future. Should new work begin or

similar activity recommence at the site at a later time, MSHA would need to evaluate the activity being performed. If that work came within the definition of a "mine," MSHA's responsibility would be to inspect and regulate the site under the Mine Act. (Emphasis added).

Relying on the definitional language of "mine" found in section 3(h)(1) of the Mine Act, and MSHA's Part 45 Program Policy Manual, Mr. Clair concluded as follows:

> Applying this language to the facts outlined above, it is our view that the activities being conducted by K & L at the Lancashire Coal Company site are mining activities within the meaning of the 1977 Act. The demolition and dismantling being performed involves structures, facilities and equipment which were "used in" and, hence, are now "resulting from" the work of extracting and preparing coal at the site. Just as the wording "to be used in" reflects Congress's intent that construction of structures and facilities involved in extraction and preparation of coal is subject to MSHA jurisdiction, the language "resulting from" similarly reflects coverage of activities involving the demolition or dismantling of those same facilities and structures. This view is consistent with longstanding MSHA policy requiring independent contractors performing demolition of mine facilities to obtain an MSHA identification number.

The record also includes an additional memorandum issued by Mr. Clair on May 24, 1989, in connection with a question concerning MSHA's jurisdiction over a reclamation project identified as the "Huntsville Gob" (Tr. 201-205; copy furnished by MSHA's counsel and submitted by Lancashire's counsel by letter of November 2, 1989, Tr. 277).

Based on the facts presented in the memorandum, it would appear that the Huntsville Gob reclamation project concerned a contractor who hauled gob materials from the site to a power plant in order to reduce the amount of gob which was to be reclaimed at the site. The contractor was required to "dry screen" the gob prior to loading and hauling it from the site in order to eliminate the waste materials from the coal fines which were apparently hauled away and used by the power plant which paid a percentage of the haulage costs. This money went directly to the State's abandoned mine land fund. In concluding that MSHA did not have jurisdiction over the gob project in question, Mr. Clair's memorandum states in relevant part as follows:

> Under Section 3(h)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the term "mine" includes

not only land from which minerals are currently extracted, but also land "resulting from" the work of extracting minerals. On the basis of this language, MSHA has jurisdiction over certain reclamation activities, such as surface work performed by the mine operator immediately following mining to restore mined land to its original contour. However, other activities more remote from mining, such as reclamation work occurring on previously mined abandoned lands are not subject to the Mine Act.

The factors considered when determining MSHA's authority in such cases include (1) the nature of the activities, particularly in relation to activities normally associated with mining; (2) the relationship in time and the geographic proximity of the activities in question to active mining operations; (3) the nature of the land at the time of the activities; and (4) the operational relationship of the activities to active mining operations, including the control and direction of the workforce and the degree to which equipment or facilities are shared with active mining operations.

Applying these criteria to the Huntsville Gob, it is our conclusion that MSHA does not have jurisdiction over the reclamation activities in question primarily because of the nature of the activities, and the amount of time which has elapsed since mining took place on the site. These activities involve coal handling which is incidental to the reclamation process. The Federal Mine Safety and Health Review Commission (Commission) has held that "inherent in determining whether a preparation operation is a mine is an inquiry not only into whether the operator performs one or more of the listed work activities, but also into the nature of the operation." Secretary v. Elam, 4 FMSHRC 5 (1982). In the case at hand, coal screening and coal removal from the reclamation site is incidental to the reclamation process. There is no exchange of money for the coal fines, and the screening and transportation serve primarily to remove and dispose of the product from the reclamation site. (Emphasis Added).

I have difficulty finding any meaningful factual or legal distinctions which formed the basis for Mr. Clair's advisory memorandums concerning Lancashire's demolition or reclamation work and the reclamation work of the Huntsville Gob contractor who was engaged in activities normally associated with active coal mining. The contractor screened, loaded, and transported from the site coal fines which I assume resulted from coal extraction activities which had at some time in the past taken place at the site. Mr. Clair concluded that these activities

were primarily for the purpose of removing and disposing of the product from the site. In the instant proceedings, Lancashire was simply removing some old structures from the site as an initial step to the ultimate reclamation of the site, and its activities in this regard were primarily for the purpose of removing and disposing of these "products" from the site. In my view, these activities were no less "incidental" to the reclamation process, and indeed were further removed from any "coal handling" than the work performed by the Huntsville Gob contractor.

Although I am not bound by inconsistent and contradictory MSHA memorandums, I do find the rationale and criteria advanced by Mr. Clair in making his determinations to be relevant with respect to the kinds of activities encompassed by section 77.1712. For example, the Lancashire memorandum suggests the need to evaluate any "new work" or "similar activity" which may recommence after a site has been abandoned. The Huntsville Gob memorandum enumerates certain criteria to be followed with respect to any activities at a previously abandoned mine site, and they include (1) the nature of the activities in relation to activities normally associated with mining; (2) the relationship in time of the activities to active mining operations; (3) the nature of the land at the time of the activities; and (4) the operational relationship of the activities to active mining operations, including the control and direction of the workforce and the degree to which the equipment or facilities are shared with active mining operations.

On the basis of the facts and evidence adduced in these proceedings, I cannot conclude that the demolition and removal of the structures in question from the abandoned mine site in question were closely associated with activities normally associated with active coal mining. It is undisputed that active coal mining had not taken place at the site for at least 6-years prior to the demolition activities in question, and the underground shafts were permanently sealed in 1986, and MSHA declared the mine permanently abandoned in 1988. Mr. Falger's unrebutted credible testimony suggests that the structures which were being demolished and removed from the site had not been used in any mining activity for at least 18-years prior to their demolition. There is no evidence that Lancashire ever intended to resume any active coal mining activities at the time the demolition work was taking place. The site was dormant, and there is no evidence that Lancashire had taken any action to resume the extraction or processing of any coal after the site was declared permanently abandoned. Further, the demolition work was being done by K & L, and there is no evidence that any Lancashire employees were performing any of this work.

The regulatory language found in section 77.1712, requires a mine operator to inform MSHA before reopening an abandoned mine

and MSHA is required to inspect the mine before any mining operations are instituted. No reference is made to any activities such as demolition work. As noted earlier, MSHA's policy statements concerning the application of section 77.1712, do not mention demolition work, and there is no MSHA regulatory standard requiring the filing of any demolition plan with MSHA prior to that kind of work. The "plans, programs, and systems" alluded to in the policy statements concerning section 77.1712, are matters normally associated with active coal extraction and production. MSHA's reliance on its Part 45 policy statements in connection with its "longstanding policy" requiring independent contractors performing demolition work to obtain mine identification numbers, does not bear any rational or reasonable relationship to the obligations and duties which may be imposed on a mine operator pursuant to section 77.1712. Further, the testimony of the MSHA's inspectors in this case indicates to me that they were either confused or ignorant of any clearly defined policies concerning the inspections of demolition work at a previously abandoned mine site, and that such inspections have not been routinely or otherwise made. MSHA's failure to produce any further information concerning the 12 previously abandoned mine sites which were subsequently reactivated, raises a strong inference that the activities which resumed at those sites were activities normally associated with active coal production rather than demolition or reclamation activities.

Although I have concluded that the abandoned mine site in question constitutes a "mine" as that term is defined in the Mine Act, and that MSHA has enforcement jurisdiction, I cannot conclude that MSHA has established a violation of section 77.1712 by a preponderance of the evidence. I conclude and find that in order to establish a violation of section 77.1712, there must be some indicia of active coal mining operations, or at least some evidence that a mine operator intended to resume the active mining of coal. On the facts and evidence adduced in this case, I cannot conclude that Lancashire reopened the previously abandoned mine for the purpose or intent of resuming any active coal extraction, production, processing, or preparation, activities which I believe are usually and normally associated with active mining operations. To the contrary, I conclude and find that the demolition activities by K & L were activities normally associated with the dismantling of a mine and removing the salvaged structures from the site in order to reclaim it, rather than activities incident to the resumption of any active coal mining. Under the circumstances, I further conclude and find that the demolition work performed by K & L was not within the scope or intent of section 77.1712.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish a violation of section 77.1712. Accordingly, the contested citation IS VACATED.

Section 103(k) Order No. 2888399, March 21, 1989, (Docket No. PENN 89-147-R)

Section 103(k) of the Act authorizes a mine inspector, in the event of an accident which occurs in a coal or other mine to "issue such orders as he deems appropriate to insure the safety of any persons in the coal or other mine, ..." In this case, Mr. Sparvieri confirmed that he issued the order to insure the safety of all mine personnel around the silo and screen house structures. The order, on its face, further states that it was issued to close the area to all persons except those needed to conduct and complete the accident investigation. Orders of this kind are typically issued by MSHA to secure the scenes of accidents, to insure the continued safety of mine personnel, to preserve evidence, and to facilitate MSHA's statutory authority to investigate accidents. See: Miller Mining Company, Inc. v. FMSHRC and Secretary of Labor, 3 MSHC 1017 (9th Cir. 1983). I find nothing unusual or unreasonable in the inspector's action in issuing the order in this case, and IT IS AFFIRMED.

Section 107(a) Imminent Danger Order No. 2888400, March 21, 1989, (Docket No. PENN 89-148-R

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

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operation Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." In the Old Ben Corp. case, the court stated as follows at 523 F.2d at 31:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added).

The evidence in this case establishes that at the time of the issuance of the order, Inspectors Sparvieri and Kuzar had both personally observed the condition of the silo and the screen house. Mr. Sparvieri's credible testimony establishes that a large portion of the silo base was missing, and that several of the steel reinforcing bands which had been around the structure had been cut and were hanging down. The employee who was killed had returned to the base of the silo where he had previously performed work cutting some of the bands to resume the cutting of additional bands with a torch, and as he prepared to do so the base of the structure collapsed and inundated him with the materials which came out of the silo. Having viewed the silo structure after the accident, Mr. Sparvieri concluded that it was in a weakened and unsafe condition, inadequately supported, and posed a hazard and danger to employees or others on the property who might venture near it. Indeed, the structure collapsed on its own several days later after the order was issued.
Mr. Sparvieri's conclusions regarding the condition of the silo, as he viewed it, were based on his observations of the missing portion of the base of the structure, and the supporting bands which had been cut and hanging down. While it is true that the bands were deliberately cut in order to weaken the structure to facilitate its collapse and ultimate removal from the mine site, the fact remains that after the accident, the silo was in fact in a weakened and dangerous condition, subject to collapse at any time, particularly if work were allowed to continue.

With regard to the screen house structure, Mr. Sparvieri believed that it too was in a weakened and hazardous condition. Although he did not know how much work had been done on the support legs to weaken them, he nonetheless expressed his concern about the safety of the structure. His principal concern focused on the pieces of steel and tin siding materials which he observed hanging from the top and sides of the structure as shown in the photographs which he took of the structure while it was still erect. Mr. Sparvieri believed that these overhanging materials resulted from the condition of the structure, and that they were not deliberately torn of or stripped away while the structure was being dismantled. However, he conceded that he did not know that this was in fact the case, and agreed that if the steel siding were being stripped away, the partially stripped materials would remain in place if the job were interrupted (Tr. 77).

None of the employees who were working at the site at the time of the accident were called for testimony in this case. There is no testimony of record from either Mr. Falger or Mr. Morchesky with respect to the overhanging siding materials which concerned Mr. Sparvieri. Nor is there any testimony as to when these materials may have been stripped away from the structure and left in the condition noted by the inspector. Since they were in place shortly after the accident, one may reasonable conclude that they were in this condition when employees were

working at the base of the structure notching the legs and performing other work. Mr. Sparvieri believed that the materials posed a hazard to these employees working beneath them, and several employees informed him that they had notched the legs sometime during the day of the accident.

In describing the work performed by his employees on the morning of the accident, Mr. Morchesky confirmed that both the silo and the screen house were being weakened so that they could ultimately be collapsed. The notches were cut in the screen house to facilitate the installation of cables which would have been used to collapse the structure. He conceded that the work was dangerous, and that his crew worked in "two man" teams while one man worked and the other man stood by "with his hand on somebody's shoulder to pull him free and clear of anything, if something was going to happen" (Tr. 251). He conceded that the silo "was not weakened exactly as it was supposed to" (Tr. 251), and Inspector Kuzar, who was present when the screen house was finally taken down, confirmed that while it took some effort to take it down, "it didn't come the way they were planning on it coming down" (Tr. 227). Mr. Kuzar also expressed his concern about the presence of workers under the overhanging siding materials while they were engaged in the notching of the screen house legs (Tr. 227).

After careful review of all of the testimony and evidence with respect to the conditions of the silo and screen house structures at the time the contested order was issued, I conclude and find that the conditions, as described by Inspector Sparvieri, and as corroborated by Inspector Kuzar, could reasonably be expected to cause death and serious physical harm to the employees who were working under and around these structures if the normal work operations were permitted to proceed in those areas before the dangerous conditions were eliminated. Under the circumstances, I conclude and find that Inspector Sparvieri acted reasonably and that his decision to issue the order was justified. Accordingly, the contested imminent danger order IS AFFIRMED.

