FEBRUARY 1994

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

FEBRUARY 1994

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

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 93-369. (Judge Amchan, December 30, 1993)

Secretary of Labor on behalf of Carroll Johnson and UMWA v. Jim Walter Resources, Inc., et al., Docket No. SE 93-182-D, SE 93-104. (Judge Weisberger, December 30, 1993)

Secretary of Labor, MSHA v. Martin Marietta Aggregates, Docket No. YORK 93-126-M. (Judge Melick, Settlement Decision issued November 4, 1993 - unpublished)

Peabody Coal Company v. Secretary of Labor, MSHA, Docket No. KENT 93-318-R, etc. (Judge Amchan, January 5, 1994)

Secretary of Labor, MSHA v. Buck Creek Coal Company, Docket No. LAKE 93-241. (Judge Hodgdon, January 10, 1994)

Secretary of Labor, MSHA v. Tug Valley Coal Processing, Docket No. WEVA 94-26. (Chief Judge Merlin, unpublised Settlement issued January 13, 1994)

Secretary of Labor, MSHA v. Wagner Sand & Sonte, Inc., Docket No. SE 93-114-M. (Chief Judge Merlin, unpublished Default issued October 22, 1993)

Secretary of Labor, MSHA v. T & F Sand and Gravel, Inc., and others, Docket No. CENT 91-215, etc. (Chief Judge Merlin, Unpublished Order of Dismissal issued June 5, 1992)

Secretary of Labor, MSHA v. Hickory Coal Company, Docket No. PENN 93-86. (Judge Maurer, unpbulished Settlement issued January 24, 1994)

There were no cases filed in which review was denied:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 8, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 93-126-M
MARTIN MARIETTA AGGREGATES	:	

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners[1]

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. (1988)("Mine Act"), the Secretary of Labor proposed penalties for eight citations issued to Martin Marietta Aggregates ("Martin Marietta"). On November 3, 1993, the Secretary filed with Administrative Law Judge Gary Melick, on behalf of the parties, a Motion to Approve Settlement. The Secretary's motion stated that Martin Marietta had agreed to pay proposed penalties in the amount of $50 for each violation and that the total sum due was $350. The judge approved the settlement motion by decision dated November 4, 1993.

On January 11, 1994, the Secretary filed with the judge a Motion to Amend Decision Approving Settlement ("Motion to Amend"). Judge Melick forwarded the Motion to Amend to the Commission. As grounds for the motion, the Secretary asserts that, due to clerical error, the parties' settlement agreement incorrectly set forth the total amount of the settlement for the eight violations as $350 rather than $400. The Secretary states that Martin Marietta has no objection to his Motion to Amend.

The judge's jurisdiction in this matter terminated when his Decision Approving Settlement was issued on November 4, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's

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[1] Commissioner Nelson participated in the disposition of this case. He passed away before the order was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Secretary did not file a timely petition for discretionary review within the 30-day period and the Commission did not sua sponte direct this case for review. Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem the Motion to Amend to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See, e.g., Island Creek Coal Co., 15 FMSHRC 962, 963 (June 1993).

Under Fed. R. Civ. P. 60(b)(1) & (6), the Commission has afforded relief from final judgements on the basis of inadvertence, mistake, and other reasons justifying relief. See, e.g., Klamath Pacific Corp., 14 FMSHRC 535, 536 (April 1992). The record reveals that, due to a calculation error, the Secretary's settlement motion mistakenly proposed a total penalty of $350. The Secretary seeks to correct this error and asks that the judge's decision be amended to assess a penalty of $400; Martin Marietta does not oppose the motion. Accordingly, we conclude that the Secretary's motion should be granted.

For the reasons set forth above, we reopen this proceeding, grant the Motion to Amend and modify the judge's decision to assess Martin Marietta a total penalty of $400.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 9, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-669
MULLINS AND SONS COAL COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners[1]

DECISION

BY: Holen, Chairman; and Doyle Commissioner:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), raises the question of whether violations of 30 C.F.R. §§ 75.400 and 75.402 by Mullins and Sons Coal Company, Inc. ("Mullins") were caused by its unwarrantable failure to comply with the standards.[2] Administrative Law

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[1] Commissioner Nelson participated in the disposition of this case. He passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

[2] 30 C.F.R. § 75.400, "Accumulations of combustible materials," provides:

> 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.

30 C.F.R. § 75.402, "Rock dusting," provides:

> All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding

Judge Jerold Feldman determined that both violations had not been caused by Mullins' unwarrantable failure. 15 FMSHRC 1061 (June 1993)(ALJ). The Commission granted the Secretary's petition for discretionary review challenging these findings. For the reasons discussed below, we vacate the judge's decision and remand for further proceedings.

I.
Factual and Procedural Background

Mullins operates the No. 6 mine, an underground coal mine in Pike County, Kentucky. On Monday, June 17, 1991, Inspector Donald Milburn of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the mine and reviewed the preshift examination book. A notation stated that accumulations of coal and coal dust existed in the Nos. 1 through 6 entries in the No. 2 section and that the area needed rock dusting. He inspected the six entries and observed accumulations that were between three and six inches in depth and extended inby the No. 2 belt feeder approximately 180 feet in each entry . The accumulations, which were dry and black, consisted of loose coal, coal dust and float coal dust. The inspector also observed that the mine roof, floor and ribs in the six entries and the connecting crosscuts were black. At the time of the inspection, the battery-operated scoop usually used to remove accumulations and to rock dust was being charged.

Inspector Milburn issued a citation to Mullins under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a significant and substantial ("S&S") violation of section 75.400, and an order of withdrawal under section 104(d)(1) of the Act, alleging an S&S violation of section 75.402.[3] The citation and order were terminated the following day after the accumulations were removed and the area was rock dusted.

The Secretary proposed that a civil penalty of $1,000 be assessed against Mullins for each violation and Mullins challenged the proposals. At the hearing, Mullins conceded that it had violated the standards and that the violations were S&S, but contended that the violations were not caused by its unwarrantable failure.

The judge found that Mullins' violation of section 75.400 was not caused by its unwarrantable failure because the accumulations had existed for only three hours, they had been noted in the preshift examination book, the scoop usually used to remove accumulations was inoperable, and no alternative means of clean-up existed. 14 FMSHRC at 1064. The judge found that Mullins' violation of section 75.402 was not caused by its unwarrantable failure

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> that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

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

because Mullins intended to remove, rather than rock dust, the accumulations as soon as the scoop became operable. 14 FMSHRC at 1065. Accordingly, the judge assessed civil penalties for the violations of sections 75.400 and 75.402 in the amounts of $600 and $400, respectively. Id.

II.
Disposition

A. Legal standard

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected, or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use ... characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991).

The Secretary argues that, as to both violations, the judge applied an incorrect legal standard by equating unwarrantable failure with gross negligence.[4] We disagree. Although the judge stated that unwarrantable failure is a phrase "used to connote gross negligence," relying upon Emery and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987), he also distinguished unwarrantable failure from ordinary negligence, stating that "ordinary negligence is manifested by inadvertence, thoughtlessness or inattention, whereas unwarrantable failure is conduct that is not justifiable, or, conduct that is inexcusable." 15 FMSHRC at 1063. The judge applied the correct legal standard in determining whether Mullins' behavior reflected unwarrantable failure.

B. Section 75.400 violation

The Secretary argues that the judge erred in concluding that Mullins' notation of the violation in the preshift log insulated it from an unwarrantable failure finding. He contends that Mullins' failure to commence removal of the accumulations after they were discovered demonstrates its unwarrantable failure to comply with the standard. The Secretary requests that the Commission vacate the judge's determination to the contrary and remand to him for reconsideration.

The judge stated that "a notation in the pre-shift examination book ... insulates, to a certain degree, the operator from an unwarrantable failure charge because it shows a recognition of the hazard created by the accumulations." 15 FMSHRC at 1064. The judge further stated that, if the

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[4] Mullins did not file a brief on review.

operator "proceeds to ignore the accumulations, such conduct would constitute an unwarrantable failure." Id. He determined that the violation was not unwarrantable failure based on his finding that Mullins' failure to remove the accumulations, after the preshift examination, was not the result of its "inexcusable neglect." Id.

We agree with the Secretary that the notation of coal accumulations in a preshift examination book does not insulate an operator from an unwarrantable failure finding. The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. See, e.g., Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992). Although the judge correctly stated that the operator's efforts to eliminate the hazard must be examined when determining whether a violation resulted from an unwarrantable failure, we conclude that the judge did not adequately consider such factors in his analysis. Moreover, the findings relied upon by the judge in reaching his conclusion that Mullins' violation of section 75.400 was not an unwarrantable failure are not supported by substantial evidence.

The record indicates that, at the time of the inspection, Mullins had taken no steps to remove the accumulations, except to begin charging the scoop. The judge found that Mullins' lack of abatement activity did not constitute aggravated conduct because the scoop used for cleaning accumulations was being charged and no other scoops were available. 15 FMSHRC at 1064. He further found that, "given the length of [the accumulations] in each entry (180-feet), cleaning the accumulations by manual shoveling was not feasible." 15 FMSHRC at 1063 n.3 (citation omitted). He concluded that "no alternative means of cleaning up the accumulations" existed. 15 FMSHRC at 1064.

The judge's finding that Mullins had no alternative means to remove the accumulations is not supported by substantial evidence.[5] Inspector Milburn testified that Mullins could have used shovels to remove the accumulations or refrained from producing coal until the area had been cleaned. Tr. 33-34, 39, 146.[6] The judge's finding that shoveling was not feasible was not based on evidence, but rather on a question asked by Dale Mullins, vice president of Mullins, who represented it, during cross-examination of Inspector Milburn. Tr. 87-8. Mr. Mullins asked whether the inspector would agree that the

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

[6] Dale Mullins testified that production had not been ceased because Mullins did not think conditions were "all that bad." Tr. 192.

accumulations "would have been quite a bit for a man to have to do by hand." Id.[7] This question was not answered by the inspector and Mr. Mullins offered no testimony that the accumulations could not have been removed by hand. In fact, Mr. Mullins stated, in an exchange with the judge, that to remove the accumulations "with a shovel, ... would have [taken] several shovels." Tr. 88-89.

Substantial evidence is also lacking for the judge's finding that the accumulations had existed for only three hours. Inspector Milburn testified that the accumulations had existed for at least three hours based upon the fact that, at the time of his 10:00 a.m. inspection, coal had been in production since 7:00 a.m. that morning. Tr. 69, 133-34. He also testified, however, that he believed the accumulations had existed since the previous Friday, because of the quantity and nature of the accumulations and based on his conversations with the operator, in which he was informed that the section had been behind in cleaning and rock dusting since the previous Friday because the scoop used for such purposes had been "down."[8] Tr. 24-25, 69-72. Dale Mullins also testified that they were not able to "catch up" during the maintenance shift on Saturday because the scoop was "down." Tr. 176-77, 184. More importantly, the parties stipulated that the preshift entry noting the accumulations had been entered in the preshift book at approximately 6:00 a.m. on Monday, June 17. Tr. 11. Since production had not commenced until approximately 7:00 a.m. on that day and no coal had been produced over the weekend, all or a large portion of the accumulations must have existed since the previous Friday. Tr. 194-95.

Accordingly, we vacate the judge's finding of no unwarrantable failure and remand the proceeding for further consideration consistent with our decision. The judge should review the record evidence and consider it in light of the factors set forth in Peabody, including the extensiveness of the accumulations, the length of time that they had existed and Mullins' efforts to eliminate them. If he determines that the violation was the result of Mullins' unwarrantable failure, he should reassess the civil penalty.

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[7] In his question, Mr. Mullins indicated that the six entries contained about 20,000 square feet of accumulations. Tr. 87. Based on his estimate that the accumulations were 180 feet long and 6 inches wide in each of the 6 entries, it would appear that they were closer to 540 square feet. See Id.

[8] The inspector documented this conversation in the contemporaneous notes that he took during his inspection:

> I held a mini close-out [conference] with Dale Mullins & Tony Mullins. Both ... remarked that they were behind on permanent stoppings, that [the] scoop was down on Saturday and that they were behind on cleaning & rock dusting also since Friday's shift.

G. Ex. 1, pp. 40-41.

C. Violation of section 75.402

The Secretary argues that the judge erred in concluding that Mullins' violation of section 75.402 was not unwarrantable because Mullins intended to remove the accumulations rather than rock dust as soon as the scoop used for such purposes was operable. The Secretary requests that the Commission vacate the judge's determination and remand for reconsideration. We agree that such action is appropriate.

The judge determined that, because Mullins intended to clean up the accumulations as soon as the scoop was placed in service, Mullins' failure to rock dust them was not an unwarrantable failure. 15 FMSHRC at 1065. The judge held that "rock dusting is an alternative method of neutralizing combustible accumulations that are not removed with a scoop...." Id. He based this conclusion, in part, on Inspector Milburn's testimony that "it would serve no purpose to rock dust accumulations that were going to be cleaned." Id.

Section 75.402 does not exclude from its rock dusting requirement areas containing accumulations that will be cleaned up. The safety standard states that "[a]ll underground areas of a coal mine ... shall be rock dusted to within 40 feet of all working faces...." The only exception is for "areas in which the dust is too wet or too high in incombustible content to propagate an explosion." Dust samples taken by the inspector indicate that the accumulations did not fall within this exception. Tr. 111-12.

The judge erred to the extent that he concluded that rock dusting is an alternative method of complying with the clean-up requirements of section 75.400. Although the inspector acknowledged that rock dusting the accumulations would serve no purpose if the operator were going to immediately remove them, he clarified that operators are required by the safety standards to clean up accumulations and then to rock dust the area. Tr. 150-51, 152-53. In any event, it would appear that Mullins was not planning to remove the accumulations immediately, but, instead, intended to remove them at an indefinite time in the future when the scoop became operable.

Moreover, the rock dusting citation was not limited to the area of the accumulations but included the roof, ribs and other floor areas in the entries and the connecting crosscuts. Joint Ex. 2. Thus, the fact that Mullins was planning to remove the accumulations does not excuse its failure to rock dust the roof, ribs and floor in those areas.

Accordingly, we vacate the judge's finding that Mullins' violation of section 75.402 was not caused by its unwarrantable failure and remand for reconsideration in light our decision. In determining whether the violation was the result of unwarrantable failure, the judge should review the record and consider such factors as the extensiveness of the area that was not rock dusted, the length of time that the violation had existed and Mullins' efforts to comply with the safety standard. If he determines that the violation was the result of Mullins' unwarrantable failure, he should reassess the civil penalty.

III.
Conclusion

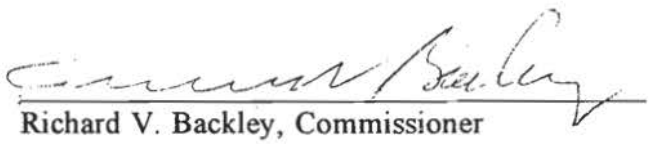
For the reasons discussed above, we vacate the judge's determination that Mullins' violations of sections 75.400 and 75.402 were not caused by its unwarrantable failure. We remand for reconsideration on this record consistent with this decision, and for the reassessment of civil penalties, if appropriate.

Arlene Holen, Chairman

Joyce A. Doyle, Commissioner

Commissioner Backley, concurring in part, and dissenting in part.

I am in complete agreement with the analysis of this case as set forth by my colleagues. However, in view of the referenced */ compelling record evidence regarding the issue of unwarrantable failure as to both violations, I have concluded that no useful purpose is served by remanding that issue to the administrative law judge. In my opinion both violations resulted from an unwarrantable failure by the operator. Therefore, I would reverse the judge on the unwarrantable failure issue as to both violations, and remand the case only for the purpose of reassessment of civil penalties, as appropriate.



Richard V. Backley, Commissioner

*/ Additionally and significantly, I note that, as to the violation of § 75.402, Inspector Milburn testified that the entries and crosscuts were black and appeared never to have been rock dusted. Tr. 75, 110-111, 118, 123-24, 146-48.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 14, 1994

LARRY E. SWIFT, MARK SNYDER, and RANDY CUNNINGHAM	:	
v.	:	Docket No. PENN 91-1038-D
CONSOLIDATION COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners[1]

DECISION

BY: Holen, Chairman; and Backley, Commissioner

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Larry E. Swift, Mark Snyder and Randy Cunningham, miners who were employed by Consolidation Coal Company ("Consol"), charged that Consol's Program for High Risk Employees ("the Program") violated section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). Administrative Law Judge Gary Melick concluded that the Program was facially discriminatory under the Act and ordered Consol to cease implementation of the Program. 14 FMSHRC 361 (February 1992)(ALJ).

The case raises four issues: (1) whether the reporting of injuries under the Program constitutes protected activity under section 105(c)(1); (2) whether the Program is facially, or per se, discriminatory in violation of section 105(c)(1); (3) whether the Program was instituted for discriminatory reasons; and (4) whether the Program was applied to miners in violation of section 105(c)(1). For the following reasons, we affirm the judge's conclusion that injury reporting constitutes protected activity; we reverse the judge's finding that the Program was facially discriminatory; and we remand for consideration of the third and fourth issues, which the judge did not reach.

[1] Commissioner Nelson participated in the disposition of this case. He passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

I.

Factual Background and Procedural History

Consol operates the Dilworth Mine, an underground coal mine in Greene County, Pennsylvania. On January 1, 1990, the Dilworth Mine initiated the Program, which is attached as an appendix to the judge's decision. 14 FMSHRC at 365-67, App. A. The Program directs that each employee report to management any incident resulting in personal injury.[2] The Mine's previously adopted safety rules also require employees to report all injuries.[3]

Step I of the Program consists of designating as "High Risk" any employee who experiences four injuries in 18 working months. Such an employee receives counseling from Consol's management. If the employee at Step I works 12 months without experiencing an additional injury, he clears his record and leaves the Program; the employee reaches Step II if he incurs an additional injury within the 12 months. The employee at Step II is counseled, suspended from work for two days without pay, and required to attend a special awareness session. That employee leaves the Program if he works 12 months without experiencing further injury; if the employee experiences an injury within the 12 months, he reaches Step III. At Step III, the employee is suspended with intent to discharge. 14 FMSHRC at 365-66, App. A ¶¶ 3-5.

On January 23, 1990, Dilworth employees Larry Swift, Randy Cunningham and Mark Snyder, who were members of the United Mine Workers of America ("UMWA") and safety committeemen at the mine, filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that implementation of the Program penalized miners and restricted them from reporting all accidents. See 30 U.S.C. § 815(c)(2). Following its investigation, MSHA determined that Consol had not violated the Mine Act and the Secretary of Labor declined to prosecute. Swift, Snyder and Cunningham pursued their claim with private counsel. They filed a discrimination complaint on behalf of themselves and all Dilworth employees with the Commission on July 20, 1990, pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. § 815(c)(3). At the hearing before Judge Melick, the miners argued that the Program violated section 105(c)(1) of the Mine Act on its face, in its motivation, and as it was applied.

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[2] The Program provides at paragraph 2:

> Each employee continues to be obligated to report to Management any work related incident which results in personal injury to the employee and to complete a Report of Personal Injury (RPI) for each such injury.

14 FMSHRC at 365, App. A ¶ 2.

[3] The Dilworth Mine safety rules provide at paragraph 28: "All employees must report to management, each day, any injury that has occurred on mine property." Ex. R-2.

The judge found that reporting mine injuries is a protected right under the Mine Act. 14 FMSHRC at 363. The judge concluded that the Program was discriminatory on its face. He determined that, by subjecting Consol's employees to suspension and discharge based upon the filing of reports of personal injury, the Program inhibited the reporting of mine injuries and, in so doing, constituted illegal interference with such protected activity. Id. Given this ruling, the judge did not consider complainants' alternate theories of violation. He ordered Consol to "cease and desist from implementation of any disciplinary action" under the Program and to expunge from all records any references to disciplinary action taken under the Program. Id. at 364.

The Commission granted Consol's petition for discretionary review, permitted Peabody Coal Company ("Peabody") to participate as amicus curiae, and heard oral argument in the matter.

II.

Disposition of Issues

A. Parties' Arguments

On review, Consol argues that the Program is consistent with the safety purposes of the Mine Act. Consol asserts that the judge erred in finding a violation in the absence of any discriminatory motivation. Consol contends that, even if it could have violated the Act absent unlawful intent, the judge failed to consider legitimate safety interests in accident prevention that motivated Consol to adopt the Program. Consol argues that the judge failed to consider its affirmative defense -- that it would have taken the actions at issue for reasons unrelated to protected activity. Consol also asserts that the judge made no finding that any of the accident reports under the Program involved protected activity under section 105(c)(1) of the Mine Act.

Amicus Peabody argues that the judge's decision is contrary to the purposes of the Mine Act, which makes safety a primary concern and imposes the responsibility to abate unsafe conditions on both operators and miners. Peabody contends that the judge's analysis is inconsistent with the Commission's case law, under which a showing of improper motivation is required to sustain a discrimination complaint.[4]

The complainants argue generally in support of the judge's decision. They argue that the Program violates section 105(c)(1) because it interferes with accident reporting. They further assert that the Program was discriminatorily motivated to inhibit reporting of accidents and that it was instituted in response to the safety committee's complaints.

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[4] In discussing the arguments of Consol and Peabody on review, we refer to them collectively as "the operators." Amicus Peabody contends in its supplemental memorandum that the judge's decision conflicts with state laws that decertify unsafe miners. We do not reach this issue because it is outside the scope of Consol's petition for review and was not first presented before the judge. 30 U.S.C. § 823(d)(2)(A)(iii).

B. Overview

We first consider whether a miner's reporting of injuries to an operator constitutes protected activity and whether the Program is facially discriminatory, apart from its motivation. Next, we address the issues of motivation for establishing the Program and the Program's application to individual miners.

C. Protected Activity

The Mine Act prohibits discrimination against miners for exercising any protected right including filing a complaint, testifying in a Mine Act proceeding and instituting a proceeding under the Act.[5] The general principles applicable to analysis of discrimination under section 105(c) of the Mine Act, formulated primarily for analysis of particular acts of discrimination against individuals, are well settled and have become known as the "Pasula-Robinette" test. See Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). In order to establish a prima facie case of discrimination under that analysis, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that

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[5] Section 105(c)(1) of the Mine Act provides:

> 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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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].

protected activity. Id.

We affirm the judge's conclusion that a miner's reporting of injuries to an operator constitutes protected activity. Section 2(e) of the Act provides that "operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." 30 U.S.C. § 801(e). In order to carry out this responsibility, mine operators need to know about unsafe conditions that cause accidents and injuries. Further, accurate information must be gathered by operators in order to comply with the Secretary's regulations at 30 C.F.R. Part 50 (1993), requiring operators to file with MSHA reports of all accidents and injuries that occur at mines. Operators can be fully informed about accidents and injuries only with the cooperation of miners. Therefore, taking adverse actions against miners for their reporting of injuries would restrict the free flow of information and compromise accurate reporting and mine safety.

We reject the operators' contention that the act of reporting a personal injury would qualify as protected activity only if the report contains a safety complaint; this approach takes too narrow a view of such reports. The legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ("Legis. Hist.").

The right to report injuries, however, carries with it a corresponding responsibility that miners report injuries and accidents. The legislative history of the Act shows that Congress provided protection to miners against discrimination in order to encourage their active role in enhancing mine safety:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.... [I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

Legis. Hist. at 623. Moreover, the right to report injuries does not include a protected right to incur or cause injury.

D. Whether the Program is Facially Discriminatory

1. Introduction

Central to proving a case of discrimination under section 105(c)(1) is the determination of unlawful motive. The Mine Act prohibits retaliatory conduct or discrimination that is motivated by a miner's exercising any protected right. Nevertheless, rare situations have arisen in which proof

that adverse action was improperly motivated has not been required. The Supreme Court has permitted a showing of facial discrimination under section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3): "Some conduct ... is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1967)(citations omitted). The Commission found in UMWA and Carney v. Consolidation Coal Co., 1 FMSHRC 338, 341 (May 1979), that an operator's business policy was facially discriminatory. There, the Commission found that, under section 110(b) of the Coal Act (30 U.S.C. § 820(b)(1976)(amended 1977)), the predecessor to section 105(c), a company policy requiring union safety committeemen to obtain permission from management before leaving work to perform safety duties was unlawful because it impeded a miner's ability to inform the Secretary of alleged safety violations. See also Simpson v. FMSHRC, 842 F.2d 453, 462-63 (D.C. Cir. 1988)(when mine conditions intolerable, operator motive need not be proven to establish constructive discharge). Cf. Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1532-33 (August 1990)(held that operator's policy was not facially discriminatory).

To establish that a business policy is discriminatory on its face, a complainant must show that the explicit terms of the policy, apart from motivation or any particular application, plainly interfere with Mine Act rights or discriminate against a protected class. See Price and Vacha, 12 FMSHRC at 1532. Once a policy is found to be discriminatory on its face, an operator may not raise as a defense lack of discriminatory motivation or valid business purpose in instituting the policy. Compare Price and Vacha, 12 FMSHRC at 1532-33 with Price and Vacha, 10 FMSHRC 896, 907-08 (July 1988)(ALJ).

When reviewing a claim of facial discrimination, the Commission has stated:

> "The Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of [a challenged business program or policy] apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act." Our limited purpose is to focus simply on whether the [program] or enforcement of some component thereof conflicts with rights protected by the Mine Act.

Price and Vacha, 12 FMSHRC at 1532 (citation omitted).

2. Facial Analysis of the Program

We address the issue of whether the Program, as alleged by the complainants, was "facially discriminatory to themselves and to all other miners" (14 FMSHRC at 362), and therefore interfered with Mine Act rights. The Program explicitly requires the reporting of personal injuries and the Dilworth Mine safety rules additionally require employees to report all injuries. These requirements, on their face, are consistent with the Mine

Act's goals of encouraging miners to report accidents and injuries. Under the legislative history of the Act, the reporting of an injury is equally the miner's responsibility as it is his right. The Program does not, as asserted by complainants, impose or threaten discipline for reporting injuries. Rather, it imposes discipline for incurring a number of injuries. Further, all miners at Dilworth are subject to the Program; it does not single out for special treatment particular workers or classes of workers. Thus, the Program's terms on their face do not discriminate against miners who report injuries, nor do they interfere with miners' rights to report injuries.

The judge concluded that the Program interferes with Mine Act rights by "creat[ing] an obvious and persuasive disincentive to report injuries." 14 FMSHRC at 364. The judge reasoned that "[s]ustaining an injury and the reporting of the injury are ... inextricably interrelated." Id. As a matter of law, we reject the judge's legal inference and ultimate conclusion.[6] Reporting and sustaining injuries, in general and under the Program, are distinct events and can involve different individuals. Indeed, the judge recognized that sustaining injuries is not protected activity under the Mine Act. Id. As noted earlier, the Program continued the requirement under the company's rules that all injuries be reported.

Under the judge's reasoning, any program that penalizes injuries sustained, even a program that is based on fault, would chill accident reporting. See 14 FMSHRC at 363-64.[7] The complainants, however, effectively concede that, absent inclusion of blameless accidents, the Program may be facially lawful. See Oral Arg. Tr. 52-53. Nevertheless, the complainants have not shown that the inclusion of no-fault injuries in the Program specifically contravenes the Mine Act.[8]

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[6] The judge's analysis is based on the express terms of the Program; he did not base his conclusion that the Program interfered with Mine Act rights on any factual findings nor discuss any evidence in the record as to whether reporting was encouraged or discouraged under the Program. The judge, consistent with Commission precedent (see Price and Vacha, 12 FMSHRC at 1533; Carney, 1 FMSHRC at 341), did not consider the subjective testimony of individual miners to determine whether the allegedly discriminatory employment action interfered with Mine Act rights.

[7] The Program is virtually no-fault, i.e., a miner is charged with an injury even if blameless in the causation of the accident. In paragraph No. 8, however, management reserves the right to exclude injuries in the "rare situation" when management determines that there was "absolutely no culpability on the part of the injured employee" and when such exclusion appears "to be in the best interest of attaining a safe working environment for all employees at the mine." 14 FMSHRC at 367, App. A ¶ 8.

[8] The parties disagree on the merits of a no-fault injury reduction program. This issue is appropriately resolved in collective bargaining and the grievance/arbitration process. See, e.g., UMWA on behalf of James Rowe v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (September 1985), aff'd sub nom. Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987).

In Secretary on behalf of Pack v. Maynard Branch Dredging Co., 11 FMSHRC 168, 172 (February 1989), aff'd, 896 F.2d 599 (D.C. Cir. 1990), the Commission rejected a similar argument as to the chilling of reporting, raised against a company policy that required employees to report dangerous conditions to the company. The Secretary asserted that such a policy would intimidate miners from exercising their rights under sections 103(g) or 105(c) of the Act. Id. at 172-73. The Commission held that the operator was entitled to initiate such a policy that called for miner participation in the maintenance of safety. Id. As Commissioner Backley stated in Pack, a "fundamental goal of the Act [is] to ensure that every miner does all that he can to make the work environment safe." Id. at 174 (concurring in part and dissenting in part). Making the work environment safe requires the accurate reporting of injuries.

For the reasons set forth above, we hold that Consol's Program, on its face, does not violate the Mine Act.

E. Issues Remanded

The foregoing conclusion does not dispose of the case. Because the judge did not reach the issues of whether the initiation of the Program was discriminatorily motivated and whether the Program was subsequently applied in a discriminatory manner, we remand for his consideration of these issues. We provide the following guidance for the judge and parties.

1. Motivation for Instituting the Program

In Price and Vacha, the Commission indicated that discriminatory motive would invalidate a policy that is otherwise facially lawful. 12 FMSHRC at 1532-33. The Pasula-Robinette test provides the appropriate framework for analyzing the reasons for Consol's adoption of the Program. See Pasula, 2 FMSHRC at 2797-800; Robinette, 3 FMSHRC at 817-18.

Under the Pasula-Robinette test, an operator may rebut a prima facie case of discrimination by showing either that no protected activity occurred or that an adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Id. See also, e.g., Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 398-403 (1983)(approving nearly identical test under National Labor Relations Act).

The judge did not make express findings as to Consol's motivation for

initiating the Program -- whether it was to reduce the high injury rate, to discourage accident reporting, or to retaliate against the mine safety committeemen's filing of safety complaints. We direct the judge to make findings and conclusions as to whether the initiation of the Program was, even in part, discriminatorily motivated.

If the judge finds unlawful motivation, he shall further analyze whether Consol, nevertheless, presented a successful Pasula-Robinette affirmative defense -- i.e., showed that it also initiated the Program to help reduce accidents and would have done so in any event for safety purposes alone.[9]

If Consol fails to sustain its affirmative defense, a violation is proven. If the judge finds no evidence of discriminatory motivation in the establishment of the Program or if Consol sustains its affirmative defense, he shall proceed to address whether the Program was applied in a discriminatory manner.

2. Application of the Program

The question before the judge will be whether the Program was specifically applied in a disparate way to individual miners or classes of miners in contravention of the Mine Act. See Price and Vacha, 12 FMSHRC at 1533-36. (An example of such treatment would be exclusion from the Program of an injury to one miner and inclusion of similar injuries to another miner.) We note that, by itself, hostility of miners to the Program is not sufficient to prove the existence of a violation. Id. at 1533. The judge shall make all findings necessary to dispose of application issues within the Pasula-Robinette framework.

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[9] We note the judge's finding that, during the 1980's, before the adoption of the Program, the Dilworth Mine had the worst safety record of Consol's Eastern Division. 14 FMSHRC at 362. Consol refers to evidence in the record that it asserts represents a decline in the frequency and severity of injuries at Dilworth. C. Br. at 10-11. To the extent that the judge can infer motivation from the effect of the Program, he should consider this evidence. Counsel for complainants at oral argument attributed the improved safety record, in part, to extra care taken by employees as a result of the Program. Oral Arg. Tr. 47-48.

III.

Conclusion

For the reasons set forth above, we reverse the judge's determination that the Program was facially unlawful. We remand for his consideration of whether Consol was improperly motivated in instituting the Program and, if so, whether it sustained its affirmative defense. If the judge finds no discriminatory motivation or if Consol sustains its affirmative defense, he shall address whether Consol applied the Program in a discriminatory manner. Accordingly, this matter is remanded for further proceedings on this record consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Commissioner Doyle, concurring in part and dissenting in part:

I concur with my colleagues in affirming the administrative law judge's determination that the complainants engaged in activity protected under the Mine Act when they reported injuries to their employer, Consolidation Coal Company ("Consol"). Slip op. at 4-5. I must, however, respectfully dissent from their determination that Consol's Program for High Risk Employees (the "Program") is not discriminatory on its face. I would also affirm the judge's decision on the basis that the Program inhibits the exercise of Mine Act rights in violation of section 105(c).

Under the Mine Act, operators are required to report all accidents and occupational injuries, as those terms are defined at 30 C.F.R. §50.2, to the Mine Safety and Health Administration ("MSHA"). To fulfill that obligation, operators rely, to a great extent, on reports from their employees of such occurrences. It is that reporting to Consol of miners' injuries that is the "protected activity" underlying this complaint of discrimination.

Consol's Program requires each employee to report to management each work related incident that results in his injury and to also file a "Report of Personal Injury." 14 FMSHRC 365-66, App. A ¶ 2. An employee experiencing four injuries in eighteen months is designated a "High Risk Employee" and is enrolled in the Program. Id. at ¶ 3. Another injury within twelve months subjects the employee to suspension. Id. at ¶ 4. If an additional injury is suffered within the following twelve months, the employee is subject to suspension with intent to discharge. Id. at ¶ 5. Those causing accidents or injuries are not placed in the program unless they, too, are injured. Oral Arg. Tr. at 9-12, 67.

The Complainants, filing on their own behalf and on behalf of all miners subject to the Program, claimed, among other things, that the Program was initiated to inhibit the accident reporting required by 30 C.F.R. Part 50 and that it was per se violative of section 105(c). Complainants' Post Hearing Br. at 5.[1] The judge found that the Program, by subjecting miners to suspension and discharge, created an obvious disincentive to report injuries and inhibited and interfered with that reporting. 14 FMSHRC at 363-64. Further, he found that the Program was discriminatory on its face in violation of section 105(c). Id. at 364.

As noted by the majority, a program or policy is discriminatory on its face if its explicit terms, apart from motivation or particular application, interfere with Mine Act rights or discriminate against a protected class. Slip op. at 6. Thus, if the Program provided that those engaged in the protected activity of reporting their injuries were subject to adverse action, it would be, without question, discriminatory on its face. The Program, albeit less

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[1] Their other claims were: (1) that the Program was initiated in retaliation for, and to counteract the effects of, actions by the mine safety committee to force proper accident and injury reporting to MSHA by Consol; and (2) that each application of the Program created an individual violation of section 105(C). The judge did not reach these issues.

blatantly, achieves the very same result by requiring each employee to report his injuries and, on the basis of those injuries, designates him a "High Risk Employee." He is then placed in the Program.

The judge found that sustaining and reporting injuries were so "inextricably interrelated" that the two activities could not be separated. 14 FMSHRC at 364. My colleagues, in reversing the judge, characterize this finding as a "legal inference and ultimate conclusion," which, "[a]s a matter of law, [they] reject." Slip op. at 7. They state that "[r]eporting and sustaining injuries, in general and under the Program, are distinct events and can involve different individuals." Id. While others may also report accidents, that does not diminish the fact that the Program itself, at paragraph 2, states that each individual sustaining an injury must report that injury to management and "complete a Report of Personal Injury." 14 FMSHRC at 365, App. ¶ 2. Thus, the Program itself, on its face, inextricably links the sustaining and reporting of injuries. That being the case, I agree with the judge that, on its face, the Program violates section 105(c) of the Mine Act.[2]

Not only is the Program discriminatory on its face in that it provides for adverse action against those engaged in protected activity but, as the judge found, its effect is to inhibit the exercise of reporting rights.[3] Congress, in passing the Mine Act, recognized in section 2(c) the need for more effective means of preventing death and serious injuries in the nation's mines. 30 U.S.C. § 801(c). In furtherance of that goal, and to encourage a more active role by miners, it provided the anti-discrimination provisions of section 105(c), which protect miners from adverse actions as a result of the exercise of rights provided under the Mine Act. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ("Legis. Hist.") at 623. The Senate report stressed that the anti-discrimination section should be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." Legis. Hist. at 624.

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[2] Citing Oral Arg. Tr. at 52-53, the majority states that Complainants "effectively concede that, absent inclusion of blameless accidents, the Program may be facially lawful." Slip op at 7. A review of those pages indicates that Complainants made no such concession. They stated they would not be troubled by a program that dealt with those engaged in unsafe acts. Oral Arg. Tr. at 52-53. In any event, the Program does include blameless accidents.

[3] My colleagues note, but do not follow, the factually similar UMWA & Carney v. Consolidation Coal Co., 1 FMSHRC 338 (May 1979), in which the Commission found discriminatory the operator's policy of requiring miners to obtain company permission to perform union safety duties. In reaching its conclusion, the Commission reasoned that the operator's policy effectively impeded a miner's ability to exercise his Mine Act rights. Id. at 341.

The majority, in reversing the judge, dismisses out of hand his finding that the Program inhibits and interferes with the exercise of Mine Act rights.[4] 14 FMSHRC 363; Slip op. at 6-7. That finding is, however, supported by substantial evidence and, under the terms of the Mine Act, must be affirmed. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Complainant Swift testified that numerous employees had told him that, because of the Program, they would not report accidents if they could avoid it. Tr. at 230, 231. He testified further that he knew of four accidents that had not been reported because of the Program. Tr. at 232. One employee who injured his back was afraid to report it for fear of losing his job. Tr. at 224-25. Another employee who required stitches had to be convinced by Swift to report the accident because he feared going into the Program. Tr. at 231. Complainant Cunningham testified that, because he has experienced four accidents,[5] he is now in the Program, although he lost no time as a result of the incidents. Tr. at 22, 29. He now feels inhibited about filing accident reports for fear of losing his job and, if he sustains another injury, he intends to leave the mine without reporting the accident and see his own doctor. Tr. 28, 31-32.[6]

The Program's inhibiting effect on injury reporting is uncontradicted in this record. Thus, because the Program interferes with protected activity, precisely what section 105(c) was designed to prevent, it is discriminatory.

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[4] Contrary to the majority's assertion, the Commission did not reject a similar argument in Pack v. Maynard Branch Dredging Co., 11 FMSHRC 168 (February 1989). Slip op. at 8. Rather, it found that the record evidence did not support the argument. 11 FMSHRC at 173. In Pack, the company policy required employees to report all unsafe conditions to their supervisors. There was no discipline or other adverse action taken against those who followed the policy. It was Pack's failure to report that caused his dismissal. The Commission found that "miners being intimidated from exercising their rights under ... the Mine Act simply is not presented by this case." Id. Here, the judge found that miners were inhibited from exercising their Mine Act right to report (14 FMSHRC at 363-64) and adverse action was taken against those who did report.

[5] In one instance, Cunningham was struck by an elevator door as he attempted to exit the elevator. His foreman was operating the controls at the time. Tr. at 23-24. In a second accident, Cunningham was told to enter a scoop car to assist in locating an oil leak. After pulling levers as instructed, he was hit in the face by spraying oil and, although he was wearing safety glasses, oil had to be flushed from his eye. Tr. at 24-25.