Section 104(a) non-"S&S" Citation No. 2891508, April 17, 1989, (Docket No. PENN 89-192-R

Fact of Violation, 30 C.F.R. § 45.4(b)

Lancashire is charged with a violation of 30 C.F.R. § 45.4(b), which provides as follows:

> (b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make

this information available to any authorized representative of the Secretary upon request.

Lancashire does not dispute the fact that it failed to maintain the information required by section 45.4(b), and indeed stipulated that the information was not maintained in writing at the work site. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Section 104(a) "S&S" Citation No. 2891501, March 21, 1988, (Docket No. PENN 89-149-R)

Fact of Violation, 30 C.F.R. § 77.200

Lancashire is charged with a violation of 30 C.F.R. § 77.200, which provides as follows: "All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees."

The inspector issued the citation after observing that several reinforcing bands had been cut from around the base of the silo, weakening the structure (Photographic Exhibits R-16, R-17, R-18). He believed that the removal of the bands affected the stability of the structure, and that part of it had collapsed, further weakening it. Under these circumstances, the inspector concluded that the silo was not maintained in good repair to prevent accidents or injuries to employees as required by the cited standard. He also believed that the standard applied to demolition work, and the fact that the structure was being torn down still required it to be maintained in a safe condition so that the employees working to dismantle it were not exposed to a risk of injury.

With regard to the screen house structure, the inspector did not believe that it was maintained in good repair because he observed loose sheet metal siding materials hanging from the sides of the structure (photographic exhibits R-15, R-20, R-21, R-25). He believed that these materials posed a hazard and risk of injury to the employees who were working on the ground in and around the structure and under the materials. Under these circumstances, the inspector concluded that the structure was not maintained in good repair as required by the standard.

The inspector determined the condition of the screen house through observation only, and he did not know to what extent the siding materials were secured to the structure (Tr. 64). He did not know for a fact that the materials had been stripped away from the structure during the demolition work, and stated that "its possible that stuff had fallen off and not been stripped off," and that due to the condition of the structure as he viewed it, it appeared that the loose overhanging materials had fallen

off (Tr. 63, 75). He did not know when the site was last inspected by MSHA, and except for the bands which had been cut away from the silo, and the notches which had been made in the support legs of the screen house, he assumed that both structures were in the same condition as he found them at the time the demolition work began (Tr. 75). The inspector believed that a structure which is being taken down could still be maintained in good repair, and he agreed that one cannot conclude by simply looking at a structure while it is being demolished that it is not in good repair pursuant to section 77.200 (Tr. 76).

Lancashire argues that the "disrepair" associated with the silo was the result of the demolition work, and that with respect to the screen house, the inspector had no evidentiary support for his belief that the materials which were hanging from the side of the structure may have been in that condition prior to the beginning of the demolition work. Since there is no evidence that any of the MSHA inspectors who had performed periodic inspections at the work site prior to 1988, had cited Lancashire for permitting loose metal to hang from its screen house, Lancashire concludes that it was maintained in good repair prior to the beginning of the demolition work in 1989.

Lancashire asserts that at the time of the accident, all demolition work stopped "mid-course" after the contractor purposely weakened the two structures in accordance with its demolition plan, and that when the inspector initially viewed the structures during his accident investigation, the structures were viewed in their partial state of demolition. Lancashire argues that it is obvious that any time demolition work is being performed and is stopped mid-course, a structure could be found not to be in "good repair." Lancashire points out that after MSHA took control of the demolition work, the screen house was demolished using the same plan devised by the contractor. Assuming that Inspector Sparvieri had stopped this MSHA-supervised demolition work at any given point after it had begun, but before it had been completed, Lancashire suggests that the inspector would have found the screen house to not be maintained in a state of "good repair." Under the circumstances, Lancashire concludes that regardless of who it is supervising or performing the demolition work, it could virtually always be cited for not maintaining a structure in "good repair" if the demolition work is stopped mid-course. Lancashire concludes that the evidence of record establishes that this is not a case where it failed to maintain the cited structures in good repair. Rather, Lancashire maintains that it simply hired a contractor who intentionally placed the structures in "bad repair" as part of its plan to demolish them, and that it makes no sense to cite Lancashire for not keeping them in good repair.

MSHA agrees that once a structure is demolished, it is clearly no longer in good repair and that it would be ludicrous

to require it to be maintained in good repair per se at all times. However, MSHA takes the position that the structures must be maintained in a condition to prevent injury to employees, and that throughout any demolition process the structures must be maintained in such a condition as to prevent injuries or hazard exposure to employees doing the work. MSHA concludes that the condition of the silo and the screen house were not maintained in a safe condition, and posed an injury risk to the employees working in those areas.

After careful consideration of all of the evidence in this case, I agree with MSHA's position with respect to the application of section 77.200, to the work which was being performed at the time of the accident. In my view, the fact that demolition work was taking place did not absolve Lancashire from its duty to insure that the structures were maintained in "good repair" to prevent accidents and injuries to those employees who were doing the work. Although the work was under the supervision of the contractor, Lancashire had a supervisory employee (Falger) at the work site after the shafts were sealed and the mine was abandoned. Part of Mr. Falger's duties involved security at the site, and he acknowledged that during his demolition negotiations with Mr. Morchesky, they visited the work area where Mr. Falger pointed out the structures to Mr. Morchesky and explained the work that was to be done (Tr. 144). At that point in time, I believe it is reasonable to conclude that Mr. Falger and Mr. Morchesky knew or should have known about the conditions of the two structures, and in particular the loose and overhanging materials at the top and side of the screen house.

Lancashire's arguments and suggestions that the silo and screen house were rendered in "disrepair" as a result of the demolition work which was interrupted mid-course by the accident and the MSHA orders which followed are rejected. While it is true that demolition work may result in the further deterioration of the structures being razed, the issue here is whether or not the conditions of the structures, as reflected in the unrebutted testimony of the inspectors, support a reasonable conclusion that they existed at the time the work was taking place, and whether they posed a hazard to the employees performing the work.

Lancashire has advanced no credible testimony or evidence to support any conclusion that the loose overhanging materials at the top and sides of the screen house were conditions which resulted from any demolition work which may have been interrupted mid-course, and posed no hazard to those performing the work. There is no testimony from Mr. Falger or Mr. Morchesky with respect to whether or not the siding materials in question were stripped away from the structure during the demolition work. Even if they were, I believe that Lancashire nonetheless had a duty to insure that these materials did not pose a hazard to the employees working in the areas below the materials.

Mr. Morchesky confirmed that on the day of the accident, his workers were working at the screen house notching the inside support beams and legs so that cables could be attached to pull the structure down (Tr. 251-252). The work orders for the screen house and silo (Joint Exhibits 1 and 2), simply reflect that K & L was to raze the structures and "dismantle and reclaim the scrap," and the documents include no details as to how this work was to be performed. Since the removal of each and every piece of sheet metal siding is costly and labor intensive, I believe that one may reasonably conclude that K & L intended to reclaim the scrap materials and haul it away after the structure was pulled down, rather than dismantling the structure piece-by-piece.

Although Inspector Sparvieri was uncertain as to whether or not the screen house conditions which he observed resulted from the demolition work taking place, he believed that the conditions were the result of the general condition of the structure and that the loose and overhanging materials should have been taken down in order to remove the potential for an accident or injury to the employees working below them. Given the fact that the structure had not been in use for many years, I believe that one may reasonably conclude that as a surface structure, it would be subjected to deterioration and corrosion through exposure to the elements over a long period of time, and that it is just as likely as not that the structure was simply left unattended over a period of time prior to the onset of the demolition work.

With regard to the silo structure, the accident report reflects that the employee who suffered fatal injuries had completed his work of cutting some of the steel support bands around the base of the silo approximately 15 minutes prior to the accident, and that he had returned to the base area with a cutting torch in his hand, and was observed in a kneeling position by another employee when the base gave way freeing the coal materials inside the silo and inundating him. Mr. Morchesky confirmed that while it was known that the silo was constructed of cement block, the work being performed by the victim was accomplished in order to weaken the structure so that once it started to topple, the weight of the topped screen house falling on it would crush the rest of the silo (Tr. 276). When asked whether anyone made any determination as to what was in the silo before this work began, and why any work to weaken it would be performed before anyone knew what was in it, Mr. Morchesky explained that one could observe the coal in the silo, at least up to the window level, but he could offer no explanation as to why so many of the bands had been cut, or why the accident victim returned with the base of the silo with his cutting torch. It seems reasonably obvious to me that no hazard assessment was made by Lancashire or K & L with respect to the stability of the structure in its weakened state after the initial cutting away of the support

bands, which one may also reasonably conclude caused it to give way.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has established by a preponderance of the evidence that the silo and screen house structures were not maintained in good repair to prevent accidents or injuries to the employees performing work as required by section 77.200, and the citation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the

contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

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

I conclude and find that the condition of the silo and screen house structures, as observed and described by the inspector, including the failure by Lancashire to insure that these structures were maintained in good repair, exposed the workers who had performed work in those areas both before and at the time of the accident to hazardous conditions. The worker exposed to the weakened condition of the silo suffered fatal injuries. The workers doing the work in and around the ground areas of the screen house were exposed to a falling materials hazard, and in the event they were struck by any of these materials, I believe that it was reasonably likely that they would sustain injuries of a reasonably serious nature. Accordingly, the inspector's significant and substantial (S&S) finding IS AFFIRMED.

Estoppel and Selective Enforcement Issues

As part of its pre-trial pleadings, and during the course of oral argument during the hearing in connection with its jurisdictional arguments, Lancashire contended that since MSHA failed to inspect similar prior demolition work performed by the same contractor at another mine site (Barnes & Tucker No. 20 Mine), MSHA was estopped from inspecting Lancashire's mine site, and that its attempts to do so in these proceedings constitutes arbitrary and capricious selective enforcement. Lancashire's posthearing brief does not address these issues.

Citing the applicable case law with respect to the doctrine of estoppel, MSHA argues that Lancashire has not met its burden of establishing any misrepresentations or misconduct on the part of MSHA with respect to its actions or inactions at the Barnes and Tucker mine site, and has not established that it has been prejudiced, or has suffered any detriment, by virtue of MSHA's refraining from inspecting its mine site until March 21, 1989. MSHA cites the testimony of the contractor (Morchesky) that his employees welcomed the presence of MSHA's inspectors at the site after the accident because "the more people around with opinions, everybody just felt better" (Tr. 253). MSHA concludes that the inspectors sought to regulate the mine site to protect the affected employees and others who may have been there.

With regard to the selective enforcement issue, MSHA cites the applicable case law, and concludes that Lancashire cannot meet its burden of proof establishing that it "was singled out for prosecution among others similarly situated and that the decision to prosecute was improperly motivated." MSHA points out that it has produced evidence that other mines in MSHA's Johnstown Subdistrict office which were placed in an abandoned status and then subsequently reactivated were inspected. During the course of the hearing, MSHA's counsel pointed out that immediately following the accident, the inspectors sought further advice with respect to the jurisdictional question raised by Lancashire, and subsequently returned to continue with their inspections after they were informed they were authorized to do so (Tr. 33). MSHA concludes that there is not a shred of evidence to suggest that MSHA was "improperly motivated" in seeking to regulate Lancashire's mine site, and that it did so to protect the safety of the employees who were working there.

In Secretary of Labor v. Superior Sand and Gravel, Inc., and Patrick K. Thornton, 2 FMSHRC 1308 (June 1980), Judge Broderick rejected a mine operator's defense that it was singled out for enforcement by MSHA because other operators were not being inspected and fined, and he cited Thompson v. Spear, 91 F.2d 430, 433-34 (5th Cir. 1937), cert. denied, 302 U.S. 762 (1938), where the court held as follows:

> [The agency's] mere inability does not render such enforcement as it accomplished wrongful. The fact that others violated the law with impunity is no defense. It is only when the enforcement agency is vested with a discretionary power and exercises its discretion arbitrarily or unjustly that enforcement of a valid regulation [violates the law].

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1980), the Commission rejected the doctrine of equitable estoppel with respect to a mine operator's liability for a violation. However, the Commission viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which may be considered in mitigation of the civil penalty. Further, Commission Judges have consistently rejected an operator's reliance on prior inspections and the lack of citations, and have held that the lack of prior inspections and the lack of prior citations does not estop an inspector from issuing citations during subsequent inspections. See: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983). In Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Court of Appeals for the Tenth Circuit, in affirming the

Commission's decision at 5 FMSHRC 1400 (August 1983), stated as follows at 3 MSHC 1588:

> As this court has observed, "courts invoke the doctrine of estoppel against the government with great reluctance" . . . . Application of the doctrine is justified only where "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation" . . . . Equitable estoppel "may not be used to contradict a clear Congressional mandate," . . . as undoubtedly would be the case were we to apply it here . . . .
>
> Although the record reflects some confusion surrounding MSHA's approval of Emery's training plan, as a general rule "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law" . . . .

After careful review of the record in these proceedings, and the arguments advanced by the parties, I agree with the position taken by MSHA, and I conclude and find that Lancashire has not established by a preponderance of any credible evidence that MSHA has acted arbitrarily or capriciously by exercising its enforcement and inspection authority at the mine site in question. I also reject Lancashire's selective enforcement argument, and I cannot conclude that MSHA was improperly motivated in initiating the enforcement actions in question against Lancashire. In my view, any inconsistencies or contradictions with respect to MSHA's enforcement policies and practices concerning demolition work at previously abandoned mine sites does not rise to the level of prejudicial arbitrary action against Lancashire.

History of Prior Violations

The parties have stipulated that for the 2-year period preceding the issuance of the contested violations, Lancashire had no assessed violations. I adopt this stipulation as my finding, and have taken this into consideration with respect to the civil penalties which I have assessed for the violations which have been affirmed.

Good Faith Compliance

The parties have stipulated that Lancashire demonstrated good faith in attempting to abate the alleged violations, and I adopt this as my finding and have taken it into consideration.

Gravity

In view of my "S&S" findings with respect to section 104(a) Citation No. 2891501, concerning a violation of 30 C.F.R. § 77.200, I conclude and find that it was a serious violation. With regard to Citation No. 2891508, concerning Lancashire's failure to maintain the information required by section 45.4(b), I conclude and find that the violation was non-serious.

Negligence

I agree with the inspector's moderate negligence findings with respect to the two citations which have been affirmed, and I conclude and find that the violations resulted from Lancashire's failure to exercise reasonable care.

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

The record reflects that at the time the citations were issued, Lancashire had one employee at the mine. The parties stipulated that payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business. I adopt this stipulation as my finding on this issue, and have considered these matters in the civil penalty assessments which have been assessed by me for the violations which have been affirmed.

Civil Penalty Assessments

With respect to Citation No. 2891501, for the violation of section 77.200, Lancashire takes issue with the basis for the "special assessment" of $3,000, as articulated by the "Narrative Findings" of MSHA's Office of Assessments. Specifically, Lancashire takes issue with the statement that "the cause of the accident was management's failure to provide an adequate plan for the safe demolition of the coal site." Lancashire asserts that it had no reason to believe that K & L's demolition plan was inadequate, and that it is inappropriate and highly unfair to charge it with not maintaining the structures in good repair while they were in the process of being demolished.

Inspector Sparvieri conceded that there are no MSHA mandatory regulations requiring a contractor or mine operator to file a demolition plan with MSHA prior to commencing the work (Tr. 109). Although the imminent danger order required K & L to submit a written demolition plan before continuing with its work, no written plan was submitted. However, Inspector Kuzar obviously accepted the verbal description of the demolition procedures as communicated to him by K & L while he was present when this work was taking place as adequate to insure the safety of the personnel doing the work. If this were not the case, I

would assume that Mr. Kuzar would not have allowed the work to continue in the absence of a written plan. Although the silo had already fallen down when Mr. Kuzar returned to the site, he confirmed that the procedures used by K & L to take down the screen house after the orders were issued and modified were essentially the same procedures followed by K & L prior to the accident. Under the circumstances, one may reasonably concluded from this that the lack of a demolition plan per se may not necessarily establish that the procedures followed by K & L were inadequate, or that the lack of a plan caused the accident.

It is clear that I am not bound by MSHA's "special assessment" for the violation in question, and that I may consider any appropriate mitigating circumstances, particularly with respect to Lancashire's negligence, in the assessment of a civil penalty for the violation in question. See: Allied Products Company v. FMSHRC, 666 F.2d 890, 896 (5th Cir. 1982); Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981); Marshfield Sand & Gravel, Inc., 2 FMSHRC 1391 (June 1980); Old Dominion Power Co., 6 FMSHRC 1886 (August 1981); Secretary of Labor v. Marion County Limestone Company, LTD., 10 FMSHRC 1683 (December 1982).

Although I have considered Lancashire's argument with respect to the asserted lack of a safe written demolition plan, and have considered the fact that it may have reasonably believed that it was not required to maintain the structures in good repair after MSHA permanently abandoned the mine and advised it that it would no longer inspect the facility, the fact is that the silo which collapsed and resulted in the death of the employee in question was not maintained in a safe condition as the work progressed and it was in a weakened condition at the time that the employee was working on it. In my view, closer supervision of the employee, inspection of the work which he had already performed, and at least some hazard assessment by K & L and Lancashire before the work began may have prevented the accident. Under these circumstances, although I have taken into consideration Lancashire's arguments in mitigation of the special assessment proposed by MSHA for the violation, and have affirmed the inspector's moderate negligence finding, I find no reasonable basis for any substantial decrease or increase in the civil penalty assessment proposed by MSHA.

In view of the foregoing findings and conclusions made by me in these proceedings, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the civil penalty assessments which I have made for the two violations which have been affirmed in these proceedings are reasonable and appropriate in the circumstances.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. PENN 89-147-R. Section 103(k) Order No. 2888399, IS AFFIRMED, and Lancashire's contest IS DENIED.

2. Docket No. PENN 89-148-R. Section 107(a) Imminent Danger Order No. 2888400, March 21, 1989, IS AFFIRMED, and Lancashire's contest IS DENIED.

3. Docket No. PENN 89-149-R. Section 104(a) "S&S" Citation No. 2891501, March 21, 1989, IS AFFIRMED, and Lancashire's contest IS DENIED.

4. Docket No. PENN 89-192-R. Section 104(a) non-"S&S" Citation No. 2891508, april 17, 1989, IS AFFIRMED, and Lancashire's contest IS DENIED.

5. Docket No. PENN 89-193-R. Section 104(a) "S&S" Citation No. 2891509, April 17, 1989, IS VACATED, and Lancashire's contest IS GRANTED.

6. Civil Penalty Docket No. PENN 90-10. Lancashire is assessed a civil penalty assessment in the amount of $2,800, for a violation of 30 C.F.R. § 77.200, as noted in the section 104(a) "S&S" Citation No. 2891501, issued on March 21, 1989. Lancashire is also assessed a civil penalty assessment in the amount of $20, for a violation of 30 C.F.R. § 45.4(b), as noted in the section 104(a) non-"S&S" Citation No. 2891508, issued on April 17, 1989.

Payment of the civil penalty assessments shall be made by Lancashire to MSHA within thirty (30) days of the date of these decisions and Order, and upon receipt by MSHA, the civil penalty proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 27 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. VA 89-68 A.C. No. 44-05748-03554
v.	:	
HIOPE MINING INCORPORATED, Respondent	:	Docket No. VA 89-69 A.C. No. 44-05748-03555 Mine No. 1
HIOPE MINING, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. VA 89-35-R Citation No. 2969642; 1/23/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. VA 89-36-R Order No. 2969654; 3/6/89 Mine No. 1 Mine ID 44-05748

DECISIONS

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner/Respondent;
Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, Abingdon, Virginia, for the Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concerns Notices of Contest filed by the contestant (Hiope) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the captioned citation and order issued by MSHA mine inspector Steven May. The civil penalty proceedings concern proposals for assessment of civil penalties filed by MSHA seeking

civil penalty assessments against Hiope for the alleged violations stated in the citation and order. Hearings were held in Kingsport, Tennessee, and the parties waived the filing of posthearing briefs. However, I have considered their oral arguments made on the record during the hearings in my adjudication of these matters.

Issues

The issues presented in these proceedings include the following: (1) Whether Hiope violated the cited mandatory safety standards; (2) whether the alleged violations were significant and substantial (S&S); and (3) whether the alleged violations cited in the contested section 104(d)(1) citation and order resulted from an unwarrantable failure by Hiope to comply with the cited standards.

Assuming the violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to the civil penalty assessment found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

2. Sections 110(a), 110(i), 104(d), and 105(d) of the Act.

3. Mandatory safety standards 30 C.F.R. §§ 75.400 and 75.220.

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

Stipulations

The parties stipulated to the following (Tr. 10; Joint Stipulation):

1. Hiope is the owner and operator of the No. 1 Mine.

2. The operations of the mine are subject to the jurisdiction of the Act.

3. The Commission and its presiding Administrative Law Judge have jurisdiction in these matters.

4. MSHA Inspector Steven May was acting in his official capacity as an authorized representative of

the Secretary of Labor, when he issued the contested citation and order.

5. True copies of the citation and order were served on Hiope or its agent as required by the Act. Copies of the citation and order, exhibits G-1 and G-2, are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

6. The imposition of civil penalty assessments for the alleged violations in question will not adversely affect Hiope's ability to continue in business.

7. The alleged violation stated in the section 104(d)(1) citation was timely abated.

8. MSHA's Proposed Assessment Data Sheet, exhibit G-4, accurately sets forth (a) the number of assessed non-single penalty violations charged to Hiope for the years 1986 through April, 1989, and (b) the number of inspection days per month during this time period.

9. MSHA's Assessed Violations History Report, exhibit G-3, may be used in determining the appropriate civil penalty assessments for the alleged violations.

The parties agreed that Hiope's annual coal mining production was approximately 130,000 tons, that it employed approximately 30 miners, and may be considered a small mine operator (Tr. 5).

The parties further stipulated that the technical procedural requirements concerning the section 104(d)(1) citation and order issued by Inspector May (the section 104(d) "chain") have been met in these proceedings, and that there were no intervening "clean inspections" during the intervening time period when the supporting citation and subsequently issued order were issued by Inspector May (Tr. 8).

Discussion

Docket Nos. VA 89-36-R and VA 89-69

The section 104(d)(1) "S&S" Order No. 2969654, issued on March 6, 1989, by MSHA Inspector Steven May, citing an alleged violation of 30 C.F.R. § 75.220, states as follows (exhibit G-2):

> Approximately 12 feet of coal was mined from the pillar split of the No. 1 pillar block on the 001-0

section and a breaker line had not been established across the 001-0 pillar section. The approved roof control plan requires that all breakers (timbers) be installed prior to any mining along the pillar line.

The record reflects that the citation was issued at 11:06 a.m., and that Inspector May terminated it at 1:15 p.m., the same day.

MSHA's Testimony and Evidence

MSHA Inspector Steven May testified as to his background and experience, and he confirmed that he has served as an inspector for 7 years, previously worked for two coal mining companies, and holds certificates as a mine foreman, electrician, and a state mining inspector. He also confirmed that he conducted two complete inspections of the Hiope No. 1 Mine in November, 1988, and January, 1989. He stated that he was at the mine on March 6, 1989, for the purpose of giving a safety talk, and after completing this talk he decided to conduct an inspection. Referring to a sketch of the area which he made, exhibit G-15, he explained that he proceeded inby the belt conveyor area for two breaks where he gave his safety talk, and then went to the point marked "C" on the sketch where he found a continuous-mining machine "sumped up" in the block of coal (Tr. 18-23).

Inspector May testified that he issued the violation because mining had proceeded in the No. 1 pillar split without first setting eight timber breaker posts in each entrance, and that the failure by Hiope to first set these posts before commencing mining violated its approved roof-control plan and constituted a violation of section 75.200. He found the continuous-mining machine advanced approximately 12 feet into the No. 1 pillar block of coal, and no breaker posts were installed in this area. He observed no supply of timbers on the section. He identified the applicable roof-control plan, at page 9, exhibit G-16, and explained the plan requirements for installing posts before the No. 1 coal block is cut and taken. He also explained the mining and roof bolting cycles which follow the taking of the number 1 coal block (Tr. 24, 29-35). He confirmed that he issued the section 104(d)(1) order because "its something that the operator known (sic) or should have known" (Tr. 24).

Mr. May stated that the failure to follow the roof-control plan presented a roof fall hazard, and by taking a cut of coal without installing any roof support timbers, there was a danger of a roof fall. In the event mining had continued and the entire coal pillar were mined without any roof support timbers in place, a roof fall was reasonably likely. He also believed that it was highly likely that an injury would have occurred as a result of a roof fall and that the continuous-mining operator would be

exposed to disabling or fatal crushing injuries from such a fall (Tr. 36-38).

Mr. May confirmed that no mining was taking place, and no coal was being cut at the time he observed the mining machine. He also confirmed that the machine was not equipped with a canopy. Since there was nothing supporting the roof where the machine cut into the block of coal, he believed that the machine operator would be exposed to a roof fall hazard in that the roof could have broken out and fallen back beyond the end of the unsupported coal block.

Mr. May stated that he based his "high negligence" finding on the fact that mine management had knowledge of its roof-control plan and that it knew or should have known that cutting coal from the pillar block in question without installing the required roof support timbers was contrary to the plan. An additional factor which prompted him to issue the order was the fact that the continuous-miner operator Aaron Feeser was instructed to go to the area and to take the first cut of coal out of the coal block in question.

Mr. May stated that he spoke with section foreman Curt Armstrong when he issued the order but he could not recall specifically asking him why the cut of coal had been made without any roof support timbers. Mr. May confirmed that he observed no roof support timbers stored on the section, and that the lack of timbering presented a risk of a roof fall (Tr. 38-42).

On cross-examination, Mr. May confirmed that his inspection notes include a notation that if it were not for the fact that he found the mining machine "sumped up" in the coal block, he would not have issued the violation. He explained that regardless of the presence of the continuous-miner machine, he would have still issued the violation because of the fact that a cut was taken from the block without first setting timbers. If that cut had not been made, and no coal taken, he would not have issued it (Tr. 44). He confirmed that the "dots" shown at the top of exhibit G-15, reflect that roof support timbers had been installed at the locations shown. He also stated that in the event a continuous-mining machine "accidentally" cuts into a coal block the proper procedure is to stop mining and install roof support timbers. He agreed that in this case, no further mining took place after the machine cut into the coal block, and that management proceeded to install the required timbers.