[6] In Price & Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (August 1990), miners opposed an operator's drug testing program because they believed it cast suspicion of drug use on those being tested and because they saw it as an invasion of their privacy and an affront to their dignity. Id. at 1526. The Commission found that "a miner's opposition or hostility" was not determinative of a program's validity and that adverse action was "not simply any operator action that a miner does not like." Id. at 1533. Here, the Program is not simply one that miners oppose or dislike. The Program interferes with and punishes their exercise of Mine Act rights.

In the majority's opinion, the inhibiting effect on Mine Act reporting rights is apparently irrelevant. Under their analysis, Complainants must prove either that the Program was discriminatorily motivated or was discriminatorily applied to individual miners or classes of miners. Slip op. at 7-9. "Some conduct, however, is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967) (citations omitted).[7]

Thus, on the basis that the Program is discriminatory on its face, as well as on the basis that, on the undisputed record, it has inhibited Consol's employees in the exercise of their protected right to report injuries, I would affirm the administrative law judge.

Joyce A. Doyle

Joyce A. Doyle, Commissioner

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[7] The majority states that "under the judge's reasoning, any program that penalizes injuries sustained, even a program based on fault, would chill accident reporting." Slip op. at 7. They misconstrue the judge's decision. Applying his reasoning, only programs that require a miner to report his injuries, and also provide for adverse action against him based on that report alone, would be found to inhibit reporting. Fault-based programs focusing on those causing accidents and injuries, rather than on those sustaining or reporting them, would not be proscribed. This would be true even if, in some instances, the individual causing an injury were also the one reporting it, because the driving force of such a program would be unsafe conduct, not injury reporting. Apparently the program of Amicus Curiae, Peabody Coal Company, is based on unsafe conduct, not on injuries sustained. Oral Arg. Tr. at 27-29, 33, 36, Peabody Reply Br. at 3. Under the judge's reasoning, such a program would not chill reporting nor would it be discriminatory on its face.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 22, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	
	:	Docket No. WEVA 94-26
v.	:	
TUG VALLEY COAL PROCESSING, Respondent	:	

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners[1]

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. (1988)(the "Mine Act"), Chief Administrative Law Judge Paul Merlin issued a Decision Approving Penalty and Order of Dismissal on January 13, 1994. Noting that Tug Valley Coal Processing ("Tug Valley") had paid the proposed penalty, the judge reviewed the appropriateness of the penalty in relation to the statutory criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), and dismissed the proceeding.

Tug Valley timely filed a petition for discretionary review of the judge's dismissal. Tug Valley asserts, inter alia, that, because it paid the penalty through "genuine mistake," it should not be precluded from maintaining a civil penalty proceeding. Pet. at 7. Tug Valley further contends that the judge committed a prejudicial error of procedure in dismissing the proceeding based upon the "ex parte representations of the Mine Safety and Health Administration ("MSHA")." Pet. at 1-2, 10.

"[T]he Commission has held that an operator's payment of a civil penalty proposed for a violation extinguishes the operator's right to contest the fact of violation." Westmoreland Coal Co., 11 FMSHRC 275, 276 (March 1989), citing Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985). However, "where a civil penalty was paid by genuine mistake, the operator's right to contest the violation may not be lost." Id., citing Old Ben Coal Co., 7 FMSHRC at 210 n.6.

[1]Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission."

The record in this proceeding does not contain sufficient information for the Commission to determine whether Tug Valley's payment of the penalty was a "genuine mistake" as it contends in its petition. Further proceedings are necessary to address Tug Valley's assertion and to determine what relief, if any, is appropriate.

Accordingly, Tug Valley's petition is granted, the judge's decision is vacated, and the matter is remanded for further proceedings consistent with this order.[2]

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

[2]Tug Valley has not offered any support for its allegation that the judge dismissed the case based on an ex parte communication from MSHA. Pet. at 8-10. It is evident from the record that he based his dismissal on Tug Valley's payment of the penalty assessment, which is a matter of public record. See Commission Procedural Rule 82, 58 Fed. Reg. 12158, 12173-74 (March 3, 1993), to be codified at 29 C.F.R. § 2700.82.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 23, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 93-114-M
WAGNER SAND & STONE, INC.	:	

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners[1]

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On October 22, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Wagner Sand & Stone, Inc. ("Wagner Sand"), for failing to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's August 20, 1993, Order to Show Cause. The judge ordered the payment of a civil penalty of $294. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the judge dated January 14, 1994, William Wagner, President of Wagner Sand, asserts that the parties had agreed to settle this proceeding. Wagner attached a copy of a Joint Motion to Approve Settlement and to Dismiss ("Joint Motion"), dated October 7, 1993.[2]

Wagner further asserts that after the October 22, 1993, default order was issued, the Secretary's counsel conceded that a mistake had been made and advised him that it would be corrected. Wagner states that no correction has been made and he seeks relief from default.

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[1] Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

[2] The Joint Motion, however, references two citation numbers in another proceeding involving Wagner Sand (Docket No. SE 93-115-M); the judge subsequently issued an order approving settlement of the citations in that docket. The Joint Motion is silent as to the citations in this proceeding.

The judge's jurisdiction over this case terminated when his decision was issued on October 22, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Wagner Sand did not file a timely petition for discretionary review within the 30-day period and the Commission did not sua sponte direct this case for review. Thus, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem the January 14, 1994, letter to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See, e.g., Island Creek Coal Co., 15 FMSHRC 962, 963 (June 1993).

Under Fed. R. Civ. P. 60(b)(1) & (6), the Commission has afforded relief from final judgments on the basis of inadvertence, mistake, and other reasons justifying relief. See, e.g., Klamath Pacific Corp., 14 FMSHRC 535, 536 (April 1992). It appears from the record that Wagner Sand and the Secretary may have attempted to settle the citations in this proceeding, as well as those in another, and that confusion may have arisen over the citation and docket numbers. On the basis of the present record, however, we are unable to evaluate the merits of Wagner Sand's position. In the interest of justice, we remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we reopen this matter, vacate the judge's default order, and remand this matter for further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 23, 1994

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION		
v.		
T & F SAND & GRAVEL, INC.	Docket Nos.	CENT 91-215-M
REEDY COAL COMPANY, INC.		KENT 92-303
KINKAID STONE CO.		LAKE 92-199-M
KEYSTONE COAL MINING CORP.		PENN 91-960
PENNSYLVANIA ELECTRIC CO.		PENN 91-1011
KEYSTONE COAL MINING CORP.		PENN 91-1015
KEYSTONE COAL MINING CORP.		PENN 91-1017
KEYSTONE COAL MINING CORP.		PENN 91-1340
SHANNOPIN MINING CO.		PENN 92-385
JIM WALTER RESOURCES, INC.		SE 92-79
JIM WALTER RESOURCES, INC.		SE 92-208
MID-CONTINENT RESOURCES, INC.		WEST 90-383
TARMAC CALIFORNIA, INC.		WEST 91-498-M
EASTSIDE ROCK PRODUCTS		WEST 92-318-M
CONSOLIDATION COAL CO.		WEVA 91-139
ISLAND CREEK COAL CO.		WEVA 91-1231
CONSOLIDATION COAL CO.		WEVA 92-325

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners[1]

ORDER

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"), the Secretary of Labor proposed penalties for citations issued to the mine operators listed above ("Operators"). In each proceeding, the presiding administrative law judge, in accordance with the Commission's decision in Drummond Co., Inc., 14 FMSHRC 661 (May 1992), remanded the proposed penalties to the Secretary for recalculation. Under Drummond, penalties were to be recalculated in accordance with the Secretary's regulations at 30 C.F.R. Part 100 without reference to or use of the "excessive history" provisions contained in his Program Policy Letter No. P90-III-4 (May 29, 1990).

On January 14, 1994, the Secretary filed with the Commission an Amended Motion to Reinstate Civil Penalty Proceeding ("Motion to Reinstate") in each proceeding. The Secretary asserts that each proceeding was "incorrectly remanded back to the Secretary since the case did not involve the issue of excessive history." The Secretary asks that these cases be reinstated to the Commission's active docket and that the Operators be granted the right to request hearings. No opposition has been received.

The judges' jurisdiction in these matters terminated when their Orders of Remand and Dismissal were issued. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of a decision's issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Secretary did not file timely petitions for discretionary review within the 30-day period and the Commission did not sua sponte direct review of these cases. Thus, the judges' orders dismissing these proceedings became final decisions of the Commission 40 days after their issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem the Motions to Reinstate to be requests for relief from final Commission decisions incorporating late-filed petitions for discretionary review. See, e.g., Island Creek Coal Co., 15 FMSHRC 962, 963 (June 1993).

Guided by Fed. R. Civ. P. 60(b)(1) & (6), the Commission has afforded relief from final judgments on the basis of inadvertence, mistake, and other reasons justifying relief. See, e.g., Klamath Pacific Corp., 14 FMSHRC 535, 536 (April 1992). It appears that the penalties proposed by the Secretary in these matters may not have been computed in accordance with the Secretary's

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[1] Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

excessive history policy and, therefore, may have been improperly remanded to the Secretary under Drummond.

Accordingly, we reopen these proceedings and remand them to the Chief Administrative Law Judge. He shall reinstate them if he determines that they were improperly remanded to the Secretary.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 24, 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 93-86
HICKORY COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners[1]

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. (1988)("Mine Act"), the Secretary of Labor proposed penalties for three citations issued to Hickory Coal Company ("Hickory"). On January 18, 1993, the Secretary filed with Administrative Law Judge Roy J. Maurer a Motion for Decision and Order Approving Settlement, on behalf of the parties. The Secretary's motion stated that he had originally proposed penalties totaling $112. It stated further that the Secretary had agreed to vacate one citation and that Hickory had agreed to pay civil penalties totaling $40 for the remaining two citations. The judge approved the settlement motion by decision dated January 24, 1994.

Also on January 24, 1994, apparently after he issued the decision, the judge received from Hickory a Statement in Opposition to the proposed settlement. Hickory's opposition did not dispute the amount of the proposed settlement, but stated that it was "far from agreement [with] statements made by the Secretary's attorney in the motion...." Hickory contended that the motion incorrectly states that it was negligent with respect to the violations.

[1] Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

The judge's jurisdiction in this matter terminated when his Decision Approving Settlement was issued on January 24, 1993.[2] Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of the decision's issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Hickory's Statement in Opposition to be a timely filed Petition for Discretionary Review, which we grant.

"Settlement of contested issues is an integral part of dispute resolution under the Mine Act." Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). Section 110(k) of the Mine Act provides that no contested proposed penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). "[T]he record must reflect and the Commission must be assured that a motion for settlement, in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions." Peabody Coal Co., 8 FMSHRC 1265, 1266 (September 1986).

Apparently, Hickory does not dispute that it agreed to settle the proposed penalties for the amount approved by the judge. There is disagreement between the parties, however, as to the terms upon which the settlement is acceptable to each. Because Hickory was not a signatory to the settlement agreement, further consideration by the judge is necessary. See Peabody, 8 FMSHRC at 1267.

For the reasons set forth above, we vacate the judge's decision approving the settlement. We remand this matter to the judge for appropriate further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

[2] By letter dated January 26, 1994, the judge advised Hickory that his jurisdiction had terminated.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 2 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 93-102
	:	A.C. 46-01455-03966
v.	:	
	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four (4) alleged violations of certain safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer and a hearing was conducted in Morgantown, West Virginia. The petitioner filed a posthearing brief, but the respondent did not. However, I have also considered the oral arguments made by both parties on the record during the hearing in this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether the alleged violations were "Significant and Substantial" (S&S), (3) whether the alleged violations were the result of an unwarrantable failure by the respondent to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated in relevant part to the following (Exhibit ALJ-1; Tr. 11-12):

1. The Commission and the presiding Judge have jurisdiction to hear and decide this matter.

2. The respondent is the owner and operator of the subject mine and the operations of the mine are subject to the jurisdiction of the Mine Act.

3. The respondent is a large mine operator and payment of the maximum civil penalty assessments for the violations will not adversely affect its ability to remain in business.

4. The inspectors who issued the contested orders were acting in their official capacity.

5. True copies of the contested orders were served on the respondent or its agent as required by the Act.

6. MSHA's penalty assessment information (Exhibit G-1), and violation history reports (Exhibits G-2 and G-3), may be used in determining appropriate civil penalty assessments for the alleged violations.

7. The subject mine has received prior section 104(d)(2) orders and remains on the "d" chain.

Discussion

This case concerns four (4) section 104(d)(2) "S&S" orders issued by MSHA inspectors at the mine. One of the orders, No. 3122087, issued on August 6, 1992, by Inspector Richard E. McDorman, alleging a violation of 30 C.F.R. § 75.316, was settled by the parties and the respondent agreed to pay the full amount of the proposed penalty assessment of $3,000. The settlement was approved from the bench, and my decision in this regard is herein reaffirmed (Tr. 445-446).

Section 104(d)(2) "S&S" Order No. 3122095, issued on August 31, 1992, by MSHA Inspector Richard E. McDorman, cites an alleged violation of 30 C.F.R. § 75.400, and the inspector

described and cited accumulations of coal, coal dust, and float coal dust, at the following locations:

1. Butt Conveyor Belt Line take up No. 4 block. Fine coal, coal dust, & float coal dust 48" x 14" x 14" allowed to accumulate and a bottom belt roller has turned in these accumulations until it would not turn in this dry to damp coal.

2. Just inby this location, accumulations measuring 6 ft x 50" x 12 in deep are packed in under the bottom belt. These accumulations, fine coal and float coal dust, are layered, 2" to 6" of coal, with a thin layer of rock dust. This proves that the accumulations have existed for some time, they have not been removed, just hidden by thin 1/4" layers of rock dust. The bottom belt has been hitting and rubbing these accumulations turning the coal into fine coal and float coal dust, damp to dry.

3. Just inby this location fine wet coal and coal dust 6" x 3 ft x 1 ft and being rubbed by a bottom belt roller.

4. The next roller is rubbing accumulations, damp to dry, 6" x 4 ft x 1 ft.

5. The next inby roller is turning float coal dust, fine and coal that has been dried by friction, 6" x 3 ft x 1 ft.

6. The next inby roller is rubbing fine coal 48" x 3 ft x 8".

7. The next inby roller is frozen and the bottom belt is rubbing in damp to dry coal dust 4 ft x 4 ft x 8".

8. Inby 5 block dry fine coal and float coal dust under the stationary dolly measures 3 ft x 6 ft x 4 in.

9. At 7 block 3 bottom belt rollers in a row have been turning in damp fine coal, turning it into coal dust and float coal dust measuring 3 ft x 2 ft x 4, 6, 10. Approximately half of this area does not have fire suppression over the conveyor belt line. This presents a fire hazard. Air from this

belt line travels to the 7 Butt longwall section where at least six miners are working. Persons can receive burns, smoke inhalation and/or carbon monoxide poisoning fighting fires. This condition is obvious and has been allowed to exist for some time. Mine management could not give an excuse for, or justify the existence of all the areas of the accumulations. All of these accumulations are in a distance of approximately 350 feet. Ignition sources in this area include cables, motors, frozen belt rollers, and the conveyor belt.

Petitioner's Testimony and Evidence

MSHA Inspector Richard McDorman confirmed that he issued the order after finding accumulations of fine coal, coal dust and float coal dust at the mine locations cited in the order. He stated that he made notes and a sketch detailing and describing the cited conditions, and that he measured the depth of the accumulations with a three-foot long roof sounding rod. He confirmed that he did not take samples of the coal accumulations, and he described them as "black, shiny coal dust, float coal dust" (Tr. 15-24). He also stated that the dampness of the accumulations ranged "from dry to damp, some of the area was even wet", and these areas are noted in his notes (Tr. 25).

Mr. McDorman confirmed his "S&S" finding, and he believed that the accumulations presented a fire hazard. He stated that the accumulations would contribute to the hazard because "They were the fuel. You have the air there. You have an ignition source in the area, and the loose coal, fine coal and float coal dust is the fuel for the fire" (Tr. 25).

Mr. McDorman stated that six men were working on the section and that the belt was running. If a fire were to occur, he believed the men would be exposed to smoke inhalation, carbon monoxide poisoning, possible entrapment, and possible burns fighting the fire (Tr. 26). He believed an injury was reasonably likely to occur because of the ignition sources that were present. He described these sources as the starter box, electrical motors, cables, and the fact that the belt was rubbing frozen rollers and turning in coal dust and float coal dust (Tr. 26-27). He stated that the rollers were "fouled and would not turn" because the accumulations were packed against them, and they presented a potential ignition source because the rubbing action produces heat and "fires have occurred because of a belt rubbing rollers, belt rubbing the sides of stands" (Tr. 27).

Mr. McDorman confirmed that fire suppression was available over approximately half of the areas he cited, but it would not

be available if the accumulations had caught fire at a location where there was no fire suppression (Tr. 28-33).

Mr. McDorman stated that he based his "high negligence" finding on the existence of the accumulations and the fact that they "were extensive and had been allowed to accumulate over some period of time and had not been adequately cleaned up" (Tr. 36). He considered the fact that the preshift examiner should have found the accumulations on the preceding shifts, reported it, and had them removed. He also considered the fact that he had previously put the respondent on notice about the need to address the accumulations problems and had discussed it with a company representative (Tr. 37).

Mr. McDorman stated that he also based his negligence finding on the fact that some of the accumulations were "layered," and this would indicate that they had existed for some time. However, he confirmed that he only determined the layering at one location (No. 2), and did not check for layering at the other cited locations (Tr. 38-40).

Mr. McDorman identified and explained several prior citations for violations of section 75.400, including one that he issued on August 11, 1992, three weeks prior to the contested order in this case (Exhibits G-8 through G-17; Tr. 41-43). He stated that he discussed the August 11, 1992, violation with company representative and foreman Dennis Mitchell, and advised him about the "ongoing problems" with coal accumulations (Tr. 44, 49-50).

Mr. McDorman stated that no one was cleaning up when he issued the order and that it took approximately five and one-half hours to clean up the accumulations, and he explained what was done to abate the order (Tr. 50-58). Mr. McDorman stated that assistant shift foreman Schrack, who was with him during the inspection, stated that "he does not see why some of these areas were not seen and reported. He could not justify the condition". Mr. McDorman stated that he recorded this statement in his notes (Tr. 58).

Mr. McDorman believed that the accumulations had existed for several days because of the layering and depths that he found and the fact that the accumulations consisted of fine coal and coal dust (Tr. 58-59). He confirmed that he checked the preshift and onshift books for the belt and found that accumulations had been recorded for the previous days and had been removed (Tr. 60).

On cross-examination, Mr. McDorman explained the procedures he followed for measuring the accumulations, and he confirmed that he did not know how far the face was from the accumulations, and that it was "at least thirty or forty blocks" away

(Tr. 62-67). He confirmed that the existence of any ignition sources at the face was of no consequence with respect to his "S&S" finding (Tr. 67).

Mr. McDorman stated that the accumulations occurred as a result of coal coming back on the bottom belt. He explained that "fine coal" sticks to the belt and that scraper boards are placed at the dumping points to scape the fines off the belt, but they do not always work properly. The fine coal that sticks to the belt dries out and falls off and accumulates. The accumulations that he observed were not the result of a recent spill, and there were very few lumps of coal (Tr. 68-71).

Mr. McDorman confirmed that he checked for methane and found none, and carbon monoxide sensors may have been present with the fire sensors. He confirmed that the belt was running and that the belt bottom rollers that he described were frozen and not turning and they were in contact with the coal. He did not touch the rollers to determine if they were hot because the belt was running (Tr. 73). He observed no smoke and smelled nothing burning, and he observed no red or reddish brown dust in the areas (Tr. 74-77).

Mr. McDorman stated that ten percent of the violations he issued in the past year were unwarrantable failure violations. In response to a hypothetical question, he stated that if he found coal accumulations on three successive days he would find it unwarrantable even though the accumulations had been cleaned up at the end of each day. He would consider this to be an existing problem and he would expect the operator to determine the source of the problem. He would also consider issuing a section 75.1725(a), violation because of an unsafe condition (Tr. 81, 84-89).

Respondent's Testimony and Evidence

Irving L. Schrack, assistant shift foreman, confirmed that he escorted Inspector McDorman during his inspection. He stated that the inspector first observed a small coal accumulation at the belt drive and informed him that the would issue a section 104(a) citation, but after finding heavier accumulations and rollers turning in coal, he informed him that he was issuing a section 104(d)(2) order (Tr. 92).

Mr. Schrack estimated that the belt drive was 6,500 feet from the working longwall face. He explained that as the entry is developed, the belt drive remains at one permanent location as the belt is extended, and it may remain in place for two and a half years until the longwall is completed and mined out (Tr. 94).

Mr. Schrack agreed that the accumulations were the result of materials clinging to the bottom belt and being knocked off by the belt drive, as well as by spills at the belt drive, and coal being crushed by belt takeup rollers (Tr. 95-97). He explained the cleanup process and confirmed that five men were used. He stated that it took a long time because the belt was close to the roof and presented tight clearances (Tr. 97-98).

Mr. Schrack confirmed that he observed the inspector measuring the depth of a pile of accumulations by pushing a stick into the pile, and he also observed "a couple of rollers I can recall that were frozen due to haystacks underneath of them". He could not recall that any rollers needed to be replaced, and he observed none that were worn. He confirmed that this was the first time he had escorted Mr. McDorman, and he did not view the belt during the two days prior to the inspection (Tr. 100-101).

On cross-examination, Mr. Schrack stated that he did not know how long the accumulations had existed, and he could not recall making the comment attributed to him by the inspector, but sated that it was possible that he made the statement (Tr. 102). He confirmed that he was not with the inspector all of the time because he left to make a telephone call to call people in to take corrective action (tr. 109). He estimated the total amount of accumulations as "under a ton" (Tr. 110).

William A. Kun, safety supervisor, stated that the cited belt line and belt drive areas had last been inspected by a preshift examiner that same day during the day shift between 1:00 and 4:00 p.m., and that no accumulation had been reported at that location during that shift. However, accumulations around the belt drive had been reported on the previous midnight shift and on the prior Friday shift of the weekend of August 28, and spillage was reported in different locations on the belt line. In response to these reports, four different shifts of people were sent to these particular areas to clean up the accumulations, and each day the areas were cleared in the fire boss books (Tr. 111-113).

Mr. Kun confirmed that he did not go to the cited area in this case to observe that cleanup had taken place, and he explained the different ways the accumulations may have occurred, including belt misalignment that causes the scrapers to miss the materials on the belt (Tr. 112-119). He could not state that the cited accumulations were caused by a misaligned belt, and he did not know why they occurred in this case (Tr. 120).

Mr. Kun stated that based on his review of the fire boss records for the two or three days prior to the violation, accumulations were reported at different locations, including the belt drive area, and they were cleaned up. He confirmed that he knows the individuals who made the record entries, and he did not

believe that the cited accumulations were there a week prior to the inspection by Mr. McDorman (Tr. 120-125).

On cross-examination, Mr. Kun confirmed that he did not make the book entries he referred to, did not observe the cited accumulations, or the cleanup (Tr. 125-126). He also confirmed that he did not ask anyone if the tailpiece in question was out of alignment (Tr. 128). He further explained the book entries, and confirmed that no one walked the cited areas before coal production started because they had been preshifted (Tr. 129-133).

Mr. Kun stated that it was very possible that all of the cited accumulations occurred the very same day that the inspector was there, and that four of five of the locations cited by the inspector were noted on the prior reports as being cleaned up (Tr. 141-145).

Inspector McDorman was recalled and stated that he arrived at the mine at 2:45 p.m., and that the shift started work at 5:00 p.m. He confirmed that he observed the cited conditions at 8:00 p.m. He did not believe that the accumulations occurred from 8:00 a.m. that morning, or the previous Thursday and Friday, and were cleaned up (Tr. 147). He did not speak to the mine foreman, and Mr. Schrack was his only "management" contact (Tr. 148).

Section 104(d)(2) "S&S" Order No. 3121656, issued on July 21, 1992, by MSHA Inspector Michael Kalich, cites an alleged violation of 30 C.F.R. § 75.701-5, and the cited condition or practice states as follows:

> At the 8 West ITE at 5 block on 8 West Supply track the metal ITE box was not properly grounded. The frame ground and electrical return were attached to a single bond that was attached to the rail on only one end. If this single bond were broken the ITE frame would become energized to 300 volts DC and pose a shock hazard. The track cleaner or the equipment had hooked the ground feed wire at this location and pulled it apart. 100 feet of ground feed wire was rolled up into the cross cut behind the ITE box. This ground feed wire was also attached at the single bond but provided no other point of attachment to the track or ground. Area is fire bossed each shift and examined for electrical hazards weekly. Four other citations have been issued since 7-6-92 for similar conditions, No. 3121645, 3121648, 3121650, and 3121651.

This condition shows a high degree of negligence. Condition could cause an electric shock or burn injury. Separate clamps or connections to the mine track or other grounded feed conductor are needed to provide a solid connection.

On July 22, 1992, the order was modified to include the following:

Citation No. 3121638 was issued on 6-29-92 for a similar condition.

MSHA Electrical Inspector Michael Kalich, testified as to his mining experience, and he stated that he holds a degree in mining engineering from the West Virginia University and was enrolled in its electrical engineering program. He is a certified electrician and mine foreman, and has taught several electrical training courses, and taken correspondence courses in electrical theory and design. He has inspected the subject mine periodically for the past six and one-half years, including occasional electrical inspections (Tr. 175-176).

Mr. Kalich confirmed that he issued the order and he identified a sketch that he made depicting what he found at the time of his inspection (Exhibit P-19). He explained that an ITE box is a box approximately 42 inches high, 38 inches long, and 30 inches wide, and that it contains a circuit beaker which allows for energizing and deenergizing the trolley wire (Tr. 181). He further explained the mine power system, including the use of the box, and the trolley wire (Tr. 183-189).

Mr. Kalich explained that the cited condition that constituted a violation of section 75.701-5, was that the frame ground conductor attached to the frame of the ITE box and the No. 16 power conductor were both clamped together under a single "crosby clamp" attached to a single bond that was in turn attached to the track rail in one single spot (Exhibit P-19; Tr. 189-190). The specific violation of section 75.701-5, lies in the fact that it requires the use of separate clamps to make the connection in question, and he explained the connection options that would be in compliance (Tr. 191-198).

Referring to the demonstration model produced by the respondent, Mr. Kalich stated that even though it is not an acceptable connection method, as long as it is attached to the mine track, there is no hazard to anyone touching the ITE box frame, pump, or other piece of D.C. equipment (Tr. 199). However, he considered it to be a potential hazard, and he explained the hazard associated with the cited condition as follows at (Tr. 200-203):

Q. What is the hazard? Why is this method not allowed?

A. The hazard is that if this bond becomes severed from the mine track, the power will feed through the box, out this white wire to the bond. And now it has nowhere to go to complete a circuit, so it feeds back on the green wire and energizes the frame of the pump or frame of the I.T.E. box.

* * * * * * *

Q. Now, you have this setup here and the track bond is severed, assuming a hypothetical, and the equipment is working properly and someone goes and touches it, is there a danger?

A. Most definitely. It's three-hundred-volt D.C. and --

JUDGE KOUTRAS: And the guy would be the ground. The person touching it would be the grounding medium, correct?

THE WITNESS: Correct. The current would flow through the person that touched the frame of the pump and the person would complete the circuit.

Mr. Kalich explained the abatement method, and he confirmed that the proper method for making the connections required by section 75.701-5, are shown in a sketch (Exhibit G-21). He explained that the frame ground is connected to the ground feeder conductor and the No. 16 return power conductor is connected to the single bond, and these connections are made by separate clamps and connectors. With this method of grounding, if the single track bond is severed, the frame will not become energized (Tr. 210-211). Mr. Kalich confirmed that the abatement method depicted in the sketch is one of several ways to achieve compliance, and it is the method presently used at the mine (Tr. 213).

Mr. Kalich stated that in order for a person to receive a shock from the violative connection method used at the time of his inspection the track bond would have to be severed. The bond could be severed by a derailment, and electrical shock and burns, and a fatal shock could result. He further explained as follows at (Tr. 214):

Q. Why did you feel or why do you feel now that it's reasonably likely that this track bond could become severed?

A. I think it's reasonably likely because, as shown in my diagram, it's on a curve. The track is not in the best of condition in that area. There are kinks in the rail. You know, the track leans to one side. There is evidence of the single bond being run over, because it is frayed or was frayed.

Approximately half of these single conductors were broken in the bond in question that I cited in that violation from pieces of equipment, the track cleaner. Or derailments of supply cars or jeeps or motors that occurred in this area.

Q. Are you aware of track bonds ever being severed from the track like that?

A. Yes. In my experience in the mining industry, I've seen it myself, when I worked for U.S. Steel. And it has also been cited by other inspectors.

Mr. Kalich identified copies of two citations issued at two of the respondent's other mines for improper grounding due to the return and frame ground being connected to a single bond which had been cut loose from the track (Exhibits G-22 and G-23), and the petitioner's counsel asserted that these were offered to show that track bonds can become severed and are relevant to the "S&S" finding made by Mr. Kalich (Tr. 216).

Mr. Kalich stated that he based his "high negligence" and "unwarrantable failure" findings on other violations that he had issued two weeks prior to his inspection of July 21, 1992, for making connections on pumps and ITE boxes in the same fashion (Exhibits P-24 through P-28), and his belief that the ground feeder conductor had been clearly pulled apart and had to have been hooked or hit by a piece of equipment. It appeared that someone had rolled up the conductor and place it in the crosscut, and he concluded that someone had knowledge that the conductor had been broken (Tr. 216-218).

Mr. Kalich stated that the prior citations he relied on involved grounding methods that were not approved pursuant to section 75.701, and they "may have" involved the use of separate clamps pursuant to section 75.701-5 (Tr. 220). Petitioner's counsel conceded that the prior citations did not involve that section (Tr. 222). Mr. Kalich confirmed that the prior citations

were all section 104(a) citations, but that he relied on them in part to support the order that the issued in this case (Tr. 225).

Mr. Kalich identified two prior citations issued in 1983 and 1989, citing the same ITE box that he cited, and the petitioner's counsel stated that these further support the inspector's unwarrantable failure findings (Exhibits P-29 and P-30; Tr. 228-230).

Mr. Kalich stated that mine management knew that the cited method of grounding was not approved by MSHA, and this was known through ten years of conferences with MSHA, and the fact that after being cited, the respondent would take corrective action by installing two separate bonds and providing separate connections (Tr. 231-234).

Mr. Kalich believed that the cited condition "was obvious to anyone riding along the haulage", but it was not recorded in the preshift book. He believed the condition had existed for ten days because he was told that a track cleaner had been used in the area, and he surmized that it pulled the feed wire loose and someone simply rolled it up and placed it in the crosscut behind the ITE box. He could not determine who may have done all of this (Tr. 237-242).

On cross-examination, Mr. Kalich stated that he has cited the respondent several times for failure to use separate clamps on a grounded power conductor, and that he has used sections 75.701 and 75.701-5 interchangeably. However, he could not state that these prior violations represent citations for clamping both the frame ground and the power return in the same clamp (Tr. 252-254).

Mr. Kalich stated that when he spoke with mine management he discussed the grounding of the boxes, pumps, and other electrical equipment to railbonds, and the "tack welding" of both ends of the rail bond to the rail. He denied that he did not discuss the use of separate clamps and stated that he also discussed this. He stated that he did not know how many times he has cited the respondent for violating section 75.701-5 (Tr. 256-257). He confirmed that the broken trolley feeder wire rolled up in the crosscut is not a violation and that trolley feeder wire is not required (Tr. 260).

Carl Blaney, supply motorman, testified that he escorted Mr. Kalich during his inspection and observed the cited condition. He agreed that the condition cited is accurately depicted in the sketch admitted as Exhibit P-19, and he agreed with the inspector that the frame ground wire and return power wire going out of the ITE box were both hooked or clamped to the track bond under one "crosby" clamp (Tr. 267). He also confirmed that the ground feeder wire was rolled up behind the box, and

that the track bond "was frayed, like something had run over it, or caught in a machine or something " (Tr. 268).

Mr. Blaney stated that he has observed mine cars derail in the mine and that this occurs "maybe once a week". He has experience a derailment, and has seen track bonds severed by derailed coal cars. He has also seen track bonds torn off by a track cleaner and if a bond or wire is torn he reports it to management at the end of his shift (Tr. 268-269).

On cross-examination, Mr. Blaney confirmed that he observed the two wires with the one clamp and that Mr. Kalich explained where the wires were going or where they came from. Mr. Blaney confirmed that he has no electrical training, but was positive he saw only one clamp on the rail bond. He also confirmed that he observed the frayed conductor wires (Tr. 273-277).

Respondent's Testimony and Evidence

Ryan N. Eddy, electrical foreman, testified that the order was served on him and that he looked at the piece of track bond cited in this case. He confirmed that there was one clamp on the track bond and that the frame ground was connected to the mine feeder wire that was connected to the track through the bond. He stated that the ITE box frame ground was attached with a clamp as shown in the inspector's sketch and he believed that the other conductor was attached to a butt connector. He further confirmed that two clamps were used to connect the grounds to the track bond or the ground feeder (Tr. 279-281).

On cross-examination, Mr. Eddy stated that assuming the return wire and the frame ground had separate connections to the track bond, he would consider that to be an acceptable method of grounding. He was aware that Mr. Kalich did not consider this to be an acceptable method. He confirmed that he had received three citations on July 13, 1992, and that they were issued because equipment was grounded by attaching both the return and frame ground with track bond which was attached to the rail at one point (Tr. 283). He also confirmed that he knew it was possible that other equipment would be grounded by this method (Tr. 287).

Mr. Eddy stated that electrical equipment is checked weekly. He confirmed that the order was abated by using two separate clamps but he and his supervisors did not believe there was a violation for using the method cited by Mr. Kalich (Tr. 290).

Mr. Eddy did not dispute the fact that a track bond can be severed by derailments that do occur, and he agreed that if the track bond is severed the power will go to the frame of the equipment (Tr. 300-301). He also agreed that with the grounding method that was cited, as depicted in Exhibit G-19, where two wires are attached at one end to a single track bond, if the

track bond is severed, the equipment will become energized at 300 volts (Tr. 302).

Mr. Eddy stated that he holds a degree from Fairmont State College in electrical engineering technology and that he is a certified underground and surface electrician and certified mine foreman (Tr. 303-304). He confirmed that none of the three prior citations issued by Mr. Kalich had anything to do with section 75.701-5, or with how many clamps were used to attach grounds to the grounded power conductor. The citations concerned the single bond, the tacking of the other end of the rail bond (Tr. 309).

William J. Helfrich, was called in rebuttal by the petitioner and he was accepted as an expert witness in electrical matters (Exhibit G-31). Mr. Helfrich holds a B.S. degree in electrical engineering from the Pennsylvania State University and is employed by MSHA as Chief of the Mine Electrical Systems Division. His experience includes membership on committees rewriting MSHA's electrical regulations, teaching electrical courses, and publishing a number of technical reports.

Mr. Helfrich stated that he was familiar with the cited regulation and the issues presented in this case, and has over the past ten years "poured over these regulations and I've rewrote several or many times these regulations" (Tr. 312). Referring to the track bond demonstration model referred to in this case, he stated that it was not in compliance with the intent of section 75.701-5. He stated that the regulation requires that the frame grounding wire be attached to the track by a separate completely independent connection, and that in this case it was tied to a conductor. He further explained why the connection cited was a violation, and why he believed it did not constitute a grounded power conductor (Tr. 312-315).

On cross-examination, Mr. Helfrich stated that the connections shown in Exhibit G-19, show only one connection to the rail, and other wire conductors are all tied together with one clamp rather than two separate ones (Tr. 319).

Section 104(d)(2) "S&S" Order No. 3717744, issued on July 22, 1992, by MSHA Inspector Joseph A. Migaiolo, cites an alleged violation of 30 C.F.R. § 75.1403. The order states that the 5,800 foot supply track on the two (2) left section was not being maintained, and the relevant cited conditions are described as follows:

> The track has deteriorated at numerous track joints due to inadequate blocking of the track. The bottom irregularities and poor to no blocking causes the rails to fan up and down, flexing at the joints. This action causes the nuts on the bolts to gradually loosen, fall off and the bolts to become dislodged. Several stages

of this deterioration were observed to a point where two (2) bolts out of four had become dislodged and the remaining two (2) bolts had nuts nearly totally screwed off. This would have left the rails separated and subject to collision with oncoming traffic. This causes a sudden stop which throws persons about and sometimes out of the jitneys. This action can also place pressure on the fishplates causing them to break producing derailment and sudden stops.

The inspector noted defects in ninety-one (91) track joints along the cited supply track, and he described the deterioration as follows:

> 46 had one bolt loose, 24 had two bolts loose, 3 had three bolts loose, 6 had 4 bolts loose, 3 had 1 bolt missing, 2 had 2 bolts missing, 1 bolt loose with one bolt missing, 4 with a loose bolt and 4 with a nut missing, 1 with 2 loose nuts and a nut missing.

The inspector modified the order on July 23, 1992, to include the locations of the defective track joints by references to the specific block numbers enumerated in the modified order.

Petitioner's Testimony and Evidence

MSHA Inspector Joseph A. Migaiolo, testified that he regularly inspects the mine and he confirmed that he conducted an inspection on July 22, 1992, and issued the order in question. He confirmed that the order was issued under the statutory and regulatory scheme for issuing safeguard notices. The respondent's counsel did not dispute this, and he agreed that once a safeguard notice is issued it becomes mine specific for the mine. The inspector identified a copy of the initial underlying safeguard notice number 3309734, issued by MSHA Inspector Dale R. Denning on December 7, 1989. The safeguard cited the rail alignment and loose and low joints (Exhibit G-33; Tr. 325-329).

The inspector stated that hazards associated with the safeguard involved the derailment of mine cars, locomotives, and jitneys caused by the joints becoming loose and the rails breaking or coming apart. A derailment can cause serious injuries to miners if the vehicles were to come to a sudden stop and they were thrown about or out of the vehicle. The safeguard requires the respondent to maintain the joints secure and to maintain the track safe throughout the mine (Tr. 329-330).

The inspector stated that the 1989 safeguard was issued after a previously issued safeguard in 1972, which put the respondent on notice that it had several broken rails and loose

and unsecured joints. The 1989 safeguard further explained what needed to be done to maintain the track (Tr. 331). He believed that the safeguard he issued was still needed and that the derailment hazard still existed (Tr. 332).

The inspector described the conditions that he found during his inspection and he confirmed that he recorded them in his notes and diagrams, and he explained the use of fishplates to secure the rails (Tr. 333-337). In his opinion, the deteriorated rail joints were caused by the vibrations of the equipment passing over them, and the methods used to install the rails accelerates their deterioration. He explained that the crosscut intersections where most of the conditions existed are lower than the entryways and they are not properly blocked to keep them level with the entry track. As a result, the track "fans up and down when you begin to go across it". He further explained as follows at (Tr. 340):

> When you go down into the crosscut, the track on the other side pops up. It fans upward. And of course, when you come up out of the crosscut, the track behind you pops up behind you.
>
> The joints in these approaching areas and in these crosscuts become loose. And the bolts deteriorate, meaning they back off, they unscrew. And this is where your fishplates -- then you get a loose joint.
>
> The fishplate can break or the bolts can become dislodged and the rails become dislodged from each other. This causes the rail, then, to either pop up or become misaligned and a derailment occurs.

The inspector stated that the jitneys travel at a speed of five to fifteen miles an hour (Tr. 343). He explained his "S&S" finding as follows at (Tr. 344-345):

> A. Well, with just one bolt loose, not very likely anything is going to occur. But what does occur is that when you have one bolt loose, is that it causes additional stress to the other bolts that are in the plate. And then this causes those bolts to become loose, also. This, in turn, then causes the plate to become so loose that you get a derailment.
>
> Q. Why don't you explain why you thought that it was reasonably likely that this condition would result in an injury?
>
> A. It's highly likely that the joint is going to come loose and that there is going to be a

derailment when the bolts actually come loose from the joint. The situations we have where you have one bolt missing and two loose on the other side, you're just a whisper away from the joint coming apart.

So it's highly likely that the event is going to occur. As I indicted, the type of injuries that can occur, striking various parts of the body, and even being thrown from the vehicle will occur and cause very serious bodily injury.

Q. You're saying that it's highly likely, but you checked them in the order reasonably likely.

A. It's reasonably likely that it will occur, Yes, if conditions continue as they are normally, right now, with the equipment running over these type of joints, that they continually get loose, more loose and more loose.

You have all different phases of the joints being present in the area, from one bolt being loose to one bolt on each side being loose, to two bolts loose on a side, one bolt on the other side, one bolt being loose or two bolts loose and one bolt missing. You have all the phases. And the next step is for the other bolt to fall out of the joint or get loose and fall out of the joint and cause a derailment.

With regard to his "high negligence" and unwarrantable failure findings, the inspector stated as follows at (Tr. 346-347):

A. As I indicated, the operator was placed on notice as far back as 1972, then placed back on notice -- continued on notice in 1989. He knew at that time that the had a specific mine hazard that he had to watch for and take care of and that he should then take specific care when he made his examinations of the area to assure that this mine hazard didn't reexist or exist in a large volume.

The inspector stated that he had spoken to company safety supervisor William Kun over a number of years about the blocking of the track, and that Mr. Kun seldom disagreed that the track

did not need blocking because he recognized that it is a good method to maintain a level track to prevent it from fanning up and down and causing the joints to loosen. The inspector further indicated that he has spoken to the superintendent and to other safety representatives about blocking the track (Tr. 351-352).

The inspector confirmed that he has issued citations in the past at the mine for conditions similar to those cited in his order (Exhibits G-35 through G-39). He also indicated that four additional citations were issued under the same safeguard (Exhibits G-40 - G-43). All of these are section 104(a) citations, rather than (d) orders, and he explained that there are differences in the extent of the deteriorated track conditions noted (Tr. 355-363).

The inspector believed that the cited conditions had existed for several weeks and that the area was preshifted three times a day, and that this contributed to his unwarrantable failure finding in addition to the respondent's knowledge of the conditions, the prior safeguards which put it on notice, and his prior conversations with management (Tr. 363-365).

On cross-examination, the inspector confirmed that he cited the supply track from the mouth up to the working section for a distance of approximately 58 blocks, or 5,400 feet. He read from the 1989 safeguard which states that it is notice that "all track haulage at this mine shall be well maintained where men or supplies or coal is transported" (Tr. 369). There is no limitation with respect to the amount of vertical movement that is allowed, and the safeguard only required that the track be "well maintained" (Tr. 370).

The inspector explained that a "fishplate" is a securing plate that is applied to both sides of the track joint and secured by bolts inserted into the fishplate holes. He stated that all of the holes should have a secured bolt through them to hold the fishplate in place, and if any bolts are missing, he would consider this to be a violation (Tr. 376). He confirmed that missing bolts are usually initially in place but become dislodged over time, and if they are found by the track they are replaced and tightened up (Tr. 380-382). He also confirmed that the cited track was not coal haulage track, and that it is used to haul supplies and people to and from the sections (Tr. 383).

Respondent's Testimony and Evidence

William Kun, safety supervisor, testified that he traveled the two left supply track area approximately eight days prior to the issuance of the order. At that time the inspector was with him and told him that he had observed a couple of places where the track "was fanning a little bit" and he asked him to get it taken care of and did not issue a citation. Mr. Kun discussed

the matter with the mine foreman and superintendent, and it was decided to establish a maintenance schedule, beginning with the ballasting of the two left supply track. Two carloads of gravel were bought in starting at the mouth of the section, and the dumping of the gravel was a slow process. The day shift was assigned to do the rehabilitation work under the supervision of shift foreman Dennis Mitchell. At the time of the inspection, the work had progressed to the number 9 or 10 block and the gravel was used to ballast and block the rails and "getting it leveled out". He believed that bolts were being replaced as the gravel work progressed, and while he examined that work he did not check each rail joint for loose or missing bolts (Tr. 391-393).

On cross-examination, Mr. Kun confirmed that the track rehabilitation work was done on only one shift, and he did not believe it was a high priority item because he saw no joints out of alignment when he traveled the area. He confirmed that he was not with the inspector when he issued the order and he was surprised that he did so. He expressed his surprise to the inspector, and the inspector commented that "they should have taken care of it" (Tr. 394-397).

Mr. Kun stated that it was possible that the loose and missing bolts were caused by the equipment fanning up and down over the tracks. It was also possible that the condition would progressively worsen, but other than movement, he did not observe the track "raise up where you could see it seven hundred feet" (Tr. 397). Since work was in progress to upgrade the track, Mr. Kun did not believe that the conditions would have deteriorated further if normal mining operations were to continue, but that it was possible that a derailment could occur (Tr. 398).

Mr. Kun described the abatement work and stated that it was possible that it took approximately six hours, but indicated that it took a month or more to complete the ballasting of the entire track and to complete the rest of the work (Tr. 399-400).

Dennis Mitchell, day shift foreman, confirmed that he traveled with the inspector during his inspection. Mr. Mitchell did not believe it unusual to see loose track bolts and he indicated that they are initially tight when installed but loosen up by the vibration of the traffic. He believed that the track was well maintained and he did not observe that any of the fishplates were going to come off because they are seated under the 85 pound rail. He agreed that some bolts were missing and that others were visibly loose because the nut was missing. However, a preshift examiner would not have otherwise detected loose bolts unless he used a wrench. The missing bolts that could be found were replaced (Tr. 402-406). Mr. Mitchell did not

believe that any of the conditions cited constituted a hazard, and he did not consider the conditions to be a violation (Tr. 407).

On cross-examination, Mr. Mitchell was of the opinion that if a bolt is holding the fishplate on it is not a hazard, but if he observed one with only one bolt, he would make an attempt to have someone install additional bolts. He confirmed that there are four bolts for each of the rail joints, and if there is only one bolt and the fishplate falls off, it was possible that the rail would come apart (Tr. 410). He stated that depending on the traffic, the amount of loose bolts at the 91 joints cited by the inspector could have taken several weeks to loosen. He could not state when the bolts were last checked prior to the reinspection (Tr. 412-413).

Mr. Mitchell was not aware of any supply track injuries occurring at the mine as a result of poor track maintenance or otherwise (Tr. 414-415). He confirmed that the track upgrading work began before the inspector issued the order (Tr. 417).

Earl Kennedy, respondent's Chief safety inspector, stated that he was travelling the supply track with the superintendent the day the inspector issued his order. He stated that he checks the supply track every time he rides it and he listens for rattles in the joints when he crosses them in the vehicle. A loose fishplate will rattle, and he heard none rattling on the day in question. He stated that the fishplate joints are tight and secured with a steel armored tie that holds both rails on each side of the joint. He did not discuss the order with the inspector but he did check all of the track from the No. 55 block up to the No. 21 block where he found track people working. He checked every fishplate and every bolt and joint with a pry bar and he noted seven missing bolts and four missing nuts, none of which were at the same location. He saw no fishplate that was about to separate and none that were loose (Tr. 421-425). Mr. Kennedy was of the opinion that the track in question was well maintained and free of hazards (Tr. 425-426).

On cross-examination, Mr. Kennedy stated that it is common for one bolt and nut out of four to be missing from a fishplate, but if it is tight, there is no problem (Tr. 428). He agreed that loose bolts should be taken care of and this is the job of the maintenance people (Tr. 432). He confirmed that he was not with the inspector when he issued the order, but that he walked the same track less than an hour after the inspector and did not find all of the conditions that he did (Tr. 434).

Inspector Migaiolo was recalled by the presiding judge and he stated that when the miner's representative who accompanied him finds loose bolts he "finger tights" the thread so it doesn't come completely off, and when bolts and nuts were found by the

track they were replaced as they walked the track. However, the locations are still recorded and cited and abatement is not completed until a wrench is used to tighten the bolts and fish plates. He could not recall at how many locations that he cited this occurred and he believed it would account for the low number of missing bolts found by Mr. Kennedy (Tr. 445).

Findings and Conclusions

Fact of Violations

Order No. 3122095. 30 C.F.R. § 75.400

The credible and unrebutted testimony of the inspector establishes the existence of the cited coal and float coal accumulations that he observed in the course of his inspection on August 31, 1992. Indeed, the testimony of assistant shift foreman Schrack supports the inspector's observations and I have given little weight to the testimony of safety supervisor Kun, who admitted that he did not observe the cited conditions or the abatement work, and whose knowledge of the matter was limited to his review of certain shift records. The existence of the coal accumulations in question constitutes a violation of the cited section 75.400. See: Old Ben Coal Company, 2 FMSHRC 2806 (October 1980); C.C.C.-Pompey Coal Company, Inc., 2 FMSHRC 1195 (June 1980); Utah Power & Light Company, 12 FMSHRC 965, 968 (May 1990). I conclude and find that the violation has been established, and IT IS AFFIRMED.

Order No. 3121656. 30 C.F.R. § 75.701-5.

The inspector issued the violation after finding that the frame ground wire for the ITE box containing a circuit breaker for energizing and de-energizing the supply track trolley wire and the return power conductor were both attached to a single piece of track bond by one single clamp (Diagram, Exhibit G-19). The cited section 75.701-5, provides as follows:

> The attachment of grounding wire to a mine track or other grounded power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection.

In the course of the hearing, the respondent's counsel asserted that the language "will be approved" found in section 75.701-5, does not impose any mandatory requirement that separate clamps be used for the grounding wires and power conductor in question (Tr. 245-246). The respondent's position is rejectd. I agree with the petitioner's position that section 75.701-5, must be considered in context, and in conjunction with section 75.701, requires the grounding of metallic frames by methods approved by MSHA, and section 75.701-3, which contains the approved grounding

methods. Under the circumstances, I conclude and find that section 75.701-5, does impose a mandatory requirement for the use of separate clamps pursuant to that section.

I conclude and find that the credible testimony and documentation presented by the inspector, as corroborated by inspector escort Blaney and electrical expert Helfrich, establishes that the failure to use separate clamps for attaching or connecting the return power conductor and the frame ground wire to the single piece of track bond was a violation of section 75.705-5. Although electrical foreman Eddy agreed that there was one clamp on the track bond, and that the frame ground was attached with a clamp as shown in Exhibit G-19, he maintained that two clamps were used to connect the grounds to the track bond or the ground feeder. However, I find the inspector's testimony more credible than Mr. Eddy's, and take note of the fact that on cross-examination, Mr. Eddy seemingly agreed that the grounding method cited and documented by the inspector consisted of two wires attached at one end to a single track bond.

I conclude and find that the petitioner has established a violation by a preponderance of the credible evidence adduced in this matter. The failure to use separate clamps for attaching the ground wire and power conductor constituted a clear violation of section 75.701-5. See: U.S. Steel Mining Company, Inc., 6 FMSHRC 1369 (May 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1510 (June 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 2058 (August 1984). Under all of these circumstances, the violation IS AFFIRMED.

Order No. 3717744. 30 C.F.R. § 75.1403

In this instance, the respondent is charged with a violation of the safeguard requirements found in section 75.1403, which provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men an materials shall be provided.

The general criteria for issuing safeguards provides for notification in writing by an inspector to the mine operator of the specific safeguard requirements for the specific mine to which they are addressed, and once a safeguard notice is issued, the operator is obliged to comply with the safeguards and to maintain them for the particular mine in question. The respondent agreed that once a safeguard notice is issued, it becomes mine specific for the mine, and it does not dispute the fact that the order was issued pursuant to the statutory and regulatory safeguard notice scheme.

In this case, the inspector cited a violation of section 75.1403, because of the failure by the respondent to maintain the cited supply track. The inspector's narrative description of the cited conditions, as well as his credible testimony, provided a detailed and thorough description of ninety-one haulage track joints where there were missing or loose nuts and bolts in the fishplates that held the track rails together. The inspector concluded these deteriorated track conditions covering a rather extensive distance of 5,800 feet of track established that the tracks were not being maintained as required by a previously issued safeguard notice covering the track haulage at the mine.

The safeguard notice relied on by the inspector in issuing the violation was issued at the mine on December 7, 1989, (No. 3309734); and it was issued because of loose or missing track bolts along the mine track haulage. The notice specifically informed the respondent that all mine track haulage used to transport men, supplies, or coal shall be well maintained.

I conclude and find that the credible testimony of the inspector, which is supported by his detailed notes and orders, establishes the conditions that he cited and described. I further conclude and find that these conditions reasonably support the inspector's conclusions that the cited haulage tracks were not being well maintained as required by the applicable underlying safeguard notice.

Although respondent's safety inspector Kennedy testified that he found far less missing bolts and nuts, and no signs of loose fishplates, he was not with the inspector when he made his observations and notations and he walked the track after the order was issued. I find credible the inspector's explanation that when he and the miners' representative walked the track and found nuts and bolts by the tracks, they were replaced, but that abatement would not be achieved until they were secured in place with a wrench.

Respondent's safety supervisor Kun, who was not with the inspector when he issued the order, nonetheless confirmed that it was possible that the equipment "fanning" up and down over the tracks caused the bolts to loosen and came off the fishplates. Shift foreman Mitchell, who accompanied the inspector, agreed that loose track bolts caused by traffic vibrations were not unusual, and he confirmed that some bolts were missing and others were loose because of missing bolts, and he could not state when the bolts were last checked prior to the inspection in question.

I conclude and find that the cited haulage track condition existed as initially found and observed by the inspector, and that such conditions support the inspector's conclusions that the

tracks were in a deteriorated condition and were not well maintained as required by the previous safeguard issued pursuant to section 75.1403. Under the circumstances, I further conclude and find that the petitioner has established a violation by a preponderance of the credible evidence adduced in this matter, and 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).

Order No. 3122095. 30 C.F.R. § 75.400

The inspector's credible and unrebutted testimony establishes that several belt rollers were frozen, and turning in the coal, and rubbing against the belt that was running and turning in the accumulations of coal and coal dust. Indeed, the assistant shift foreman Schrack, who was with the inspector, confirmed that belt rollers were turning in the spillage and that a couple of the rollers were frozen in the accumulated coal.

Although the evidence reflects that fire suppression devices were installed along a portion of the belt, they were not installed along all of the 350 foot area that was cited. Further, even though the accumulations were found at some distance from the working face, the inspector did not believe that this affected the fire hazard that existed in the belt areas that he cited, and he noted the fact that the air ventilation travelled from the belt line to the longwall section where at least six miners were working.

The inspector believed that the dry and black shiny coal dust and float coal dust accumulations were combustible and presented a fire hazard, particularly since the belt was running and the frozen belt rollers were turning in the coal accumulations and rubbing the belt. He considered the frozen rollers and the belt rubbing the coal as a source of heat and ignition, and he also considered the other ignition sources such as a starter box, electrical motors, and cables.

The inspector believed that the coal accumulations and ready ignition sources presented a serious fire hazard, and that in the event of a fire, the accumulations would contribute to the hazard because they would constitute the fuel for feeding the fire. He further believed that it was reasonably likely that the six men working on the section would suffer injuries ranging from smoke inhalation to entrapment and burns as a result of any fire.

I agree with the inspector's "S&S" finding. I conclude and find that the cited coal accumulations presented a discrete fire hazard on the cited beltline in question and that given the existing ready sources of ignition in those cited areas where the dry coal and coal dust were turning in the moving belt and stuck rollers, I conclude and find that it was reasonably likely that a belt fire would occur if normal mining operations were continued. I further conclude and find that in the event of a belt fire, it

would be reasonably likely that the men on the section would suffer smoke inhalation and fire related injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

Order No. 3121656. 30 C.F.R. § 75.701-5.

The electrical inspector's credible and unrebutted testimony establishes that in the event of an equipment derailment, the single grounding bond to the track rail could be severed, and if this occurred the ITE box frame would be energized and present an electrical shock or electrocution hazard to anyone contacting the frame which would be energized at 300 volts D.C. Any touching of the energized frame would serve as the ground and would complete the circuit.

The inspector confirmed that he was aware of track bonds being severed by derailments, and he believed that it was reasonably likely to occur in this instance because the area where the violation occurred was on a curve and the rail tracks were not in the best condition and contained "kinks" and "leaned to one side" (Tr. 214). He also observed that the single track bond was frayed, contained broken conductors, and showed evidence of being run over.

Motorman Blaney, who also observed the cited condition, confirmed that the track bond was in poor condition. He also confirmed that derailments occurred at least once a week, and he has observed track bonds that have been severed by derailed mine cars or torn off by track cleaners.

Respondent's electrical foreman Eddy did not dispute the fact that derailments occur, and he agreed that a track bond can be severed by a derailment, and if it were severed the power will go to the frame of the equipment and will energize it at 300 volts.

I agree with the inspector's "S&S" finding. I conclude and find that the violation presented a discrete electrical shock hazard, and in the likely event that the track bond were severed by being run over by a piece of track equipment, or through an equipment derailment, which I find was reasonably likely to occur in the normal course of mining operations, the ITE box frame would become energized and expose anyone touching it to 300 volts of D.C. current. If anyone were to contact the energized frame, it would be reasonably likely that they would suffer electrical shock injuries of a reasonably serious nature. Under all of these circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

Order No. 3717744. 30 C.F.R. § 75.1403.

The inspector believed that the deteriorated track conditions, which he documented in great detail, would result in the failure and breaking of the fishplates, which in turn would result in the separation of the track rails and a derailment. He further believed that a derailment was reasonably likely to occur if normal mining operations were to continue and the equipment continued to travel over the tracks with loosened or missing fishplate nuts and bolts. Although he did not observe any separated track joints or fishplates, given the extent of the conditions, the inspector believed that a track separation was "just a whisper away" (Tr. 345). If a derailment were to occur, the inspector believed that serious injuries to the miners riding the track haulage would result.

Respondent's safety supervisor Kun agreed that the cited track conditions would progressively worsen if not attended to. Although he believed that the conditions would have been corrected as the track upgrading work continued, and disagreed that a derailment was likely to occur, he conceded that a derailment was possible (Tr. 398). Shift foreman Mitchell agreed that if a fishplate that is secured by only one bolt falls off, it was possible that the track rail would come apart (Tr. 410). He also confirmed that it was not unusual for track bolts to loosen, and he agreed that a derailment at a point where the rail joint is no longer secured could result in serious injuries (Tr. 411, 414).

I agree with the inspector's "S&S"" finding. In view of the extent of the track deterioration observed by the inspector who credibly documented 46 track joints with one bolt missing, 24 joints with two loose bolts, three joints with four loose bolts, and the remaining joints with loose and missing nuts and bolts, I cannot disagree with the inspector's conclusion that a track derailment was reasonably likely and "just a whisper away" if normal mining operations were to continue. In the likely event of a derailment, I believe it was reasonably likely that miners would suffer injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violation was significant and Substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

Unwarrantable Failure Violations

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. * * *

Order No. 3122095. 30 C.F.R. § 75.400.

The inspector testified that he based his "high negligence" order on the existence of the accumulations at all of the nine (9) locations that he described in the order, the fact that they

were extensive and had been allowed to accumulate over some period of time, his belief that they should have been discovered during the preceding shifts, and prior citations for violations of section 75.400, including a citation on August 11, 1992, three weeks prior to his order, which he had discussed with foreman Dennis Mitchell, and which put him on notice about the problem with accumulations along conveyor belt drives (Tr. 36-37).

Although the inspector conceded that his conclusion that the cited accumulations had existed "for some time" was based on his testing and observation that the 12 inches of coal accumulations at cited location No. 2, was "layered", indicating that it had been there for some time, and that he did not make an effort to determine whether "layering" existed at the other cited locations, I conclude and find that his credible and unrebutted testimony, as corroborated by his notes, establishes the existence of rather extensive accumulations of coal at the cited locations. Given the extent of the accumulations, including the measurements detailed and recorded by the inspector, I cannot conclude that they were the result of recent spills or belt malfunctions.

The accumulations cited by the inspector covered a rather extensive area of approximately 350 feet along the cited beltline. The inspector documented mine (9) locations where he found fine coal and float coal accumulations ranging in depths of four to twelve inches. Shift foreman Shrack did not dispute the existence of the accumulations, and he estimated that they amounted to "under a ton" (Tr. 110). The inspector testified that Mr. Schrack made a statement that "he does not see why some of these areas were not seen and reported", and that he recorded this in his notes (Tr. 58). Mr. Schrack could not recall making the statement, but stated that it was possible that he did (Tr. 102). I find the inspector's testimony to be credible and believable, and I conclude that Mr. Shrack made the statement.

Although the inspector confirmed that he checked the preshift and onshift books and found that coal accumulations had been reported and cleaned up for the days prior to his inspection on Monday, August 31, 1992, he did to believe that the accumulations that he found occurred on Monday, and that they had existed at least since the prior Saturday. No coal was produced on Sunday, and if any clean up was done on Saturday, the inspector believed that it was a "cosmetic job where they removed the coal down below the belt rollers and throw rock dust under it" (Tr. 60-61).

The inspector confirmed that when he issued the order no effort was being made to clean up the accumulations, and had he found such an effort taking place he would not have issued the violation as an order and would have found moderate negligence (Tr. 50).

The inspector testified credibly that after issuing the order, he was notified later that day by the respondent that the cited accumulations had been cleaned up, and he was requested to return to the mine to terminate the order so that the belt could be placed back into operation so that coal production could continue. Upon his return to the mine, the inspector found that the cited accumulations had been cleaned up to the extent that they were below the belt rollers and not in contact with the belt or the belt rollers, but they had not been completely removed from the mine and had only been rockdusted to address some of the hazards. He subsequently terminated the order after additional people, or a total or ten, were brought in to clean up and remove all of the accumulations (Tr. 51-54). In explaining the respondent's abatement efforts, the inspector suggested that the cited accumulations were the result of similar cleanup efforts, and he stated as follows in this regard (Tr. 52):

> A. It's a situation where what they had done in the past -- What they had done in the past was to remove the coal down below the rollers, throw rock dust onto it and consider that to be clean. But the accumulations were not all removed. There were still accumulations there. There were several inches of coal that had not been removed.

Respondent's safety supervisor Kun confirmed that accumulations around the belt drive had been reported on the previous midnight shift, which would have been on Saturday, two days before Mr. McDorman's inspection on Monday, as well as the prior Friday. Although Mr. Kun stated that people were sent to these areas to clean up and that the fire boss books showed that these areas had been "cleared", Mr. Kun acknowledged that he had not visited these areas personally to confirm that they had been cleaned up and that he simply relied on his review of the mine books. Mr. Kun also acknowledged that he did not visit the area cited by Mr. McDorman to observe any clean up activity, and I find his explanations as to how the accumulations may have occurred, including a suggested belt misalignment, to be speculative, less then credible, and that they do not rebut the inspector's credible testimony in this case.

Although there is no direct evidence to establish precisely how long the cited accumulations may have existed before the inspector found them, I conclude and find that they had existed, as a minimum, as early as the previous Friday, and Saturday, August 28, and 29, 1992, and more than likely longer than that. Further, I accept as credible and probative the inspector's explanation that the "layering" that he discovered indicated that the existing coal were accumulations were simply covered over with rock dust and "cosmetically" cleaned up enough to keep them from contacting belts, but were not totally removed from the

mine. I also accept as credible and probative the inspector's explanation that this was precisely what occurred when he was called back prematurely to abate his order, and I find his suggestion that this "cleanup" practice has contributed to the respondent's accumulations problems in the mine has a credible ring of truth about it.

Based on the foregoing findings and conclusions, and considering the rather extensive accumulations in question, and my belief that they had existed over a long period of time without being completely cleaned up and totally removed from the mine, I conclude and find that the inspector's "high negligence" finding was warranted. I further conclude and find that management's failure to promptly act to insure that the accumulations were cleaned up and removed from the mine before the inspector found them constitutes aggravated conduct supporting the unwarrantable failure order in question, and IT IS AFFIRMED as issued.

Order No. 3717744. 30 C.F.R. § 1403.

In support of the inspector's belief that the violation was an unwarrantable failure resulting from the respondent's aggravated conduct, the petitioner argues that the conditions had existed for several weeks and the area was subject to three daily preshift examinations, that the respondent had been put on notice by the safeguard, prior citations, and discussions with the inspector about the need to properly block and maintain the track. Under all of these circumstances, the petitioner concludes that the respondent knew or should have known of the cited condition but took no action to prevent or correct it (Posthearing Brief, pg. 40).

I find no credible evidence to support a conclusion that all of the track conditions had existed for "several weeks". The inspector confirmed that some of the conditions may have occurred over a two-day period of time. When asked how he determined that the conditions had existed "for previous days or weeks", he responded that it was his experience from working in the mines and inspecting the respondent's mines "that these type of conditions take several weeks to develop" (Tr. 379-380). Further, I find no evidence that the inspector checked the preshift mine examiner's books for the prior working shifts to determine whether the conditions had been reported.

Insofar as the prior safeguard notice relied on by the inspector is concerned, I find nothing particularly aggravating or unusual about the fact that it placed the respondent on notice that it needed to maintain its track system. That is precisely why a safe guard is issued. The fact that subsequent inspections reveal tracks that are not well maintained and result in citations does not, standing alone, indicate aggravated conduct,

particular on the facts of this case where the safeguard notice is framed in rather general and subjective language such as "shall be well maintained", without a specific requirement for blocking, ballasting, or levelling the tracks.

Insofar as the prior citations are concerned (Exhibits G-35 through G-43), I note that they were all issued as section 104 (a) citations, with low to medium negligence findings, and one was issued as a non-"S&S" citation. Two of the citations cited improper track gauging, and six citations cited single track joints with loose or broken fishplates or bolts. Two of the citations were abated within 15 minutes, one was abated within 2 hours, and the rest were all timely abated within the time fixed by the inspector. None of these violations appear to have been issued at the same supply track locations cited by the inspector in this case.

The prior citations in question must be taken in context, and I cannot conclude that they are indicative of aggravated conduct. Considering the size and scope of the respondent's mining operation, including the extensive underground haulage system, track deterioration obviously will occur, and when it is cited as a violation, the respondent is obligated to timely correct the conditions. Indeed, the inspector himself acknowledged that given the 55 miles of track at the mine, "sooner or later you're going to come across a condition where things are extensive" (Tr. 358).

The inspector testified that he had previously discussed the matter of track blocking with Mr. Kun, and that he seldom disagreed with him and recognized the need to maintain a level track to prevent it from "fanning" and causing the joints to loosen. Mr. Kun did not dispute this, and he confirmed that eight days before issuing his order, the inspector pointed out to him a track area that needed attention, asked him to take care of it, and did not issue a violation.

The inspector confirmed that the track system in the mine is rather extensive and covers an area of 55 miles (Tr. 358). It would appear to me from the record in this case that maintaining the tracks level at all times to prevent "fanning" is not an easy task. Although the inspector issued the violation for loose and missing track fishplate nuts and bolts, it seems obvious to me that his principal concern was that the irregular mine floor at the crosscut intersections caused by mining equipment during the mining and cleanup cycles presented track blocking and levelling problems, which in turn, and over time, resulted in the loosening of the nuts and bolts holding the track rails together (Tr. 338-341).

Mr. Kun's unrebutted and credible testimony reflects that as a result of his conversation with the inspector, Mr. Kun

discussed the matter with the mine superintendent and foreman, and a maintenance schedule was established to rehabilitate the tracks, beginning with the ballasting of the cited two left track. Work was begun at the mouth of the section, and it included bringing in and spreading carloads of gravel. At the time of the inspection on July 22, 1992, the work of blocking and levelling the track to address the "fanning" problem had progressed at least 9 or 10 blocks, which included some of the areas cited by the inspector (Tr. 366-367). Under the circumstances, I cannot conclude that the respondent was ignoring the problem brought to its attention by the inspector. Quite the contrary is true. The respondent had undertaken a major step in rehabilitating its track system at the problem intersections, and was engaged in this work at the time of the inspection. The fact that it may not have been working at the pace suitable to the inspector, does not in my view constitute aggravated conduct.

Based on the foregoing findings and conclusions, and after careful consideration of all of the testimony and evidence in this case, I conclude and find that the petitioner has failed to prove that the violation in question constituted an unwarrantable failure to comply with section 75.1403. Under the circumstances, the inspector's finding in this regard IS VACATED, and the section 104(d)(2) "S&S" Order IS MODIFIED to a section 104(a) "S&S" citation.

Order No. 3121656. 30 C.F.R. § 75.701-5.

In support of the inspector's unwarrantable failure determination, the petitioner asserts that management knew that the cited grounding method was improper and either knew or should have known that the cited box was so grounded (Posthearing Brief, pg. 30). The petitioner further relies on the fact that several prior citations had been issued at the mine for similar conditions (Exhibits G-24 through G-28), the ground feeder wire had been torn loose from the clamp and rolled up and stored in the cross-cut behind the cited box for as long as ten days, the cited box had been cited on two prior occasions for improper grounding in that the return power conductor and the frame ground were attached to a single piece of track bond (Exhibits G-29 and (G-30), and the fact that the inspector had discussed the practice of improperly grounding electrical equipment with mine management.

In this case, the respondent was charged with a violation of the specific requirements found in section 75.701-5, namely, the use of separate clamps for attaching grounding wires to the mine track or other grounded powers conductors. It has not been changed with a failure to connect both ends of the track bond to the track. As correctly noted by the respondent in the course of the trial, the track bonding issue has been a matter of continued litigation between the parties, and a recent settlement of that

issue in connection with a section 104(a) non-"S&S" citation with an assessment of $20, has apparently laid that matter to rest (Tr. 166). The parties also confirmed that in several other track bonding cases, the inspectors have cited violations of section 75.703-1, and 75.701-3 (Tr. 167-168). In this case, the inspector confirmed that the violation concerns the specific requirements for separate clamps as stated in section 75.701-5 (Tr. 191).

I take note of the fact that the two prior citations issued for violations at the same 8 West ADO breaker box were issued in December, 1989, and March, 1983. Aside from the age of those violations, they would appear to concern the respondent's track bonding methods rather than the use of separate clamping devices. The 1998 citation cites a violation of Section 75.701, and not 75.701-5.

With regard to the five citations issued approximately two weeks before the contested order in this case, I note that they were all issued by Inspector Kalich and they all cited violations of section 75.701, and not 75.701-5. When asked to state the number of times he cited the respondent with violations of section 75.701-5, the inspector responded "I don't know" (Tr. 256). When asked if his prior citations concerned the lack of double clamps, the inspector responded that it was his view that sections 75.701 and 75.705-5 "would be interchangeable" (Tr. 219). The petitioner's counsel conceded that none of these prior citations cited violations of section 75.701-5, for failure to use separate clamps (Tr. 222). I find the inspector's responses to be rather evasive, and based on the petitioner's admission that none of these prior citations concerned section 75.701-5, I have given them little weight and find that they do not support the inspector's unwarrantable failure finding.

With regard to the petitioner's assertion that the rolled up conductor wire had been placed in the crosscut prior to the citation, the inspector's belief in this regard was based on a purported statement by the foreman that track cleaners were in the area. From this statement, the inspector assumed that the wire had been pulled loose and rolled up and left by the track cleaners. None of these individuals are identified, none were contacted by the inspector, and none testified in this case (Tr. 237-241). Under the circumstances, I find no credible or probative testimony supporting the inspector's belief, and his hearsay testimony on this point is rejected and given little weight. As a matter of fact, the inspector conceded that the rolled up feeder wire had nothing to do with the failure to use separate clamps (Tr. 260).

The inspector asserted that management knew that the cited "grounding method" was not approved by MSHA because of "various discussion that we've had with mine management in the past ten

years" and that whenever it has been cited, "its always been corrected by installing separate bonds and providing separate connections" (Tr. 231-232). When asked to explain why no section (d) orders have been issued over the past ten years if in fact the respondent has been in violation that long, the inspector could not answer (Tr. 232).

With regard to his asserted discussions with mine management concerning his prior citations of July 6, and 13, 1992, Inspector Kalish stated that he conducts conferences on every violation that he issues and speaks to the individual who receives the citation. He testified that he "more than likely" discussed them with the mine superintendent and with safety director Kun (Tr. 225). When asked if he noted the discussions in his inspection notes, Mr. Kalich stated that he did not have his notes with him, and when asked why, he responded that he did not believe they were relevant (Tr. 225-226). He later contended that his discussions included the use of separate clamps (Tr. 225).

Inspector Kalich stated that his prior citations were served on foremen Eddy and Coker, and that he discussed them with these individuals (Tr. 226). Mr. Coker did not testify in this case. Foreman Eddy confirmed that three of the prior citations issued by Mr. Kalich were served on him and that he was aware that Mr. Kalich did not approve of the use of a single track bond attached to the track as a suitable grounding device, but he was not asked if Mr. Kalich had ever discussed the use of separate clamps as stated in section 75.701-5 (Tr. 282-283).

Mr. Eddy took the position that the prior citations served on him had nothing to do with the number of clamps used to attach grounds to the grounded power conductor and that they all concerned the use of a single track bond and the failure to tack the other end of the bond to the track, and did not concern violations of section 75.701-5 (Tr. 309). Mr. Eddy also confirmed that although he and his supervisors disagreed that the prior cited conditions were violations, they were abated and he began checking the equipment to comply with the inspector's abatement requirements (Tr. 290-291).

The unidentified mine superintendent referred to by the inspector did not testify in this case. Although Mr. Kun testified in regard to other violations, he was not called to testify about this citation. I find no credible evidence to support the petitioner's assertion that the inspector discussed the specific requirements of section 75.701-5, with mine management prior to the issuance of his order. I also find that he did not discuss the matter with foreman Eddy either.

The petitioner's assertions that the prior citations issued by the inspector, and his asserted discussions with mine

management, clearly support a finding of aggravated conduct are rejected. I conclude and find that the prior citations concerning a different regulatory standard are irrelevant, and I have concluded that there is no credible evidence that the inspector discussed the specific requirements of section 75.701-5, with mine management.

It would appear to me from the record in this case that the issue of separate clamps found in section 75.701-5, has been clouded by the interjection of the single track bond issue raised by the prior citations, as well as the inspector's order. Adding to the confusion, in my view, is the "will be approved" language found in section 75.702-5, which suggests that some sort of approval process is available to a mine operator seeking alternative methods of grounding (Tr. 245-249). Counsel for the parties confirmed that prior litigation and discussions have taken place, that MSHA has "informally approved" a type of track bond not specified in the regulation, and the respondent's counsel stated that a written request made to MSHA's district manager in this regard has not been answered (Tr. 250-251). There also appears to be a difference of opinion among the parties as to precisely what is required to maintain compliance with the cited standard.

Based on the foregoing findings and conclusions, and after careful consideration of all of the evidence in this case, I conclude and find that the petitioner has failed to prove that the violation in question was the result of the respondent's aggravated conduct amounting to an unwarrantable failure to comply with section 75.701-5. Under the circumstances, the inspector's finding in this regard IS VACATED, and the section 104(d)(2) "S&S" Order IS MODIFIED to a section 104(a) "S&S" citation.

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

I conclude and find that the respondent is a large mine operator and the parties have stipulated that payment of the civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The petitioner's computer print-outs for the Osage No. 3 mine for the period August 1, 1990, through August 30, 1992, reflect that the respondent paid civil penalty assessments for fifty-two (52) violations of section 75.400, fifteen (15) of which were "single penalty" non-S&S citations; four (4) violations of section 75.701-5, and fifty-seven (57) violations of section 75.1403, seventeen (17) of which were non-S&S, "single

penalty" assessments. For an operation of its size, I cannot conclude that this is a particularly egregious compliance record warranting additional civil penalty assessments for the violations which have been affirmed.

Good Faith Abatement

In the absence of any evidence to the contrary, I conclude and find that the respondent timely abated the violations in good faith.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the violations affirmed as "S&S" violations were serious violations.

Negligence

I conclude and find that the violation of section 75.400, resulted form a high degree of negligence, amounting to aggravated conduct. I further conclude and find that the violation of section 75.1403, and section 75.701-5, were the result of the respondent's failure to exercise reasonable care amounting to a moderate degree of negligence on the part of the respondent.

ORDER

Section 104(d)(2) "S&S" Order No. 3122087, August 6, 1992, citing a violation of 30 C.F.R. § 75.316, has been settled, and the respondent has agreed to pay a civil penalty assessment of $3,000, in settlement of the violation. The respondent IS ORDERED to pay this amount to MSHA in settlement of the violation.

In view of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, IT IS FURTHER ORDERED AS FOLLOWS:

1. Section 104(d)(2) "S&S" Order No. 3122095, August 31, 1992, 30 C.F.R. § 75.400, IS AFFIRMED AS ISSUED, and the respondent shall pay a civil penalty assessment of $3,000, for the violation.

2. Section 104(d)(2) "S&S" Order No. 3717744, July 22, 1992, 30 C.F.R. § 75.1403, IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED. The respondent shall pay a civil penalty assessment of $1,000, for the violation.

3. Section 104(d)(2) "S&S" Order No. 3121656, July 21, 1992, 30 C.F.R. § 75.701-5, IS MODIFIED to a section 104(a) "S&S" citation, and as modified, IT IS AFFIRMED.The respondent shall pay a civil penalty assessment of $1,000, for the violation.

IT IS FURTHER ORDERED that payment of the aforementioned civil penalty assessments, including the settlement amount, shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decisions and Order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 3 1994

BETHENERGY MINES, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 92-511-R
	:	Citation No. 3705954; 4/10/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 92-512-R
	:	Citation No. 3705227; 4/21/92
	:	Docket No. PENN 92-514-R
	:	Citation No. 3705229; 4/22/92
	:	Docket No. PENN 92-515-R
	:	Citation No. 3705230; 4/23/92
	:	Docket No. PENN 92-516-R
	:	Citation No. 3705231; 4/23/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 92-595
	:	A.C. No. 36-00840-03815
v.	:	Docket No. PENN 92-643
BETHENERGY MINES, INCORPORATED, Respondent	:	A.C. No. 36-00840-03818
	:	Docket No. PENN 92-652
	:	A.C. No. 36-00840-03817
	:	Cambria Slope Mine #33
	:	Mine ID 36-00840

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, Philadelphia, Pennsylvania, for the Respondent/Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant/Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise respectively under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815, 820, and involve the interpretation and application of certain of the Secretary of Labor's ("Secretary") mandatory safety standards regulating the ventilation of underground coal

mines. Citations charging the violations were issued by the Secretary's Mining Enforcement and Safety Administration ("MSHA") to BethEnergy Mines, Inc. ("BethEnergy"), at its Cambria Slope No. 33 Mine ("Mine No. 33"). BethEnergy contested the citations and the proposals of the Secretary for the assessment of civil penalties and the cases were the subject of a duly noticed hearing in Indiana, Pennsylvania, at which R. Henry Moore represented BethEnergy and John Strawn represented the Secretary.