Mr. May stated that 48 additional roof support timbers should have been installed before the first coal cut was taken, and confirmed that the coal block in question was the proper block to begin the mining cycle, but that no mining was taking place when he viewed the violative conditions.

Mr. May stated that Mr. Armstrong told him that the miner had accidentally cut into the coal block while Mr. Feeser was picking up gob, but that his notes reflect that Mr. Feeser told him he was told to cut into the coal block. Mr. May stated that he did not believe the coal cut was taken accidentally because there were two cuts of coal taken, and the mining machine had penetrated the coal block for a distance of 12 feet.

In response to further questions, Mr. May stated that given the size of the cut made into the block, it would have taken 10 minutes to make that cut, and if Mr. Feeser were only cleaning up gob, he would not have turned the machine into the block of coal. Mr. May also confirmed that he did not measure the size of the coal cuts made by Mr. Feeser, and that he estimated it by the location of the machine head lights which were 12 feet into the block. He also stated that Mr. Feeser told him that he had been instructed to clean up the gob and to cut the block of coal (Tr. 42-76).

Aaron Feeser testified that he was previously employed by Hiope in early August, 1989, and had worked there for 4 years as a roof bolter, scoop operator, and continuous-miner operator and helper. He was also a member of the union mine safety committee (Tr. 77-79).

Mr. Feeser confirmed that on March 6, 1989, he was working on the No. 1 section as a continuous-miner operator "getting ready to start the pillar section," and that prior to the inspector's safety talk "we had cleaned up a section and moved the miner across the section and started mining" coal from the first pillar block (Tr. 81). He stated that none of the pillars had been mined at that time and that he had just started one block and took approximately one-half of a cut of coal. He described the "cut" as 12 feet deep and "maybe" 18 feet wide. He observed no timbers set between the blocks. He confirmed that the miner machine is 10 feet wide, and that in order to take an 18-foot wide cut, "we'd cut into the block of coal on one side and back up and set it over and cut into the block again" (Tr. 82).

Mr. Feeser stated that he operated the miner for approximately 30 minutes cutting the pillar, and that mine foreman Curt Armstrong instructed him "to take the miner across the section and start the first block" (Tr. 82). He denied that Mr. Armstrong told him to go and clean up gob at that location. Mr. Feeser stated that there were "buggy men running buggies" in the area, and he believed there were three men other than himself in the area, and that Mr. Armstrong was on the section all morning (Tr. 83).

On cross-examination, Mr. Feeser stated that he was familiar with the mine roof-control plan and knew the requirements for setting timbers. He confirmed that during a meeting with Hiope's

counsel (Daniel Bieger) at the mine office sometime in March, 1989, he told Mr. Bieger that he was cleaning up the gob and had accidentally cut into the coal block (Tr. 86). He also confirmed that he attended an informal conference at MSHA's Richlands, Virginia office, and when asked whether he had stated at that time that he had accidentally cut into the block while picking up gob, Mr. Feeser stated as follows at (Tr. 86-87):

> Q. Okay. and you said the same thing to the informal conference man, that you accidentally cut into the block while you were picking up gob, didn't you?
>
> A. No.
>
> Q. You didn't tell them that when we were all sitting around the table, the same thing?
>
> A. No, not those words, I did not.
>
> Q. Okay. You told them that you were picking up gob, didn't you?
>
> A. I did.
>
> Q. And that you cut into the -- that you accidentally cut into the block?
>
> A. No.
>
> JUDGE KOUTRAS: What specifically do you remember telling them at the conference?
>
> THE WITNESS: I didn't tell them I accidentally cut into the block.
>
> JUDGE KOUTRAS: What did you tell them?
>
> THE WITNESS: They asked did I pick up gob? Yes, I did. Did I accidentally cut into the block? No, I did not.
>
> BY MR. BIEGER:
>
> Q. You didn't say -- you didn't tell them at the informal conference that you intentionally cut into the block?
>
> A. I wasn't asked.
>
> Q. Okay. And you didn't volunteer that?
>
> A. I wasn't asked.

Mr. Feeser confirmed that subsequent to the informal conference in question, he was laid off by Hiope and filed a grievance which went to an arbitration hearing. However, during the grievance process, he quit and went to work for his current employer. He denied that he changed his testimony because of any disagreement with Hiope in connection with this grievance (Tr. 93-94).

Mr. Feeser confirmed that he stopped the miner into the cut in the coal block when someone told him to "stop the miner" (Tr. 95). He stated that he was told to stop by "Curt (Armstrong) or Danny (McGlothlin) or it might have been a buggy man" (Tr. 95).

Mr. Feeser stated that he "sometimes" takes his safety committeeman's position seriously and that he feels some responsibility not to engage in unsafe practices (Tr. 96). He confirmed that he had picked up gob with his miner machine, but denied that he cut into the block while using the machine to push the gob against the block (Tr. 97).

Mr. Feeser stated that he spoke with Mr. May when the citation was issued and that he informed Mr. May that he was told to cut into the block by Mr. Armstrong (Tr. 98). When asked how far he would have to go into the coal block if he were cleaning up gob, he replied "maybe a foot" (Tr. 99). He stated that there was no need to cut into the block for 10 or 12 feet in order to pick up the gob, and when asked why he was told to stop mining, he replied "they told me we had an inspector . . . to stop mining, that we was going to set timbers" (Tr. 99). After stopping mining, Mr. May came to the section to give his safety talk and all operations stopped (Tr. 99).

Mr. Feeser stated that he made no complaint to anyone that he was "about to engage in an unsafe mining practice" and conceded that it should have been his duty as a safety committeeman to do so. He confirmed that at the time he spoke with counsel Bieger in the mine office, Mr. Bieger did not "bully or scare him" in any way (Tr. 100).

Mr. Feeser stated that he did not know in advance that Mr. May was coming to the mine to give a safety talk, and found out about it "when he come" (Tr. 102). When he was told to stop mining, he was not told that he was to stop because Mr. May was going to make a safety talk, and was simply told "stop mining, we had an inspector" (Tr. 102). He construed this to mean that the inspector "was coming inside and everything better be right." He confirmed that he knew the timbers were not set, and when asked why he did not refuse to work without the timbers being installed, he replied "I don't know. I was told to take the miner across the section and start mining," and that he said nothing to Mr. Armstrong (Tr. 103).

Mr. Feeser stated that a "complete cut of coal" would have been an area 20 feet by 20 feet, and that he took "half of one cut." He explained that his machine initially penetrated the coal block on one side for a distance of 6 feet deep, backed out, and then made another "pass" back into the coal block for approximately a 10 to 12 foot distance, and that the ultimate cut was approximately 18 feet wide (Tr. 105-107).

Mr. Feeser stated that if the roof had fallen while he was making the cuts he would have been in danger "if it would have run through an intersection," and if the fall did not go through the intersection, he would not have been in danger (Tr. 107). He stated that no timbers were set before Mr. May came to the cited location, and that Mr. May came to the area after completing his safety talk. He stated that he simply left the mine machine parked into the block of coal, that no one informed Mr. May that it was there, and that he came to the face area as part of his normal inspection routine (Tr. 109). Mr. Feeser confirmed that he was laid off, and not discharged by Hiope, and that his lay off had nothing to do with this case (Tr. 110).

Inspector May was recalled by the Court, and he confirmed that although he had previously visited the mine with other inspectors, he had been assigned to the mine for regular inspections 4-months prior to the time he issued the contested citation in question. He confirmed that there were no prior roof control violations at the face areas, and that the mine "didn't usually get too many roof control violations," and that he had not previously encountered a situation where coal was cut before the timbers were installed. He stated that he did not accept the assertion by Hiope that the block of coal had been cut accidentally, and he decided to issue the unwarrantable failure citation because he believed that Mr. Feeser was told to cut the coal block. When asked why anyone would tell Mr. Feeser to cut the coal in violation of the roof-control plan, Mr. May stated "obviously, he didn't think I was coming to the mine," and that it takes time to set all of the timbers, and "they'd go ahead and run and mine that coal and be setting the timbers in the process" (Tr. 113).

Mr. May stated that his inspection notes reflect that Mr. Armstrong told him that "by the time we get this row of pillars pulled we'll have the timbers installed." Mr. May believed that the timbers would have been installed eventually, but that the roof-control plan requires them to be installed before any coal is mined. He confirmed that he did not attend the MSHA violation conference (Tr. 114). He confirmed that he has never had any problems with Mr. Armstrong and considered him to be a fair person (Tr. 119).

Mr. May stated that after the citation was issued it took an hour to obtain the timbers, and another hour or so to install them. Mr. May stated that "anytime you pull a pillar there's a danger," and that if part of a coal pillar is pulled without first installing timbers there would be a danger because there is no way to get in to install timbers because one would have to be working in an unsupported roof area, and once the pillar block is split through, it is too late to install timbers (Tr. 120).

Hiope's Testimony and Evidence

Curtis A. Armstrong stated that he has been employed by Hiope as a section foreman for 4 years, has served as a section foreman for 16 years, and has worked in underground mines for 21 years. He stated that on the day in question the pillar section was just starting and he planned to begin the cycle of pulling the pillars. He stated that he instructed Mr. Feeser to take the miner machine to the pillar block of coal which was cited and told him that "that was the block that we were supposed to start." The gob, or loose debris, had been pushed up to the pillar block and needed to be cleaned up (Tr. 124). He believed that Mr. Feeser cut into the coal block when he was picking up the gob, and turned the machine into the block "and it started cutting." He denied that he told Mr. Feeser to start cutting the block, and stated that when this occurred he was installing curtains or checking the ventilation, and when he returned he found that the block had been cut and he stopped Mr. Feeser from further cutting (Tr. 126).

Mr. Armstrong denied that he knew that Mr. May was at the mine, and that he learned about his presence while in the process of installing timbers. He stated that approximately 50 timbers had already been installed that morning by the rest of the section crew, and that after instructing Mr. Feeser to stop cutting, he was to help set all of the required timbers before any mining was started. Referring to Mr. May's diagram, Mr. Armstrong explained where the timbers had already been installed, and where he intended to continue installing additional timbers. He denied that he intended to mine any blocks of coal without installing the timbers (Tr. 128).

Mr. Armstrong stated that the block of coal was cut at an angle, and he estimated that a cut of approximately 10 feet was taken, and since the miner was at an angle, the cut could end up 15 to 18 feet wide. He did not see the miner cutting into the block, was not present when it was cutting, and he did not know whether it went into the block of coal one or two times (Tr. 129). It was possible to have a wide cut with one pass of the miner because it went in at an angle (Tr. 129).

Mr. Armstrong stated that since the section was new and just starting up, he has to know exactly where to begin starting to

cut a block of coal once mining began, and that he instructed Mr. Feeser to take the miner to the block of coal in question and told him "This right here is the block that we will start" according to the mining plan (Tr. 130). With regard to the statement attributed to him by Inspector May, as reflected in his notes, Mr. Armstrong recalled some conversation with Mr. May but could not recall exactly what was said. He stated that he told Mr. May that "he knew that these timbers would be set there before this block was mined" (Tr. 131). He could not recall how much time passed from the time he told Mr. Feeser to stop cutting and Mr. May's arrival at the scene (Tr. 131). Everyone on the section was installing timbers at the time and no coal was being mined. No coal was mined after he told Mr. Feeser to stop cutting, and by the time Mr. May arrived, no coal had been mined (Tr. 132).

Mr. Armstrong stated that timbers were stored underground and that 60 timbers had been installed before Mr. May came to the area. Approximately 48 additional timbers were subsequently installed, and that a sufficient supply of timbers were readily available for the entire timbering job (Tr. 134). Mr. Armstrong confirmed that he was present in the mine office when Mr. Feeser met with counsel Bieger, but he could not recall what was said, and did not remember Mr. Feeser stating that he accidentally or intentionally cut into the block of coal (Tr. 135).

On cross-examination, Mr. Armstrong confirmed that he helped install some of the timbers while Mr. Feeser was moving the miner machine across the section, and that five or six men were on the section installing timbers and hanging curtains, and one mechanic was working on a shuttle car (Tr. 137). He estimated that it would have taken an hour and a half to 2 hours to install all of the timbers on the pillar line (Tr. 141). Given the fact that the miner machine has cables and water lines, it would have taken Mr. Feeser approximately 40 minutes to move the miner machine across the section to the block, a distance of about 280 feet (Tr. 144-145). He confirmed that he saw the cut made by the machine into the block of coal in question, and that it was approximately 10 feet in at the deepest penetration (Tr. 146).

Mr. Armstrong stated that a "buggy" was parked near the coal block in question and a mechanic was working on it when Mr. May came to the area, and that the entire block of coal would not have been mined out with the buggy parked in that location (Tr. 148). Mr. Armstrong did not dispute the fact that the roof-control plan required that timbers be installed along the area cited by Mr. May, and he did not believe that Mr. Feeser had to penetrate the coal block as far as he did to pick up gob which had been left over and pushed up against the coal block (Tr. 154).