STIPULATIONS

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

> 1. Mine No. 33 is owned and operated by BethEnergy.
>
> 2. Mine No. 33 is subject to the jurisdiction of the Act.
>
> 3. The Administrative Law Judge has jurisdiction over these proceedings.
>
> 4. The subject citations were properly served by duly authorized representatives of the Secretary on agents of BethEnergy on the dates and at the places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevance of any statements asserted therein.
>
> 5. The assessment of civil penalties for any violations found to have occurred will not affect BethEnergy's ability to continue in business.
>
> 6. BethEnergy is a large company and Mine No. 33 is a large mine.
>
> 7. Mine No. 33 was assessed a total of 624 violations between April 1990 and April 1992. These assessed violations were cited during 1,324 inspection days.
>
> 8. The exhibits of the parties are authentic.
>
> 9. All citations at issue were abated in a timely fashion.

See Tr. 16-17.

The parties also concurred as follows:

> 1. In Docket No. PENN 92-512-R BethEnergy is contesting Citation No. 3705227. This same citation is one of two at issue in penalty proceeding Docket No. PENN 92-652. The parties agree that the decision concerning this citation will control that portion of Docket No. PENN 92-595 in which the Secretary is seeking a civil penalty assessment for Citation No. 3705986, an alleged violation involving circumstances similar to Citation No. 3705227.
>
> 2. In Docket No. PENN 92-514-R BethEnergy is contesting Citation No. 37095229, the second citation at issue in penalty proceeding Docket No. PENN 92-595. The parties agree that the decision concerning this citation will control the outcome of Docket No. 92-515-R in which BethEnergy contests Citation No. 3705230, a citation involving circumstances similar to Citation No. 3705229.

See Tr. 17-19.

MOTIONS TO WITHDRAW

Prior to the taking of testimony, counsel for the Secretary stated MSHA agreed to vacate Citation No. 3705954. The citation is the subject of contest proceeding Docket No. PENN 92-511-R and civil penalty proceeding Docket No. PENN 92-643. As a result, counsel for BethEnergy moved to withdrawn BethEnergy's contest of the citation and counsel for the Secretary moved to withdraw the Secretary's civil penalty petition. Tr. 20-21. In addition, counsel for BethEnergy announced that Citation No. 3705231, the subject of contest proceeding Docket No. PENN 92-516-R, had been vacated by MSHA and counsel for BethEnergy moved to withdraw its contest. Tr. 13, 21.

I orally granted the motions. Tr. 21. The agreements and motions to withdraw left three citations to be tried.

DOCKET NO. PENN 92-595

Citation No.	Date	30 C.F.R. §	Proposed Penalty
3705944	3/19/92	75.309(a)	$506

Citation No. 3705944 states in part:

> The split of air returning from the 026 No. 1 longwall thru the No. 2 entry of 7 left & east main contained 1.3% of methane when tested at a point between the two regulators[,] [n]ot less than 12 inches from the roof and rib. A[n] air sample bottle has been collected at this location.

P. Exh. 2.

30 C.F.R. § 75.309(a), which reiterated Section 303(i)(1) of the Act, 30 U.S.C. § 863(i)(1), stated:

> If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. Tests under this [section] shall be made at 4-hour intervals during each shift by a qualified person designated by the operator of the mine. In making such tests, such person shall use means approved by the Secretary for detecting methane.

Section 309(a) has been replaced by 30 C.F.R. § 75.323(c), as part of the Secretary's general revision of the standards for underground coal mine ventilation. 57 F.R. 20914 (May 15, 1992).

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

SAMUEL J. BRUNATTI

Samuel J. Brunatti, an MSHA inspector, testified that Mine No. 33 liberates more than a million cubic feet of methane every 24 hours and therefore, pursuant to Section 103(i) of the Act, 30 U.S.C. § 813(i), all or part of the mine must be inspected every 5 working days at irregular intervals. (Such inspections are known to as section 103(i) "spot inspections.") On March 19, 1992, Brunatti went to the mine to conduct such an inspection.

Brunatti traveled first to the longwall section where he detected methane in a split of air returning from the longwall face (the "split return"). The methane was in the No. 2 entry on the headgate side of the longwall. Brunatti stated that the No. 2 entry not only returned air from the longwall face, in addition, some air traveled from the gob into the No. 2 entry. Therefore, he described the No. 2 entry as having a dual ventilation purpose. Tr. 61, 64.

Prior to reaching the point at which he tested for methane, Brunatti stated he was told by BethEnergy's foreman, Michael Baker, that methane was present on the longwall. Tr. 35-36. Baker also told Brunatti that because of the methane, Baker had shut down the longwall and de-energized the longwall face equipment during the previous shift. The equipment had not been restarted. Tr. 52

Following the conversation with Baker, Brunatti traveled to Evaluation Point No. 62 ("EP-62") where he tested for methane in the split return between two regulators. The test revealed a methane content of 1.3 percent. Tr. 38, 52. Brunatti waited for approximately two hours and when the methane level did not drop, he issued Citation No. 3705944. Tr. 38-40, 69. Brunatti stated he understood that an inspector was supposed to wait a "reasonable time" to determine if the methane level would fall below 1.0 percent before citing a violation of section 75.309(a). Tr. 56-57. He testified:

> If I would find the methane or one of [the operator's] foremen [would find it], [the operator] is, according to our program policy manual, to make changes or adjustments in the ventilation system itself at once. If he's doing this, [and] that methane goes down, we don't issue the violation. However, if he makes ventilation changes at once and after a reasonable amount of time, then that ventilation isn't going down, we can issue the violation.

Tr. 71. Brunatti maintained that when he issued Citation No. 3705944, he knew only that Baker had de-energized and shut down the longwall.

Brunatti acknowledged that section 75.309 had been revised and superseded by section 75.323 and he read from MSHA's preamble to the revision that "limiting the rate of production of coal to permit the existing ventilation system to maintain the level of methane below 1.0 percent constitutes a reasonable action to control the rate of methane and is acceptable." Tr. 68. He maintained, however, that stopping longwall production was not the type of "change or adjustment" that had to be made "at once"

under section 75.309. Tr. 65. He noted that the mine liberated high quantities of methane, most of it coming from the longwall gob. Tr. 44, 54. If longwall production was stopped, the gob would not cease to liberate methane. The roof would continue to fracture in the gob and methane emissions would continue. Tr. 68.

Brunatti testified he was told later by the mine foreman that the foreman had instructed Baker to try to induce more air into the return split from the 8-left side, the headgate side, of the longwall. Tr. 39. Brunatti believed there were other things BethEnergy could and should have tried to dilute the methane -- things such as routing additional air from the drill site to the No. 2 entry, opening fully the regulators at EP-62 and redirecting ventilation so as to add to air at the longwall face. Tr. 40-42, 54. He acknowledged, however, that such redirection of the air probably would have involved major ventilation changes and therefore would have required MSHA approval. Tr. 55.

To abate the citation BethEnergy reversed the direction of airflow in the No. 2 entry and what Brunatti and MSHA had regarded as a split return became a bleeder entry. Tr. 51. Methane is not required to be maintained at or below 1.0 percent in a bleeder entry. Tr. 57.

BETHENERGY'S WITNESSES

ROBERT DUBREUCQ

There are two seams from which coal is extracted at Mine No. 33, the B seam and the C seam. The B seam is the lower of the two seams. Tr. 78. BethEnergy has been mining the B seam since 1964 approximately and its underground workings are among the most extensive in the industry. Tr. 81. Robert DuBreucq is superintendent of the B seam.

DuBreucq testified that at approximately 6:30 a.m., on March 19, 1992, at the end of the midnight shift, 1.3 percent methane was discovered by the section foreman in the No. 2 entry off of 7-left. Upon detecting the methane, the section foreman shut off the electric power to the face area and ceased longwall operations. Tr. 82. The midnight shift ended at 7:30 a.m., and Brunatti arrived in the area shortly after the day shift had begun. Brunatti was informed of the shutdown. Id.

According to DuBreucq, in addition to shutting down the longwall, changes were made in the ventilation in that a regulator at EP-62 was opened fully and the air at the drill site was decreased from 12,000 cfm to 9,000 cfm, the minimum allowed by the ventilation plan. Less air at the drill site meant increased air on 7-left. Tr. 84, 119. Finally, all of the bore holes were checked to make certain they were functioning at full

capacity. DuBreucq did not know if these steps to alter the ventilation had been brought to Brunatti's attention. Tr. 84, 111-112, 119.

DuBreucq maintained that BethEnergy did all it could to bring down the level of methane short of making major changes in ventilation, that would have required MSHA's approval. DuBreucq stated that by 2:30 p.m., methane readings were below 1 percent and mining was resumed. Tr. 97.

DuBreucq described the No. 2 entry off 7-left as a bleeder entry which was designed to move methane-air mixtures away from active workings, out of the gob and into the return air course. Dubreucq acknowledged that the No. 2 entry also moved air that had crossed the longwall face, and that because of this MSHA believed the entry was a split return, that is an entry that carried air away from a working section. However, because the air that crossed the longwall face and entered the No. 2 entry also mixed with air coming off the gob through bleeder connectors, the No. 2 entry, in Dubreucq's opinion, became a bleeder entry after the air from the face and gob had mixed. Tr. 87. (DuBreucq stated "[T]he fact is, a split return cannot be influenced by air from another split or air coming out of the bleeder connector." Tr. 87.)

DuBreucq described a bleeder connector as a crosscut connecting the gob to the bleeder entry. He also identified a crosscut immediately adjacent to the tailgate end of the longwall. The crosscut connected the No. 1 entry with the No. 2 entry. The stopping in the crosscut had been holed through so that air passed freely through the crosscut. Tr. 98. ("B" on Exh. R-1.) Several other such crosscuts with holed through stoppings also served as bleeder connectors.

DuBreucq described how air that had crossed the longwall face passed through "B" and into the No. 2 entry. In addition, he described how some of the air at the face did not reach the end of the longwall but rather traveled over the gob and out the other bleeder connectors into the No. 2 entry. Tr. 94. In DuBreucq's view, the function of the No. 2 entry was to carry gas coming off the longwall and gas coming out of the gob back to EP-62 and thence into the main return air course. Tr. 91. Thus, when Brunatti tested for methane at the EP-62, he tested air that had ventilated the longwall gob as well as air that had crossed the longwall face. Tr. 91-92, 96.

Because the gob was not part of the working section, DuBreucq believed that under section 75.309 when a test for methane was made of "a split of air returning from any working section" it should be made before the air mixed with air that had ventilated the gob. Tr. 102; Exh. R-1 at "C".

DuBreucq stated that even though BethEnergy considered the No. 2 entry to be a bleeder entry, the company was well aware MSHA regarded it to be a split return entry -- that is as a split of air returning from a working section -- which is why BethEnergy shut down the longwall when 1.3 percent methane was detected. Tr. 89-90.

To abate the violation BethEnergy revised its ventilation plan. Under the revised plan, air traveled from the tailgate end of the No. 2 entry outby to 7-left, rather than from the tailgate end of 7-left inby to EP-62 and what had been intake air became return air. In addition, some of the air that formerly had come up the tailgate entry from 7-left was diverted to the headgate side from 8-left and crossed the face from the headgate to the tailgate side.

PARTIES' CONTENTIONS

Brunatti found that the split of air returning from the longwall through the No. 2 entry contained 1.3 percent methane when tested at EP-62. The longwall had been shut down on the previous shift, but simply shutting down the longwall and waiting was not sufficient for compliance with the regulation. Other steps could and should have been taken. Sec. Br. 12-14. Because it is undisputed that the No. 2 entry contained air from the longwall face, the air tested at EP-62 was from a split of air returning from a working section. The presence of 1.3 percent methane required BethEnergy to make immediate changes or adjustments in the ventilation other than shutting down the equipment which it did not do. Therefore, the violation existed as charged. Sec. Br. 15.

The Secretary dismisses BethEnergy's argument that the entry was a bleeder entry. The Secretary notes that BethEnergy shut down production because of the 1.3 percent level of methane. If BethEnergy really believed the entry was a bleeder entry it would not have taken this drastic step. It could have resolved the issue easily by negotiating a change in its ventilation plan with MSHA prior to being cited. Sec. Br. 14-15.

BethEnergy argues section 75.309(a) did not apply to the cited entry. It notes that section 75.309-2 specified where the methane content was to be measured for a split of air returning from a working section -- between "the last working place of the working section ventilated by the split and the junction of such split with another air split or the location at which such split is used to ventilate seals or abandoned areas." Thus, according to BethEnergy, the purpose of section 75.309(a) was to regulate the amount of methane coming from the working section before any methane from other areas mingled with it. BethEnergy Br. 7-10. Brunatti did not find methane in excess of 1.0 percent in a location uninfluenced by air from another air current. Rather,

the air he tested already had mixed with the air from the gob. Since the air measured by Brunatti included air from the gob, which was an abandoned area, the air was not covered by the standard. BethEnergy Br. 9-10.

In the alternative, BethEnergy argues it complied with the standard, in that the record supports finding it made the required changes or adjustments in ventilation upon discovery of excessive methane by ceasing mining, de-energizing face equipment, fully opening a regulator at EP-62, increasing the air flowing from the drill site and by determining whether the bore hole fans were operating properly. BethEnergy Br. 11-15.

THE VIOLATION

Because it is agreed the air tested by Brunatti contained more than 1.0 percent methane, the initial question is whether the air at EP-62 -- "the air returning from the No. 2 entry of 7-left & east main" -- was "a split of air returning from any working section." If not, the Secretary has failed to prove the violation and the question of whether BethEnergy undertook "changes or adjustments ... at once in the ventilation in the mine" need not be addressed.

The No. 2 entry was the middle of three entries that made up the tailgate side of the longwall. Intake air was brought up the headgate entries and across the longwall face. In what may have been a somewhat unusual configuration for longwall ventilation, intake air also was brought up the tailgate entries. Intake air from the headgate side crossed the face and at the tailgate end of the longwall mixed with intake air from the tailgate side before passing through the open crosscut into the No. 2 entry. As the testimony of both Brunatti and DuBreucq establish headgate intake air also moved from the face over the gob and traveled to the No. 2 entry through the series of bleeder connectors that had been created as the longwall advanced. (This ventilation system is best depicted on Resp. Exh. 1.) Thus, the air that traveled the No. 2 entry inby the longwall and that passed through EP 62, was a mixture of headgate air that had crossed the longwall face, headgate air that had passed over the gob and traveled through the bleeder connectors into the No. 2 entry, and tailgate air that had traveled up the tailgate side of the longwall.

A "split" is defined as "[a] current of air which has been separated from the main intake to ventilate a district in a mine." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 1056. The intake air ventilating the longwall constituted a split, but was the air tested by Brunatti "returning from any working section?"

Regulation 30 C.F.R. § 75.2(g)(3) defines "working section" as "all areas of the coal mine from the loading point of the

section to and including the working faces. Certainly, the air tested by Brunatti contained air that had ventilated areas to and including the working face, i.e., the longwall. "The problem is that the air tested also contained air that had ventilated the gob, an area not a part of the "working section." Did this mixed air qualify as "air returning from any working section" within the meaning of section 75.309(a)?

The standard could be read to include such air. Strictly speaking, some of the air had traveled inby the loading point and crossed the working face. In this instance, I am persuaded, however, that construing the standard to exclude such mixed air from the gob is more in tune with its intent.

Under the ventilation standards then in effect permissible methane levels varied with respect to air returning from a working section and air returning from the gob, as the criteria for the approval of ventilation system and methane and dust control plans made clear. 30 C.F.R. § 75.316-2(d) set as a minimum level of protection that all such plans insure the methane content in any return aircourse other than an aircourse returning from the split air from a working section not exceed 2.0 percent. Presumably, the reason for the different levels of methane allowed in the different types of returns was the desire to assure miners in working sections of enhanced protection against methane related ignitions and explosions, a protection afforded by a strict 1.0 percent level in air that had ventilated a working section. This made sense given the usual presence of miners in working sections and the number of potential ignition sources therein. Presumably, as well, the level of protection was not as stringent in other types of returns because miners were not usually working or traveling in such returns.

Because under the particular circumstances of this case, the air tested by Brunatti did not indicate the methane content of air returning from the working section, but rather indicated the methane content of air returning from the working section and from a part of the mine other than the working section, I find that it did not come within section 75.309(a).

This is not to say that such mixed air always would have been outside the confines of the standard. There might have been situations in which such air only could have been tested after it mixed with air that had ventilated an area other than a working section, and in such a case, application of the standard might well have been necessary to assure miners in the working section the level of protection afforded by the standard. However, here the return air that had ventilated the working section could have been tested at the tailgate end of the longwall before it mixed with the air that had ventilated the gob. The result of such a test that would have indicated the methane connect of the split of air returning from the No. 1 longwall working section and

would have indicated with certainty whether or not BethEnergy was in compliance with section 75.309(a).

While I conclude, the Secretary has not proven a violation of section 75.309(a), my decision in no way implies a criticism of Brunatti. As I have indicated, the manner of ventilating the longwall apparently was unusual. The practical effect was the creation of a return aircourse that did not clearly come within the then existing regulations. The inspector, acting in good faith, tried to fit the system into the regulations and to do so in the face of an acknowledged disagreement between MSHA and the company as to the nature of the return air. In hindsight, the matter might have been handled better through the ventilation system and methane and dust control plan provision of the regulations -- a provision to which the parties ultimately resorted in carrying out abatement of the alleged violation.

DOCKET NO. PENN 92-512-R

DOCKET NO. PENN 92-652

Citation No.	Date	30 C.F.R. §	Proposed Penalty
3705227	4/21/92	75.316	$204

Citation No. 3705227 states in part:

> The air current flow exiting from the approved bleeder evaluation point (Co. No. 62) contained methane readings of 2.6% thereby exceeding the maximum allowable level of 2.0%. This bleeder evaluation point is approved in lieu of traveling the bleeder entry for the active 8 left E-East No. 1 L.W. (026) working section's gob line. Two (2) air samples were collected at the inby end of this bleeder evaluation point w[h]ere 2.6% methane was detected with an air quantity of 47,988 cubic feet per minute passing thru.

P. Exh. 4.

Section 75.316, which restated Section 303(o) of the Act, 30 U.S.C. § 863(o), required the operator to adopt and MSHA to approve a ventilation system and methane and dust control plan suitable to the mining system of the coal mine involved. Like section 75.309, section 75.316 also was revised, subsequent to the issuance of the contested citation. 57 F.R. 20868, 20914 (May 15, 1992). The ventilation methane and dust control plan provisions now are found at 30 C.F.R. § 75.370.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

NEVIN JOHN DAVIS

Nevin John Davis, an MSHA inspector, testified that on April 21, 1992, he conducted an inspection at the mine in the company of Mike Baker, company longwall general assistant, during which the inspection party proceeded to EP-62. (Although the phrase "BP-62" was used by Davis to refer to the bleeder evaluation point, the location is the same as that previously described as EP-62 and for the sake of consistency, I will use the latter term. Tr. 144.) Davis explained that a bleeder evaluation point is an agreed upon place at which to evaluate air to assure the gob is properly ventilated. Such points are used when gob areas can not be traveled due to roof conditions. Tr. 129. The air at EP-62 was checked weekly by a company examiner. Tr. 137.

Davis took an air reading using a smoke tube in order to determine the direction in which air was traveling and then took a methane reading using a methane detector. Tr. 125-126. Davis found a methane level of 2.6 percent. Davis identified a copy of the ventilation system and methane and dust control plan then in effect for the mine. P. Exh. 7. He noted that on page 4, the plan stated bleeder entries were to be examined at least weekly to determine whether they were functioning as required by 30 C.F.R. § 75.316-2(e)(1). Reading section 75.316-2(e) and section 75.316-2(e)(1) together, Davis believed the approved ventilation plan required compliance with all of the requirements of section 75.316-2, including section 75.316-2(h), which stated that "[t]he methane content of the air current in the bleeder split at the point where such split enters any other air split should not exceed 2.0[%]." Tr. 148-150. In Davis' opinion, a methane reading in excess of 2.0 percent could indicate a methane buildup in the longwall gob area. Tr. 130. Davis agreed, however, that there was no language in section 75.316-2(e)(1) that specifically limited methane to 2 percent at an evaluation point. Tr. 140.

Davis took contemporaneous notes to document the conditions he found during the inspection. He also made a sketch to depict the conditions. P. Exh. 5 at 24. Referring to that sketch, Davis explained that EP-62 was located at a crosscut that intersected with a main return entry coming from A left east. The return air from A left east and the return air from the bleeder mixed at the mouth of the crosscut and the main return. Davis referred to this as the "mixing point." Tr. 131.

(The mixing point is indicated by the "squiggly" line on the sketch. See P.Exh. 5 at 24.) Davis determined where the two air currents mixed with the smoke tube. Davis then went into the crosscut to measure the quality of air at the evaluation point. Tr. 132. He calculated an air volume of 47,000 cfm. Tr. 137.

Davis stated that when measuring methane at EP-62 he believed it important to measure inby the mixing point in order to get a "true" reading of the methane content of the air coming off of the gob. If the reading were taken outby, in the area of mixed air, the result would have indicated the methane content of air coming off the gob and methane from the A left east return. Tr. 132. Davis believed the mixed air would have had a lower methane content than the gob air. Therefore, Davis moved 17 feet into the crosscut (i.e., the bleeder connector) to test the air before it mixed. Tr. 137.

JOSEPH D. HADDEN

Joseph D. Hadden is the ventilation supervisor of MSHA District 2, the district in which Mine No. 33 is located. Hadden has been the district ventilation supervisor since 1986. As such, one of his duties is to review the ventilation plans operators submit and to recommend whether or not MSHA approve them. (The plans are submitted to MSHA on an annual basis and are reviewed every six months.) He estimated that since 1986, he has reviewed more than 800 such plans, none of which allowed methane levels at bleeder evaluation points to exceed 2.0 percent, and in fact, he would not recommend for approval a plan containing such a provision. Tr. 155.

Once MSHA approves a plan, an approval letter is sent to the operator. Hadden identified an approval letter for a six month review of the plan for No. 33 Mine. Tr. 157; P. Exh. 8. The letter is dated October 28, 1991, and is from the district manager of District 2 to R. E. Stickler, manager of operations for BethEnergy. The letter states in part, "These plans and all criteria listed under Section 75.316 ... shall be complied with." P. Exh. 8. Until 1993, the sentence was included in all approval letters as a matter of district policy. Tr. 157, 164-165. Hadden maintained the statement conveyed to BethEnergy that no more than 2 percent methane in the air at bleeder evaluation points was allowed because that was what one of the criteria -- section 75.316-2(h) -- required. Tr. 157, 159.

Hadden acknowledged, however, that the plan for Mine No. 33 lacked a specific statement that the methane content of air at a bleeder evaluation point could not exceed 2.0 percent. Tr. 161. He further agreed that when section 75.316-2(h) stated that the methane content of air should not exceed 2.0 percent "at the point where ... [the bleeder] split enters any other split," the "point" had been interpreted to mean the mixing point and

that the bleeder evaluation point was not necessarily always the same as the mixing point. Tr. 161. Nonetheless, he believed the measurement of air at the bleeder evaluation point should have been made "[i]nby the mixing point" and "anywhere in that air course where another air split hasn't entered into that air." Tr. 162.

BETHENERGY'S WITNESSES

ROBERT DUBREUCQ

DuBreucq indicated that the question of the percentage of methane allowed in a bleeder split had been a subject of controversy between the company and MSHA for some time. Tr. 178-179. DuBreucq testified that in his opinion, section 75.316-2(h) was not a part of the approved ventilation plan for the mine. Tr. 175. However, if it applied he believed that Davis had not taken the methane measurement where the criterion required. He explained that when section 75.316-2(h) specified a 2.0 percent limit for the methane content "of the air current in the bleeder split at the point where such split enters any other air split," it implied that the measurement of the air current should be made at the mixing point. Tr. 173, 184. DuBreucq testified he asked Davis what the methane content of the air was at the mixing point and that Davis told him it was "probably below 2 percent." Tr. 175.

JOHN GALLICK

John Gallick, is the former director of safety and environmental health for BethEnergy. During the time he worked for the company he interacted with MSHA personnel regarding the agency's approval of mine ventilation plans. Gallick was asked about MSHA's assertion that the criterion of section 75.316-2(h) had been incorporated into the plan by the statement in the approval letter that the company was to comply with "all criteria listed under [s]ection 75.316." He stated that BethEnergy's position was if MSHA wanted something in a ventilation plan the item should have been specifically stated. In his opinion, incorporation by reference was unwise from both a safety and legal viewpoint. Tr. 204-205.

PARTIES' ARGUMENTS

According to the Secretary, the essence of the alleged violation is that BethEnergy violated its ventilation plan by having in excess of 2.0 percent of methane inby the mixing point where the bleeder entry air current entered a return air split. There were two ways in which the 2.0 percent limit was included in BethEnergy's plan for the mine. First, BethEnergy's plan specifically stated that bleeder entries were to be examined or

evaluated at least weekly to determine, inter alia, whether the bleeders were functioning per section 75.316-2(e)(1). The specific reference to section 75.316-2(e)(1) meant that section 75.316-2(e) was incorporated into the plan as well. Section 75.316-2(e) stated, in part, that bleeder entries or bleeder systems should conform with the requirements of section 75.316-2 and section 75.316-2(h) provided that the methane content of the air current in a bleeder split at the point where it entered any other air split should not exceed 2.0 percent. Sec. Br. 17-18. Because, "BethEnergy's ventilation plan in the section on bleeders specifically incorporate[d] [section] 75.316-2(e)(1)" and "[t]hat section provide[d] ... all bleeders must meet the requirements of [section] 75.316-2 ... the 2[.0]% limit [wa]s incorporated in [BethEnergy's] plan." Id. 18.

Second, the plan approval letter from MSHA to BethEnergy specifically stated that the company must comply with the criteria contained in section 75.316-2. Id. Acknowledging that Commission Administrative Law Judge Avram Weisberger had ruled in BethEnergy Mines, Inc., 12 FMSHRC 975 (May 1990), review vacated, 12 FMSHRC 1751 (September 1990), that the criteria of section 75.316-2 could not be incorporated through a plan approval letter, the Secretary nonetheless argues Judge Weisberger's decision does not operate as res judicata. Judge Weisberger did not rule whether the incorporation of section 75.316-2(e)(1) under the bleeder section of a plan could make applicable the 2.0 percent limit of section 75.316-2(h), and in any event, under UMWA v. Dole, 870 F.2d 662 (D.C.Cir. 1989), incorporation of regulatory criteria in ventilation plans is permissible. Id. 26.

With regard to the location of the methane tests, the Secretary asserts that Davis located a point where the bleeder air would not be affected by the air from the main return and correctly tested for methane there. Sec. Br. 19.

According to BethEnergy, the principal question at issue is whether the Secretary has properly imposed, through the plan approval letter, a limit on the amount of methane at a bleeder evaluation point. This was precisely the issue Judge Weisberger decided in BethEnergy Mines, and the Secretary, who did not seek review of this portion of Judge Weisberger's decision, should be barred from attempting to relitigate it. BethEnergy Br. 19-21.

If the Secretary is not so barred, his attempt to incorporate the criterion of section 75.316-2(h) through stating in the plan approval letter that "all criteria listed under section 75.316 shall be complied with" is the type of all inclusive, across-the-board imposition of requirements rejected by the Commission in Carbon County Coal Company, 7 FMSHRC 1367 (September 1985). At most, the Secretary established that MSHA

sought unilaterally to impose all of the criteria in section 75.316-2 without regard to mine specific conditions -- an improper basis upon which to allege a violation of section 75.316. BethEnergy Br. 22-26.

Moreover, there was no such specific language in the plan limiting the methane content to 2.0 percent or below. The only language addressing bleeders and evaluation points require that BethEnergy determine the bleeders were "free from explosive mixtures of methane," i.e., 5.0 percent to 15 percent.

Attentively, if the criterion of section 75.316-2(h) was properly included by reference in the ventilation plan, the Secretary still did not prove a violation. Davis took the methane reading 17 feet from the mixing point rather than at that point, as required. BethEnergy Br. 26.

THE VIOLATION

To sort through the arguments regarding whether the Secretary has proven a violation, it is helpful to review the basic principles underlying section 75.316. They have been repeatedly explained by the Commission, most recently in Peabody Coal Company, 15 FMSHRC 381 (March 1993). There the Commission, citing decisional law beginning with Zeigler Coal Co. v. Kleppe, 4 IBMA 30, aff'd 536 F. 2d 398 (D.C.Cir. 1976), reiterated that once a plan has been adopted and approved its provisions are enforceable as mandatory safety standards. The Commission emphasized, however, the individual nature of a plan and the limits on MSHA's authority to impose general rules applicable to all mines through the plan approval process. 15 FMSHRC at 385-386. After summarizing the law with respect to the process, the Commission stated:

> [M]ine ventilation ... provisions must address the specific conditions of a particular mine. Such conditions, however, need not be unique to the mine. Indeed, a general plan provisions addressing conditions that exist at a number of mines may be permissible providing those conditions are present at the mine in question.

Peabody Coal Company, 15 FMSHRC at 386.

Keeping these principles in mind, I must determine whether the Secretary has established that the criterion of section 75.316-2(h) -- that the methane content of air in the bleeder split should not exceed 2.0 percent -- applied to

Mine No. 33. I conclude that he has not, for the reasons following:

First, I reject the Secretary's suggestion that section 75.316-2(h) was made applicable through the requirement in the plan that bleeders be examined or evaluated weekly to determine whether they "are functioning per 75.316-2(e)(1)." P. Exh. 7 at 4. The specific reference in the plan was to subsection (1) of section 75.316-2(e) and subsection (1) described how bleeders are supposed to function -- that is, how they are "to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses." If the plan was meant to impose a requirement that there be compliance with all of the criteria of section 75.316-2, it would have so stated; or it would have stated that there be compliance with section 75.316-2(e). It would have not couched the compliance requirement in terms of bleeder "function," that is, in terms of section 75-316-2(e)(1).

Second, I reject the Secretary's suggestion that the requirement of section 75.316-2(h) was made applicable through the statement in the approval letter that "[A]ll criteria listed under section 75.316 ... shall be complied with." I am persuaded the Secretary's attempt to impose the requirement through the blanket statement in the approval letter was in this instance unavailing. While the result I reach is consistent with that reached by Judge Weisberger in BethEnergy Mines , 12 FMSHRC at 975, it is not based upon the preclusive nature of his decision, but rather upon the conclusion the Secretary has not established section 75.316-2(h) was made applicable on a mine specific basis.

BethEnergy's res judicata argument is not well taken. The nature of the ventilation plan approval and adoption process is such that I would be unwilling to hold MSHA forever barred at Mine No. 33 from establishing the applicability of a particular criterion, based on a 1990 ALJ decision involving an approval letter written in 1989. The process calls for flexibility and requires both the operator and MSHA to adjust to the changing ventilation dynamics of the ongoing mining situation. Conceivably, circumstances could arise in which MSHA would insist upon a criterion applying to the mine and MSHA would be able to establish that the criterion was specifically suited to the mine for the courts and the Commission have emphasized that if the Secretary insists upon a particular provision in a plan, his insistence must be based upon consideration of the particular conditions of the mine involved.

Here, however, he has not done so. Hadden was specific in describing MSHA's policy in District 2 regarding the criteria in section 75.316-2. "In our approval letters that go out with the plans, it's stated that all of the criteria under 75.316 shall be complied with." Tr. 157. He acknowledged the statement was

included in plan approval letters as a matter of district-wide policy in 1989, 1990 and 1991. He believed the policy only changed in 1993. Further, Hadden had no knowledge of any discussions between BethEnergy and MSHA regarding the 2.0 percent limit. He knew only that MSHA never would have approved a plan that indicated the company was not going to comply with such a limit. Tr. 160.

Missing from Hadden's testimony, as from Davis', was any consideration given by MSHA as to why Mine No. 33 required such a limit at bleeder evaluation points when the plan was approved in April 1991, or when it was reviewed and approved again in October of that year. There was testimony by Gallick that the applicability of the 2.0 percent limit to the mine was the subject of discussion between MSHA and BethEnergy in the spring of 1992, but there was nothing to show that such discussions had any effect upon the plan as approved or that they resulted in a revision of the plan. Tr. 206-211.

Thus, the Secretary did not establish that the provision he sought to enforce was included in the adopted and approved ventilation plan because of characteristics individual to Mine No. 33 or because of characteristics shared by many mines in the district, including Mine No. 33. Compare Peabody Coal Co., 15 FMSHRC at 387. Rather, the record suggests rote inclusion by MSHA of the pertinent catch-all sentence in all plan approval letters. Judge Weisberger cautioned MSHA about relying upon such a practice, yet from all that appears on the face of this record, the agency persisted.

As a result, I conclude a requirement that the methane content of air was limited to 2.0 percent or less at EP-62 was not included in the approved and adopted ventilation plan for Mine No. 33, and I hold the Secretary has failed to establish a violation of section 75.316.

DOCKET NO. PENN 92-514-R

DOCKET NO. PENN 92-652

Citation No.	Date	30 C.F.R. §	Proposed Penalty
3705229	4/22/92	75.316	$229

Citation No. 3705229 states in part:

> The air current flow exiting from the approved bleeder evaluation point (Co. No. 57) off the abandoned L.W. gob area between 6 right and 7 right off D-East Mains could not be fully evaluated at this time. This marked bleeder evaluation point as indicated by a

barricade device (wire mesh screen), date board, and chalk markings, was being directly influenced by a return air current flowing across the face of the wire mesh screen barricade. The air current direction of this return air current was indicated by smoketube clouds at this time.

P. Exh. 11. On May 8, 1992, the citation was modified to state:

"The air current flow exiting from the approved bleeder evaluation point (Co. No. 57) contained methane readings of 2.5% thereby exceeding the maximum allowable level of 2.0%. This bleeder evaluation point is approved for evaluation of the abandoned L.W. gob area between 6 right and 7 right of D.East Mains." Id. at 2.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

NEVIN DAVIS

Davis testified that on April 22, 1992, during the course of an inspection at the mine, he traveled to a bleeder evaluation point, EP-57, where he evaluated the direction of the air current. Davis found that the air from the main return was flowed directly across a fenced area of EP-57. At the fence the air from the main return was mixed with air coming off the gob and through the evaluation point. Because BethEnergy employees could not proceed inby the fence and into an area where air off the gob was not mixed, Davis believed there was no way they could evaluate properly the return air coming off the gob at the evaluation point. Tr. 248. The return air blowing across the bleeder entry made evaluation of the bleeder air at the evaluation point impossible. In Davis' opinion, this constituted a violation of one of the criteria found at section 75.316-2, which, as with the previous citation, was incorporated by reference into the approved and adopted mine ventilation plan. Tr. 260-264.

Upon further examining the screen Davis noted a bent area and he was able to reach over and inby the bent area and to conduct a valid test of unmixed air which showed methane in excess of 2.0 percent. Tr. 248. (Bottle samples taken to substantiate the readings Davis obtained with his methane detector produced results of 2.1 percent and 2.16 percent methane. Tr. 259.)

Davis initially issued two separate citations. Subsequently, at the insistence of the district manager, Davis combined both allegations into Citation No. 3705229. Tr. 249. Thus, as ultimately modified, Citation No. 3705229, alleged two violations of section 75.316: (1) methane in excess of 2.0 percent at EP-57 and (2) inability to evaluate air coming off the gob at EP-57 due to the screen. See Sec. Br. 23.

BETHENERGY'S WITNESSES

GEORGE MOYER

Moyer, the mine foreman for the B seam for the last two to three years, stated he was familiar with the citation and the facts surrounding it. He also stated that the screen was erected to prevent miners from entering the bleeder and the unsupported, unsafe gob area adjacent thereto. Tr. 267-268. Moyer believed that the bleeder was functioning properly and that the gob was being adequately ventilated. In his opinion, there was no violation. Tr. 271-272.

JOHN GALLICK

Gallick believed the effectiveness of gob ventilation could have been evaluated even if air readings were taken in the mixing point because the air readings would have revealed whether the bleeder system was moving air from the gob. The amount of methane detected, whether 2.0 percent or some other number, was not critical from an overall ventilation standpoint. What was critical was whether the bleeder system was working as it should. Tr. 288-289, 291-292.

PARTIES' ARGUMENTS

Regarding the purported violative presence of over 2.0 percent methane the Secretary restates arguments made concerning the previous alleged violation. With respect to the alleged inability to determine the methane content of air coming off of the gob, the Secretary argues that having to take readings of mixed air vitiated the plan's requirement. Sec. Br. 24.

BethEnergy responds to the first part of the alleged violation by referencing the arguments it made with respect to Citation No. 3705227, to the effect that the presence of methane in excess of 2.0 percent at the evaluation point was not a violation of its ventilation plan.

With respect to the second part of the alleged violation, since the approved plan required the bleeder entries be evaluated to determine "whether bleeder entries are functioning per section 75.316-2(e)(1)" (P. Exh. 7 at 4 emphasis added) and since this meant that they were to be evaluated in order to determine

whether they were moving air-methane mixtures away from the gob and in a controlled fashion were preventing methane inundation of the returns, the Secretary failed to establish the alleged violation because a determination was made that air was moving in the proper direction out of the bleeders. BethEnergy Br. 35.

THE VIOLATION

To the extent, Citation No. 3705229 alleges a violation of the adopted and approved ventilation plan for Mine No. 33 because the methane content of air exiting from EP-57 exceeded 2.0 percent, I hold, for reasons previously stated with respect to Citation No. 3705227, that a violation of the plan has not been established. To the extent, Citation No. 3705229 alleges a violation of the adopted and approved ventilation plan because the screen at EP-57 prevented an evaluation of the methane content of the air at that evaluation point, I also conclude that a violation of the plan has not been established.

The plan stated that "bleeder entries ... are to be examined and date marked, so far as safe, or evaluated at least weekly to determine whether they are free from explosive mixtures of methane ... and whether they are functioning per [section] 75.316-2(e)(1)." P. Exh. 7 at 4. As I have previously noted, in describing how bleeder entries are to function, section 75.316-2(e)(1) required in part that bleeder entries be designed so as to continuously move air-methane mixtures from the gob, away from active workings and deliver such mixtures to the mine return aircourses. I therefore interpret the plan to mean that when a bleeder evaluation point was approved by the district manager, the operator was required to evaluate the bleeder at the evaluation point to determine whether the air at the point was free from explosive mixtures of methane and whether the bleeder was moving methane mixtures from the gob and to the return air courses. In other words, whether the bleeder was "functioning per [section] 75.316-2(e)(1)." The question, therefore, is whether the Secretary has established that on April 22, 1992, this evaluation could not be made.