Danny W. McGlothlin, President, Hiope Mining, stated that he works underground at the mine everyday overseeing the operation, and that he was working at the mine when the citation was issued. He stated that he did not tell anyone to cut into the block of coal in question, and he explained that while he was underground working "somebody hollered and said there was a mine inspector outside." Mr. McGlothlin stated that he proceeded to the outside to meet the inspector, and that it took him a half-hour to get to the outside, and a half-hour to get back underground. Mr. May wanted to give a safety talk, and all of the men were gathered up for the talk (Tr. 156). Mr. May then informed him he wanted to visit the faces, and after crawling to the area he saw the miner machine and informed him that it was a violation of the roof-control plan and that he was going to issue "a order over it" (Tr. 157). Mr. McGlothlin confirmed that the buggy parked by the block of coal in question had broken down on the previous night shift, and he believed that Mr. May "had to crawl around it" (Tr. 158).

Mr. McGlothlin confirmed that he was present during the meeting in the mine office with Mr. Feeser and Hiope's counsel Bieger, and that Mr. Feeser stated that "he loaded up the loose coal and proceeded into the block" (Tr. 160). Mr. McGlothlin stated that "I can't recall for sure whether he said it was accidental" (Tr. 160). He further stated that he attended the MSHA informal conference, which he had requested, and that Mr. Feeser was present at this conference and stated that he had accidentally cut into the coal block. The statement was made to Larry Werrell, the MSHA supervisor conducting the conference, in response to a question from Mr. Werrell as to whether he had accidentally cut into the coal (Tr. 162). Mr. McGlothlin further explained Mr. Feeser's statement as follows at (Tr. 162-163):

> Q. And did he ask Mr. Feeser if he accidentally cut into it?
>
> A. Yes.
>
> Q. And he replied yes to that?
>
> A. He replied that he was cleaning up coal and cut into the block of coal. And we had done, you know, said accidentally, and Mr. Werrell or Mr. Bieger one said, "Is that accidentally?" and he said, "Yes."
>
> Q. But he never actually said, "I accidentally cut into the block," did he, or at least you don't remember him saying that?
>
> A. At one time he did say he accidentally cut into the block, I do remember that.

Q. Okay. Replying to a question by somebody else?

A. Yes.

Mr. McGlothlin agreed that Inspector May could come to the conclusion that the roof-control plan was violated when he saw that the area where the coal was cut was not completely timbered. He confirmed that the citation was served on him and that he explained to Mr. May that they were in the process of installing the bleeder timbers, that other timbers were brought in, and that when they saw that the block of coal had been cut, "we ceased to mine" (Tr. 164). He also stated that he told Mr. May that it "made no sense" to bring him into the mine if he thought that a (d) order violation had occurred, and that if they thought this would occur, the timbers could have been brought in and set before the inspector got there because "I had enough time, if I felt like this was going to be a (d) order, to set the timbers" (Tr. 164). Mr. McGlothlin confirmed that he did not speak to Mr. Feeser that day because he was busy installing timbers. He confirmed that he explained to Mr. May that Mr. Feeser "was told to go up and clean up the loose coal and I figured he just cut into it cleaning up the loose coal," and that Mr. May replied "I have to write a (d) order" (Tr. 165).

In response to further questions, Mr. McGlothlin stated that the coal cut made by Mr. Feeser was made before he left the mine to get Mr. May, and that the miner was in the same position when he returned with Mr. May. He conceded that he knew at that time that there was a roof control violation, but did not think about it being a (d) order because timbers were being installed and he did not realize that the miner machine "was in as much as it was" (Tr. 167). He also conceded that even though he knew that the cut taken was a potential violation, he said nothing to Mr. May about it (Tr. 169).

James C. McGlothlin, mine superintendent, confirmed that he was not present when the block of coal was cut, but that he was present during the meeting in the mine office to discuss the matter, and he stated as follows in this regard (Tr. 173-175):

Q. All right. Do you recall what Aaron Feeser said about how the block came to be cut into?

A. Yes, sir, I do.

Q. What did he say?

A. Aaron said they'd cleaned up a section that morning and dumped a gob out against the block of coal. And they told him to take the miner over and clean up the loose coal. And said, "They done told me that the block actual we was going to start." Said, "I didn't

try just to clean the block of coal or the gob up." Said, "Whenever the miner started in the coal," said "I didn't think it was going to matter because that was the block that was going to come out."

Q. Did he say whether he intended to cut in there or whether it was an accident?

A. He told us that it was an accident that he cut that much. Said he just -- it went further than he thought.

Q. All right. Were you also present at the informal conference?

A. Yes, sir.

Q. Did he testify similarly or differently at the informal conference?

A. He said it was an accident. And I asked Mr. Feeser before we even had the meeting what happened because it aggravated me that it happened. And he said, "Well," said, "Curt didn't tell me to do it." Said, "He come down and stopped me." Said, "I just cut a little more out of there than I did."

Q. And after you had that conversation with him that's why we had the meeting, right?

A. That's right.

Inspector May was recalled, and he questioned Mr. Armstrong's assertion that all of his crew, except for a mechanic, were installing timbers, because someone had to haul the coal cut by Mr. Feeser away from the face area in question. He also did not believe that Mr. Danny McGlothlin would have known how much coal Mr. Feeser cut because he was outby the section when he came to bring him into the mine, and he may not have known that the cut had been taken. Mr. May could not recall whether the buggy which was parked near the coal block was down for maintenance, but this would have made no difference since there were other buggies available on the section (Tr. 181).

Mr. May reiterated that he based his unwarrantable failure finding on the fact that Hiope "knew or should have known" that coal could not be cut before installing timbers, and that Mr. Armstrong was required to check the section every 20 minutes and should have stopped Mr. Feeser from cutting "prior to getting in there as much as he did" (Tr. 182). Mr. May also considered Mr. Feeser's statement that he was told by Mr. Armstrong to take the cut, and Mr. Armstrong's statement which he recorded in his notes that "By the time we get this block or these blocks mined,

then we'll have our timbers set" (Tr. 183-184). Mr. May also believed that "they were going to mine coal to the point they got caught up with the timbers" (Tr. 187).

Docket Nos. VA 89-35-R and VA 89-68

The section 104(d)(1) "S&S" Citation No. 2969642, issued on January 23, 1989, by MSHA Inspector Steven May, citing an alleged violation of 30 C.F.R. § 75.400, states as follows (exhibit G-2):

> Float coal dust has been allowed to accumulate on previously rock dusted surfaces at the belt conveyor entry and connecting crosscuts beginning at the mine portal and extending to the 1st return overcast a distance of approximately 2,000' (feet). This dust is very dry and is from 0" to 13" (inches) in depth. Citations were issued for the same condition on the last AAA inspection. This conveyor entry serves the 001-0 section.

The record reflects that Inspector May fixed the abatement time as 7:00 a.m., January 24, 1989, but that on January 25, 1989, he extended the time for abatement to January 26, 1989, because "float coal dust was cleaned from around the conveyor. However, sufficient inert material was not applied to the crosscuts to render float coal dust present inert. More time is granted."

On January 26, 1989, Inspector May extended the abatement time further to January 30, 1989, after verifying that the mine ran out of rock dust before the crosscuts were completely rock dusted and Hiope experienced a problem in obtaining more rock dust from the supplying quarry. He also noted that the mine was down because a conveyor belt was being moved, and he granted Hiope more time to completely abate the cited conditions. He subsequently terminated the citation on January 30, 1989, at 3:00 p.m., after finding that the cited areas had been cleaned and the float coal dust rendered inert by the application of rock dust.

MSHA's Testimony and Evidence

MSHA Inspector Steven May confirmed that he conducted a regular inspection of the mine on January 23, 1989, and issued the citation after finding accumulations of float coal dust ranging in depth from zero to 13 inches on previously rock dusted surfaces along the mine belt conveyor entry and connecting crosscuts from the mine portal to the first return overcast (exhibit G-2). He explained that the belt travels through two stoppings as it comes to the outside, and that the belt air travels from the outside along the belt toward the face. He stated that the accumulations were "worse" along the first 400 feet of the number

one belt, and that he used a mine map to estimate the belt conveyor distance.

Mr. May stated that in order to reach the 001 section, miners had to pass by the cited conveyor belt areas and that the belt was required to be examined at least once each day during the working shift, and if the mine works two shifts, it must be examined twice a day. He stated that the accumulations were deeper at the two stopping doors where the air would pick up the dust from the belt and deposit it on the floor. He stated that the float coal dust was black in color, and that he used a rule to measure the 13-inch accumulations at three locations along the belt conveyor. The belt and the accumulations were dry, and he described the float coal as "black, fine, coal dust." He did not consider the accumulated float coal dust to be spillage because spillage would be "heavier and granular," and would be deposited "straight down" from the belt conveyor.

Mr. May stated that the float coal dust accumulations constituted a fire and explosion hazard because they could be placed in suspension and heat and ignition sources were present. He described the ignition sources as the belt conveyor drive motors, the conveyor belts and rollers, and electrical cables which would be present along the conveyor belt system. He considered the float coal dust to be combustible and that the possibility of a fire is always present with float coal dust and sources of ignition.

Mr. May stated that the presence of the float coal dust increased the likelihood of a fire, and that in the event of a fire the hazard would be more severe because of the extent of the accumulations. He believed that an accident was highly likely if the conditions were allowed to continue without being corrected. He did not consider the accumulations to be an imminent danger because he saw no visible or readily available heat sources. He observed one man inby at the No. 3 belt drive, and eight men were on the section. He did not believe that mining was taking place, and that in the event of a fire on the section it would travel "up the belt" and towards the face area. He also believed that the miners would be unable to escape a fire and would suffer permanently disabling injuries.

Mr. May stated that he based his high negligence finding on the fact that the violation was repetitious, and that he had issued prior coal and float coal accumulation violations of section 75.400 during prior inspections of the same belt conveyor area. He also confirmed that other inspectors had also issued prior violations for the same conditions (exhibits G-6 through G-14). Mr. May also considered the fact that management could have discovered the accumulations by making the proper daily shift examinations.

Mr. May stated that the accumulations along the first 400 feet on the No. 1 belt conveyor "possibly" accumulated over a period of 1 week, and that the area inby the No. 1 belt where the accumulations were 2 inches deep took a month or so to accumulate. In view of the amount of accumulated coal dust he observed, he believed that they should have been detected and reported by the preshift mine examiner.

Mr. May drew a sketch of the belt conveyor system which extended from the mine portal to the working face, and he explained that the distances noted between the four belt sections were approximations which he arrived at by reference to the scale shown on the mine map which he reviewed. He estimated the distance of the No. 1 belt as 400 feet, and the No. 2 belt as 1,600 feet (Tr. 13-46).

Mr. May confirmed that he extended the abatement times after returning to the mine and finding that the conditions were partially abated and he verified the fact that Hiope was having a problem with obtaining rock dust to complete the abatement work and were making an effort to complete the job (Tr. 46-53). He confirmed that he based his "S&S" finding on his belief that there was a reasonable likelihood that an injury, with lost work days or restricted duty, would occur (Tr. 53).

On cross-examination, Mr. May stated that the individual he observed at the No. 3 belt drive was there to maintain the belt. Mr. May confirmed that he took no float coal dust samples, took no pictures, and did not test the "combustibility" of the float coal dust. He explained that he cannot test float coal dust, but that he did feel it with his hand and kicked it around. He observed no dust in the air and did not believe that coal was being mined when he observed the conditions. He confirmed that he did not tell management not to run any coal, and did not tell them that "everything was so dangerous and so hazardous" that he did not want any coal run. If he had thought this was the case, he would have issued an imminent danger order. He confirmed that the float coal dust was deposited on the previously rock dusted areas in question (Tr. 53-58).

Mr. May confirmed that dust is present wherever coal is mined, and that during a previous inspection he required Hiope to plaster some ventilation brattices to abate a citation which he issued. He denied that this action on his part increased the air flow over the belt and made any dust problem worse. He believed that Hiope had installed some additional curtains on their own inside the belt line to help slow down the air, and that he did not object to this (Tr. 59).

In response to further questions, Mr. May confirmed that he spoke with Mr. McGlothlin over the phone about the citation and that Mr. McGlothlin gave him no explanation with respect to the

existence of the float coal dust and told him that he "would get somebody to work on it" (Tr. 61). Mr. May confirmed that he checked the shift book, and it reflected that the belts had been "walked" and that the belts "had been made" the day before his inspection (Tr. 62). He could not recall any notations in the book confirming the existence of the float coal dust, and he recalled looking at the book "for several days ahead." He confirmed that all of the cited dust was float coal dust, black in color, and that the areas were previously rock dusted to abate a prior citation which he had issued. He further confirmed that he is not required to take float coal dust samples, did not use a sieve, and based his determination that it was float coal dust by kicking it and observing it and that "it'll go out in front of you when you step on it" (Tr. 65). He confirmed that the float coal was dry and that none of it was wet, and he determined that it was combustible by its black color (Tr. 65).