I accept as fact that an evaluation of mixed air would not have yielded an accurate determination of the methane content of bleeder air. Therefore, to determine whether the bleeder air was free of explosive mixtures of methane, it made sense to test the air at the evaluation point <u>before</u> it mixed with air from the main return. I also find, however, that the screen did not prevent Davis, and presumably BethEnergy personnel as well, from testing for methane before the air mixed.

I credit Davis' testimony that he was able to reach over and inby the bent area of the screen and determine the methane content of the unmixed bleeder air. Tr. 247. I also note his speculation that the screen was bent because others might have

reached over at the same spot. Tr. 248. Since it is clear that the screen did not prevent Davis from determining the methane content of the bleeder air, and since what Davis did, BethEnergy personnel also could have done, I conclude that BethEnergy was in compliance with that portion of its plan requiring it to be able to determine whether air exiting at the evaluation point was free from explosive mixtures of methane.

Davis also testified that by reaching over the screen he was able to determine the air current direction with a smoke cloud. Tr. 245-246. From this I conclude that on April 22, BethEnergy personnel also were able to determine whether the bleeder was moving methane mixtures from the gob to the return in compliance with the approved plan. I especially note the following colloquy between BethEnergy's counsel and Davis:

> Q. And on April 22, was there air moving out of this bleeder connector into the return?
>
> A. Yes, if you went inby the fenced area.
>
> Q. [W]hen you brought the smoke tube to test and you saw that the air evaluation point was influenced by the return, that air nonetheless moved out into the return, did it not, when you tested it with the smoke tube?
>
> A. Yes. When it mixed, yes.
>
> Q. And did you bring a smoke tube at the wire mesh to see what the air was doing there?
>
> A. Yes, I [brought] it inby.
>
> Q. And it was moving out toward the return; was it not?
>
> A. Uh-huh (yes).
>
> Q. So the bleeder was functioning properly, as far as you could determine?
>
> A. Yes, as far as I could determine.

Tr. 256-257. Because the plan did not limit the methane content of the air at the evaluation point to no more than 2.0 percent and because the Secretary failed to prove that on April 22, BethEnergy was unable to determine whether at EP-57 the bleeder entr[y] "[was] free from explosive mixtures of methane ... and whether [it was] functioning per [section] 75.316-2)(e)(1)" I hold the Secretary has not established a violation of section 75.316.

ORDER

DOCKET NO. PENN 92-511-R

The Secretary, having agreed to vacate Citation No. 3705954, is ORDERED to do so. BethEnergy's motion to withdraw its contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-512-R

Citation No. 3705227, is VACATED. BethEnergy's contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-514-R

Citation No. 3705229, is VACATED. BethEnergy's contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-515-R

The parties having stipulated that the outcome of BethEnergy's contest of Citation No. 3705229 will determine the outcome of BethEnergy's contest of Citation No. 3705230 and Citation No. 3705229 having been vacated, Citation No. 3705230 is VACATED. BethEnergy's contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-516-R

The Secretary having stated Citation No. 3705231 has been VACATED, BethEnergy's motion to withdraw its contest of the citation is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-595

The parties having stipulated that the outcome of BethEnergy's contest of Citation No. 3705227 will determine the outcome of the Secretary's penalty proposal for the violation alleged in Citation No. 3705986 and Citation No. 3705227 having been vacated, Citation No. 3705986 also is VACATED. Citation No. 3705944 having been found not to allege properly a violation of section 75.309(a) likewise is VACATED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-643

The Secretary having agreed to vacate Citation No. 3705954 and the citation being the only one at issue in this case, the Secretary's motion to withdraw its proposal for assessment of civil penalty is GRANTED. This proceeding is DISMISSED.

DOCKET NO. PENN 92-652

Citation No. 3705227 and Citation No. 3705229 having been vacated, this proceeding is DISMISSED.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEB 4 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-519-M A.C. No. 48-00154-05549
v.	:	Big Island Mine and Refinery
RHONE-POULENC OF WYOMING CO., Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (1988) ("Mine Act" or "Act"), On October 13, 1993, the Commission remanded the case for further proceedings, consistent with its decision.

Pending herein is the Secretary's motion for summary decision filed pursuant to Commission Rule 67, 29 C.F.R. § 2700.67.

In support of the motion, the Secretary relies on the stipulation of the parties filed December 27, 1993, the subject citation incorporated by reference and on the grounds set forth herein.

Respondent did not reply to Secretary's motion for summary decision.

The motion for summary decision states:

1. There is no issue as to jurisdiction in this matter as set forth in the Stipulation. Rhone-Poulence of Wyoming Company ("Rhone-Poulenc") is engaged in the mining and selling of trona in the United States, and its mining operations affect interstate commerce. (Stip. 1). In addition, Rhone-Poulenc is the owner and operator of the Big Island Mine and Refinery, MSHA I.D. No. 48-00154. (Stip. 2). As a mine operator, Rhone-Poulence is subject to the jurisdiction of the Federal Mine Safety and Health

Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"), and the Administrative Law Judge has jurisdiction in this matter. (Stip. 3, 4). Finally, the subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein. (Stip. 5).

2. This case arises out of the Respondent's contest of Citation No. 3634635 issued on October 2, 1991, by MSHA Inspector Gerry Ferrin. The subject citation alleged that an electrical foreman Willie Bramwell, employed by the Respondent, received an electrical shock-type injury while performing mechanical work inside an electrical control compartment at the Big Island Mine and Refinery. The electrical foreman failed to lock out or take other effective means to prevent the likelihood of being shocked while performing the mechanical work on the compartment. (Citation No. 3634635). As such, the company's actions through its electrical foreman were alleged to be in violation of 30 C.F.R. § 57.12016. (Stip. 7).

3. The condition cited in Citation No. 3634635 was determined by the Inspector to be a significant and substantial violation of the Act as the failure to comply with 30 C.F.R. § 57.12016 was deemed to have contributed to a reasonably serious injury that resulted in lost workdays for the affected electrical foreman. (Stip. 8). Thus, given the reasonably serious injury that occurred, the violation was a significant and substantial violation as set forth in Section 104(d) of the Act.

4. MSHA determined that the operator's negligence was high as to the occurrence of this violation. Bramwell was an experienced and well-trained electrical foreman, and as a supervisor, was an agent of the operator as defined in Section 3(e) of the Act. MSHA determined that Bramwell knew or should have known that he violated the Act when he failed to lock out or take other effective means to prevent the likelihood of being shocked while performing the mechanical work on the compartment at the mine. (Stip. 9).

5. Moreover, MSHA determined that the operator's conduct was aggravated and therefore, constituted an unwarrantable failure as set forth in Section 104(d)(1) of the Act. MSHA based its determination of unwarrantability on the following factors:
1) the electrical foreman was a supervisor of other employees;
2) the electrical foreman was an agent of the operator; and
3) the electrical foreman was knowledgeable about MSHA regulations. (Stip 10).

6. MSHA agreed to stipulate to a proposed penalty of $800 for Citation No. 3634635. (Stip. 11). The proposed penalty will not affect Respondent's ability to continue in business and takes into account the relevant penalty criteria pursuant to 30 C.F.R. Part 100. (Stip. 12). As such, the operator demonstrated good

faith in quickly abating the violation. (Stip. 13). In addition, Rhone-Poulenc is a large mine operator with 1,176,624 hours worked at the controlling company and 994,463 hours worked at the mine. (Stip 14). In the 24 months prior to the inspection, Respondent was inspected a total of 278 days and received 73 assessed violations only 3 of which were significant and substantial and none of which were unwarrantable failures. (Stip. 15). The negligence criteria are discussed above in paragraph 4.

7. For purposes of a summary decision, the "adverse party may not rest upon the mere allegations or denials of his pleadings ... . If the party does not respond, summary decision, if appropriate, shall be entered against him." 29 C.F.R. § 2700.67. In the instant matter, Respondent stipulated that it will not challenge the facts as set forth in the attached stipulation. (Stip. 16). As such, given the lack of challenge by the operator, the attached stipulation and the citation establish without a genuine issue of fact, the elements of the violation, the significant and substantial nature of the violation, unwarrantability, and the penalty criteria. Thus, it is appropriate for this case to be decided by summary decision.

8. The procedural history of this case is as follows: On December 28, 1992, Administrative Law Judge John J. Morris issued an Order of Dismissal denying Respondent's Motion to Dismiss under Section 105(a) of the Act, denying the Secretary's motion to accept late filing of Proposal for Penalty, and granting Respondent's Motion to Dismiss on the issue of timeliness of the Proposal for Penalty. On October 13, 1993, the Federal Mine Safety Review Commission (hereinafter the "Commission") issued its Decision vacating the Judge's order dismissing this proceeding and remanding the case to the judge for further proceedings. (Stip. 17).

9. With relation to the Commission's decision of October 13, 1993, the parties expressly reserve the right to appeal the issues raised and decided in the decision, once the remaining merits of the case have been resolved by the issuance of a decision and order by the Administrative Law Judge. A final decision and order on the merits is needed prior to any further appeals on the issue of the timeliness of the Proposal for Penalty. (Stip. 18).

10. The parties have agreed that the Secretary shall not attempt to collect the penalty ordered herein until Respondent's appeal is finally resolved, provided that Respondent timely commences and prosecutes said appeal.

In summary, the Secretary moved, unchallenged by Respondent, for a summary decision in this matter pursuant to 29 C.F.R. § 2700.67. Such a decision would resolve all pending issues on the merits of the citation and the penalty and would preserve the

right of any further appeals on the procedural issue of timeliness of the Proposal for Penalty.

Based on the stipulation of the parties, I enter the following:

ORDER

1. The Secretary's motion for summary decision is **GRANTED.**

2. Citation No. 3634635 is **AFFIRMED.**

3. A civil penalty of $800 is **ASSESSED.**

John J. Morris
Administrative Law Judge

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FEB 4 1994

WESTERN FUELS-UTAH, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 94-95-R
v.	:	Citation No. 3850092; 10/19/93
	:	
	:	Docket No. WEST 94-96-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 3850087; 10/05/93
	:	Deserado Mine
	:	Mine I.D. 05-03505

DECISION

Appearances: Karl F. Anuta, Esq., Boulder, Colorado, for Contestant;

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

These contest proceedings arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

Contestant, Western Fuels Utah ("Western Fuels") requested an expedited hearing, which was held in Glenwood Springs, Colorado, on November 30, 1993.

Contestant filed briefs in support of its position and the Secretary submitted her views in oral argument.

In these cases Western Fuels requests that the Commission vacate Citation Nos. 3850087 and 3850092.

Citation No. 3850087, issued under Section 104(a) of the Act, alleges Western Fuels violated 30 C.F.R. § 75.516-2(c).

The citation reads as follows:

Additional insulation was not provided for the communication wire (cable) where it passed under a 480 V.A.C. power conductor for the belt take-up winch of the 9th East belt drive between No. 1 and No. 2 crosscuts. The phone cable was hung approximately 3 inches under the power cable for the winch.

Citation No. 3850092, issued under Section 104(a), alleges the operator violated the same regulation.

The citation reads as follows:

Additional insulation was not provided for the mine phone cable where it was hung with the 480 V.A.C. power cable for the East Main No. 1 belt drive motor. The phone cable did not contact the power cable; however, both were supported by the same messinger wire.

The regulation relating to power wires (30 C.F.R. § 75.516) provides as follows:

§ 75.516 Power wires; support.

All power wires (except trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs.

§ 75.516-1 Installed insulators.

Well-insulated insulators is interpreted to mean well-installed insulators. Insulated J-hooks may be used to suspend insulated power cables for temporary installation not exceeding 6 months and for permanent installation of control cables such as may be used along belt conveyors.

S 75.516-2 Communication wires and in cables; installation; insulation; support.

(a) All communication wires shall be supported on insulated hangers or insulated J-hooks.

(b) All communication cables shall be insulated as required by § 75.517-1, and shall either be supported on insulated or uninsulated hangers or J-hooks, or securely attached to messenger wires, or buried, or otherwise protected against mechanical damage in a manner approved by the Secretary or his authorized representative.

(c) All communication wires and cables installed in track entries shall, except when a communication cable is buried in accordance with paragraph (b) of this section, be installed on the side of the entry opposite to trolley wires and trolley feeder wires. Additional insulation shall be provided for communication

circuits at points where they pass over or under any power conductor.

(d) For purposes of this section, communication cable means two or more insulated conductors covered by an additional abrasion-resistant covering.

The Secretary relies solely on the underlined portion of § 75.516-2(c).

STIPULATION

The parties stipulated:

1. That Contestant's Deserado Mine is an underground coal mine in Rio Blanco County, Colorado;

2. The operator is subject to the jurisdiction of the Act and the Commission; and

3. The citations were issued and duly served on Contestant.

THE EVIDENCE

The evidence is essentially uncontroverted.

Art Gore and James E. Kirk testified for the Secretary. Robert Daniels and Anthony Lauriska testified for Western Fuels.

Both contested citations allege a violation of 30 C.F.R. § 75.516(2)(c). (Tr. 9). The areas cited involve a communication cable (phone cable) and a power conductor cable. There are no trolley wires in the area. (Tr. 9).

The Deserado Mine, a gassy mine, was inspected by Mr. Gore in October 1993. The mine was an underground coal mine with a longwall mining system. (Tr. 18).

Both of the citations involve a voice communication circuit, namely, a telephone. (Tr. 19). The communication cable is the wiring that connects the telephones. There could be literally miles of cable in the mine connecting the telephones. (Tr. 19, 20).

The telephone cable was insulated. The cable loops line-insulated conductors with another wrapping of insulation. This makes it a cable instead of a wire.

Usually, there are two conductors for the telephone system and one for the ground. The wires are wrapped within one cable. (Tr. 20).

The insulated communication cable normally carries about 600 volts. The cable serves the telephone system only. (Tr. 20, 21).

The telephone box in itself is a permissible unit when connected to a permissible telephone system. It becomes a part of it. (Tr. 21).

In the two cited areas, a 350-MCM power cable provided voltage to the belt motor which powered the conveyor belt. The power cable was a large 480-volt three-phase cable, which was insulated. (Tr. 23).

The power cable was not intrinsically safe. (Tr. 23, 24).

Citation No. 3850087 was issued because the telephone cable was hung three inches beneath and crossed a power cable. In Mr. Gore's opinion, the regulation requires additional insulation where the cables cross. This is because the last sentence of § 75.516(2)(c) stands alone. (Tr. 25). Also Part 18.68(d) and .68(c) state that intrinsically safe systems cannot be mingled with power conductors.

At the crossover there was a three-inch space between the two cables. (Tr. 25, 26). This air gap is additional insulation but this could change if the gap closed. (Tr. 32, 33).

Additional insulation is required regardless of the insulation provided. The "additional insulation" must be in addition to the insulation already present. (Tr. 26, 29).

The telephone cable could be rendered unsafe by physical contact with a power cable or by induced voltage. If one component is rendered non-intrinsically safe, all components could be non-intrinsically safe. (Tr. 27).

MSHA standards require certain types of insulation on the cables. (Tr. 28). At other mines, Mr. Gore has seen a flame-resistant rubber hose where the cables intersect. Also, electrician's tape has been used. (Tr. 29).

In view of the three-inch air gap (Citation No. 3850087), the hazard potential is very low. However, hangers or cables break and scaling could occur and there could be contact between the cables. (Tr. 30). In addition, a hanger could break in a crosscut and cause the cables to touch. (Tr. 31). This condition has been cited in numerous other mines. (Tr. 32). The operator's cable was in good condition. (Tr. 34).

Citation No. 3850087 was abated by putting electrician's tape around the telephone cable where they intersected. (Tr. 34, 35).

Citation No. 3850092 involved a power cable and a communications cable hung on the same messinger wire. [A messinger wire is a steel cable strung and tensioned between two anchors.] The telephone cable was over the power cable for a distance of 10 to 12 feet, but the cables did not cross. (Tr. 35, 36). There was no additional insulation provided where the two cables ran in a parallel manner. (Tr. 37).

Mr. Gore has seen hooks fall; cables also become tense. (Tr. 38). The Deserado Mine was cited for a violation of § 75.516(2)(c) in February 1992. (Tr. 39).

Mr. Gore agreed that the Communications Circuits involved in these two citations were voice communication (telephone) circuits and not CONSPEC circuits involving mine monitoring systems. (Tr. 43).

However, a data communication circuit would be a power conductor. (Tr. 43).

A belt control cable is 12 volts and is considered to be a control cable rather than a power conductor. (Tr. 44). A power cable supplies power or current to a device for the purpose of running it, not controlling it. (Tr. 45).

ROBERT DANIELS, a company representative and an MSHA certified underground electrician, accompanied Inspector Gore. He terminated Citation 3850087 by applying additional insulation. (Tr. 83). The insulation went all the way around the cable.

There were no abrasions or breaks in the insulation of the communications cable. (Tr. 86, 87). There is no room for mobile equipment to travel in these four- to five-foot areas. The belt line goes down the entry. (Tr. 87).

In the area of Citation No. 3850092 there is fencing around the drive motors. To reach the cables, you have to go over the fencing. (Tr. 88).

The witness was not aware of any faulty maintenance. The cables are checked weekly. (Tr. 87). Further, the witness was not aware of the failure of any hooks or cables, nor have any rock falls occurred in the areas where the citations were written. (Tr. 89, 90).

There is induced RF voltage for the STOLAR radio system. The RF flows along the antenna itself. (Tr. 91).

Mr. Daniels agreed that he has always been trained to keep power and communication cables from touching. (Tr. 93). In weekly examinations, he has found cables that needed repair. He has also found fallen J-hooks. (Tr. 94).

ANTHONY LAURISKI, experienced in mining, is Western Fuels' maintenance superintendent. (Tr. 95, 96).

The witness is familiar with the insulation rating on the data communication line. The manufacturer's suggested working voltage is 400 volts. (Tr. 97). The line carries 24 volts. The power cable carries 480 volts phase-to-phase. The insulation on the power cable is rated at 600/2000 volts. This means it can be used on a 600-volt system up to 2000 volts. If not shielded in an underground coal mine, voltage above 480 needs a shielded cable. The communications cable was shielded. (Tr. 98).

The witness identified three exhibits: R-1 is a specification sheet for a power cable used in the mine. One of the citations involved a 350-MCM cable. The voltage rating on the insulation is shown as 600/2000 volts. (Tr. 100).

Exhibit R-2 lists the specific telephone cable used at the mine. The cable is shielded and the voltage rating is 400; that means it will carry up to 400 volts, but it carries 24 volts D.C. at the Deserado Mine. (Tr. 101).

Exhibit 3 is a 3-M data sheet on vinyl electrical tape. It is one of the electrical tapes used at the mine. (Tr. 101, 102).

Mr. Lauriska supervises electricians and mechanics at the mine.

The National Electric Code considers this to be a Class 2 circuit. At any place where a class 2 circuit crosses a power or a lighting circuit, a two-inch minimum separation between insulated conductors is recommended. (Tr. 103, 104).

Telephone lines were installed right after the mining was completed. (Tr. 104). The belts are also inspected every day by belt inspectors. Electrical inspections are done once a week. Power cables and telephone lines are inspected and repaired (or reported for repair) if a break is found. (Tr. 104, 105). Generally, a special cobalt jacketing material is used. (Tr. 105).

There are no bare electrical wires or telephone wires in the Deserado Mine. (Tr. 104, 105). There are no trolley wires in the Deserado Mine. (Tr. 105).

In the Kaiser Mine in Sunnyside, Utah, a rubber conduit material is placed where communication wires cross the trolley

line wires. (Tr. 106). The lines were six inches to a couple of feet apart. (Tr. 106, 107).

The signal wires carried 24 to 30 volts, about the same as the Deserado Mine. (Tr. 107). If a telephone wire fell against a power wire in the Kaiser Mine, it would probably cause an arc. (Tr. 107). If the 480-volt power line comes in contact with the telephone line at the place where the two citations were written, nothing would happen. (Tr. 110). Mr. Lauriska explained what might occur if bare conductors were touching. (Tr. 110-112).

Mr. Lauriska is familiar with the data line that operates the CONSPEC System. The line, a four conductor, sends two D.C. power signals and there are two D.C. power sources. It also has two data communication lines. The line carries 12 volts and the digital communication carries three volts. (Tr. 113). The line is used to connect the computer to sensors at various places throughout the mine. It monitors all the belt drives underground and all the gas monitoring, including carbon dioxide and methane.

There are about 13 belt drives underground. Each has 15 to 22 monitoring points. There are about 52 carbon dioxide and methane monitors underground. (Tr. 113). There are easily over 100 monitoring points. The witness was sure the data line crossed over or under the power line. (Tr. 114).

The Inspector and Mr. Lauriska disagree over whether cables should be run together. (Tr. 117).

Mr. Lauriska believes the cables are rated for protection. As a result, their rating protects the cable from whatever comes in contact with it. (Tr. 118).

Mr. Lauriska has never received from MSHA a definition of what constitutes "additional insulation." (Tr. 118). At a point where the cables were touching, some insulation was needed. An air gap could be the additional insulation. (Tr. 119).

There is a potential for the two cables to come in contact. A hazard would exist if both wires were bare and there was a potential for the current to flow back to the transformer ground. (Tr. 120). In the case of a power cable, several safeguards would be the circuit breakers and the ground fault interrupter. These safety devices come into play when necessary.

Mr. Lauriska considered air but not a piece of conduit to be additional insulation. (Tr. 121). It is Mr. Lauriska's opinion that the power cable and the telephone cable can touch. (Tr. 122). Mr. Lauriska agrees that power cables and intrinsically safe circuits should not touch. (Tr. 123).

The law requires the high voltage and low voltage to be separated. The communication cable is shielded to keep other induction like noise from interfering with the cable. (Tr. 127).

A data line is a hybrid, since it is both a power cable and a digital communication cable. (Tr. 127).

JAMES E. KIRK, an MSHA inspector as well as an electrical specialist, is qualified in all voltages for surface and underground. (Tr. 131-133). He has cited § 75.516(2)(c) numerous times. Mr. Kirk has always considered the second part of the regulation separate from the first portion dealing with communication cables and trolley wires. (Tr. 133). Basically, MSHA contends that communication cables should be kept separate from other power circuits. (Tr. 134). The regulation prohibits communication cables from passing over or under power cables. (Tr. 135). Operators sometime use conduit called **CANOFLEX** or electrical tape. Air is also considered an insulator but cables and hooks could fall or tighten up. (Tr. 136, 137).

The purpose of the regulation is to keep the communication circuit separate from the power cable. (Tr. 138).

If a low voltage system (12 to 24 volts) intermingles with a high voltage system, it is possible that the high voltage system can be induced or transmitted to the low voltage. (Tr. 138).

In connection with this particular regulation, we look at the condition of both cables, the voltages, the shielding, and any damage. All of these things would not prevent a citation from being used but would make any hazard nearly non-existent. (Tr. 140).

If an induced or transmitted voltage enters a communication line it would travel throughout the line. (Tr. 141). Section 18.62(2) prohibits intermix of intrinsically safe circuits with power circuits. (Tr. 143). In a mine environment cables are damaged all the time. They are still damaged and can blow up. (Tr. 143).

Section 57.108(12) is the metal/non-metal regulation dealing with communication/power cables. The regulation requires the cables be kept separate. (Tr. 144).

If a 24-volt power cable came in contact with a high voltage cable or line that was not a communication line, a chain of events would occur. (Tr. 145, 146). A communication line is not considered to be a power cable since you don't find power cable voltages on a communication cable. (Tr. 147). The communication cable in the Deserado Mine is 24 volts. (Tr. 147, 148).

If a power cable came in contact with a communication cable, the latter could become energized. Under such circumstances, an intrinsically safe communication cable could be rendered unsafe. There is no intrinsically safe data cable at this time. (Tr. 148).

CONSPECT systems sense carbon dioxide and methane gas. The sensors themselves are intrinsically safe and they are attached to the CONSPEC line through a barrier box. (Tr. 150). Going through the barrier box is considered to be intrinsically safe because it goes through a protective barrier. (Tr. 152).

Today MSHA defines a data line to be a power cable (Tr. 152) but a communication line is not considered to be a power cable. (Tr. 152). A 480-volt power line is certainly a power cable.

Low voltage power lines can cross each other without any additional requirement. High voltage power circuits and low voltage power circuits must have additional protection where they cross. See 30 C.F.R. § 75.80(7). (Tr. 153).

Low voltage is zero to 600, intermediate is 600 to 999 volts, 999 volts up to 13,700 volts is considered to be high voltage by MSHA. (Tr. 153, 154).

A 400-volt line without additional protection could erase a data line because they are both low voltage lines. Additional insulation can be a piece of tape wrapped around a cable or a piece of conduit or anything rated as a dielectric that is flame resistant or an insulator.

In Mr. Kirk's opinion, whatever the manufacturer provides is essentially irrelevant when one cable crosses a communication line. The regulation requires additional protection where the cables pass over or under. (Tr. 156).

If the communication line were a bare wire, the operator would comply with the regulation by putting a piece of tape on the wire. (Tr. 156-157). However, he would try to discourage that procedure. (Tr. 157-158). The regulation requires some additional insulation to be added regardless of what comes from the manufacturer. (Tr. 158).

A communication cable can be a telephone cable. Signal devices are also communication cables. Data cable is not a communication cable. (Tr. 160, 161). Communications are transmitted in a telephone cable through voltage signals. Communications are transmitted in a data cable in the same manner. (Tr. 162).

The citations involved in this case have nothing to do with the CONSPEC system. MSHA is now attempting to deal with the new concept of computer or data lines. (Tr. 168, 169).

In Mr. Kirk's opinion, Section 18.68(c)(3) can stand alone. (Tr. 169). Mr. Kirk didn't know if the telephones at the Deserado Mines are permissible telephones. (Tr. 170).

DISCUSSION AND FURTHER FINDINGS

As threshold issues, Western Fuels assets the "over" and "under" requirements of § 75.516-2(c) are vague, unclear, and undefined. Therefore, they are subject to selective and unequal enforcement.

I disagree. The Commission has previously recognized that, in order to afford adequate notice, a mandatory safety standard cannot be "so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990); Cyprus Tonopah Mining Corporation, 15 FMSHRC 367, 375 (March 1993).

The term "over" is defined in Webster's as "used as a function word to indicate motion or situation higher than or above another." [1] "Under" is defined as "in or into a position below or beneath something." [2]

Western Fuels further asserts that the above underlined portion of § 75.516-2(c) cannot "stand alone" as an MSHA requirement. In particular, Western Fuels argues the "additional insulation" requirement is limited to wires and cables installed in track entries as provided in the first sentence of § 75.516-2(c).

I disagree. The plain text does not support this view. Local Union 1261, District 22, United Mine Workers of America v. FMSHRC, 917 F.2d 42.45 (D.C. Cir.) is not inopposite to the view expressed here. Local union 1261 involved the same nexus, i.e., the construction of Section 111 of the Mine Act. In the instant case, no such nexus exists. In fact, there are few if any "Track entries" in coal mines in the Western United States.

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[1] Webster's New Collegiate Dictionary (1979) at 810.

[2] Webster's New Collegiate Dictionary (1979) at 1265.

The pivotal issue is whether the Secretary may impose "additional insulation" where a communication cable passes "over/under" a power cable. This requirement is sought to be imposed although it is uncontroverted that the MSHA-approved cables were in good condition and without breaks or abrasions.

In enforcing this regulation requiring "additional insulation," an inspector merely has to visually determine whether extra insulation has been added where power cables and communication cables meet. However, in considering a parallel regulation [30 C.F.R. § 57.12-82], the Commission found such enforcement to be inadequate.

In Homestake Mining Company, 4 FMSHRC 146 (February 1982), the Commission stated, in part, that

> ... the interpretive memorandum imposes a blanket requirement that additional insulation be placed between power cables and metal pipelines, regardless of the cable's existing insulation, dielectric strength, the conditions under which the cable is to be used, or the composition or design of the cable and its insulation. We recognize that enforcement of the standard would be simpler if an inspector merely has to visually determine whether extra insulation has been added where power cables and pipelines meet. We fail to see, however, how this superficial examination bears any relationship to the purpose of the standard. Rather, in order to make a bona fide determination that insulation adequate to prevent the transmission of current to adjacent pipelines is present, the adequacy of the added insulation must be evaluated, and this determination must be based on the objectively determinable character of the powerline and the existing insulation. In order to achieve the purpose of the standard, enforcement should not turn on the subjective evaluation of an inspector, without the objective revaluation of whether a hazard is or may be present. Further, section 57.12-82 does not state that "additional insulation" must be placed between powerlines and pipelines; it merely requires separation or insulation. 4 FMSHRC at 148, 149 (Feb. 1982).

Further,

> ... [t]he purpose of the standard, as written, can more accurately be achieved by an examination of the suitability of the insulation that is present at crossover points where water, telephone or air lines are in proximity to powerlines. 4 FMSHRC at 149. To like effect, see Climax Molybdenum, 4 FMSHRC 159 (February 1982).

In Cyprus Emerald Resources Corporation, 11 FMSHRC 2329 (November 1989), Commission Judge George A. Koutras, relying on

Homestake and Climax, supra, vacated an alleged power cable violation 30 C.F.R. § 75.517. In Cyprus Emerald, the Secretary alleged that "the light switch block indicator was not protected at the point where the power cable crossed over the trolley wire." (11 FMSHRC at 2330).

Judge Koutras, in vacating this citation, ruled:

> That in order to support any finding that a power cable is not fully protected in violation of Section 75.517, an inspector must, on a case-by-case basis, make an objective evaluation of all of the circumstances presented, including the use to which the power cable is being put, its condition, the location and distance from equipment or other physical objects which may reasonably expose it to physical damage, its proximity to miners who are required to work or travel in the area, and any other relevant factors which may support a reasonable conclusion that the cable is located and utilized in such a manner as to expose it to physical damage. Reliance by an inspector on the mere location of the cable listed among unexplained policy "location examples" is insufficient, in my view, to establish a violation. If an inspector followed the literal language of MSHA's policy, as the inspector did in this case, without any evaluation of all of the circumstances presented, he could issue a citation simply because the power cable crossed over a trolley wire, even thought the cable passed any number of feet over the trolley wire and could never conceivably come into contact with the trolley wire. Such an interpretation and application does little to foster mine safety, and simply encourage litigation. 11 FMSHRC at 2345.

In the instant cases, the Secretary does not seek to impose a blanket requirement that additional insulation be installed at all crossover points. Rather, the Secretary's citations deal with specific conditions at particular locations.

In connection with the regulation, Inspector Kirk aptly stated that we (MSHA) look at the condition of both cables, the voltages, the shielding, and any damage. (Tr. 140). Such an approach is on a case by case basis.

It is, accordingly, appropriate to review certain evidence as to the citations.

Citation No. 3850087 was issued because the communication cable was beneath the power cable. At the point where they crossed there was a three-inch gap.

In Mr. Gore's opinion, "additional insulation" was required at that crossover. The Judge has considerable difficulty in finding that the installation of mere electrician's tape remedies

a problem. However, an insulation could include a flame-resistant rubber hose or Canoflex. In any event, the method of abatement is generally within MSHA's discretion.

Based on the uncontroverted evidence, I conclude that Citation No. 3850087 was properly issued. It accordingly follows that the contest should be dismissed.

Citation No. 3850092 involved a situation where the communication cable was above the power cable for a distance of 10 to 12 feet. However, the cables did not cross. In Mr. Gore's opinion, additional insulation was required in the 10- to 12-foot distance where the cables ran parallel to each other.

It is uncontroverted that the cables did not cross. (Tr. 35, 36).

Additional insulation is required where the cables pass "over or under" any power conductor. Since there was not "over or under" passage in connection with this particular location, Citation No. 3850087 should be vacated.

For the foregoing reasons, I enter the following:

ORDER

1. The contest of Citation No. 3850087 is **DISMISSED.**

2. The contest of Citation No. 3850092 is **SUSTAINED.**

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 8 1994

WEBSTER COUNTY COAL CORP., Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 93-201-R
v.	:	Citation No. 3549595: 12/3/92
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Retiki Mine
	:	I.D. No. 15-00672
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 93-341
	:	A.C. No. 15-00672-03644
	:	
v.	:	Retiki Mine
	:	
WEBSTER COUNTY COAL CORP., Respondent	:	

DECISION GRANTING THE CONTESTANT'S MOTION FOR SUMMARY DECISION

Appearances: Timothy M. Biddle, Esq. Crowell and Moring, Washington, D.C., for Contestant/Respondent; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent/Petitioner

Before: Judge Feldman

This consolidated contest and civil penalty proceeding is before me as a result of Citation No. 3549595 issued on December 3, 1992, pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a). The subject citation, designated as non-significant and substantial, alleged a violation of the mandatory safety standard contained in

Section 75.333(e)(1), 30 C.F.R. § 75.333(e)(1), a standard promulgated in May 1992[1] which requires, in pertinent part, that permanent stoppings shall be constructed of "durable" material. Specifically, Section 75.333(e)(1) provides:

> ...permanent stoppings, and regulators installed after November 15, 1992, shall be constructed of durable and noncombustible material, such as concrete, concrete block, brick, cinder block, tile, or steel. (Emphasis added).

The term "durable" is defined in Section 75.333(a), 30 C.F.R. § 75.333(a). The provisions of this rule section state:

> For purposes of this section: ..."durable" describes a material and construction method that when used to construct a ventilation control results in a control that is structurally equivalent to an 8-inch hollow core concrete block stopping with mortared joints as described in ASTM E72-80 Section 12-Transverse Load-Specimen Vertical, load only. (Emphasis added).

The "structural equivalency" standard in Section 75.333 is quantified in the rulemaking proceeding that promulgated this new mandatory safety standard. The rulemaking specified that "structurally sound material" must withstand the same or greater static pressure as 8-inch hollow core concrete block with mortared joints (39 pounds per square foot) when pressure is applied according to ASTM E72-80 testing methods. 57 Fed. Reg. 20868, 20885 (1992). ASTM is the acronym for the American Society for Testing and Materials, an organization that has standardized sophisticated laboratory test methods to ensure sound engineering design of structures. (Contestant's Motion for Summary Decision, Attachment 4). The citation in question charged that the use of concrete block stoppings, plastered on one side only, by the contestant/respondent (hereinafter referred to as contestant) did not satisfy the structural equivalency standard in Section 75.333(e)(1).

This matter was stayed on July 20, 1993, at the parties' request in order to permit the parties to confer with their expert witnesses in an attempt to reach settlement. The parties agreed that if settlement was not reached, the contestant would file a Motion for Summary Decision (contestant's Motion). The contestant's Motion was filed on August 16, 1993. The Secretary

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[1] The mandatory safety standard in Section 75.333 was promulgated at 57 Fed. Reg. 20868, May 15, 1992, and amended at 57 Fed. Reg. 53858, November 13, 1992.

filed his opposition on September 14, 1993, and the contestant replied to the Secretary's Opposition on September 21, 1993. As a result of the parties' inability to reach settlement, by Order dated December 1, 1993, I lifted the stay in this matter and scheduled the contestant's Motion for oral argument. The parties participated in oral argument on December 8, 1993, at which time they addressed the issues designated in the December 1, 1993, Order.

The parties have stipulated that the permanent stopping in issue consists of 8"x6"x16" solid concrete blocks which are plastered with "Rite-Wall" bonding adhesive on the pressure side only. The parties also stipulated to language in a Mine Safety and Health Administration (MSHA) guidance document issued on November 9, 1992, which is entitled "Ventilation Questions and Answers" (VQA) which addresses dry stacked stoppings which are plastered on one side. (Secretary's Opposition, Attachment 2). The stipulated language states,

> The law does not preclude [dry stacked stoppings plastered on one side], but so far no product has demonstrated adequate strength when applied to only one side. However, if the stopping, when tested under Section 12 of the American Society for Testing and Materials (ASTM) E72-80, passes the test, the stopping will be acceptable. (Emphasis added).

It is unclear whether the contestant was aware of MSHA's November 9, 1992, VQA when the subject citation was issued on December 3, 1992. However, in view of the equivocal nature of this VQA with respect to the permissibility of concrete block stoppings plastered on one side, the issue of actual or constructive notice of the VQA on the part of the contestant is not dispositive.

FINDINGS OF FACT

On the basis of the parties' pleadings, their submissions in support thereof, their presentations at oral argument and their post-oral argument briefs, I have reached the following findings of fact:

1. The purpose of "durable" stoppings is to withstand pressure during fire or explosion in order to maintain the integrity of escapeways to protect miners from the harmful effects of combustion contamination. (Tr. 26-27; 57 Fed. Reg. at 20868, 20885).

2. Prior to the promulgation of Section 75.333, Section 75.316-2(b), 30 C.F.R. § 75.316-2(b), governed the structural

standard for permanent stoppings. That mandatory standard required that "permanent stoppings...should be constructed of substantial, incombustible material, such as...concrete blocks,...having sufficient strength to serve the purpose for which the stopping or partition is intended."

3. The stoppings in issue were constructed of 8"x6"x16" solid concrete blocks which were plastered with "Rite-Wall" on the pressured side only.

4. 8"x6"x16" solid concrete blocks plastered with Rite-Wall bonding adhesive on the pressure side only satisfied the fitness for purpose requirements of Section 75.316-2(b).

5. Section 75.333 was promulgated by rulemaking on May 15, 1992. Section 75.333 superseded Section 75.316-2(b) effective November 16, 1992.

6. The new "durable" standard specified in Section 75.333 does not preclude the use of concrete block plastered on one side if it is structurally equivalent (can withstand pressure of 39 pounds per square foot) to an 8-inch hollow core concrete block stopping with mortared joints.

7. Citation No. 3549595 was issued on December 3, 1992, citing a violation of the new mandatory standard in Section 75.333(a) because the cited stoppings were plastered on the pressure side only. The citation was issued approximately two weeks after the new regulatory standard became effective.

8. Citation No. 3549595 was modified on December 14, 1992, to change the cited violated mandatory standard from Section 75.333(a) to Section 75.333(b)(1).

9. Citation No. 3549595 was modified on December 30, 1992, to change the cited violated mandatory safety standard from Section 75.333(b)(1) to Section 75.333(e)(1).

10. On July 2, 1993, approximately seven months after the issuance of Citation No. 3549595, MSHA issued Report No. 07-183-93 on Sealants for General Purpose and for Application on Dry Stacked Stoppings which concluded that in order to reach the 39 pounds per square foot structural equivalency requirement of section 75.333, "...dry-stacked concrete block stoppings require strength-improving sealants to be applied in suitable thickness to both sides of the stopping." (Secretary's Opposition, Attachment 3, p. 2).

11. On August 13, 1993, more than eight months after the issuance of Citation No. 3549595, MSHA issued Report No. 09-225-93 on Small-Scale Testing of Concrete Masonry Unit Wall Sections. The report noted that "the Mine Safety and

Health Administration (MSHA) accepts 8-inch hollow-core concrete block stoppings, coated on both sides with a suitable strength-enhancing sealant (surface bonding product), at least 1/8 inch in thickness as meeting 30 C.F.R. 75.333(e)(1)." (Secretary's Opposition, Attachment 4).

12. On September 1, 1993, approximately nine months after the issuance of Citation No. 3549595, MSHA's Pittsburgh Safety and Health Technology Center (PSHTC) had a facsimile of the permanent stopping in issue tested using ASTM E72-80 Section 12-Transverse Load-Specimen Vertical Methods by the Pittsburgh Testing Laboratory Division of PSI, Inc., under contract with the Mine Safety and Health Administration. Three 48"x96"x8" thick solid concrete block walls coated with a 1/4 inch thick coating of Rite-Wall on one side only were tested. The sample stopping walls were loaded on the coated side and exhibited an average strength of 22.1 pounds per square foot as per the subject ASTM testing methods. The specific test results on the three sample stopping walls were 21.7 pounds per square foot, 16.1 pounds per square foot, and 28.5 pounds per square foot. (Letter from Edward H. Fitch, Esq., to Timothy M. Biddle, Esq., dated September 2, 1993.).

FURTHER FINDINGS AND CONCLUSION OF LAW

As noted above, Section 75.333 the cited mandatory safety standard, became effective on November 16, 1992, only two weeks prior to the issuance of the subject citation. Consequently, this case presents questions of law concerning the interpretation, application and enforcement of this new regulatory provision that are matters of first impression. These questions of law are:

1. Whether Section 75.333(e)(1) requires the operator to utilize durable construction methods as well as durable construction materials;

2. whether the Secretary or the operator has the burden of proof with respect to whether a violation of Section 75.333 in fact occurred;

3. whether the subject citation was issued in accordance with the requirements of Section 104(a) of the Mine Act;

4. and, whether the operator had adequate notice of the requirements of Section 75.333 on December 3, 1992, the date the subject citation was issued.

Issue One - The "Durability" Requirement as It Pertains to Construction Methods and Materials

The contestant argues that the durable construction method component of the term "durable" as defined in Section 75.333(a) should not be incorporated into Section 75.333(e)(1) which only references a requirement of durable construction material. Thus, the contestant questions the relevance of its application method of adhesive compound on one side only in that it utilized concrete block which is admittedly a "durable material."

At the culmination of oral argument on this issue, I rendered a bench decision that the definition of "durable" in Section 75.333(a), which describes a construction method as well as a construction material, must be incorporated in the interpretation of Section 75.333(e)(1). I noted that a regulatory safety standard should be interpreted harmoniously with the hazard it seeks to avoid. See Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). In this regard, the contestant has conceded, consistent with the language in the implementing rulemaking proceeding, that the purpose of Section 75.333 is to ensure proper underground coal mine ventilation by requiring stoppings that can withstand pressure from fire or explosion. It is clear, therefore, that this mandatory standard seeks to achieve a certain minimal structural strength. Thus, the contestant's proffered interpretation, which ignores construction methods and simply requires durable construction materials, regardless of their effectiveness, is inconsistent with the regulatory purpose and must be rejected. (Tr. 26-27, 34-35, 38-40; 57 Fed. Reg. at 20868, 20885).

Issue Two - The Burden of Proof

The subject citation alleges that the contestant's concrete block stoppings, plastered on one side, are not structurally equivalent to an 8-inch hollow-core concrete block stopping with mortared joints. Mortared joint stoppings are capable of withstanding flexural loading of 39 pounds per square foot as determined by application of ASTM E72-80 Section 12-Transverse-Specimen Vertical. (Secretary's Opposition, Attachment 3, p. 2; 57 Fed. Reg. at 20885). This ASTM testing method is an expensive and sophisticated procedure which must be performed in a controlled laboratory setting. (Contestant's Motion, Attachment 4). MSHA has estimated that conducting "...an ASTM E72-80 [test] on a candidate alternate ventilation control can cost over $1,000." (Secretary's Opposition, Attachment 4,).

At oral argument, the Secretary argued that "the pragmatic reality" is that the Secretary does not have the facilities or the budgetary wherewithal to perform the requisite ASTM test to determine structural equivalency. (Tr. 57-58). In fact, the

September 1, 1993, ASTM test using Rite-Wall adhesive conducted by PSI, Inc., was performed under contract with MSHA for the sole purpose of preparation for a hearing in this proceeding as distinguished from testing to support the citation when written. (Tr. 63-64). Thus, apparently relying on "pragmatic realities," the Secretary asserts that it is the burden of the operator to prove that its stoppings are structurally equivalent to 8-inch hollow-core concrete block with mortared joints if it chooses to use an alternative method of stopping. (Tr. 57-58).

At the oral argument, I issued a bench decision noting that I was not persuaded by the Secretary's attempt to shift the burden of proof. (Tr. 58-60). As a threshold matter, there is nothing in the rulemaking proceeding that reflects that the operator has the burden of proving structural equivalency. Moreover, the Commission has consistently held that the Secretary bears the burden of proving alleged violations. See ASARCO Mining Company, 15 FMSHRC 1303, 1306-1307 (July 19,1993) citing Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987) and Wyoming Fuel Co., 14 FMSHRC 1282, 1294 (August 1992).

While the burden may shift to the operator if the Secretary presents evidence that the pertinent ASTM structural equivalency test was failed, the mere allegation of such failure by the Secretary is not sufficient to shift the burden of proof. Simply put, the accuser must present evidence to support the accusation.

Moreover, the burden of proof remains with the Secretary even in instances where the operator must operate with the prior approval of MSHA. For example, the Secretary must establish that a ventilation plan provision sought to be enforced by MSHA is suitable to the mine in question. Peabody Coal Company, 15 FMSHRC 381, 388; Jim Walter Resources, Inc., 9 FMSHRC at 907. The Secretary must also establish that an operator is violating an approved ventilation plan provision. Thus, the Secretary's assertion that the contestant bears the burden of proof in this matter is lacking in merit.

At oral argument, I indicated that even if it were appropriate to shift the burden of proof, it is not a pragmatic solution because the validity of the purported ASTM testing method used by the operator would remain at issue. In such an event, it would be the Secretary's burden to prove that the operator's ASTM testing results were unreliable. (Tr. 59). Thus, in the final analysis, the burden of proof must always remain with the Secretary.

Issue Three - Section 104(a) Statutory Requirements for Issuance of a Citation

Section 104(a) of the Mine Act requires that,

> ...if, upon inspection or investigation, [an inspector] believes that an operator...has violated...any mandatory health or safety standard...he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. (Emphasis added).

In this case it is appropriate to focus on two of the requirements of Section 104(a). Namely, the inspector's belief and the specificity of the violation cited.

a. Inspector's Belief

Turning to the issue of the inspector's belief, such belief must be based on the inspector's consideration, upon inspection or investigation, of past events and circumstances, or upon his analysis of current circumstances and conditions. NACCO Mining Company, 9 FMSHRC 1541, 1549 (September, 1987). A citation may not be issued based upon a future analysis in the hope that the inspector was correct when, as in this case, past events or current observation does not support the fact of a violation.

It is of fundamental significance that, according to the position taken by MSHA in its November 9, 1992, VQA, the contestant's use of concrete block, plastered on one side only, was not a per se violation of Section 75.333. Therefore, we must focus on the inspector's December 3, 1992, inspection observations and findings. In Consolidation Coal Company, 15 FMSHRC 130, 138 (January 1993), I concluded that an inspector's observations of widespread sealant cracking on Kennedy stoppings established that the stoppings were not an adequate ventilation control. However, in the current case, the Secretary does not contend that the issuing inspector's observations revealed a stopping in such poor condition that it was readily apparent that the structural equivalency test was not met. On the contrary, September 1, 1993, laboratory testing, performed approximately nine months after the issuance of the citation, revealed flexural strength of 22.1 pounds per square foot. (Letter from Edward A. Fitch, Esq., to Timothy M. Biddle, Esq., dated September 2, 1993). As these test results were not available on December 3, 1992, when the citation was issued, they cannot be used to support the inspector's belief at the time of his investigation.

b. Specificity of Citation

With regard to specificity, the Commission has stated that this requirement of Section 104(a) of the Mine Act serves the dual purpose of permitting the operator to determine what conditions require abatement and to adequately prepare for a hearing. See Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993) and citations therein. The December 3, 1992, citation failed to serve these purposes.

The December 3, 1992, citation charged that the contestant's stoppings could not withstand 39 pounds per square foot pressure. The Secretary mailed his proposed assessment of $50.00 to the contestant on February 2, 1993. The contestant, pursuant to Section 100.7, 30 C.F.R. § 100.7, had 30 days from the receipt of the proposed assessment to either pay the assessment or notify MSHA that it desired a hearing before this Commission. On February 8, 1993, the contestant requested a hearing which gave rise to my jurisdiction in this matter. However, at the time of the proposed penalty and the contestant's subsequent hearing request, the contestant could not intelligently determine whether to request a hearing, let alone prepare for a hearing, as it was not advised, nor did the Secretary know, the alleged flexural strength of the stoppings in question. Thus, the operator was prejudiced by the Secretary's admitted reticence to perform the requisite ASTM testing to support the alleged 75.333(e)(1) violation. (See tr. 57-58).

It is incumbent on the Secretary to inform the contestant what the alleged deficient structural strength is. Pertinent citation specific ASTM testing using Rite-Wall adhesive on one side of dry-stacked concrete block was not performed by PSI, Inc., under contract with MSHA, until September 1, 1993, approximately nine months after issuance of the subject citation. This situation is analogous to citations for alleged excessive respirable dust concentrations under 30 C.F.R. § 70.100, or inadequate rock dusting under 30 C.F.R. § 75.403, without quantification through supporting laboratory analysis. Thus, even if the issuing inspector had the requisite belief required under Section 104(a) of the Mine Act, the instant citation is fatally flawed because it was lacking in specificity. Therefore, Citation No. 3549595 must be vacated on this basis alone.

Issue Four - The Prudent Person Test

Although I have concluded that the citation in question was defective when issued, I will address the issue of whether Section 75.333 afforded adequate notice to the contestant. This issue must be resolved based upon the information available to the contestant as of the December 3, 1992, citation date. The Commission has stated that adequate notice requires that a mandatory safety standard cannot be "so incomplete, vague,

indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Ideal Cement Company, 12 FMSHRC 2409 (November 1990). The appropriate test in applying this standard:

> ...is not whether the operator had prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. Id at 2416.

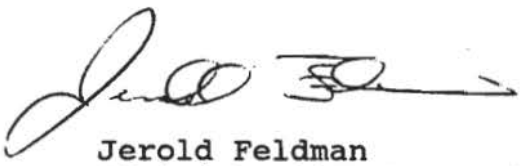
As noted above, the reasonably prudent person test must be viewed in the context of what the operator knew or should have known on the date the citation was issued. Significantly, concrete block plastered on one side was not prohibited by Section 75.316-2(b), the predecessor of Section 75.333. When viewed prospectively from the December 3, 1992, citation date, it is clear that MSHA has concluded that concrete stoppings plastered on one side do not satisfy the structural equivalency test in Section 75.333. This prospective analysis consists of the results of MSHA's July 2, 1993, report on sealants for dry-stacked stoppings, which concluded that adhesive compound must be applied to both sides; MSHA's August 13, 1993, report on small-scale testing of concrete masonry walls which enumerated three alternative methods of construction consisting of a surface bonding product applied to both sides of block stoppings that would satisfy the structurally equivalency test; and, finally, the September 1, 1993, laboratory test of PSI Inc., which determined that Rite-Wall plaster applied to one side of concrete block resulted in structural strength of 22.1 pounds per square foot. All of these facts were not known to the contestant on December 3, 1992. Thus, the contestant did not have an adequate basis for anticipating that its stoppings were structurally deficient and in violation of the new regulatory standard. Moreover, MSHA's initial citation with its two modifications changing the alleged cited subsections of 75.333 further supports the conclusion that there were significant uncertainties associated with the application of this new regulatory standard.

Thus, I conclude that the contestant was not afforded adequate notice as a matter of law and is, therefore, not liable for the alleged violation in issue. I reach this conclusion based solely upon the undisputed evidence of record. The contestant asserts that ASTM laboratory test results on simulated stoppings do not accurately reflect the flexural strength of actual stoppings that are subject to mine conditions such as roof weight. The propriety and validity of ASTM testing methods as they pertain to structural equivalency findings require expert testimony and are beyond the scope of this proceeding.

I also wish to note that this holding should be narrowly construed. I have not addressed whether the industry has been adequately notified of MSHA's pertinent findings in its July and August 1993 reports and whether a citation issued after such notification would alter my conclusions in this matter.

ORDER

In view of the above, I conclude that there are no unresolved issues of material fact that require a hearing in this proceeding. Accordingly, the contestant's Motion for Summary Decision **IS GRANTED**. Consequently, Webster County Corporation's contest of Citation 3549595 **IS GRANTED** and this citation **IS HEREBY VACATED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 8 1994

JOHN J. STACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 94-4-DM
	:	WE MD 93-12
ECHO BAY MINERALS,	:	
Respondent	:	McCoy Cove
	:	

DECISION

Appearances: Mr. John J. Stack, Ms. Terri Lynn Stack, Winchester, Idaho, pro se;
Stephen M. Long, John F. Van De Beuken, Echo Bay Minerals Company, Battle Mountain, Nevada for Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by John J. Stack against Echo Bay Minerals Company under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that while Mr. Stack may have engaged in activities protected under the Act, the evidence does not support his claim that he was discriminated against by Echo Bay as a result of having engaged in such activities.

Mr. Stack filed a discrimination complaint with the Secretary of Labor pursuant to Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). The Secretary concluded that the facts disclosed during its investigation did not constitute a violation of Section 105(c). Mr. Stack then instituted this proceeding before the Commission pursuant to Section 105(c)(3), 30 U.S.C. § 815(c)(3).

The case was heard on December 16, 1993, in Winnemucca, Nevada. Ricky Cordova, Lawrence Spring, Nick Chavez and Dan Howard, all employees of Echo Bay, testified on behalf of Mr. Stack, as did the complainant himself. Manuel Barella, John Van De Beuken, Antonio J. Lanzone, Stephen M. Long and William B. Francom testified on behalf of the company.

FINDINGS OF FACT

Mr. Stack began working for Echo Bay as an underground miner on August 8, 1988. On January 7, 1991, he was promoted to "Miner B." On January 6, 1992, he was demoted retroactively to December 30, 1991, to the job of "Pumpman/Nipper." On April 26, 1993, he was transferred from the Underground Department to Surface Maintenance as a "Mechanic Helper." On April 27, 1993, Mr. Stack submitted his resignation, effective May 7, 1993. His last day of work was May 7.

Echo Bay operates two underground projects in the same area, the Cove mine and the McCoy mine. Both projects are mined with the same people. Depending on the work going on, miners are moved back and forth from one mine to the other. Thus, at times a crew may be in one mine or the other, or split between the two (Tr. 163).

According to Mr. Stack, he did not have any problems at Echo Bay until 1991, when he complained to his supervisors that crews were "drilling and loading at the same time" (Tr. 42-3).[1] After that, he testified that he was sent from Cove to McCoy to "muck," that is, to remove broken rock and ore from the mine and that his foreman, Manny Barella, began "harassing" him by calling him "dirty names" and "threatening to terminate" his employment (Tr. 43-5). The Complainant averred that he took the position as Pumpman/Nipper because it "was the only way I could get out of being harassed practically every day" (Tr. 45).

Mr. Stack testified that when Echo Bay began its reduction in force in 1993, he was offered a utility job on the surface. He considered that he was being "railroaded" out of the underground, so he refused the utility job (Tr. 46-7). Some time later, after thinking it over, he informed management that he would take the utility job, however, he was informed that the job was no longer available (Tr. 47).

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[1] That is, drilling holes for charges at the same time previously drilled holes in the same heading were being loaded with charges. The proper method would be to drill all of the holes in the heading, then move the drill to another heading and then load the rounds (Resp. Ex. M, p. 2).

Mr. Stack stated that he was then told that he would be working in the surface shop, but while he was filling out the paperwork for that position, he decided that he could not do it (Tr. 48). He then submitted his resignation (Tr. 48-51).

According to Echo Bay, Mr. Stack was not harassed for complaining about loading and drilling at the same time (Tr. 95, 97, 103). He was not transferred to McCoy for engaging in protected activities (Tr. 96, 166-67). He voluntarily transferred to Pumpman/Nipper because he thought it was a less hazardous job (Tr. 97, 160, 186). Finally, he was not treated any differently than the rest of the miners in being reassigned due to the reduction in force, and after refusing to accept two reassignments, voluntarily resigned (Tr. 181-82).

To sum up, it is Mr. Stack's contention that as a result of his complaining about loading and drilling at the same time he was discriminated against by Echo Bay in that he was harassed into taking a lower paying job as Pumpman/Nipper and then subsequently forced into resigning. On the other hand, Echo Bay asserts that Mr. Stack suffered no discrimination from the company for making safety complaints, that he voluntarily transferred to the position of Pumpman/Nipper as a less hazardous position and that he resigned on his own after they made several attempts to reassign him.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F2d. 1211 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC

2508 (1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Id. at 2800; Robinette, 3 FMSHRC at 917-18.

It is undisputed that the Complainant engaged in protected activity by complaining about possible loading and drilling at the same time and I so find. However, the evidence does not support Mr. Stack's claim that the adverse actions which he complains about were motivated in any part by Echo Bay as a result of his engaging in protected activity.

There is no doubt that the Complainant and Manny Barella had a personality conflict (Tr. 45, 93-4). Nevertheless, there is no evidence that their animosity toward one another was anything other than that, i. e. a personality conflict rather than an effort by Echo Bay to harass against Mr. Stack because of his complaints. For instance, Mr. Stack received five negative actions, four daily reviews and one six month performance evaluation, from Barella (Resp. Exs. E and L).[2] Three of those negative daily reviews were given before the safety complaints in question had been made. Nor are the negative evaluations limited to Manny Barella, the complainant received three negative reviews for poor work performance and one warning before he began on a Barella's crew, a time when even Mr. Stack does not claim that he was being discriminated against (Resp. Exs. A and L).

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[2] Respondent's Exhibit L consists of most of the papers from Mr. Stack's personnel file at Echo Bay. The top three sheets of the exhibit are a chronological listing of the documents in his file. Some of the documents in the file were offered and admitted as separate exhibits. In those instances, I have noted on the listing what exhibit those documents are.

The record also does not support Mr. Stack's claim that he was transferred to the other mine as a form of harassment. In the first place, it is clear that all miners worked back in forth between the mines (Tr.96-7, 163). In the second place, it is obvious that Mr. Stack was frequently used to perform mucking because he was very good at it (Tr. 97, 167). Even he admitted as much:

> Q. Oh. Did you believe that's why you were transferred?
>
> A. Well, I don't really know. I know that they needed to get the muck out, but it didn't -- there was times that I wasn't comfortable being over there all by myself. (Tr. 44).
>
> Q. Okay. In your opinion, would your ability to run equipment effectively, very productively, been a reason why you were assigned to work at McCoy when we were mining stope ore out of the stopes there?
>
> A. Probably, yes. (Tr.70).

Mr. Stack also claimed that Manny Barella gave orders in Spanish. Mr. Barella denied that he gave instructions to Stack in Spanish, but admitted he sometimes did give orders in Spanish to Hispanic employees (Tr. 92-3). I have no doubt that Mr. Barella frequently spoke in Spanish with his fellow Hispanics or that this may have irritated some of the non-Hispanics (Tr. 93, 188). I do doubt that Mr. Barella gave direct orders to the complainant only in Spanish, since, as the foreman testified, he generally only gave orders to the lead miners, and because Mr. Stack does not claim that there were times when he did not know what jobs to perform as a result of his orders being given only in Spanish.

Therefore, I conclude that any problems that Mr. Stack had with Mr. Barella resulted from their inability to get along. If Mr. Barella did, in fact, harass Mr. Stack, and there is little in the way of specifics to support this allegation, it was because of this animosity and not because Mr. Stack had complained about safety violations.

The evidence also supports Echo Bay's assertion that Mr. Stack's transfer to Pumpman/Nipper was the result of his actions, not theirs. The best evidence on this issue is the December 26, 1991, request for transfer signed by Mr. Stack. It states that "I voluntarily request to be transferred." It also indicates that the new position has a lower rate of pay. Finally, it states as the reason for the request, "development of skills for an employment alternative which has less risk than underground miner" (Resp. Ex. C). This evidence is consistent with the frequently reported statements by Mr. Stack that Echo Bay did not pay enough money to warrant the hazards to which miners were exposed (Tr. 165).

Lastly, I conclude that Mr. Stack was not forced to resign from Echo Bay. It is uncontested that Echo Bay was, and is, undergoing a reduction in force because the ore reserves were running out in the underground mines (Tr. 63, 178). They had a rational basis for determining what miners would remain underground and they did not treat the Complainant any different from other miners (Tr. 180-82). He was offered a job on the surface and turned it down. It was not unreasonable on Echo Bay's part to have already given the job to someone else when Mr. Stack informed them three weeks later that he had reconsidered and would take the position.

Even then, Echo Bay did not terminate the Complainant but attempted to place him again. It was only after he turned down that job and stated that he wanted to resign that his resignation was accepted. Since this was a voluntary resignation on Mr. Stack's part (Comp. Ex. 1, Resp. Ex. F) it can hardly be considered an adverse action on Echo Bay's part. There is no evidence to support the claim that Mr. Stack was forced to resign. On the contrary, it appears that Echo Bay went out of its way to retain him.

In reaching these conclusions, it is not necessary to decide that Mr. Stack is not credible. Most of the matters that he testified to are corroborated by the company's evidence. It is in the inferences that he draws from the evidence that Mr. Stack is mistaken. To successfully show discrimination under the Act, there must be a connection between the protected activity and the

resulting adverse actions. The lack of connection in this case is perhaps most starkly illustrated by the Complainant's allegations that as a result of his complaints about safety violations his life was threatened and his car was damaged (Tr. 7-8, 123-24).

With regard to the threat, if there was one, it clearly came from a fellow miner and management apparently did not even know about until the hearing (Tr. 123). With respect to the complainant's car being scratched in the parking lot, it was never determined who the culprit was, even though the incident was investigated (Tr. 123). These are two incidents in which there is no evidence in the record that would tie them to management. Yet, in Mr. Stack's mind they provide part of the basis for his claim of discrimination.

In short Mr. Stack has taken his complaint of loading and drilling at the same time and attributed everything else that happened to him at the mines, that he considered adverse, to discrimination on the part of Echo Bay. However, there is no evidence to support his claimed inferences.[3] Echo Bay, on the other hand, has provided a logical explanation for what happened to Mr. Stack and, further, has shown that what he claims would be out of character for the company.

ORDER

I conclude that the adverse actions which Mr. Stack complains about did not result from his engaging in protected activity. Accordingly, his complaint of discrimination is **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

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[3] I have considered the testimony of Ricky Cordova, the only witness whose evidence comes close to supporting Mr. Stack's claims. However, the accuracy of his testimony is lessened by the fact that he made only generalized assertions, that he did not work with Mr. Stack for more than a short while, and that he also filed a discrimination complaint against Echo Bay apparently for some of the same reasons.

Distribution:

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/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 9, 1994

MAGMA COPPER COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEST 94-161-RM
	:	Citation 4332116; 12/6/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Respondent	:	Docket No. WEST 94-175-RM
	:	Citation 4335790; 12/1/93
	:	
	:	Superior Mine 02-00152

DECISION

Appearances: Mark N. Savit, Esq., Washington, D.C. for Contestant;
Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Notices of Contest filed by Magma Copper Company ("Magma" or "Contestant") challenging the issuance by the Secretary ("Respondent") of two citations alleging violations by Contestant of 30 C.F.R. § 57.11050(a). Contestant also filed a Motion for Expedited Proceedings. At the initiative of the undersigned, conference calls were held with counsel for both parties on January 5, 7, and 10, 1994. The parties agreed that these cases be consolidated and heard on January 19 and 20, 1994. Subsequent to the hearing, Respondent agreed to extend the time set for abatement of the alleged violative conditions pending a decision in these cases. It also was agreed that Respondent would file a brief by February 4, and Contestant would file its brief by February 11. On January 26, 1994, Respondent filed a statement waiving his right to file a brief.

I. Findings of Fact

Ore was mined at Contestant's Superior Mine, an underground copper mine, between 1905 and 1982. The mine closed in 1982 due to economic conditions and, reopened in the fall of 1990. At that time, the older workings were sealed off, and only those areas used for current production were left open.

The deepest elevation at the mine is at 4100 feet. Initially, this elevation consisted of a 22 foot diameter vertical shaft ("No. 9 shaft") which provided intake air from the surface. Horizontal drifts extended for more than 1500 feet from the No. 9 shaft. In November, 1992 a dam was built to the northeast of the No. 9 shaft blocking off access to the drifts north of the dam.

In addition, presently, a barrier at the south end of the drift, south of the No. 9 shaft, is "impassable to men but not to air"[1] (sic) (Tr. 108). Also, a sign just east of the cave states "do not enter" (Tr. 261).

The area of the drifts at the 4100 elevation that is presently accessible to miners, is only approximately 1/10 of the area of the drifts that where accessible when this elevation was used for exploration (See Exhibit C-3).

In addition to the No. 9 shaft, the following items are located at the 4100 elevation in the area that is presently accessible: a fan to ventilate the loading pocket, a 98 borehole, a slusher to clean under the conveyor belt, electrical switches, a skip tender station, and a sub-station. A service cage which is raised and lowered by way of a surface hoist to transport men and materials from the surface to the 4100 elevation, is located in a passageway within the No. 9 shaft. Also skips are raised through the No. 9 shaft by way of a surface hoist to transport ore from the 4100 elevation to the 500 foot elevation where the ore is dumped and transported out of the mine.

An operator spends approximately 6 hours a day in the accessible portion of the 4100 elevation were materials are loaded on skips, and hoisted up the No. 9 shaft. In addition, water is gathered in the area and pumped up the No. 9 shaft which requires a person to visit the pump station daily, for 15 to 30 minutes. Also, miners enter the area to maintain the ore loading facility, and perform general maintenance. This work averaged 25 hours a month over the last three months. These are the only activities that take place at the 4100 elevation.

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[1] The record does not establish when this barrier was installed. According to the uncontradicted testimony of Steven D. Lautenschlaeger, the mine manager at the mine in question, the sign was in place prior to the date the citation at issue was issued, i.e., December 6, 1993. Also Lautenschlaeger testified that there is a pile of rocks ("cave") in this area making the area not passable. He indicated that the cave was in place when he started to work for Contestant, in January 1992.

Air from the 4100 elevation is not used to ventilate any other area of the mine. [2]

The 3200 elevation was previously used for production. When used for production, drifts extended over 8000 feet to the west and north off of the No. 9 shaft. (See Exhibit C-3). Sometime prior to January 1992, a concrete dam was installed blocking access from the No. 9 shaft to the drifts west of the dam. Also, a bulkhead was installed blocking off access from the No. 9 shaft to the drift east of the bulkhead. In the accessible area that remained, drifts extended less than 1,000 feet (See Exhibit C-3).

Air from the 3200 elevation does not ventilate any other area of the mine.

The accessible area at the 3200 elevation at the date cited contains, in addition to the No. 9 shaft, a shortage shed, two seal dump pockets, a controlled ventilation door, an electrical substation, a refuge chamber, electrical switch equipment, and a small amount of flammable equipment in a semi-mobile storage container.

A chippy hoist operator ("hoister") spends, on a average, at least 8 hours a day in this area. Also, a person enters the area every week to inspect a wheel in the shaft, and every other week to inspect the hoist rope. Maintenance activities averaged, over the last 3 months of 1993, 10 hours per month. Persons do not regularly wait at levels 3200 to change from the chippy hoist to the service cage.

II. DISCUSSION

A. Citations

Both the 3200 elevation and the 4100 elevation have only one escapeway. On December 6, 1993, MSHA inspector, Seibert L. Smith, issued a citation alleging a violation of 30 C.F.R. § 57.11050 regarding the 4100 elevation. On December 1, 1993

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[2] Roderick M. Breland, the MSHA District Manager for the Rocky Mountain District, testified regarding the flow of air at the 4100 elevation, and opined that this elevation is used for ventilation and is the main passageway for air flow. I do not place much weight on his testimony, as he has not been in the area in question since 1976. I accord more weight to the detailed testimony of Lautenschlaeger, as it was based on his personal knowledge.

MSHA inspector, Ronald S. Goldade, issued a citation alleging a violation of Section 57.11050(a) supra regarding the 3200 elevation.

Section 57.11050(a) supra, as pertinent, provides that a mine shall have two separate escapeway to the surface ". . . from the lowest levels . . . ." The parties have stipulated that the issue before me is whether the elevations at issue are "levels" within the purview Section 57.11050 supra, and if so, whether Contestant had adequate notice that these elevations are considered to be "levels."

B. Respondent's Evidence

Roderick M. Breland, an MSHA District Manager whose jurisdiction covers nine states, previously worked as an assistant district manager, and field office supervisor. He has approximately 10 years experience as an MSHA inspector, and also worked as approximately 10 years as a miner for Magma. He stated that based upon his experience he considered both of the elevations at issue to be "levels." However, on cross-examination he conceded that not all areas where maintenance is performed in a mine are on a "level." He also conceded that there are places in a mine that are used to transfer ore ("skip pockets") that are not "levels." He also indicated that neither the location of pumps, nor the presence of an electrical substation, substation, nor the fact that an area is ventilated, are determinative of whether an area is a level.

Siebert L. Smith who has been an inspector since 1978, opined that the 4100 elevation is a "level", as the area consists of drafts that come off the No. 9 shaft, and contains working places, electrical substations, a pump station and a skip pocket conveyor. Also, he based his conclusion upon fact that there was ventilation throughout the area. On cross-examination, he indicated that the skip pocket by itself was not a level, but was part of a level.

Larry James Aubuchon, an MSHA supervisory inspector for the last 10 months had been an MSHA inspector since 1975. He indicated that he considers the 4100 elevation to be a "level" as it is a passageway leading to a work area, and it provides access from the No. 9 shaft. He has never been to the 4100 elevation.

Ronald S. Goldade, has been an MSHA inspector for the last 3 years. He worked for over 24 years as a miner. He opined, based upon his experience as a miner, that the 3200 elevation is "level," as it is a flat excavated area coming off a shaft. He also noted that the area is ventilated, and serves as a passageway, as it is traversed by the hoist operator to go to his work station from the No. 9 shaft.

Contestant's MINE EVACUATION PROCEDURES refers to the 3200 elevation, and the 4100 elevation each as a "level". The bell system, which is posted in the cage that transports miners, lists all elevations including those where nothing is located. The bell system uses the term "level" for each listed elevation, including the 3200 and 4100 elevations.

C. Contestant's Evidence

Frederick D. Owsley, who has been involved in the mining industry for 44 years as a miner, manager, and supervisor, examined the 3200 elevation the week prior to the hearing. He opined that previously it was a "level" but subsequently it had been closed off and its use was changed. He said that "normally" a "level" is comprised of drifts, crosscuts, raises, (Tr. 312-313) and is "normally" a production area, and "is major haulage" (Tr. 313). He said that on a "level" there is usually "major" ventilation because men are working there. (Tr. 312-313).

Owsley also visited the 4100 elevation. He described it as a pump station, and skip loading facility. He indicated that based on his experience at other mines, "... we never referred to that as a level ..." (Tr. 314). He stated that in his experience, it is "common" to have loading pockets below the lowest level. (Tr. 315).

Lautenschlaeger opined that the 3200 and 4100 elevations are not "levels." His opinion was based on the amount of activity at these areas, the extent of the workings, and the absence of any production, breaking, drilling, or blasting of rock. He opined that, in contrast, elevations 500, 3000, 3400, 3500, 3600, 3700, 3800, (Exhibit R-9), are all levels, because the drifts at these elevations are used for production or development, or serve as a secondary escapeway, main haulageway, or primary ventilation conduit. He also noted that each of these elevations extends at least 1,000 feet. He stated that at elevations 3400, 3500, 3600, 3700, and 3800, ore is currently being extracted.

D. Analysis

The term "level" is not defined in the Title 30, of the Code of Federal Regulations. There is no regulatory or legislative history to shed any light on the legislative or regulatory intent regarding the scope to be accorded this term. Accordingly, the inquiry must focus on whether a reasonably prudent person familiar with the mining industry would have considered the cited areas to be "levels." (See, Ideal Cement Co. 12 FMSHRC 2409 (1990)); Cannon Coal Co., 9 FMSHRC 667, 668 (1987); Quinland Coal Co., 9 FMSHRC 1614, 1618 (1987).

A Dictionary of Mining, Mineral and Related Terms (U.S. Dept. of the Interior, 1968) ("DMMRT") is a generally accepted text. The DMMRT defines a "level," as pertinent, as follows:

> "A main underground roadway or passage driven along the level course to afford access to the stopes or workings and to provide ventilation and haulageways for the removal of coal or ore. See also level interval. Nelson. b. Mines are customarily worked from shafts through horizontal passages or drifts called levels. These are commonly spaced at regular intervals in depth and are either numbered from the surface in regular order or designated by their actual elevation below the top of a shaft. Lewis p. 21 .... "

Thus, as defined in the DMMRT, a level serves as a "main" passage, and provides both access to workings, and ventilation and haulage ways.

I accord very little weight to the testimony of Breland, and Aubuchon, regarding the present use of the elevations at issue, as they never saw these areas. I place most weight upon the testimony of Lautenschlaeger due to his personal knowledge of the areas in question. His testimony establishes that on the dates cited, the areas in question at the 3200 and 4100 elevation were no longer providing ventilation and access to the workings or stopes.

The Underground Mining Methods Handbook (Society of Mining Engineers, 1982), ("UMMH") relied on by Respondent's witnesses Breland, Smith, and Goldade, defines "level", as "... a system of horizontal underground workings that are connected to the shaft. A level forms the basis for excavation of the ore above or below." (emphasis added).[3] The underground mining method handbook does not define "workings." In the DMMRT, supra, "workings" is defined, as pertinent, as follows. "b. the system of openings in an mine for the purpose of exploration. Normally, usage tends to restrict the term to the area where coal, ore, or mineral is actually worked." "Work" is defined in the DMMRT supra, as pertinent, as "a. The process of mining coal." On the dates cited the elevations in question were no longer being used as workings, as no exploration or mining of coal was taking place at those elevations. The accessible areas at each elevation at issue had been significantly reduced and only maintenance, service, or loading work was being performed in these areas.

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[3] This definition is set forth in an article entitled "Choosing an Underground Mining Method" (UMMH supra, at 88).

Respondent does not have a written policy setting forth the scope to be accorded the term "level", and whether or not that term is to be applied to the cited elevations. In this connection, I take cognizance of the testimony of Lautenschlaeger, that in the numerous inspections Respondent conducted of the elevations at issue since January 1992[4], these areas where never cited for not having two escapeways, except on April 14, 1992 and April 16, 1992 when the 3200 and 4100 elevations were cited, respectively. However, it was most significant that Lawrence E. Nelson, who is presently an MSHA supervisory inspector[5], vacated the citation issued on April 16 for the 4100 elevation because he was of opinion that this elevation did not meet the requirements of a "level". He indicated that a "level" pertains to an area of major activity involving mining, haulage, and the delivery of supplies. He indicated that these activities are not present at the 4100 elevation.[6] He also indicated that a "level" should supply ventilation to active areas. He said that the meaning that he accorded the term "level", is consistent with MSHA policy.

Also, significant is the fact that in September 1993, MSHA inspector James E. Eubanks, inspected the 4100 elevation, but did not cite it for not having two escapeways. (Tr. 221-222).

Within the above framework, I conclude that it has not been established that a reasonably prudent person familiar with the mining industry would apply the term "level" to the areas cited in the citations at issue. Hence, inasmuch as it has not been established that the cited areas were "levels", there was no requirement for Contestant to provide two escapeways. Accordingly, Contestant did not violate Section 57.11050(a), as alleged. Therefore, the citations at issue are to be dismissed.

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[4] The usage and physical condition of the cited areas, remained the same from January 1992 through December 1993, when cited by Smith and Goldade.

[5] Nelson served in this position for 14 years. He previously served as an MSHA inspector for 6 years. In addition, he had worked as an miner for Contestant for 17 years.

[6] Nelson also vacated the citation issued on April 14, 1992 for the 3200 elevation, on the ground that he did not believe this elevation met the requirements of a "level". The condition and use of this elevation in April 1992 remained the same through December 1993, when cited in the citation at issue.

ORDER

It is ORDERED that these cases be dismissed.

Avram Weisberger
Administrative Law Judge
(703) 756-6215

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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 14 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-895
	:	A.C. No. 15-17018-03510
v.	:	
	:	No. 1 Surface Mine
COBRA MINING INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Amchan

This case is before me upon petition for assessment of a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. At the commencement of the hearing in this matter on January 11, 1994, the parties moved for approval of a settlement and to dismiss the case. The terms of the settlement are as follows:

The parties agree that the penalty for Citation/Order 9978535/4228205, alleging violation of 30 C.F.R. § 71.803, is reduced from the proposed $382 to $240, which is to be paid in 12 $20 monthly installments, beginning February 1, 1994.

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty of $240 in 12 $20 installments beginning February 1, 1994. Upon such payment this case is DISMISSED.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 16 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 93-97-M
	:	A.C. No. 14-00164-05515
v.	:	
	:	Kansas Falls Quarry
WALKER STONE COMPANY, INC., Respondent	:	& Mill
	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner:
Keith R. Henry, Esq., Weary, Davis, Henry, Struebing and Troup, Junction City, Kansas, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two (2) alleged violations of mandatory safety standard 30 C.F.R. § 56.14107(a). The respondent filed a timely answer and a hearing was held in Manhattan, Kansas. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and if so, (2) the appropriate civil penalties to be assessed for the violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. 30 C.F.R. § 56.14107(a).

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

Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. The respondent, is engaged in the mining and selling of limestone (crushed and broken) in the United States, and its mining operations affect interstate commerce.

2. The respondent is the owner and operator of Kansas Falls Quarry and Mill Mine, MSHA I.D. No. 14-00164.

3. The respondent is subject to the jurisdiction of the Federal Mine Safety and health Act of 1977, 30 U.S.C. §§ 801 et seq ("the Act").

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

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The proposed penalties will not affect the respondent's ability to continue in business.

7. The respondent is a small mine operator with 81,602 hours worked in 1991.

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

Discussions

The citations issued in this case were both issued on March 19, 1992, by MSHA Inspector Richard Laufenberg, and they both cite alleged violations of mandatory safety standard 30 C.F.R. § 56.14107(a).

Section 104(a) non-"S&S" Citation No. 4123442, states as follows:

> The V-belt drive unit on the #1 screen was not guarded. A locked gate at the bottom of the stairs to the #1 screen was being used as a means to guard the V-belt unit. Current MSHA policy does not allow for a gate to be used as a means to guard moving machine parts.

Section 104(a) non-"S&S" citation No. 4123553, states as follows:

> The V-belt drive units on the #2 and #3 screens were not guarded. A locked gate at the bottom of the stairs to the #2 and #3 screens was being used as a means to guard the V-belt units. Current MSHA policy does not allow for a gate to be used as a means to guard moving machine parts.