Mr. May confirmed that the No. 2 and No. 4 belt drives were equipped with water sprays, and that the No. 3 belt had a chemical type spray (Tr. 66). He also confirmed that he found no stuck belt rollers, or the belt out of line, and he considered the ignition sources which were present to be potential sources of ignition (Tr. 67). He believed that the eight people working in the mine would be exposed to a hazard in the event of a belt fire because it was the belt closest to the outside (Tr. 68). He confirmed that the prior citations issued for float coal and loose coal accumulations indicated to him that dust accumulations were a problem in the mine (Tr. 69).

Hiope's Testimony and Evidence

Mine Superintendent James C. McGlothlin, confirmed that he is underground on a daily basis, and that he was present when Inspector May conducted his inspection. He disputed Mr. May's assertion that there was 2 to 13 inches of coal dust at the belt line, but conceded that "right behind the brattices there might have been 10 to 11 inches of coal dust" which he attributed to the wind which pulling the dust through the brattices where the belt travels through (Tr. 71). He described the coal as "grains . . . big as your finger and it settles right beside the brattice just like a snowstorm, just like a drift, whenever it gets to where the air ain't hitting it, it lays down there" (Tr. 72). He contended that the coal dust was 20 feet behind the brattice where it was "probably from 8 to 12 inches," and indicated that "it was coal" rather than float coal dust (Tr. 72).

Mr. McGlothlin explained the steps taken by management to control float coal dust, and stated that the belts are equipped with sprays and fire hoses. He contended that the mine had never been cited for a violation of its dust-control plan, but conceded that there have been problems because of the air velocity going through the restricted overcast which "throws a lot of air on the

belt line" (Tr. 73). He contended that Mr. May and another inspector required him to replaster the brattice line, and that this holds all of the air on the belt, and that this occurred before Mr. May became the "regular inspector" at the mine (Tr. 74). He further explained his efforts at dealing with the problem. He confirmed that Mr. May told him that he was going to issue an order because of the dust from the overcast area back towards the outside of the mine, and that he assigned men to take care of the problem immediately and stopped mining. He contended that coal was being run on the belt at the time Mr. May observed the conditions, and that Mr. May told him that he did not need to stop running coal and that he would give him time to clean up the belt. He stated that after the belt was cleaned, Mr. May refused to go back into the mine to check it, and advised him that he would return the next day (Tr. 78).

In response to further questions, Mr. McGlothlin disputed the inspector's contention that the float coal dust extended 2,000 feet along the belt line up to the overcast. He contended that his mine maps reflect that the belt line is 1,100 feet up to the overcast, and that the coal dust was "backed up about 20 feet behind the . . . brattices where it was piled up from 8 to 13 inches. From the rest on back, it wasn't even enough to shovel. All we could do to that was just put dust over it and make it white" (Tr. 81). He conceded that the coal dust was black in color, that at least 1,000 feet of the belt cited by Mr. May was black, and it needed some rock dust (Tr. 82). He confirmed that prior ventilation changes were made "to suit three different inspectors," and that some of the changes were made "to try and help us solve the problem" on a "tough belt line to control" because of the amount of air (Tr. 83-84).

Inspector May was recalled, and he confirmed that he discussed the violation with Mr. McGlothlin, and that he (McGlothlin) thought that a (d) order rather than a (d) citation would be issued. Mr. May denied that he told Mr. McGlothlin that he need not clean up the float coal dust immediately, and he stated that no one told him that it had been cleaned up before he left the mine (Tr. 94). Mr. May confirmed that he estimated the 2,000 feet belt line distance from the scale on the mine map, and that "it looked like 2,000 feet," but "it may have been 1,000" (Tr. 96). He confirmed that the depth of the material "ranged from zero to 13 inches" along the entire length of the belt line "and tapered out by the time you got to the overcast return" (Tr. 96).

Danny McGlothlin, explained the efforts made to keep the coal dust from accumulating on the belt line, the "continuous problems" with ventilation on the belt, beginning in June, 1985, and the efforts made by state and federal inspectors who have suggested ways to control the ventilation (Tr. 103-106).

Mr. McGlothlin stated that during a state mine inspection conducted January 11-13, 1989, the No. 1 and No. 2 belt lines were cited for loose coal and float coal dust accumulations, and the lack of rock dusting, and that he was with the inspector when the citations were issued. He confirmed that no float dust tests were made at that time, and that all of the conditions were corrected on January 13, 1989, 10 days before Mr. Mays issued the contested citation in this case. Mr. McGlothlin did not believe that the float coal dust cited by Inspector existed for a month along portions of the cited belt because the state inspector "is a strict inspector" (Tr. 107).

Mr. McGlothlin stated that he has always tried to keep two men assigned to the belt to keep it clean, and that the certified man who has been assigned to the belt for 3 years "knows the trouble spots, will not sign the books if the belt is not kept up, and each day he cleans the belt." He explained further that its impossible to keep the belt clean while coal is being run, and that Hiope has done everything possible to try and correct the problem, and that its recent efforts at cutting down on the ventilation air velocity on the belt had helped. He believed that management makes an attempt to keep the belt clean and did not believe that its "entirely negligence and we don't try" (Tr. 109).

When asked whether he and the state inspector went into and looked at the crosscuts during the state inspection, Mr. McGlothlin stated that "me and him crawled up No. 2 belt line on the opposite side of the belt and came out the return side" (Tr. 110). When asked why the No. 2, No. 3, and No. 4 belts were cited by the state inspector if there were problems on the No. 1 belt, Mr. McGlothlin responded "when you spend a lot of time on one, you kind of let the other one just get behind too" (Tr. 111).

Findings and Conclusions

Docket Nos. VA 89-35-R and VA 89-68

Fact of Violation - 30 C.F.R. § 75.400

Hiope is charged with a violation of mandatory safety standard 75.400, for allowing float coal dust to accumulate on previously rock dusted surfaces along the belt conveyor entry and connecting crosscuts described by Inspector May. Section 75.400 provides as follows:

> 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.

In Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), the Commission held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also: MSHA v. C.C.C. Pompey Coal Company, Inc., 2 FMSHRC 1195 (1980), and 2 FMSHRC 2512 (1980).

In Back Diamond Coal Company, 7 FMSHRC 1117, 1120 (August 1985), the Commission stated as follows:

> We have previously noted Congress' recognition that ignitions and explosions are major causes of death and injury to miners: "Congress included in the Act mandatory standards aimed at eliminating ignition and fuel sources for explosions and fires. [Section 75.400] is one of those standards." Old Ben Coal Co., 1 FMSHRC 1954, 1957 (December 1979). We have further stated "[i]t is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." Old Ben Coal Co., 2 FMSHRC 2806, 2808 (October 1980). The goal of reducing the hazard of fire or explosions in a mine by eliminating fuel sources is effected by prohibiting the accumulation of materials that could be the originating sources of explosions or fires and by also prohibiting the accumulation of those materials that could feed explosions or fires originating elsewhere in a mine.

I conclude and find that Inspector May's credible testimony establishes the existence of float coal dust accumulations deposited on previously rock dusted surfaces along a rather extensive area of the cited belt conveyor in question. Mr. May's confirmed that he measured the depth of the accumulations with a rule at three locations and estimated the depth of the rest of coal dust by observation. He visually observed the accumulations, which he described as dry "black, fine, coal dust," and while he did not test it with a sieve, he felt it with his hand and kicked it around to confirm his visual observations that the black coal dust was in fact float coal dust which he believed is combustible.

Although superintendent James McGlothlin disputed the accuracy of Inspector May's estimate of the length of the conveyor belt, the depths of some of the accumulations, and believed that some of the accumulations were loose coal rather than float

coal dust, Mr. McGlothlin nonetheless confirmed that coal dust was present behind the brattices where it was backed up for some 20 feet at depths ranging from 8 to 13 inches, and that the coal dust which had accumulated along at least 1,000 feet of the belt cited by Mr. May was black in color, needed rock dust, and had not been cleaned.

Danny McGlothlin took issue with Inspector May's estimate as to how long the accumulations had existed prior to his inspection, and I find nothing in his testimony to rebut the inspector's testimony that the float coal accumulations did in fact exist at the time Mr. Mays observed them.

On the facts of this case, the fact that the inspector did not sample the float coal dust is irrelevant to any determination of a violation of section 75.400. The inspector's credible and unrebutted testimony establishes the existence of a significant amount of accumulated dry float coal dust which was black in color over a rather extensive area, and I conclude and find that the inspector's observations, coupled with his feeling and kicking the float coal dust around is sufficient enough to establish a violation. See: Kaiser Steel Corp., 3 IBMA 489 (1974); Pyro Mining Company, 7 FMSHRC 1415 (September 1985); Helvetia Coal Company, 7 FMSHRC 1613 (October 1985).

In view of the foregoing, I conclude and find that MSHA has established by a preponderance of the evidence that the accumulations of float coal dust as described by Inspector May were allowed to accumulate and were not cleaned up as required by section 75.400. Accordingly, the violation IS AFFIRMED.

Docket Nos. VA 89-36-R and VA 89-69

Fact of Violation - 30 C.F.R. § 75.220

Hiope is charged with a violation of mandatory safety standard 30 C.F.R. § 75.220, for failing to install roof support timbers at the cited pillar block which had been cut by the continuous-miner operator. Hiope's approved roof-control plan required the installation of timbers at the cited pillar location before any mining commenced, and Hiope does not dispute the fact that the required roof support timbers were not installed as required. Section 75.220 requires a mine operator to follow its roof-control plan.

The credible and unrebutted testimony of Inspector May clearly supports a violation of section 75.220. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

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

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

Violation of 30 C.F.R. § 75.400

The credible evidence adduced by MSHA establishes the existence of the dry and black coal dust which was deposited on top of previously rock dusted surfaces along the belt conveyor system locations described by the inspector. These accumulations ranged in depths of 0 to 13 inches, and they were located in belt conveyor areas which included potential sources of ignition. The inspector described these ignition sources as a belt conveyor drive motor, the belts and rollers, and electrical cables. Since miners travelled through the cited conveyor belt location and worked on the section on a daily basis, and the belt was on an intake air course, the inspector believed that in the event of a belt fire, smoke would course through the area towards the working face areas where miners would be working, and they would be exposed to fire and smoke hazards, and possible entrapment. If a fire were to occur, it would be reasonably likely that the miners would be exposed to these hazards and suffer permanently disabling injuries of a reasonably serious nature.

I conclude and find that the inspector's credible testimony establishes that the float coal dust accumulations in question, which I believe one may assume were combustible, located in areas where potential ignition sources were present, presented a discrete fire and smoke hazard, and possibly an explosion hazard. The inspector's belief that no coal was being mined or transported on the belt at the time of his observations of the float coal dust conditions was disputed by superintendent James McGlothlin who believed that the belt conveyor was in operation. If this were true, and the belt was running with coal, I believe that the hazard presented by the existence of float coal dust along a rather extended area of the belt conveyor, with potential ignition sources present would be increased. Any frozen or stuck belt roller, or malfunctions of the electrical cables or belt drive motors would provide a ready source of heat or friction to ignite the float coal dust and propagate a fire.

The fact that the conveyor belt may not have been in operation at the precise moment the inspector made his inspection and observed the conditions does not affect the hazards which one may reasonably conclude existed. In the normal course of mining with the belt running, the miners working on the section would be exposed to fire, smoke, and explosion hazards of a reasonably serious nature. Under all of these circumstances, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Violation of 30 C.F.R. § 75.220

Hiope does not dispute the fact that the pillar coal block was in fact cut, and that coal was removed from the block, without first installing the roof support timbers required by the

roof-control plan. I agree with the inspector's credible testimony that there is always a danger of a roof fall where coal pillars are mined without adequate roof support, and that the increased stress placed on the roof by the lack of timbering increases the likelihood of a roof fall.

The inspector's unrebutted credible testimony establishes that the taking of a cut of coal without first installing roof support timbers exposed the continuous-miner operator to the danger of a roof fall, and that in the event the miner operator continued to cut the coal block without timbers being installed, a roof fall was reasonably likely. If a roof fall had occurred, I believe it was reasonably likely that the miner operator would have sustained injuries of a reasonably serious nature.

The fact that the continuous-miner operator may not have been under unsupported roof while at the controls of his machine does not lessen the hazard exposure. The inspector reasonably concluded that the unsupported roof area in question could have broken out and fallen back beyond the end of the unsupported coal block while it was being cut, and exposed the miner operator to a roof fall hazard. Indeed, in this case, the miner operator believed that he would be exposed to a danger if the roof had fallen and extended out through the pillar intersection.

The Commission has taken note of the fact that mine roofs are inherently dangerous and that even good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982); Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986); Consolidation Coal Company, supra.

In the Consolidation Coal Company case, supra, the Commission affirmed my "S&S" finding concerning an over-wide roof bolting pattern which had existed along a supply track for a period of 6-months, and stated that "[T]he fact that no one was injured during that period does not ipso facto establish that there was not a reasonable likelihood of a roof fall."