Inspector Laufenberg confirmed that he modified citation No. 4123553, in November, 1992, to delete any reference to the No. 3 screen, because he saw no point in issuing a separate citation and he considered both screens to be in the same area (Exhibit P-5; Tr. 13, 19, 53).

Petitioner's Testimony and Evidence

MSHA Inspector Richard Laufenberg confirmed that he inspected the respondent's surface limestone mine quarry operation on March 19, 1992. He stated that he issued citation No. 4123552, on the No. 1 screen V-belt drive unit because it was not guarded in that it was not totally enclosed at the actual drive unit. The screen was elevated off the ground and rested on four legs. The drive unit was approximately two to four feet above an adjacent walkway that was on the south side of the screen. The walkway was approximately three-feet wide, with an outside handrail. Mr. Laufenberg identified Exhibit P-6, as a diagram of the screen unit that he drew from his field notes. He prepared the diagram when he returned to the mine for a compliance follow-up inspection (Tr. 10-19).

Mr. Laufenberg identified the cited V-belt drive and walkway in question and marked his diagram accordingly (Tr. 19-20). He stated that the pinch points were "right at the walkway", and they consisted of the shive on the screen drive which served to

shake the screen, and the motor drive. The turning shive was a moving machine parts, and the V-belt itself was approximately an inch to a couple of inches wide and moved "very fast, maybe as fast as a thousand RPM's", and was also a moving machine part which was not guarded all around the structure (Tr. 21-22).

Mr. Laufenberg stated that the pinch points that he described could be contacted by someone, and be believed that such contact would result in lacerations, and if someone's hand was pulled through the pulleys, it would result in broken bones or permanent disability such as a loss of a finger "if it went through the shive" (Tr. 22). He also believed that an injury would result if someone caught their clothing in the pinch points (Tr. 23). He was also concerned that someone would suffer injuries if he slipped and fell into the running V-belt drive, and would suffer non-fatal injuries resulting in lost work days or restricted duty (Tr. 23).

Mr. Laufenberg stated that it was unlikely that an injury would occur because a gate restricted access to the cited area, and it was unlikely that anyone would be there while the equipment was running (Tr. 24). The gate was located at the bottom of the stairs connecting the ground level to the elevated deck area, and he was informed that the gate was normally kept locked when the plant was in operation, and that the key to the locked gate was kept by the quarry supervisor Clifford Moenning (Tr. 24-25). Mr. Laufenberg confirmed that the gate was locked when he was at the plant, but he did not enter the area because he did not believe it was safe to do so while the equipment was in operation (Tr. 26).

Mr. Laufenberg identified Exhibit P-3, as a photograph of the locked gate leading to the No. 1 screen (Tr. 27). He did not measure the gate, but estimated that it was approximately 40 inches high and that there was wire mesh material around the gate access area (Tr. 29-30). He believed that it was possible for someone to climb over the fence (Tr. 31).

Mr. Laufenberg stated that someone would have occasion to be on the walkway for maintenance if there was a problem such as holes in the screens, which would affect the sizing of the materials, and he would possibly go there to check on the problem (Tr. 31-32). Mr. Laufenberg also believed that someone would be in the area for preventive, routine maintenance, such as lubrication of the machine parts, and that "most operations" do this on a daily basis. He did not know that the respondent performed such maintenance, was not aware of its maintenance schedule, and only generally knew from his experience that such equipment is greased. He did not know if the specific equipment in question was a greaseless or maintenance free operation (Tr. 33).

Mr. Laufenberg stated that depending on production, the respondent had 20 to 30 employees at its operation, and that one plant operator would be at the screening plant while it was running, and he would be located in a small control room. He stated that Mr. Moenning informed him that no one would be in the walkway area when the equipment was operating, and that the respondent's procedure was to shut the equipment down when maintenance was performed (Tr. 35). Mr. Laufenberg was not aware of any accidents at the respondent's operation as a result of unguarded equipment (Tr. 37).

Mr. Laufenberg confirmed that one person, namely the plant operator, would be affected by the unguarded equipment "if he was to go up there with the equipment running" (Tr. 37). He confirmed that he did not speak with the plant operator, and only spoke to Mr. Moenning (Tr. 38).

Mr. Laufenberg stated that his testimony with respect to the second citation he issued on the No. 2 screen would be the same as his testimony regarding the No. 1 screen, and the parties agreed that this was true (Tr. 39-40). He did not know for sure that it was possible to shut off one of the screens without shutting off the others, but stated "no" (Tr. 41).

Mr. Laufenberg confirmed his "moderate negligence" finding, and explained that he based this on the fact that MSHA had previously informed the respondent during a prior inspection in August, 1991, that the V-belt drive needed to be guarded, and that the gate at the No. 1 screen would no longer be considered a guard (Tr. 42). He stated that the respondent was informed of this by Inspector Joe Quartaro, and that he (Laufenberg) discussed this prior inspection with Mr. Moenning during his March, 1992, inspection (Tr. 42). He stated that Mr. Moenning informed him that it was his understanding when he discussed the matter with Mr. Quartaro in August, 1991, that the respondent would be allowed to provide guards for the equipment during the shutdown (Tr. 43). Mr. Laufenberg characterized a "shutdown" as "routine maintenance, shutdown for inclement weather during the winter" (Tr. 44).

Mr. Laufenberg further explained that Mr. Moenning told him that Mr. Quartero indicated that the repairs could he made "at their convenience, or when they shut down" because the guards needed to be built and no production would be lost during the shut down (Tr. 45).

Mr. Laufenberg confirmed that he issued the second citation No. 413553, on the No. 2 screen V-belt drive unit five minutes after the first citation, and that the No. 2 unit was the same as the No. 1 unit, and it was not guarded at all with a physical guard around the pinch points. He believed that a person could contact the unguarded No. 2 unit moving parts, and that the

conditions and hazard exposure for both screens was the same, that the relative location of both screens was the same, that both walkways were of the same width, and that access to the No. 2 screen was by a stairway and walkway (Tr. 51).

Mr. Laufenberg confirmed that his gravity findings for the No. 2 screen were the same as the No. 1 screen, and that an injury was unlikely because he believed the company has a policy that no one is to go up to that area when the equipment is running, and that a gate was located at the bottom of the stairs (Tr. 52). However, he believed that it was possible for someone to climb over the gate, and that his testimony regarding his belief that someone would be on the No. 2 screen walkway would be the same as his testimony regarding the No. 1 screen (Tr. 53).

Mr. Laufenberg stated that the citations were not abated by the termination date of April 14, 1992, and he learned of this when he returned to the mine site during his second fiscal year 1992, inspection. Mr. Moenning informed him at that time that the V-belt guards had not been built because of the prior agreement that this would be done after a shut down and at the respondent's convenience, and that twelve months had passed from August, 1991, until his second inspection in 1992, and the guards had not been installed (Tr. 56). Mr. Laufenberg concluded that there was no justification for extending the abatement time further, and he proceeded to issue section 104(b) orders for both screens on September 21, 1992, when he returned to the site (Tr. 56-57). He confirmed that Mr. Moenning informed him at that time that the screens were guarded by two locked gates that were kept locked all of the time and that he had the key (Tr. 58). He also stated that Mr. Moenning informed him that the screens were not physically guarded because MSHA had accepted the gates in the past (Tr. 58-59).

Mr. Laufenberg stated that during his first inspection, Mr. Moenning's main objection to guarding the screens was the agreement that this could be done during the shut down, and that during his second inspection Mr. Moenning took the position that the gates were in place, that "we had accepted them in the past", and "also brought up the fact that, you know, we had that agreement, that they were going to do it" (Tr. 59). Mr. Laufenferg confirmed that he recommended that the citations be "specially assessed" because the respondent had been cited for not having the guards built, and did not do so (Tr. 60-61).

Mr. Laufenberg stated that he was not aware of any MSHA written policy approving a locked gate as an acceptable means of guarding moving machine parts. However, he explained that he was aware of the fact that MSHA supervisor McGee, of the Topeka Office, had attended a meeting in Denver, where an April, 1991, inspector's manual policy was discussed, (Exhibit P-11), and he explained the manual policy as follows at (Tr. 66-67; 72):

THE WITNESS: The April, '91 policy basically says we'll not accept it, that is what we are talking about here, the chain lock, chain restricted access. When Mr. McGee came back, we discussed this at a staff meeting.

THE COURT: What happened then?

THE WITNESS: He basically informed us that the district manager at that time was aware that he had knowledge that there were using chains, gates, as a guard to block access to certain pinch points. He informed the supervisors that if they were aware of the condition, that they were to instruct the inspectors to tell the mine operators that they were no longer going to be able to use a gate, that they could leave the gate, but they would also have to build the guards.

* * * * * * *

The inspectors were -- if they had any of those, that we were supposed to notify the mine operators they needed to follow the intent of new 1988 regulation, that the equipment itself be enclosed and guarded. That was the reason for the new policy. The inspectors were told if we had any of those, to give the operators an opportunity to guard them, and not cite them, but when we went back to evaluate the situation, to take whatever appropriate action we thought was necessary to get the equipment guarded.

Q. Do you know whether or not Walker Stone was informed of this change in policy?

A. Yes, I do.

Q. And I think it's been -- you have already testified to it, when did they receive this notification?

A. I was informed in September -- the last week in September of 1991, the meeting with Joe Quartaro and Jim McGee, and Jim McGee said that Walker Stone was informed in August, a month before our meeting, that they were informed that they were going to have to build these guards.

Mr. Laufenberg did not believe that the respondent exercised good faith compliance in this case because it took over twelve

months to complete the guarding and the guards were built only after the section 104(b) orders were issued (Tr. 76-77). He confirmed that the respondent was using the gates with the knowledge of MSHA inspectors, and that someone had accepted the gates as compliance in the past. Although there was no formal MSHA gate policy in the past approving their use, Mr. Laufenberg confirmed that the respondent had been cited in the past for not having gates, and after installing them, the citation was terminated (Tr. 78).

On cross-examination, Mr. Laufenberg stated that the guarding regulatory section 56.14107, has been in effect since the effective updated version effective August, 1988 (Tr. 79). He confirmed that the citations he issued in this case stated that "current MSHA policy does not allow for a gate to be used as a means to guard moving machine parts" (Tr. 79-80). He confirmed that the previously referred to provision cited as Exhibit P-11, refers to the use of chains as non-complying guards for moving machine parts, and that a chain is not a gate, and that this prior policy does not directly address locked gates (Tr. 80).

Mr. Laufenberg confirmed that it was his understanding that the respondent was cited on September 1, 1985, for having chains across walkways (Tr. 80-81). He confirmed that he inspected the respondent's operation in August, 1989, but did not cite the gates at that time became they were installed at that time to terminate a citation issued by another inspector (Tr. 82). He agreed that he would feel "comfortable" if he had abated such a citation by installing a gate, and that he would discuss such a situation with an inspector who wanted to cite him for the same condition at some future time (Tr. 82).

Mr. Laufenberg confirmed that he issued the citations in March, 1992, fixed the abatement time as April 14, 1992, and did not return to the mine until September, 1992. He did not believe that the cited conditions were serious because access to the cited areas was restricted by the locked gates (Tr. 83). He further confirmed that when he returned in September, 1992, Mr. Moenning told him that pursuant to the agreement the prior twelve months, the guards would be installed during the winter shutdown, but that there was no shutdown that year (Tr. 84). Conceding that there was no opportunity for the respondent to install the guards pursuant to the agreement because there was no shutdown, Mr. Laufenberg stated that he issued the citations because "I feel that there was an opportunity in that six-month period for them to fix it", and that this was a reasonable time to build the guards because they were ultimately built in four to five hours to abate the orders (Tr. 84-85).

Respondent's Testimony and Evidence

Clifford Moenning, respondent's plant manager, confirmed that he was served with the citations issued by the inspector. He stated that he informed the inspector that the guards would be installed when there was a winter shut down, but that no shutdowns occurred in 1991 or 1992, because the weather permitted the plant to remain in operation (Tr. 92). He confirmed that the respondent had previously received a citation No. 2392412, on September 11, 1985, for the same screen V-belt drives cited in this case, and at that time chains were installed across those areas with a sign prohibiting entry while the equipment was in operation (Exhibit R-A, Tr. 93). He further confirmed that this citation was abated by installing locked gates and screens over the stair rails so people could not climb over them (Tr. 94). These gates are higher than 40 feet, and they have not been changed since 1985 (Tr. 95).

Mr. Moenning confirmed that Inspector Laufenberg inspected the plant in 1989, but did not cite the gates, and he could not remember discussing the gates with the inspector (Tr. 97). He stated that there are three other similar screens at other locations that he supervises. Two of the screens are guarded similar to the ones cited in this case and they are reached by a ladder which is removed to block access when work is performed on the screen. The third screen is a dry screen that is "guarded up above", and none of these screens have ever been physically guarded (Tr. 97-98).

Mr. Moenning explained how the guards were constructed on site and installed to abate the section 104(b) orders issued by the inspector, and he stated that it took six or seven hours to do this work with some difficulty because the guards had to be constructed to withstand the vibrations of the screens (Tr. 100).

On cross-examination, Mr. Moenning stated that he has a key to the locked gates in question, and that the operator who controls the screening machinery also has a key. If the operator has reason to go to those areas, he can unlock the gates, and go to the machinery areas. He confirmed that he or the operator is there at all times. The machinery is turned on and off by electrical buttons in the operator's control house, and the screens and parts can be turned off separately (Tr. 102).

Mr. Moenning confirmed that he was at the plant in August, 1991, when Inspector Quartaro conducted an inspection, and he confirmed that the inspector informed him that MSHA's Denver regional manager sent him a personal message stating that MSHA no longer considered gates as adequate guards for the screens. Mr. Moenning stated that he informed Mr. Walker that gates were no longer acceptable and they discussed providing the guards when there was a shut down (Tr. 103).

Mr. Moenning stated that he informed Mr. Walker about the citations issued by Inspector Laufenberg in March, 1992, and they discussed taking care of it during the shutdown time, and Mr. Walker "said we would take care of it in shutdown time" (Tr. 105). Mr. Moenning stated that he told Mr. Laufenberg that he had "already changed the same thing three times, I didn't know whether the law had changed or not", and that Mr. Laufenberg informed him that "they interpret the law different now than they did before" (Tr. 105). When asked for an explanation as to why the guards had not been provided from August, 1991, through March 19, 1992, Mr. Moenning stated as follows at (Tr. 105-106):

> A. We felt that we had abated slips on that, and -- from the prior time, and we felt it wasn't a danger area. There's no one works up there while that operation is in -- while the machine is in operation, and we didn't have any shutdown time, and we didn't feel it was an emergency time thing.

Mr. Moenning stated that when the inspector visited the site in August, 1991, he did not issue a citation, and the gates had remained in place from 1985 to 1991, and were there when Mr. Quartero came to the site (Tr. 108).

Mr. Moenning stated that in September, 1992, the plant operated six days a week, from 7:30 or 8:00 A.M. to 4:30 or 5:30 P.M. daily, including the winter, but depending on the workload and weather (Tr. 110). He confirmed that the equipment did not operate between closing time in the afternoon and the next morning, and he could not recall any shutdowns "that would take me down long enough to guard the screens" (Tr. 112). He confirmed that materials were on hand for building the guards and stated that "we build guards all the time" (Tr. 112). He stated that he never had any maintenance that would have required a shut down for several hours (Tr. 113).

Mr. Moening stated that Mr. Laufenberg never told him that he could wait until a shut down to fix the guards, that he had no agreement with Mr. Laufenberg, and that Mr. Laufenberg told him to "Fix it" (Tr. 114). Mr. Moenning further stated that when Mr. Laufenberg issued the March, 13, 1992, citations, he (Moenning) did not believe that he had the next seven months until winter to install the guards, but he did not believe that it was an emergency, and that "this was the third time that I had redid this for MSHA, without any law changing or anything else . . . We'd fixed it and like, they were satisfied with it for years" (Tr. 114-115).

Mr. Moenning stated that his workload was heavy after the citations were issued, and although he could not recall if Mr. Laufenberg told him that he would issue a section 104(b)

order when he returned if the citations were not abated, he stated that "he might have told me that" (Tr. 117).

David Walker, the respondent's owner-operator, stated that the plant was purchased in 1970, and when the Mine Act became effective in 1977, chains were in place to guard the screens in question, and he was cited for this and it was corrected. Subsequently, in August, 1991, Mr. Quartaro came to the mine, but did not issue a citation, and Mr. Moenning told him that Mr. Quartaro informed him that the gates on the stairs that accessed the screens were no longer acceptable and that every moving part on the screening tower had to be guarded (Tr. 119-120). The regulation had not changed at that time, and Mr. Moenning informed him that he agreed to guard each V-belt on the screening tower during the winter shutdown (Tr. 121). Mr. Walker stated that "I said fine . . . I didn't feel like we had to, because we already had an abated citation on the same guarding citation, but to get along with them we would do it" (Tr. 121). However, there was no winter shutdown and "we wanted to operate right through the winter," but that this was not common (Tr. 121).

Mr. Walker confirmed that Mr. Laufenberg inspected the plant in 1989, but did not cite the gates, and that no citations were issued for the gates since 1985, until Mr. Laufenberg cited them in March 1992 (Tr. 122). Mr. Walker stated that when Mr. Moenning informed him of the citations, he informed Mr. Moenning that "we have an agreement with them, that we'll fix them when we shut down. We haven't shut down, so I felt like our agreement was still good" (Tr. 123). Mr. Walker agreed that he had no agreement with Mr. Laufenberg, but believed that he had one with MSHA. When asked who he had the agreement with, Mr. Walker responded "I think the inspectors all speak for MSHA" (Tr. 123).

Mr. Walker stated that he decided to comply in December, 1992, when he ordinarily shut down, and that he did so after calling the local MSHA district manager in Topeka, who informed him that "he was ordered by the district manager to write it" (Tr. 124). Mr. Walker explained his understanding of the agreement as follows at (Tr. 125):

> THE WITNESS: We had agreed to comply with their request. I felt like we already had it guarded, we already have an abated citation that says it's okay. They said, "Okay, we do it when we have time," because this has been okay for five or six years, or whatever.

Mr. Walker stated that "I don't think regulation by policy is legal", and when reminded that "policy is not the law", he responded "I understand that, they changed the policy" (Tr. 125-126). Respondent's counsel stated that "The MSHA

allowed compliance, that is the whole issue", but he agreed that this is not a legal defense, and Mr. Walker believed that it was (Tr. 126).

Mr. Walker believed that he had a verbal agreement with the inspector (Quartaro) "to fix it when we shut down" and to change the method of guarding during the shutdown. He stated that he never received any written notification that gates were not acceptable and that "all I had was the word of an inspector, that they weren't going to accept it any more, and we agreed to fix it" (Tr. 127).

On cross-examination, Mr. Walker reviewed the language of section 56.14107(a), and he believed that it allows for the use of gate guarding because "the machine part is not accessible, it doesn't have to be guarded" (Tr. 130). He mentioned a guarding exception if the equipment is seven feet off the ground and inaccessible, but conceded that the two cited pinch points were not seven feet from the walkways (Tr. 131). He stated that he has never attempted to file a petition for modification of the standard, and did not know about this provision (Tr. 131).

Mr. Walker confirmed that he was aware of the fact that in August, 1991, Inspector Quartaro informed Mr. Moenning that the use of gates were no longer sufficient to guard the equipment in question, and that he discussed this with Mr. Moenning. It was Mr. Walker's recollection that Mr. Moenning told him about his conversation with Mr. Quartaro, and it was his understanding that he could wait until the winter shutdown to install the guards, and he guessed that Mr. Quartaro assumed the winter shutdown time frame (Tr. 134-135). He denied knowing that Mr. Quartaro had stated that the next time an inspector came to the mine he would be cited if the equipment was not guarded (Tr. 135).

Mr. Walker confirmed that he was aware of the citations issued by Inspector Laufenberg in March, 1992, and he stated "I felt comfortable with our abated citation. I didn't think you could come change the rules in the middle of the game and get fined for it" (Tr. 136). He further explained that he relied on the agreement and that he would abate the citations and change the guarding when the operation shut down. He believed that he could do this at his convenience, and that it was very possible that if he did not shut down for the winter, he would have waited until the next year to install the guards. He further relied on his belief that no changes in the regulation had occurred since 1985, and his view that the gates constituted compliance because they restricted access to the area and meet the purpose of the regulation (Tr. 136-138).

Mr. Walker stated that after the citations were issued by Mr. Laufenberg, he instructed Mr. Moenning to make the repairs "if he had time at any time, even if it was before the winter

shutdown" (Tr. 138). Mr. Walker did not believe he had to guard the screens by the scheduled abatement time because "You get extensions all the time" (Tr. 139). Mr. Walker did not believe that the section 104(b) orders should have been issued, and he stated that he tried to protest them (Tr. 139). He further stated that if he had not received the orders he would not have installed the guards and would have waited to do this during the next shutdown because he believed that the gates were in compliance, and his belief in this regard is based on the fact that the initial citation he received was abated after the gates were installed (Tr. 139-141). He further explained as follows at (Tr. 144-145):

Q. You are saying you feel comfortable with the abated citation in the face of an inspector coming and telling you that the policy has changed, that you need to guard it, you still feel comfortable with the abated citation?

A. It's true that I felt protected, but I also agreed to change it.

Q. But did you agree to change it as soon as you could?

A. As soon as it was convenient for us to do that.

Q. Wasn't this convenience rather loose? I mean, you said earlier that you didn't really know what MSHA assumed, but did you realize that your idea of convenience would not being line with what MSHA's idea of convenience was?

A. That's very possible.

Q. In other words, you know by not abating the citation that you were not doing what MSHA asked you to do?

A. That's correct. I also felt like it was not regulation, it was policy.

Q. And that was prior to the citation being issued, is that correct?

A. That's right.

Q. After the citation was issued, you still didn't abate the citation?

A. No, because I still felt like it was policy, not regulation.

Q. All of this time were not these two V-belt pinch points -- I should say the two V-belts still unguarded?

A. They were still unguarded by those guards, they were guarded by a locked gate.

MSHA Inspector Joseph Quartaro was called in rebuttal by the petitioner and he confirmed that he inspected the mine in August, 1991, and that he spoke with Mr. Moenning and informed him that he was relaying a message from his supervisor and district manager that gates were no longer acceptable and that the equipment itself would have to be guarded. Mr. Quartaro stated that Mr. Moenning became upset and alluded to "some sort of an agreement that the gate was supposed to be all right" (Tr. 148). Mr. Quartaro informed Mr. Moenning that he would be cited on the next inspection if the equipment was not guarded, and Mr. Moenning reiterated "that it was always all right before, and now they are changing it again, and that he didn't think that they should have to do it" (Tr. 149). Mr. Quartaro further explained as follows at (Tr. 149-150):

Q. Okay. What else did he say? Did he say when he would change them?

A. Well, I think it came up, you know, when he had to change them, and I think I said something to the effect he didn't have to stop right now and do it, he could do it when they were down.

Q. When you said they could do it when they were down --

A. Uh-huh.

Q. -- what did that mean to you?

A. To me, that meant when they were not producing, at -- you know, perhaps after work or on weekends, during breakdowns, or whatever, you know. I think he understood what I meant by down. You know, we've worked together many times, and he's been inspected many times, and I felt that he understood what I mean by that.

Q. So would you say -- did you come to any agreement that he did not have to fix the guards until a winter shutdown?

A. I don't remember any such agreement as that, no. I said, as I remember, that they can do it when they were down. Now, if he wants to say that mean, you know, during winter shutdown, I -- you know, I don't know as that necessarily is correct.

Mr. Quartaro did not believe that it was reasonable for Mr. Moenning to assume that he could wait until the following spring to install the guards. In response to a question as to what he would have done if Mr. Moenning had asked if he could wait until the winter shutdown to install the guards, Mr. Quartaro responded that he would have told Mr. Moenning that "you ought to get it done by the first available down time that you had" (Tr. 154). Mr. Quartaro further explained as follows at (Tr. 156):

Q. Okay. When you had the conversation in August, did you have an understanding with Mr. Moenning that they, Walker Stone, could wait to put the guards on until their shutdown, even if they didn't shut down for two years?

A. No.

Q. Did you have any understanding that they would not get cited because you had told them that they did not have to fix the guards until they shut down, even if that time -- even if there was no definite time of shutdown?

A. No, because as I stated earlier, I think what I said was that it had to be done prior to the next inspection. You know, the next inspection, done any time.

Mr. Quartaro believed that the "next inspection" after his visit could have been anytime after October 1, 1991, through December (Tr. 157-158).

On cross-examination, Mr. Quartaro stated that "the message he conveyed" in August, 1991, to Mr. Moenning was oral and there was nothing in writing, and that neither he or Mr. Moenning explained what was meant by "when the mine was down" (Tr. 159).

Mr. Quartaro could not recall that any specific time or date when the guarding had to be in place was mentioned, and he did not state any specific time for compliance (Tr. 160).

With regard to his instructions concerning the discontinued acceptance of gates as compliance with the guarding requirements of the regulation in question, Mr. Quartaro stated that the decision was apparently made at the MSHA Denver district meeting, and he explained further as follows at (Tr. 164):

> THE WITNESS: That information was brought back to us by our supervisor and told to us. You know, when they do that, well, then if you go to someplace and they have a gate there, and then it becomes our job to tell him. And at that time, by the way, we were also told that because it was a change in policy, that you weren't to issue a citation at that time, you were only to tell them, and give them this fair amount of time to comply before a citation would be issued.

Mr. Quartaro could not recall that any written instructions followed the verbal communication to him. He confirmed that he was aware at that time that gates were being used as guards and that this was acceptable because of MSHA'S policy or "understanding", and he would not cite an operator for using a gate at that time (Tr. 165-166).

Petitioner's Arguments

The petitioner argues that the evidence establishes that the cited moving machine parts were not guarded by an enclosure to prevent persons from coming in contact with the machine pinch points. The petitioner takes note of the fact that the respondent does not claim that section 56.14107(a), does not apply to the cited equipment. In response to the respondent's defense that it complied with the regulation by installing a locked gate, the petitioner asserts that while the gate may have restricted access to the equipment, it was not an adequate guard and did not physically prevent anyone from coming into contact with the moving machine parts.

The petitioner concedes that while the presence of a gate may affect the likelihood of an injury, it cannot satisfy the requirements of section 56.14107(a), because nothing will prevent a person from coming in contact with the moving machine parts once a person gains access to the area. The petitioner cites inspector Laufenberg's testimony that it was possible for someone to climb over the gate, that someone could be at the equipment checking it for routine maintenance, and that two employees had keys to the gate and could have gained access to the equipment.

Citing the "unpredictability of human behavior", the petitioner concludes that an employee might attempt to save time and lubricate the machinery while it was operating, rather than shutting the machine down.

The petitioner points out that Mr. Walker and Mr. Moenning were aware of the fact that Inspector Quartaro had notified them in August, 1991, that using gates as guards would no longer be acceptable. The petitioner acknowledges that Mr. Quartaro informed them that they did not need to immediately shut down the equipment, and could unit until the plant shut down, but also stated that the equipment would have to be guarded by the next inspection or a citation would be issued. The petitioner further points out that Mr. Quartaro did not state that the respondent could install the guards at its convenience, and that he meant that the guards could be installed after work, on week-ends, or when there was a break-down, and that Mr. Quartaro believed that the respondent knew what he meant. Further, the petitioner cites Mr. Walker's testimony that by interpreting Mr. Quartaro's words to mean that he could install the guards when he thought it was convenient, he was not doing what MSHA requested.

The petitioner concludes that once faced with a citation and a time for abatement, the respondent was required to abate the condition within the allotted time, and if it disagreed with the citation, it had a right to a hearing on whether the citations were properly issued. By refusing to cooperate with the inspectors and to reject MSHA's determination that the cited conditions constituted violations, the petitioner concludes that the respondent acted in bad faith. The petitioner further concludes that the respondent could have taken the approximately four hours to construct and install the guards, and points out that it had six months to build and install the guards on the screens, not counting the six months that it was aware that it was not in compliance, and that Mr. Walker testified that he would not have complied with the citations without the issuance of the Section 104(b) orders. Under these circumstances, the petitioner believes that the section 104(b) orders were justified, and that the special penalty assessments were warranted.

Respondent's Arguments

The respondent does not dispute the fact that the cited screen v-belt drives were not individually physically guarded from contact. It contends that the drives were "guarded" by locked gates at the bottom of the access stairs leading to the equipment, and relies on the fact that this method of guarding had been inspected by MSHA for a number of years without any citation being issued.

The respondent acknowledges that during an MSHA inspection in August, 1991, it was advised that the use of locked gates as a guarding method for the equipment in question was no longer acceptable to MSHA. Respondent asserts that it agreed that it would change the method of guarding when the plant shut down for the winter. However, the plant did not shut down for the winter, and during a subsequent inspection on March 19, 1992, the respondent was cited for failure to properly guard the cited belt drive units. Subsequently, on September 21, 1992, the inspector who issued the citations returned to the mine, and after finding that the conditions had not been abated and the guards were not installed, he issued section 104(b) orders shutting down the cited equipment. The guards were provided and the orders were terminated the next day.

The respondent takes the position that based on more than three years of MSHA inspections without citation for the use of locked gates, and without a change in the regulation, its method of guarding the cited equipment with gates was in compliance with the regulation. In further support of this position, the respondent cites Inspector Laufenberg's testimony that there had been no change in the regulation since 1988, and that locked gates to prevent access had been acceptable and passed inspection.

The respondent cites the testimony of Inspector Quartaro confirming the fact that MSHA supervisors informed inspectors of the change in the interpretation of the regulation which led to the citations in this case, but it takes the position that a change in interpretation without notice and opportunity for hearing is not a lawful change in the regulation.

The respondent asserts that all of the witnesses testified to the conversation between Mr. Moenning and the inspectors "which resulted in an agreement" that it could change the method of guarding "to meet this new interpretation" when the plant shut down for the winter. However, between August, 1991, "when this new interpretation was first announced", and March, 1992, when the citations were issued, the plant had not shut down for the winter and continued to operate.

The respondent asserts that Inspectors Quartaro and Laufenberg did not deny that the respondent had been told it could change the method of guarding during the winter shutdown, and that the only evidence in support of the citations is that "their supervisors" felt that sufficient time had past to enable the respondent to change the method of guarding. Respondent contends that this ignored MSHA's concurrence that the change could be made during a shutdown even though no plant shut down occurred, and that Mr. Walker believed that that inspectors intended that the change in the guarding method be made when the plant shut down. Under all of these circumstances, the

respondent suggests that no violations occurred. However, if the citations are affirmed, and relying on the purported MSHA "agreement", and the decision in Moline Consumers Company, 15 FMSHRC 1954 (September 1993), the respondent further suggests that minimum assessments be made for the violations.

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 56.14107(a), which provides as follows:

> § 56.14107 Moving machine parts.
>
> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

MSHA's Program Policy Manual, June 18, 1991, with respect to the interpretation and application of section 56.14107(a), states in relevant part as follows (Exhibit P-11):

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.

In Yaple Creek Sand & Gravel, 11 FMSHRC 1471 (August 1989), Judge Morris found that a gate 4 to 5 feet from an unguarded chain drive assembly on a hopper feeder conveyor belt did not satisfy the guarding requirements of section 56.14001 (redesignated 56.14107).

In Moline Consumers Company, 12 FMSHRC 1953 (October 1990), I affirmed a citation issued on June 21, 1989, for a violation of the guarding requirements of section 56.14107, because of the mine operator's failure to physically guard a crusher V-belt drive motor. The cited equipment was being "guarded" by a gate normally equipped with a padlock, but the gate was partially opened and unlocked at the time the inspector observed the condition.

In the Moline Consumers case, although the operator conceded that the cited equipment was not individually physically guarded and constituted a violation of section 56.14107, it relied on the fact that the MSHA district that inspected its operation accepted a gate as compliance with the regulation, and it challenged

MSHA's position that the gate must be kept secured with a bolt and nut rather than a padlock and key. The operator also relied on the fact that in another MSHA district where it operated, it had not been cited for guarding equipment with padlocks rather than bolts. The inspector who issued the initial citation, the inspector who issued the follow-up section 104(b) order, and their supervisor all confirmed that at that point in time their district accepted gates secured by bolts as compliance with section 56.14107, but did not accept gates secured only by padlocks. Indeed, after the section 104(b) order was issued, the operator installed a physical guard over the cited belt drive to abate the order, but was subsequently permitted to remove the guard and allowed to continue to use the bolted gate as a means of guarding. Out of an apparent abundance of caution, the operator also used a padlock to secure the gate and posted warning signs.

In Moline Consumers, I noted that MSHA's Program Policy Manual, July 1, 1988, contained no reference to the use of locked or bolted gates as a means of complying with the guarding requirements of former section 56.14001, but did mention the fact that the use of chains at walkways and travelways near moving machine parts was unacceptable. I also noted that an MSHA publication guide relating to equipment guarding relied on in part by the operator also stated that moving machine parts must be individually guarded rather than restricting access by installing railings.

In a subsequent Moline Consumers Company case, 15 FMSHRC 1954 (September 1993), Commission Judge Gerold Feldman rejected the operator's use of perimeter fencing to guard a jaw crusher with drive assembly pinch points, as compliance with the guarding requirements of section 56.14107(a). The fencing in question was similar to that used at the Moline Consumers operation that was the subject of my case. Judge Feldman ruled that it was clear from the plain and unambiguous words of the regulation, that moving machines parts must be individually physically guarded and that the use of area guarding, such as fencing, does not meet the standard. Judge Feldman also concluded that it was clear that the intent of the standard is to protect individuals from moving machine parts rather than the machine itself, and he cited two U.S. Labor Department Petition for Modification decisions concerning section 56.14107, concluding that area guarding is only an alternative to the required guarding of moving parts found in that regulation.

In Highlands County Board of Commissioners, 14 FMSHRC 270, 291 (February 1992), I affirmed a violation of section 56.14107(a), after concluding that the specific and unequivocal language of the regulation requires guarding for any of the enumerated moving machine parts, and that the obvious intent of the regulation is to prevent contact with a moving part.

In Overland Sand and Gravel, 14 FMSHRC 1337, 1341 (August 1992), Commission Judge David Barbour affirmed a violation of section 56.14107(a), after concluding that a padlocked chain stretched across an access stairway leading to an unguarded screening device used to screen gravel did not constitute adequate guarding within the meaning of the regulation.

I conclude and find that the clear and unambiguous language found in section 56.14107(a), which states in relevant part that "moving machine parts shall be guarded to protect persons from contacting" the enumerated and "similar moving parts" requires that such parts be individually physically guarded, and that the use of perimeter or area guarding, such as fences or locked gates, as a means of preventing or impeding access to the equipment, does not comply with the standard. Since the obvious intent of the standard is to prevent injuries to anyone who may, for whatever reason, come in contact with an exposed moving machine part, I cannot conclude that requiring a guard at the specific location of the moving machine part to prevent contact by anyone who may have gained authorized or unauthorized access to the equipment, is unreasonable. The respondent does not dispute the fact that the cited screen V-belt drives were not individually physically guarded from contact.

In the course of the hearing, the respondent's counsel stated that the respondent decided to litigate the citations "as a matter of principle" because locked gates had been accepted as compliance in the past as a matter of policy (Tr. 63-64). In this regard, the respondent asserted that MSHA's policy change in the interpretation and application of section 57.14107(a), with respect to the use of locked gates as a means of compliance, was unlawful because it was accomplished without notice and hearing. The respondent's arguments are rejected. The respondent has acknowledged that it was advised in August, 1991, seven months before the citations were issued, that the use of locked gates as a guarding method were no longer acceptable, and the fact that MSHA's office may have made that decision without formal notice and hearing does not warrant the vacation of the citations. I conclude and find that normal APA rulemaking was not required because no mandatory safety regulation was involved.

I find no evidence that MSHA's past acceptance of locked gates as a means of compliance with the standard was in writing, or incorporated as part of its official policy manual. The written policy of record simply states that the use of chains across a walkway or travelway was not acceptable and no mention is made of locked gates. The evidence establishes that the respondent was cited for a guarding violation on September 11, 1985 (exhibit R-A), because it had "guarded" its V-belt screen drives with a chain and a sign placed across the walkway leading to those areas. The citation was abated after the respondent removed the chain and installed a locked gate as a means of

blocking access to the cited equipment. The respondent obviously views the abatement as MSHA's "policy" acceptance of locked gates as a means of compliance, particularly since the use of the gates were not challenged during subsequent MSHA inspections. However, in the context of a litigated case, the question of whether or not the use of a gate complies with section 57.14107(a), is a matter for adjudication by the Commission and its trial judges. Local MSHA policy directives, or policy manual guidelines, are not officially promulgated regulatory standards or rules of law binding on the Commission or the trial judge. See: Old Ben Coal Company, 2 FMSHRC 2806, 2809 (October 1980); Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982); King Knob Coal Co., 3 FMSHRC 1417 (June 1981). However, any confusion resulting from inconsistent policy interpretations and applications may mitigate the respondent's level of negligence and the civil penalty assessment for the violation.

The respondent's suggestion that the citations should be vacated because it had an "agreement" with MSHA that it could construct and install the required guarding at its convenience during any winter shutdown after August, 1991, when it was first informed that MSHA would no longer accept locked gates as equipment guarding is rejected. I find no credible probative evidence of any binding agreement between MSHA and the respondent that permitted the respondent to wait indefinitely for a winter season severe enough to cause it to shut down its operation, thereby providing a "convenient" time for it to comply with the requirements of section 56.14107(a). I conclude and find that the respondent was obliged to abate the citations issued by Inspector Laufenberg within the time fixed for abatement, and there is no evidence that Mr. Laufenberg was a party to any "agreement". Indeed, Mr. Moenning admitted that no such agreement existed, and that Mr. Laufenberg did not tell him that he could unit until a shut down occurred before guarding the equipment. Mr. Moenning also confirmed that at the time the citations were issued, he did not believe that he had the next seven months until winter to install the guards (Tr. 114-115).

Insofar as any "agreement" with Inspector Quartaro is concerned, I find no credible evidence to support any reasonable conclusion that Mr. Quartaro agreed to any "open ended" time frame within which the respondent could comply and install the guards at the time he visited the mine in August, 1991, and informed the respondent that locked gates were no longer acceptable. Although Mr. Quartaro may not have informed Mr. Moenning of any specific time for compliance, and simply advised him that the guards could be installed during "the first available down time", I find credible Mr. Quartaro's testimony that the guards would have to be installed by the next inspection which would have occurred during the last quarter of 1991. I find incredible the respondent's suggestion that in the absence of any winter shut downs, it could have waited indefinitely to

comply and install the guards. I also find incredible Mr. Walker's reliance on the prior abatement of the September 11, 1985, citation as an excuse for not complying with the citations issued by Inspector Laufenberg on March 19, 1992.

The respondent's assertion that the citations should not have been issued because its method of guarding the cited equipment had not been previously cited by MSHA inspectors is rejected. I conclude and find that the fact that Inspector Quartaro did not issue a citation when he inspected the mine in August, 1991, or that other inspectors did not cite the use of gates as guarding devices in the past, did not estop Inspector Laufenberg from issuing the citations during his March 19, 1992, inspection. While the absence of prior citations may be relevant to the issue of negligence, it is not controlling on the issue as to whether or not there was a violation.