In U.S. Steel Mining Company, Inc., 6 FMSHRC 1369, 1376 (May 1984), Judge Melick found that a hazardous roof condition was significant and substantial notwithstanding testimony from a mine foreman that it was unlikely that the roof would fall "right away," and his belief that the condition was not unsafe because he and the inspector were under the roof while taking certain measurements. In R B J Coal Company, Inc., 8 FMSHRC 819, 820 (May 1986), Judge Melick cited Mathies Coal Company, 6 FMSHRC 1 (1984), in support of his finding that a hazardous roof condition constituted a significant and substantial violation even in the absence of an "immediate hazard."

In Halfway Incorporated, supra, the Commission upheld a significant and substantial finding concerning a roof area which had not been supported with supplemental support, and ruled that a reasonable likelihood of injury existed despite the fact that miners were not directly exposed to the hazard at the precise moment of the inspection. In that case, the Commission stated as follows at 8 FMSHRC 12:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984).

In view of the foregoing findings and conclusion, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

The Unwarrantable Failure Issues

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

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

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

Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

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

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

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Violation of 30 C.F.R. § 75.400

MSHA argues that the violation resulted from a high degree of negligence on the part of Hiope, and that due to the egregious nature of the violation, MSHA concludes that it has established that the violation resulted from Hiope's unwarrantable failure to comply with the requirements of section 75.400. In support of its conclusion, MSHA relies on the testimony of the inspector which reflects his opinion that in some areas where the float coal dust was up to 13 inches in depth, it could have accumulated over a period of at least a week, and that in other areas where there was less air, and where it had accumulated to depths of 2 inches, it would have taken over a month for the float coal dust to accumulate.

MSHA asserts that since the belt line in question is subject to at least one inspection a day, Hiope should have observed the float coal dust conditions and cleaned them up. MSHA points out that the mine had a history of coal dust accumulation problems and similar prior violations were issued at the same belt area for the same conditions as those cited by Inspector May, and that Hiope's management acknowledged its awareness of the problem.

waited until its rock dust supplies were exhausted before ordering more (Tr. 120-122).

Hiope denies that it has exhibited a high degree of negligence with respect to the violation. It takes the position that it cannot be held accountable "for every bit of float dust," and that it has attempted to control float coal dust and has done everything that it has been asked to do to control it. Hiope disputes the accuracy of the inspector's belief that the accumulations had existed for a month, and it points to the fact that a state mine inspection report reflects that as late as 10 days before the inspection, the state inspector found the cited area to be "all clear" (Tr. 129-130).

Hiope's witness, Danny McGlothlin disputed the inspector's estimates that the float coal accumulations along the first 400 feet of the No. 1 belt had possibly accumulated over a period of 1 week, and that the area inby that location took possibly a month for the float coal dust to accumulate. Mr. McGlothlin stated that during a prior state inspection, the No. 1 belt was cited for loose coal and float coal dust accumulations, and lack of rock dust, during an inspection on January 11-13, 1989, and that the accumulations were cleaned up on January 13, 1989, 10-days prior to the inspection by Mr. May. With regard to the areas where Mr. May believed the accumulations existed for possibly a month, Mr. McGlothlin's basis for disputing Mr. May's belief was that the state inspector was "strict."

Hiope did not offer the state mine inspection report that it alluded to, and in my view, Mr. McGlothlin's testimony at best reflects that the last time the conveyor belt was cleaned was 10-days prior to the inspection conducted by Inspector May on January 23, 1989. I cannot conclude that this rebuts the inspector's belief that the accumulations had probably existed for at least a week. Indeed, Mr. McGlothlin's testimony corroborates the inspector's testimony. Mr. McGlothlin's characterization of the State inspector as "strict" falls short of credible testimony rebutting the MSHA inspector's testimony that the remaining float coal conditions accumulated over a period of a month. Hiope does not dispute the fact that the cited belt conveyor belt was not cleaned, and it presented no evidence to establish when the belt was last cleaned up and rock dusted.

With regard to Hiope's contention that it had difficulty obtaining an adequate supply of rock dust, I reject this as a defense. Although I do not dispute the difficulty which was verified by the inspector, it is incumbent on Hiope to insure that it maintains an adequate supply of rock dust to stay in compliance with the requirements of the regulations. Further, Hiope has not established that it could not obtain adequate

supplies of rock dust from sources other than the quarry which was experiencing a production problem.

Hiope did not dispute the fact that prior violations were issued by MSHA inspectors for violations of section 75.400 because of float coal dust and loose coal accumulations along the same belt conveyor location. Copies of the previous violations reflects that Inspector May issued two prior citations for violations of section 75.400, because of float coal dust accumulations on the No. 1 belt conveyor on March 14 and November 14, 1988 (exhibits G-6 and G-13). He also issued seven additional citations for accumulations of dry loose coal and float coal dust on the Nos. 2, 3, and 4 belts during March, May, and November, 1988 (exhibits G-7 through G-12, and G-14).

After careful review of all of the testimony and evidence adduced with respect to this violation, I conclude and find that MSHA has established by a preponderance of the evidence that the violation was indeed the result of Hiope's unwarrantable failure to comply with the requirements of section 75.400. I take note of Danny McGlothlin's tacit admission that he sometimes "got behind" in insuring that the belts were cleaned up of accumulated float coal dust accumulations. I conclude and find that the evidence establishes that the float coal accumulations had existed for some time prior to the inspection without any effort by Hiope to clean them up. Coupled with the prior citations, which were issued relatively close in time to the violation issued by Inspector May on January 23, 1989, for identical float coal dust conditions, I conclude and find that Hiope's failure to clean up the accumulations constituted a serious lack of reasonable care in failing to take any action to clean up the accumulations. I further conclude and find that Hiope demonstrated indifference and a lack of due diligence in failing to correct the cited conditions, and that its failure to act demonstrated aggravated conduct which clearly supports the inspector's unwarrantable failure finding in this case. Accordingly, the inspector's finding is affirmed, and the contested section 104(d)(1) citation IS AFFIRMED.

Violation of 30 C.F.R. § 75.220

MSHA argues that the violation was the result of an unwarrantable failure by Hiope because the continuous-miner operator, Mr. Feeser, was instructed by his section foreman, Mr. Armstrong, to begin cutting the coal pillar in question before roof pillars were installed at that location.

With regard to Mr. Feeser's testimony, and the question of whether he changed his alleged prior statements that he cut into the block of coal accidentally, MSHA asserts that at the time of the inspection, Mr. Feeser told Inspector May that he was instructed to take the continuous-mining machine across the

section and start cutting, and that this prior statement by Mr. Feeser is consistent with his testimony during the hearing (Tr. 123-125).

Hiope argues that MSHA's conclusion that the violation constituted an unwarrantable failure rests on continuous-miner operator Feeser's testimony that he was instructed by foreman Armstrong to take the continuous miner to the coal block in question and to begin cutting the coal. However, Hiope contends that Mr. Feeser's testimony has been discredited in that he has given inconsistent testimony and did not completely admit or deny that he had made previous statements that he had cut into the block of coal accidentally, and Hiope's witnesses have attested to the fact that Mr. Feeser has given inconsistent testimony.

Hiope suggests that since Mr. Feeser was laid off by Hiope and filed a grievance in the matter he is a biased witness whose testimony is not credible. Further, Hiope asserts that it would be "insane" for Hiope to mine the pillars without supporting the roof, that it never intended to do so, and that the shuttle car which was broken down would have been in the way of any mining. Hiope concludes that MSHA's position is simply flawed (Tr. 127-129).

Continuous-miner operator Feeser testified that section foreman Armstrong instructed him to take the mining machine to the cited pillar location and to "start the first block" of coal. Mr. Armstrong confirmed that he instructed Mr. Feeser to take the machine to that location, but he stated that he simply pointed out to Mr. Feeser that the block of coal in question would be the initial starting point to begin cutting once the mining cycle was begun.

Mr. Armstrong stated further that some coal gob or debris left over from previous mining had been pushed up and against the coal block in question and that it needed to be cleaned up. He believed that Mr. Feeser cut into the coal block while cleaning up the gob and turned his machine into the block and it started cutting. He denied that he instructed Mr. Feeser to start cutting and mining the block of coal in question, and his unrebutted testimony establishes that when he observed that Mr. Feeser had cut into the block, he instructed him to stop any further cutting, and to help install all timbers before starting any mining.

Mr. Feeser, who was a safety committeeman, and who acknowledged that he was familiar with the roof-control plan, admitted that when he attended a meeting at the mine office, he told Hiope's counsel that he had <u>accidentally</u> cut into the coal block. Although he denied that Mr. Armstrong instructed him to clean up the gob which was against the block, Mr. Feeser admitted that during an informal violation conference with MSHA, he confirmed

that he was in fact cleaning up the gob with his machine, and he also confirmed that this was the case during his hearing testimony.

Mr. Feeser denied that he made any statement during the MSHA conference that he had accidentally cut into the coal block while cleaning up the gob. When pressed further on this question, he stated that he was never asked a direct question as to whether or not he accidentally cut into the coal block, and did not volunteer any such information.

During his direct testimony, Inspector May testified that when he spoke with Mr. Armstrong at the time the order was issued, he could not recall specifically asking Mr. Armstrong for an explanation as to why the cut was made before any roof support was installed. However, on cross-examination, Mr. May acknowledged that Mr. Armstrong told him that Mr. Feeser had accidentally cut into the coal block while cleaning the gob. Mr. Armstrong could not recall what was said during his conversation with Inspector May, and he acknowledged telling Mr. May that he knew that the timbers would be set before the block of coal was mined.

Hiope's witness Danny McGlothlin, testified that he was present during the meeting in the mine office after the order was issued, and he confirmed that while he was not certain that Mr. Feeser stated that the coal cut was accidental, Mr. Feeser admitted that he loaded up the loose coal gob and "proceeded into the block." Mr. McGlothlin further confirmed that he was present during the informal MSHA conference, and that Mr. Feeser acknowledged that he had accidentally cut into the coal block. Mr. McGlothlin also confirmed that when it was discovered that Mr. Feeser had cut into the coal block, all further mining ceased.

Mine Superintendent James McGlothlin confirmed that he was also present at the meeting in the mine office after the order was issued, and that Mr. Feeser admitted that he had accidentally cut too much out of the block of coal while cleaning up the gob, but that he did not think it would matter because the block of coal was going to be mined out. Mr. McGlothlin stated further that prior to the meeting, Mr. Feeser acknowledged to him that Mr. Armstrong did not instruct him to begin the cut into the coal block in question, and that Mr. Feeser stated "I just cut a little more out of there than I did."

Inspector May confirmed that Hiope had no prior roof control violations at the face areas, and that he had not previously encountered a situation where coal was cut before roof timbers were installed. Mr. May further confirmed that he never had any problems with section foreman Armstrong and considered him to be a fair person.

Inspector May confirmed that he based his unwarrantable failure finding on Mr. Feeser's statement that Mr. Armstrong instructed him to take the miner and proceed to cut the coal block, and on Mr. Armstrong's statement, as reflected in his notes, that "by the time we get this block or these blocks mined, then we'll have our timbers set." Mr. May also believed that Hiope "knew or should have known" that coal could not be cut before first installing timbers, and that Mr. Armstrong should have stopped Mr. Feeser from cutting as much as he did earlier because he was required to check the section every 20 minutes.

After careful review of all of the evidence and testimony in this case, I cannot conclude that MSHA has established an unwarrantable failure violation by a preponderance of the credible evidence. I find that Hiope's testimony is more credible than Mr. Feeser's with respect to the accidental cutting of the block, and I believe and accept as credible Mr. Armstrong's assertion that he did not instruct Mr. Feeser to cut the coal block before the timbers were installed, and that he only informed him where he was to start his cut once the timbers were installed and the mining cycle has begun.

I find Mr. Feeser's testimony and denials that he accidentally cut into the coal block to be contradictory and lacking in credibility. Mr. Feeser's initial admission and acknowledgement that he had previously stated that he accidentally cut into the block of coal was corroborated by Danny and James McGlothlin, and I find them to be credible witnesses.

I take note of the fact that Mr. Feeser was a member of the safety committee and was aware of the roof-control plan requirement for timbering before cutting any coal. Although he denied that his lay off and grievance colored his testimony against Hiope, I believe that Hiope's assertion that Mr. Feeser was a biased witness has a ring of truth about it. I believe that Mr. Feeser cut into the coal block while in the process of cleaning up the gob, and that he cut more coal than he had initially intended to take while cleaning up the gob, and stopped cutting and left the machine sumped up into the coal block after Mr. Armstrong observed what he had done and stopped him.

After careful review of all of the testimony and evidence in this case, I cannot conclude that MSHA has established by a preponderance of the evidence that the cutting of the coal block in question before adequate roof supports were installed resulted from a lack of diligence, or from indifference amounting to aggravated conduct. To the contrary, I find Mr. Armstrong's testimony and explanation with respect to his instructions to the continuous-miner operator to be believable and credible. Accordingly, the inspector's unwarrantable failure finding IS VACATED,

and the contested section 104(d)(1) order IS MODIFIED to a section 104(a) citation, with special significant and substantial (S&S) findings, and the citation is AFFIRMED AS MODIFIED.

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

The parties stipulated that Hiope is a small mine operator and that the imposition of civil penalty assessments for the violations in question will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

History of Prior Violations

MSHA's computer print-out reflects that during the period January 23, 1987 through January 22, 1989, Hiope paid civil penalty assessments in the amount of $8,177, for 105 violations, 17 of which are for violations of section 75.400. Although Inspector May testified that he was unaware of any prior roof control violations concerning facts similar to those in this case, the print-out reflects three prior violations of section 75.220 (exhibit G-3). A computerized MSHA "Proposed Data Sheet" reflects that for a 4-year period encompassing 1986 through May 12, 1989, Hiope's mine was inspected a total of 185 days, and that it received 152 assessed violations during these inspections. Although Hiope's compliance record may not be particularly good for an operation of its size, I cannot conclude that it is such as to warrant any additional increases in the civil penalties which I have assessed for the violations which have been affirmed.

Gravity

For the reasons stated in my S&S findings with respect to the violations which I have affirmed, I conclude and find that both violations were serious.

Negligence

In view of my unwarrantable failure findings with respect to the violation of section 75.400, I conclude and find that it resulted from a high degree of negligence on the part of Hiope. With respect to the violation of section 75.220, I conclude and find that it resulted from Hiope's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Good Faith Compliance

I conclude and find that Hiope exercised good faith compliance in timely abating the conditions cited with respect to both violations.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
2969654	03/06/89	75.220	$ 400
2969642	01/23/89	75.400	$1,000

ORDER

Hiope Mining, Inc., IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

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

February 1, 1990

EMERY MINING CORPORATION AND/OR UTAH POWER & LIGHT COMPANY, Contestants	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 87-130-R
	:	Citation No. 2844485; 3/24/87
v.	:	Docket No. WEST 87-131-R
	:	Order No. 2844486; 3/24/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 87-132-R
	:	Order No. 2844488; 3/24/87
	:	Docket No. WEST 87-133-R
and	:	Order No. 2844489; 3/24/87
UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor	:	Docket No. WEST 87-144-R
	:	Order No. 2844795; 3/24/87
	:	Docket No. WEST 87-145-R
	:	Order No. 2844796; 3/24/87
	:	Docket No. WEST 87-146-R
	:	Order No. 2844798; 3/24/87
	:	Docket No. WEST 87-147-R
	:	Order No. 2844800; 3/24/87
	:	Docket No. WEST 87-150-R
	:	Order No. 2844805; 3/24/87
	:	Docket No. WEST 87-152-R
	:	Order No. 2844807; 3/24/87
	:	Docket No. WEST 87-153-R
	:	Order No. 2844808; 3/24/87
	:	Docket No. WEST 87-156-R
	:	Order No. 2844813; 3/24/87
	:	Docket No. WEST 87-157-R
	:	Order No. 2844815: 3/24/87
	:	Docket No. WEST 87-160-R
	:	Order No. 2844822; 3/24/87
	:	Docket No. WEST 87-161-R
	:	Order No. 2844823; 3/24/87
	:	Docket No. WEST 87-248-R
	:	Citation No. 2844835; 8/13/87
	:	Wilberg Mine
	:	Mine I.D. No. 42-00080

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 87-208 A.C. No. 42-00080-03578
v.	:	Docket No. WEST 87-209 A.C. No. 42-00080-03579
EMERY MINING CORPORATION, and ITS SUCCESSOR-IN-INTEREST UTAH POWER & LIGHT COMPANY, MINING DIV., Respondent	:	 Docket No. WEST 88-25 A.C. No. 42-00080-03584 Wilberg Mine
and	:	Consolidated
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

ORDER

The issue presented here is whether the hearing in the above cases, now scheduled to commence on March 13, 1990, in Price, Utah should be rescheduled until after May 31, 1990.

Emery Mining Corporation (Emery) has filed a motion seeking the continuance. Secretary opposes and Intervenor did not state a position.

In support of its motion Emery states as follows:

That after the Wilberg Mine fire wrongful death claims were made against Utah Power & Light Company (UP&L). Some of UP&L's insurance carriers refused to contribute and UP&L sought reimbursement from certain carriers. After the fire UP&L also brought a product liability action against manufacturers of equipment involved in the fire. The equipment manufacturers impleaded Emery as a third party defendant.

The case involving UP&L, UP&L's property insurance carriers, the equipment manufacturers and Emery, the "products case", is scheduled to begin trial on April 23, 1990, in the Fourth Judicial District Court of Utah County in Provo.

With the addition of accrued interest, the total amount at issue in the products case exceeds $100,000,000.

The cases pending before the Presiding Judge involve allegations resulting from MSHA's investigation of the Wilberg fire. Since the focus of the products case will be directed at the events of the fire, it is likely the media will attend the trial and fully report the proceedings. In short, the penalty cases if tried in March will be a "warm-up" for publicity on the products case.

The expected media coverage of the Commission cases may prejudice the parties in the products case (where hearsay is inadmissible) and it could be difficult to impanel an impartial jury in the products case.

Further, media representatives are expected to seek interviews with counsel, government and company officials. In addition, television and still photography may be requested in the courtroom during the trial.

The trial of the MSHA cases after the completion of the products case remove the problems connected with pre-trial publicity and should ameliorate possible media disruption and will remove any barrier to rapid efficient disposition of the pending cases or to their settlement.

The Secretary opposes Emery's motion.

The Secretary states as follows: she believes it was appropriate to stay the hearing during the period of the criminal referral. However, the Secretary urges it is time to resolve this matter without further delay.

The Secretary believes it is unfair to the families of the victims, as well as those in management, labor and government who participated in the investigation and recovery effort and to the general public to continue the hearing.

Potential harm in a third party law suit should not be a factor in determining a continuance here. It is urged that ample procedural and evidentiary rules exist in state courts and state tort laws to protect the interest of the parties in that case.

The Secretary further urges that prompt resolution of the pending Commission cases will serve as a deterrent to former employees of Emery, now working for UP&L, other nearby mines and to the general mining community. It is contended this will encourage safe mining operations -- the underlying purpose of the Act.

Since Commission proceedings are public hearings the potential presence of the press should not be a basis for a continuance.

Finally, these proceedings before the Commission were filed long before the third party suit involving Emery.

In short, the Secretary urges that judicial efficiency supports going forward rather than adding to further delay and fading memories.

Discussion

Whether a continuance should be granted or denied is within the discretion of the Presiding Judge. Commission Rule 54, 29 C.F.R. § 2700.54.

We have reached the point where the Commission cases and the State of Utah products case are essentially scheduled to be heard back to back. This no doubt occurred because all parties involved were sensitive to the constitutional issues presented by parallel civil and criminal prosecutions. Further, the United States Attorney for the State of Utah requested that the civil administrative cases be stayed until the Secretary of Labor's criminal referral was resolved.

On August 25, 1989, the United States Attorney declined to initiate prosecutions against Emery, or any of its agents, for violations of the Mine Act arising from the fire. Further, in December, 1989, the related statute of limitations expired and the statute bars any criminal prosecutions.

These proceedings were originally brought against Emery to collect civil penalties for conditions that MSHA inspectors believed existed at the Wilberg Mine fire. At one time 44 cases were pending before the Presiding Judge. Some of the cases have been settled and others are on appeal. Only 19 cases remain pending before the Presiding Judge.

While the Act makes civil penalties mandatory for proven violations of mandatory safety standards, penalties are for the purpose of deterrence, not punishment. National Independent Coal Operators' Ass'n. v. Kleppe, 423 U.S. 388 (1976).

Normally a public interest exists in prompt penalty deterrence if it were proved that Emery violated a standard. But that interest is considerably reduced in this situation.

Due to no fault of the parties five years have expired. Emery has no employees but it continues to be a corporation in good standing and with assets to pay any civil penalty imposed in these proceedings (documented by papers filed in these cases with respect to successorship issues). Since prompt deterrence is no longer a predominant factor here, I conclude the public interest is best served by the fair and orderly adjudication of these cases.

The parties have not been dilatory in these proceedings before the Commission. The sheer volume of the files and the reduction in the number of cases from 44 to 19 cases attest to this fact.

The Judge believes Emery and the Secretary may well be able to settle many of the violations at issue in the pending cases after completion of the products case leaving only a few, if any, for trial.

Such a result would serve judicial economy. The three-month continuance sought here requires only a small investment of time for a potentially large savings in Commission resources.

For the foregoing reasons the following order is appropriate:

ORDER

1. Emery's motion for a continuance of the scheduled hearing is granted.

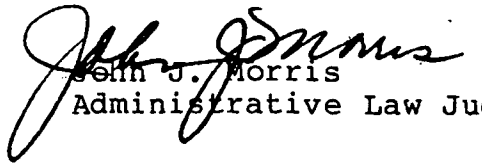
2. The hearing scheduled to commence on March 13, 1990, is cancelled.

3. The hearing will now commence at the following time and place:

9:00 a.m., Tuesday, June 5, 1990
The hearing will contiue on the
following dates:

June 5, 1990 through June 8, 1990
June 11, 1990 through June 16, 1990
June 18, 1990 through June 23, 1990
Carbon County Court Complex
(Check with District Court Clerk
for directions to courtroom)
149 East 100 South
Price, Utah

Any person intending to attend this hearing who requires special accessibility features and/or any auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Thus, the Commission may, subject to the limitations of 29 C.F.R. 2706 § 150(a)(3) and § 160(e), ensure access for any handicapped person who gives reasonable advance notice.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 14, 1990

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 89-234-R
v.	:	Citation No. 3114001; 5/31/89
	:	Docket No. WEVA 89-235-R
	:	Citation No. 3114002; 5/31/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 89-236-R
	:	Citation No. 3114003; 5/31/89
	:	Docket No. WEVA 89-237-R
	:	Citation No. 3114004; 5/31/89
	:	Docket No. WEVA 89-238-R
	:	Citation No. 3103921; 6/1/89
	:	Docket No. WEVA 89-239-R
	:	Citation No. 3103922; 6/1/89
	:	Docket No. WEVA 89-240-R
	:	Citation No. 3103923; 6/1/89
	:	Docket No. WEVA 89-241-R
	:	Citation No. 3103924; 6/1/89
	:	Docket No. WEVA 89-242-R
	:	Citation No. 3103925; 6/1/89
	:	Docket No. WEVA 89-243-R
	:	Citation No. 3103926; 6/1/89
	:	Docket No. WEVA 89-244-R
	:	Citation No. 3103927; 6/1/89
	:	Docket No. WEVA 89-245-R
	:	Citation No. 3103928; 6/1/89
	:	Blacksville No. 1 Mine
	:	Mine ID 46-01867

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 90-3 A. C. No. 46-01867-03815
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 90-8 A. C. No. 46-01318-03901
	:	Robinson Run No. 95

ORDER DENYING CERTIFICATION

The operator now has filed a motion to certify for interlocutory appeal the questions decided in my order dated January 24, 1990, denying its motion to dismiss.

Interlocutory review, including certification of interlocutory rulings by an Administrative Law Judge, is governed by section 2700.74 of Commission regulations. 29 C.F.R. § 2700.74. The regulations follow much of 29 U.S.C. § 1292(b) which concerns interlocutory appeals in the Federal Courts. At the outset, it must be noted that both under the Commission regulations and the Federal statute interlocutory appeals are a matter of discretion and not of right. Only in exceptional cases are such appeals to be allowed. Kraus v. Board of County Road Commissioners, 364 F.2d 919 (6th Cir. 1966).

After a careful review of this matter, I conclude that certification of my prior rulings would not be appropriate. One of the standards by which allowance of interlocutory appeals is measured is the material advancement of final disposition. If this case proceeds along its normal course without an appeal, a lengthy and expensive hearing will not be required. On the contrary, the operator's reply brief filed on January 11, 1990, represents that the factual issues are relatively simple and perhaps not in dispute at all. (Operator's reply brief p. 15). Likewise, the Solicitor's opposition to the operator's present motion advises that limited discovery is possible and that thereafter the Secretary is amenable to factual stipulations. Accordingly, leaving this case on its present track should, with the cooperation of the parties, result in an expeditious final decision at the trial level. Cf. U.S. v. Bear Marine Services, 696 F.2d 1117 (5th Cir. 1983).

Conversely, ultimate disposition would not be accelerated by allowing an interlocutory appeal at this time. The Commission would have to familiarize itself with the many pleadings and briefs already filed and passed upon by this Judge. Oral argument before the Commission would consume further time. And if

the Commission agreed with my order denying the operator's motion to dismiss, the case would then be returned to me after a substantial delay. In other words, all the evils of piecemeal litigation would be realized.

Finally, many cases that come before this Commission and its Judges involve challenges to the validity of the Secretary of Labor's regulations. If the questions presented here were certified and accepted for interlocutory appeal, there would be no reason why a myriad of other such cases should not be similarly appealed. In no time the Commission would become bogged down in a vast array of non-final cases, resulting in a prolonged and attenuated adjudicatory process. The Commission should not be so burdened.

In light of the foregoing, the motion to certify is DENIED.

The directives in my order of January 24, 1990 remain in effect and I look forward to seeing counsel on March 13, 1990.

Paul Merlin
Chief Administrative Law Judge

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