It is clear that the lack of previous enforcement does not support a claim of estoppel. Commission Judges have consistently 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); Sevtex Materials Company, 5 FMSHRC 520 (April 1986); Southway Construction Co., 6 FMSHRC 2426 (October 1984). Further, in the case of 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 in relevant part 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" . . . .

On the basis of the foregoing findings and conclusions, I conclude and find that the petitioner has established the violations by a clear preponderance of the evidence adduced in this case. Accordingly, the disputed citations ARE AFFIRMED.

The Section 104(b) Orders

Although Mr. Walker stated that he attempted to contest the two section 104(b) orders that were issued because of the respondent's failure to timely abate the cited conditions, there is no evidence that he did in fact timely contest the orders pursuant to section 105(d) of the Act and Commission Rule 20, 29 C.F.R. § 2700.20. Consequently, the two section 104(b) orders are not in issue in this civil penalty proceeding except to the extent that they may be relevant to the respondent's good faith compliance and the civil penalties assessed for the violations.

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

The parties stipulated that the respondent is a small operator and that payment of the proposed civil penalty assessments will not adversely affect its ability to continue in business.

History of Prior Violations

An MSHA computer print-out reflects that for the period of March 19, 1990, to March 18, 1992, the respondent paid civil penalty assessments of $192 for five (5) citations, four (4) of which were "single-penalty" citations. It was not cited for any violations of section 56.14107 (exhibit 1). The print-out further reflects that prior to March 19, 1990, the respondent paid $1,235, for thirty-three (33) citations, eight (8) of which were "single penalty" citations. Six (6) prior citations of section 56.14107, are noted, but no further information was forthcoming from the petitioner with respect to these citations. I conclude and find that the respondent has a good compliance record and that additional increases in the assessments on the basis of this record are not warranted.

Gravity

The inspector found that the violations were not significant and substantial (S&S). I take note of the fact that access to the unguarded equipment in question was restricted by the locked gates in question, and the inspector found it unlikely that anyone would be in the immediate equipment area while the equipment was in operation. Under the circumstances, I agree with the inspector's non-S&S findings, and I conclude and find that the violations were non-serious.

Negligence

Inspector Laufenberg determined that the violations were the result of moderate negligence on the part of the respondent, and he based his findings on the fact that the respondent was advised

as early as August, 1991, by Inspector Quataro that the equipment needed to be guarded and that locked gates would no longer be acceptable to MSHA. On the facts of this case, I agree with the inspector's negligence finding and I conclude and find that the violations were the result of the respondent's failure to exercise reasonable care.

Good Faith Compliance

After careful consideration of all of the evidence and testimony in this case I conclude and find that the respondent failed to exercise good faith compliance in timely abating the citations. Although I can sympathize with the respondent's frustration with respect to MSHA's prior enforcement interpretations regarding to the use of gates as a guarding method, the fact remains that the respondent was notified in August, 1991, that gates were no longer acceptable.

I can further understand the respondent's subsequent reliance on the fact that MSHA may have taken a rather benign interest in citing the respondent for using a locked gate, and the respondent's belief that Inspector Quartaro "agreed" that the guards could be installed during a shut down time which may not have been clearly defined. However, once the citations were issued by Inspector Laufenberg on March 13, 1992, and he instructed Mr. Moenning to "fix it", without any reference to any shutdown time frame, the respondent was compelled to guard the equipment within the abatement time fixed by Mr. Laufenberg. Mr. Moenning admitted that he did not believe he could unit until a winter shut down to abate the citations, but no further action was taken even though four or five additional months past beyond the April 14, 1992, abatement time fixed by the inspector.

Mr. Moenning admitted that materials were on hand to construct the guards, and he confirmed that they were routinely constructed. However, compliance was finally achieved only after Inspector Laufenberg issued the section 104(b) orders, taking the equipment out of service, and they were terminated the following day after the equipment was guarded.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
4123442	3/19/92	56.14107(a)	$350
4123553	3/19/92	56.1410(a)	$350

ORDER

The respondent IS ORDERED to pay the aforementioned civil penalty assessments, and payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 16 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-467
	:	A.C. No. 15-17202-03508M
v.	:	
	:	Dulcimer # 7 Mine
LARRY D. IRVIN EMPLOYED BY NEW HORIZONS COAL, INC., Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
Sidney B. Douglass, Esq., Harlan, Kentucky, for Respondent.

Before: Judge Amchan

Statement of the Case

On January 26, 1993, Adron Wilson conducted an MSHA inspection of the Dulcimer # 7 Mine in Harlan county, Kentucky (Tr. 9, Exh. G-1). This mine was operated by the Great Western Coal Company, which has since changed its name to New Horizons Coal, Inc. (Tr. 8-9) . During the inspection, Wilson, accompanied by Stanley Sturgill, Great Western's walkaround representative, was walking from one section of the mine to another when he saw miner Larry D. Irvin (Tr. 12 - 13, 17, 22, 36-37. 67 - 69, 101-106).

According to Inspector Wilson, his cap light was shining directly on Mr. Irvin's face (Tr. 15). He observed a lighted cigarette hanging from Irvin's mouth and he saw and smelled cigarette smoke (Tr. 13, 15, 153). The inspector testified at the hearing that Irvin quickly moved away from him, removed his hard hat and made a motion which led Wilson to believe he was putting out a cigarette in the hard hat (Tr. 17).

Wilson turned to Sturgill and asked him if he saw a miner smoking (Tr. 67); Sturgill said he had not. Wilson and Sturgill walked somewhere between 25 to 70 feet to the location at which

Wilson had observed Mr. Irvin (Tr. 13, 66, 70).[1] At this location, Sturgill saw and smelled cigarette smoke (Tr. 67 - 68, 157, 164).

Almost immediately, Mr. Irvin's foreman, Danny Bruce, appeared on the scene (Tr. 46). At Mr. Wilson's request, he searched Mr. Irvin and his partner, roof bolt machine operator Douglas Howard. Mr. Bruce had the two men take off their hard hats, pull their pants legs out of their boots and turn all their pockets inside out. Mr. Sturgill searched their lunch buckets (Tr. 38, 41, 106 - 107, 140 - 142). Bruce and Sturgill found no cigarettes, matches or any other smoking materials (Tr. 18 - 19, 140 - 142). No cigarette butt or other physical evidence that any employee had been smoking was found by inspector Wilson (Tr. 17). The inspector also found no physical evidence that Mr. Irvin had extinguished a cigarette inside his hard hat (Tr. 47 - 50)

On January 28, 1993, Inspector Wilson served upon Mr. Irvin Citation No. 4241505 alleging that Irvin violated section 317 of the Mine Safety and Health Act, 30 U.S.C. § 877(c) (Exh. G-3). That provision, which is also found at 30 C.F.R. § 75.1702, provides that: "No person shall smoke, carry smoking materials, matches or lighters underground..."

Section 110(g) of the Act, 30 U.S.C. § 820(g), provides that any miner who willfully violates the standard prohibiting smoking shall be subject to a maximum penalty of $250 for each occurrence. MSHA proposed the maximum $250 penalty for the violation alleged in Citation No. 4241505.

The allegation of willful conduct on the part of Mr. Irvin is based upon a lecture given by Wilson at the beginning of his inspection to all the employees at Dulcimer # 7 mine (Tr. 19-22). Due to a fatal mine accident in Norton, Virginia a month and half before the inspection, Mr. Wilson was making a special point of advising miners about the dangers of smoking underground (Tr. 32 - 34).[2]

Mr. Wilson concludes that Mr. Irvin was present at his lecture because he asked Great Western management if any employees were not present (Tr. 21 - 22). He was not advised that Mr. Irvin was not in attendance. As there is no evidence

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[1]Wilson was about 25 feet closer to Mr. Irvin than was Sturgill (Tr. 66 - 67).

[2]Approximately 9 miners died in the explosion at the South Mountain mine in early December, 1992. MSHA believes the explosion was caused by someone smoking underground (Tr. 167).

indicating that Mr. Irvin was absent, I conclude that he was present when Mr. Wilson lectured miners about the dangers of smoking underground prior to January 26, 1993.

Mr. Irvin categorically denies that he was smoking when approached by Inspector Wilson on January 26, 1993, or that he had any smoking materials (Tr. 111-112, 107). He contends that just prior to seeing Mr. Wilson, his partner's roof bolt machine was stuck. He also states that the roof bolter's wheels spun for five to ten minutes in an attempt to get free, thereby creating a lot of smoke (Tr. 101 - 102). When observed by Mr. Wilson, Irvin contends he was assisting his partner with the roof bolt machine. He rushed around a corner to prevent part of the roof bolter from dragging on the floor (Tr. 101-106).

Respondent denies that he removed his hard hat until asked to by Mr. Bruce when he was searched (Tr. 108). He also stated that he was using smokeless tobacco, some of which he had in his jaw when searched (Tr. 116-117). Mr. Bruce states he found a can of smokeless tobacco on Mr. Irvin and that Irvin did have some in his mouth (Tr. 140 - 141).

Mr. Irvin's account is supported by the testimony of his partner, Douglas Howard, who stated he was in a position to see if Mr. Irvin was smoking and that he was not smoking (Tr. 126). Mr. Howard also explains the presence of smoke by reference to the spinning of the roof bolter's tires or the possibility of the machine's cable having passed through some rock dust (Tr. 126-127). Sylice McDaniel, who was working near Respondent on January 26, 1993, also testified that the roof bolter produced a lot of smoke, and that he did not smell cigarette smoke (Tr. 136-137).

Discussion

The instant case is one which must be decided simply by determining whose testimony is more credible, Mr. Wilson's or Mr. Irvin's. Mr. Irvin testified under oath that he was not smoking and his testimony is supported by that of Mr. Howard and the fact that immediately after being observed by Mr. Wilson absolutely no physical evidence was found that indicated Irvin was smoking or possessed smoking materials.

On the other hand, there is nothing to suggest that Mr. Wilson had any reason to accuse Mr. Irvin with smoking underground if he was not doing so. That, however, does not rule out the possibility that Mr. Wilson did not see what he thinks he saw. On balance, I credit the testimony of Mr. Wilson and find that Mr. Irvin had a lighted cigarette in his mouth when Mr. Wilson observed him. It is the corroborative testimony of Mr. Sturgill that persuades me that Mr. Wilson's testimony is more credible than that of Mr. Irvin.

Mr. Sturgill had no reason to testify that he smelled cigarette smoke if he did not. I do not believe it is likely that Sturgill confused smoke from the roof bolter's wheels with that from a cigarette. Crediting Mr. Sturgill's testimony logically leads me to the conclusion that somebody was smoking at the time and place that Mr. Wilson saw Mr. Irvin. There is nothing in this record to suggest that, if anyone was smoking, that the person could have been anyone other than Mr. Irvin. Therefore, I credit the testimony of Wilson and Sturgill and conclude that Mr. Irvin was smoking underground in violation of the Act.

The fact that an almost immediate search of Mr. Irvin and his belongings yielded no evidence of his having smoked or even having smoking materials is troubling. While Mr. Wilson and Mr. Sturgill explained how Mr. Irvin could easily have disposed of the cigarette (Tr. 18, 36 - 37, 161), one would expect that a pack of cigarettes or other smoking materials would have been found.

Nevertheless, the standard of proof to be applied in this case is whether the Secretary has established a violation of the Act by the preponderance of the evidence Kenny Richardson 3 FMSHRC 8, 12 n. 7 (January 1981). This means that the Secretary's evidence, when weighed against that opposing it, must have more convincing force that it is more likely that Mr. Irvin was smoking than it is that he was not Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1204 n. 3 (D.D.C. 1990). I conclude that on this record that it was more likely that Mr. Irvin was smoking underground when observed by Inspector Wilson on January 26, 1993, than it is that he was not smoking.[3]

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[3]Reported cases involving citations issued to miners for smoking underground are extremely rare. I do note, however, that one is remarkably similar to the instant case MSHA v. Frank J. Bough, employed by Peabody Coal Company, 2 FMSHRC 1331 (ALJ June 1980). In that case, the inspector saw a miner smoking but could find no physical evidence to support his observations afterwards. As in the instant case, a second inspector also reported smelling cigarette smoke, although he didn't observe the cited employee smoking. The citation was affirmed by the Commission's judge and apparently became a final order.

In deciding this case, I give no weight to the fact that Mr. Irvin's employer conducted an investigation in which it concluded that he was smoking (Tr. 69 - 70, 81 - 87). Mr. Irvin was terminated from his employment as a result of that investigation. However, this record does not indicate the basis on which the company reached its conclusions, or what procedural protections were provided to Mr. Irvin.

Willfulness

To violate section 317(c) of the Act, the Secretary must show, not only that a miner was smoking underground, but that he did so willfully. To establish a willful violation of the no smoking requirement, the Secretary must establish that Mr. Irvin knew he was violating the law when he smoked underground, or that he was indifferent to either the legality of his actions, or the safety of his fellow miners and himself. Empire-Detroit Steel v. OSHRC, 579 F. 2d 378, 384-86 (6th Cir. 1975).

I find that the Secretary has established a willful violation. The preponderance of the evidence establishes that Mr. Irvin attended a lecture given by Inspector Wilson in which Wilson discussed the dangers of smoking underground and that Irvin smoked underground soon after attending that lecture (Tr. 20-22). I find such conduct constitutes indifference to the requirements of law and indifference to the safety of himself and his fellow miners.

Given the notice provided to Mr. Irvin regarding the potentially catastrophic consequences of smoking underground, I assess the maximum $250 penalty provided for in section 110(g) of the Act.

ORDER

Citation No. 4241505 is affirmed and a $250 penalty is assessed. Respondent is hereby ordered to pay the assessed penalty within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 16 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-1030
Petitioner	:	A.C. No. 15-03178-03722-R
v.	:	
	:	Ohio No. 11 Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Marshall S. Peace, Esquire, Lexington, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for assessment of 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 the Island Creek Coal Company (Island Creek) with violations of mandatory standards. The general issue before me is whether Island Creek violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Before and following the hearing the parties moved to settle Citation Nos. 3548709, 3549133, 3548691 and 3548694 and Order Nos. 3168531, 3548864 and 3548698 proposing a reduction in total penalties for the violations charged therein from $3,433 to $1,497. In addition, the parties have proposed to modify Order Nos. 3168531 and 3548864 to citations under Section 104(a) of the Act and to delete the "significant and substantial" findings from Citation/Order Nos. 3548709, 3548864, 3549133 and 3548694. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of these penalties will be incorporated in the order accompanying this decision.

Order No. 3548870 is the only charging document remaining for disposition. The Order was modified at hearing to an order issued pursuant to Section 104(d)(1) of the Act[1] and alleges a violation of the mandatory standard at 30 C.F.R. §75.400. It charges as follows:

> Loose coal and fine coal was left along both ribs of the No. 1 Unit supply road, for approx. 25 X cuts, 1500 feet. The loose coal and fine coal was more prevalent along the left rib. The coal ranged in depth from 2 inches up to 1 foot in depth and 18 inches to 36 inches wide. Coal was pushed up in a left X cut approx. 12 X cuts from air lock. The coal was 3 feet deep, 6 feet long and approx. 3 feet wide. The loose coal had been rock dusted over along the supply entry.

The cited standard, 30 C.F.R. §75.400, provides that "[c]oal 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 electrical equipment therein."

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[1] Section 104(d)(1) provides as follows:

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

According to Inspector Ted Smith of the Mine Safety and Health Administration (MSHA), on August 20, 1990, during the course of an ongoing inspection of the subject mine, he discovered an accumulation of loose coal and coal dust along the ribs of the No. 1 Unit supply road. According to Smith, the coal ranged in depth from two inches to 12 inches and was more prevalent along the left rib. Smith measured the size of the accumulations at a number of locations with a steel tape. They were from 18 to 36 inches wide. In addition, coal was found pushed into a crosscut approximately 12 crosscuts from the air lock. This coal was three feet deep, six feet long and about three feet wide. Upon close visual and physical examination Smith concluded that the material in each accumulation was in fact coal and coal dust with some mixture of fine clay near the bottom of each accumulation examined. He concluded, however, that because the accumulations had been rock-dusted and were wet the violation was not "significant and substantial." It was in fact noted on the face of the order that injuries were "unlikely."

General Mine Foreman Tommy Gatlin acknowledged that there were two inch to three inch lumps of loose coal mixed with fine clay along the left rib but he believed that the coal came from rib sloughage. According to Gatlin the material was continually falling off the ribs. Gatlin further testified that it took only about one hour to clean up the entire area cited.

The credible testimony of Inspector Smith alone amply supports a finding of the violation as charged. Moreover, based on the admissions of Gatlin regarding the presence of loose coal in the cited area, the existence of the violation is amply corroborated. The fact that the cited accumulations had admittedly been rock dusted also tends to corroborate the evidence that the material beneath consisted of, at the very least, combustible loose coal.

The Secretary further argues that the violation was the result of "unwarrantable failure." Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987). It is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Emery, supra, at 2003-04. In this case the Secretary relies in its findings of "unwarrantable failure" in part on Inspector Smith's opinion that the cited condition had existed for about 30 days (i.e., from the time the entry was first cut until cited), and his opinion that the condition was "obvious" because of its size and height.

While Respondent is clearly chargeable with negligence in this case to have permitted combustible materials to have remained in its mine for at least some period of time, I

find several factors that mitigate against a finding of the high level of gross negligence necessary for an "unwarrantable failure" finding. First, it does not appear that the condition was as "obvious" as alleged by the Secretary. If the Secretary's theory that the cited condition had existed for 30 days is accepted, it is evident that the same condition was overlooked during at least three other inspections (consisting of six trips past the cited condition) by state and Federal inspectors.

In addition, it is apparent that confusion regarding enforcement of the cited standard had been generated by MSHA inspectors during previous inspections. According to Mine Foreman Gatlin, MSHA Inspector Wilburn Vaughn told him in 1988 not to clean up rib sloughage and that it would not be cited. Indeed Gatlin raised this contention underground when Smith first cited the accumulations at issue. Moreover, Inspector Smith acknowledged at trial that there were indeed circumstances under which MSHA permitted rib sloughage not to be cleaned although he maintained that those circumstances did not exist on the facts of this case. According to Smith only when the mine roof is high and large chunks of coal have sloughed off the rib is the exception granted.

The potential for confusion and, in fact, the existence of confusion resulting from MSHA's enforcement policies has accordingly arisen. In King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (1981), the Commission held that confusing or unclear MSHA policies are a factor mitigating operator negligence. See also Secretary v. American Mine Services, Inc., 15 FMSHRC 1830 (1993). Under the circumstances it is apparent that the confusion engendered by certain unwritten MSHA enforcement policies regarding the cleanup of rib sloughage mitigates against a finding of aggravated conduct on the part of Island Creek on the facts of this case.

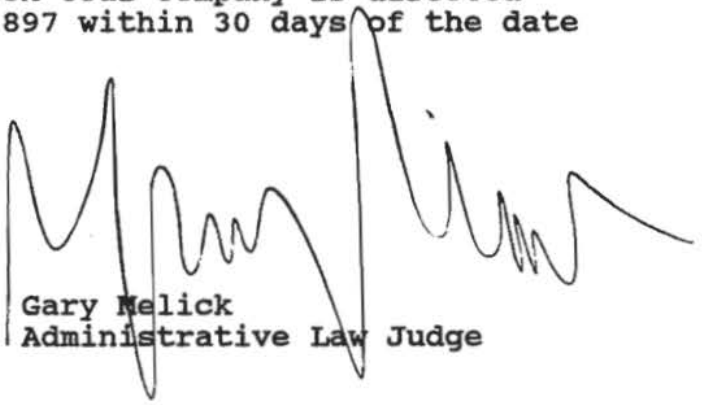
Finally, there is credible evidence of many possible sources for the accumulations found in this case, including rib sloughage and loose material scraped and scooped from the roadway. I do not therefore find that the Secretary has met his burden of proving that the cited accumulations were solely the result of original mining activity initiated some 30 days before discovery by the inspector. The undisputed evidence that other inspections were conducted in the cited area within the preceding 30 days without citation, further suggests that the accumulations had not existed for such a period.

The Secretary also cited a large number of prior violations of the same standard at this mine over the preceding two years. While such evidence might ordinary be a factor in evaluating unwarrantability, under the unique facts of this case, I do not give that evidence decisive weight. Considering the above

factors I do not find that the Secretary has met his burden of proving that the violation was the result of "unwarrantable failure" and accordingly the order herein must fail.

ORDER

Order No. 3548870 is hereby modified to a citation pursuant to section 104(a) of the Act. The additional modifications proposed in the settlement agreements are hereby adopted and Island Creek Coal Company is directed to pay a civil penalty of $1,897 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 16 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 93-225
Petitioner	:	A. C. No. 36-07045-03598
v.	:	
	:	Barbara No. 1
ROXCOAL INCORPORATED,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

This case is before me on 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. § 815(d). A hearing was scheduled for January 14, 1994, in Somerset, Pennsylvania. However, since the parties advised me that the case had been settled, the hearing was held on January 13, in Somerset.

The agreed on settlement provides that Citation No. 3706730 will be modified to delete the "significant and substantial" designation and the penalty will be reduced from $169.00 to $50.00, and that the Respondent will pay the proposed penalty of $189.00 for Citation No. 3706729 (Tr. 5-6). Having considered the representations submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i).

Accordingly, the settlement is **APPROVED**, Citation No. 3706730 is **MODIFIED** as indicated above and it is **ORDERED** that Respondent pay a penalty of $239.00 within 30 days of this order. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 17 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 93-103-M
Petitioner	:	A. C. No. 41-03595-05510
v.	:	
	:	Docket No. CENT 93-104-M
TEXAS GRAVEL INCORPORATED,	:	A. C. No. 41-03595-05511
Respondent	:	
	:	Texas Gravel, Inc.

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a Motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $2,372 to $1,100 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the Motion for Approval of Settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $1,100 within 30 days of this Order.

Avram Weisberger
Administrative Law Judge

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FEB 18 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION on behalf of ROBERT W. BUELKE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 92-243-A-DM
	:	WE MD 91-15
	:	
	:	Docket No. WEST 92-545-DM
v.	:	WE MD 92-28
	:	
SANTA FE PACIFIC GOLD CORP., Respondent	:	Rabbit Creek Mine

DECISION
ORDER OF DISMISSAL

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Charles W. Newcom, Esq., Stephen E. Hosford, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Cetti

These consolidated discrimination cases are before me on the two complaints of discrimination filed by the Secretary on behalf of Mr. Buelke alleging that he was twice discharged by Santa Fe Pacific Gold Corporation in retaliation for protected safety activity in violation of Section 105(c) of the Mine Act. Pursuant to notice a hearing on the merits was held before me. Both parties were represented by very competent counsel. The record includes over 1,300 pages of transcript of the testimony of 10 witnesses and over 100 exhibits. Both parties filed comprehensive post-hearing and reply briefs.

Just prior to my reviewing my final draft of my decision on liability the parties jointly requested a few more days to complete their final effort to resolve all issues and disputes by an amicable comprehensive settlement of all issues arising out of the facts concerning the discharges.

Although the document filed by the parties is labeled Joint Motion to Approve Settlement it appears from its content that it should properly be construed to be a motion by the Secretary to

withdraw the discrimination complaints and to dismiss the cases. The motion is based upon Mr. Buelke's agreement to settle these discrimination proceedings, and all other claims against Santa Fe, including a pending civil lawsuit which is resolved in a separate settlement agreement, and to waive his right to permanent reinstatement in exchange for payment of a lump sum which the parties represent fully compensates Mr. Buelke.

I am advised that Mr. Buelke has moved and is presently working in another state. He agrees to officially resign his position with Respondent.

Under the terms of the agreement Respondent Santa Fe agrees to expunge Mr. Buelke's personal records of any reference to events giving rise to these proceedings and to provide Mr. Buelke with a letter stating that he is in good standing with Santa Fe an as employee.

Respondent Santa Fe also agrees to post a notice for 60 days stating that Santa Fe recognizes the rights of miners to make safety complaints to mine management or to MSHA, and that miners who do so will not be punished in any way.

Upon due consideration of this matter I find that the proposed resolution and disposition of these cases is in the public interest and consistent with the remedial purposes of the Mine Act. Accordingly the motion to withdraw the discrimination complaints and to dismiss the cases is **GRANTED** and the above-captioned cases are **DISMISSED** with prejudice.

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 2 2 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 92-206-M A.C. No. 13-00203-05521
v.	:	
W. A. SCHEMMER LIMESTONE QUARRY INCORPORATED, Respondent	:	Docket No. CENT 92-255-M A.C. No. 13-00203-05522
	:	W. A. Schemmer Limestone Quarry

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carman Schemmer, Pro Se, W. A. Schemmer Limestone Quarry, Incorporated, Logan, Iowa, for Respondent.

Before: Judge Barbour:

These civil penalty proceedings were initiated by the Secretary of Labor (Secretary) on behalf of his Mining Enforcement and Safety Administration (MSHA) against W. A. Schemmer Limestone Quarry, Incorporated (Schemmer Limestone), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. §§ 815 and 820. The Secretary alleges that Schemmer Limestone was responsible for five violations of mandatory safety standards for metal and nonmetal mines found in Part 56 of the Code of Federal Regulations. The proceedings were consolidated and a duly noticed hearing was convened in Logan, Iowa, at which Robert J. Murphy represented the Secretary and the company's president, Carman A. Schemmer, represented Schemmer Limestone.

STIPULATIONS

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

> 1. [Schemmer Limestone] is engaged in mining and selling limestone in the United States, and its mining operations affect interstate commerce.

2. [Schemmer Limestone] is the owner and operator of W.A. Schemmer Limestone Quarry Mine, MSHA I.D. No. 13-00203.

3. [Schemmer Limestone] is subject to the jurisdiction of the [Mine Act].

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

5. The subject citations and orders were properly served by duly authorized representatives of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

[7.] The operator demonstrated good faith in abating the violation[s].

[8.] [Schemmer Limestone] is a medium [sized] mine operator with 28,975 hours of work in 1991.

[9.] The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.[1]

Tr. 6-7; Joint Exh. 1.

[1]The Secretary offered into evidence an exhibit representing the company's history of assessed and paid violations for the two years proceeding the first violation at issue in these matters. It revealed eight assessed and paid violations during those years, which counsel for the Secretary characterized as a "low" history. Tr. 8.

SETTLEMENTS

DOCKET NO. CENT 92-206-M

Citation No.	Date	30 C.F.R. §	Assessment	Settlement
3886105	4/7/92	56.16005	$506	$50
3886106	4/7/92	56.16006	$506	$50

DOCKET NO. CENT 92-255-M

Citation No.	Date	30 C.F.R. §	Assessment	Settlement
3886107	4/7/92	56.20003(a)	$235	$50

Prior to the taking of testimony, counsel for the Secretary stated the parties agreed to settle the referenced citations. Counsel noted that Citations No. 3886105 and 3886106 were issued for Schemmer Limestone's failure to secure properly a compressed gas cylinder and to protect its valve with a safety cap. Counsel further noted that Citation No. 3886107 was issued for the company's failure to keep clean and orderly the floor of the shop. In all three instances the inspector found the violations were not significant and substantial contributions to mine safety hazards (S&S violations), and were due to moderate negligence on Schemmer Limestone's part and were unlikely to cause injuries. Nonetheless, MSHA's Assessment Office inexplicably proposed civil penalties far in excess of those usually proposed for violations with such findings. Counsel stated the settlements reflected the amounts normally proposed for non-S&S violations caused by ordinary negligence and presenting little likelihood of injury. Tr. 9-11.

I approved the settlements on the record and in view of the inspector's findings, Schemmer Limestone's size and its small history of previous violations, I hereby affirm that approval. Tr. 12. I will order payment of the settlement amounts at the close of this decision.

THE CONTESTS

DOCKET NO. CENT 92-255-M

Order/Citation No.	Date	30 C.F.R. §	Assessment
3885143	4/7/92	56.14101(a)(1)	$5,000
3885146	4/7/92	56.14101(a)(1)	$5,000

Section 56.14101(a)(1) requires self-propelled mobile equipment to be "equipped with a service brake system capable of holding the equipment with its typical load on the maximum grade that it travels." The section 107(a), 30 U.S.C. §817(a), orders of withdrawal and associated section 104(a), 30 U.S.C. § 814(a), citations were issued during an inspection of the quarry when MSHA Inspector Ken Harris found two haulage trucks whose service

brakes were not capable of holding the equipment with their typical loads on the maximum grades they traveled. Indeed, the brakes were not capable of stopping or holding the trucks if empty on level ground. Harris also found the alleged violations S&S and were caused by high negligence on the company's part and were highly likely to cause fatalities. In its answer and again at the hearing, Schemmer Limestone did not deny that the conditions of the brakes constituted violations of the cited standards, but rather noted the violations were corrected immediately and argued the financial distress of the company warranted reduced civil penalties. Tr. 13.

THE SECRETARY'S WITNESS

Ken Harris

Harris, a MSHA inspector assigned to the Fort Dodge, Iowa, field office was the Secretary's sole witness. On April 7, 1992, Harris conducted an inspection of Schemmer Limestone's surface quarry facility located in Harrison County, Iowa. Harris was accompanied by MSHA Inspector Clarence Thilen. Tr. 17.

Harris stated that at the quarry stockpile he and Thilen observed two trucks that were used to haul limestone from the quarry pit to the stockpile. Not one of the brakes on the trucks worked, including the emergency brakes. Harris stated that in order to drive down into the quarry pit the trucks had to descend for 275 feet on a grade of 5 to 8 percent. In addition, they had to negotiate a switchback at the bottom of the descent. There was no runaway ramp at the bottom of the grade and if a truck had gone out of control the only way for it to stop would have been to hit the quarry wall. Tr. 19. In addition, each truck hauled approximately 15 tons of rock when fully loaded. If either stalled on the grade on the way out of the pit there would have been no way to prevent it from rolling back into the wall except to try to downshift, and Harris stated he later discovered that both trucks had bad clutches. Tr. 20.

Because of the lack of functioning brakes and the route and grade the trucks had to travel, Harris believed an accident was reasonably likely. Tr. 22. Further, he believed if either one of the trucks hit the quarry highwall its driver would have been severely injured or killed. Tr. 21-22, 30.

Harris issued orders and citations for both conditions. The brakes of the first cited truck were repaired in less than 24 hours. The brakes of the second were repaired two days later. Tr. 23-24.

SCHEMMER LIMESTONE'S WITNESS

Carman Schemmer

The company's sole witness was its president and representative, Carman Schemmer. Schemmer agreed the trucks' brakes did not function -- "[t]he brakes were not operable, plain and simple." Tr. 35. In abating the violation it was discovered that one of the trucks simply needed to have its brakes adjusted, while the other one needed to have fluid added and a brake diaphragm repaired. Tr. 36.

Schemmer maintained the negligence, if any, was his. He inferred he could not rely on company personnel to make the kinds of repairs necessary to keep the trucks safe. ("Even though I have people working for me and I may instruct them to do certain things, if I don't follow up it doesn't get done." Tr. 37.) Schemmer testified that since the issuance of the orders and citations he has changed procedures at the quarry so that he is solely responsible for safety. Under the new procedures he questions the employees about the condition of specific pieces of equipment and if the employees have safety complaints, corrections are made at once. Tr. 38, 58-59.

Turning to the fiscal condition of the company, Schemmer produced a copy of a company financial statement. The statement, dated October 5, 1992, reflects the company's balance sheet as of June 30, 1992. Resp. Exh. 1. Schemmer testified the company's fiscal year always ends on June 30, and that he could not have a statement for 1993 ready in time for the hearing. He noted, however, that in 1992, the company showed a retained earnings balance of $128,000 and he stated that 1993 had been a worse year than 1992. Tr. 40, Resp. Exh. 1 at 5. Schemmer also stated that the company had considerable liabilities, chief among them being notes payable in the amount of $451,448 to the First National Bank of Missouri Valley. Schemmer was uncertain if the bank would renew the notes. Tr. 42, 44; Resp. Exh. 1 at 3.

On cross examination, Schemmer was asked about the statement of the CPA who prepared the financial report and who wrote in a cover letter to the report:

> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations and cash flows. Accordingly, these financial statements are not designed for those who are not informed about such matters.

Resp. Exh. 1. Schemmer explained that he understood the statement to be a standard one included by CPA firms in all financial statements and that Schemmer Limestone had not failed to give its accountant all information necessary for a complete accounting. Tr. 43.

Schemmer confirmed that Schemmer Limestone is a corporation. The stockholders include Schemmer, his father, and his wife. Tr. 59. Schemmer is paid $850 per week. Tr. 44. The company employs approximately 13 persons at the quarry. Tr. 60. The company has limestone reserves of approximately 1,500,000 tons. If the area it is leasing currently were mined totally the area would yield 1,000,000 tons. Tr. 49-50. The average price of limestone is $6 per ton and it is mostly sold to county highway departments for road surfacing. Tr. 50.

Schemmer also offered into evidence a copy of the corporation's tax return for 1991, which showed a loss of $606,572, as well as an accountant's statement for the first quarter of 1993, which showed a net loss of $41,612. Resp. Exh. 2 and 3.

DISCUSSION

The Violations

There is no disagreement about the facts. It is agreed that the trucks were used at the quarry to haul rock from the pit to the stockpile. As such, I find that both trucks had to travel in and out of the pit, descending and ascending a road approximately 278 feet long and with a grade of approximately 5 percent to 8 percent. I credit the Inspector's unrefuted testimony that near the bottom of the road the trucks had to negotiate a switchback and that a highwall was at the bottom of the road. I further credit his testimony that when loaded the trucks each carried up to 15 tons of rock.

It is further agreed that both trucks did not have functioning brakes. Harris feared if the drivers lost control of the trucks either on entering or exiting the pit, the trucks would roll down the grade and crash into the highwall, killing or severely injuring their drivers. This was not an unreasonable fear given the grade, and the position of the highwall and the total inability of the trucks to slow except by downshifting.

Obviously, the braking system of the trucks was not capable of holding them with their typical load on the maximum grade they traveled and I conclude the violations existed as charged.

S&S

I also conclude that Harris properly found the violations to be S&S. As is now well known, a violation is properly designed S&S if based upon the particular facts surrounding it 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 set forth a four-part formula for determining whether a particular violation meets the National Gypsum definition of S&S. In the instance of both of the violations at issue here the formula has been satisfied.

As I have found, the violations existed. They posed the hazard of a serious, even fatal crash. Given the constant use of the road into and out of the pit, the grade of the road, the position of the highwall and the lack of any breaking system, it was reasonably likely such a crash would have occurred had mining operations continued.

CIVIL PENALTY CRITERIA

Gravity and Negligence

Further, in view of the gravity of the injury that could have been expected and the likelihood of the injury occurring, I conclude the violations were very serious.

In addition, the operator was highly negligent. I infer from Schemmer's testimony that prior to the citation of the violations no effective procedure existed at the quarry to ensure mobile equipment complied with the mandatory standards. Schemmer's description of the company's inspection and reporting procedures initiated post-violation confirmed as much.

Previous Violations, Size and Rapid Abatement

MSHA's computer generated history of previous violations indicates that in the 24 months prior to citation of the violations in question a total of eight violations were assessed for the quarry. As counsel agrees, this is a small history of previous violations. It should not increase any civil penalties otherwise assessed. Joint. Exh. 1. The parties have stipulated that Schemmer Limestone is a medium size operator. Also, they have stipulated that the company demonstrated good faith in attempting to achieve rapid compliance after being cited for the violations. Stipulations 7-8.

However, there is more than the stipulation to be noted about Schemmer Limestone's good faith in achieving rapid compliance, for I credit Schemmer's testimony that the company

went further than simply abating the violations at issue. Following issuance of the citations and orders Schemmer instituted a new system for checking equipment to make certain there was compliance with the mandatory standards and Schemmer assumed personal responsibility for safety at the quarry. Under this new system, Schemmer questions his employees about the condition of equipment and whether it is safe. He personally orders defects repaired and he makes certain the repairs are made. I admire Schemmer's candid willingness to assume responsibility for past mistakes, but I am even more impressed by his initiatives to prevent their recurrence. His positive attitude toward compliance is one that should be encouraged.

Ability To Continue In Business

The effect of assessed penalties on the ability of the operator to continue in business is a matter to be proved by the operator. Considering both Schemmer's testimony and the documents the company offered into evidence, I conclude that full imposition of the proposed penalties will adversely effect Schemmer Limestone's ongoing operations. Both the company's income tax return for the last year available and the company's financial statement for the same year reveal a company in potentially precarious fiscal straits. While it is true the company has significant limestone reserves upon which to rely, it must have available adequate financial resources to continue in the industry. To a large extent its financial resources are dependent upon the status of its short term obligations. In this regard, I observe that the company's notes to First National Bank of Missouri Valley are subject to call on a yearly basis despite the company's efforts to negotiate longer terms. There is no question if they are called, the company will find it difficult if not impossible to survive. Although the company is not yet on the financial ropes, its large negative ratio of current liabilities to current assents signals that the pecuniary ice upon which it skates is thin indeed. In such a situation, every added liability is important.

CIVIL PENALTIES

While I recognize that both violations of section 56.14101(a)(1) were very serious and the result of high negligence on the company's part, I believe that the company's financial condition and Schemmer's post-violation attitude toward safety and compliance fully warrant a reduction in the penalties proposed by the Secretary. I therefore assess a civil penalty of $1,000 for each violation and, as ordered below, I permit Schemmer Limestone to pay the assessments on a structured basis. I make the assessment in the expectation that Schemmer Limestone and its president will persevere in their determination to assure safe working conditions for all miners in their employ.

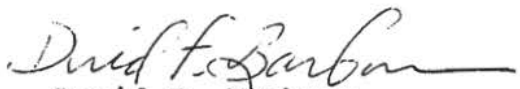
ORDER

Schemmer Limestone is ORDERED to pay a civil penalties of $50 each for the violation of section 56.16005 cited in Citation No. 3886105, 4/7/92, the violation of section 56.16006 cited in Citation No. 3886106, 4/7/92, and the violation of 56.20003(a) cited in Citation No. 3886107, 4/7/92. The penalties shall be paid within thirty (30) days of the date of this decision.

Schemmer Limestone IS ORDERED also to pay a civil penalty of $1,000 for the violation of section 56.14101(a)(1) cited in Order/Citation No. 3885143, 4/7/92 and a civil penalty of $1,000 for the violation of section 56.14101(a)(1) cited in Order/Citation No. 3885146, 4/7/92. Payment shall be made to MSHA in quarterly installments as follows:

1. $500 due and payable on or before April 1, 1994;
2. $500 due and payable on or before July 1, 1994;
3. $500 due and payable on or before October 1, 1994;
4. $500 due and payable on or before January 1, 1995.

Upon receipt of full payment this proceeding is DISMISSED.



David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 2 2 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 93-57 A.C. No. 46-01602-03502
v.	:	
	:	Mine: Kermit Coal Company
HUNTINGTON PIPING INCORPORATED, Respondent	:	Mine No. 1

DECISION

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
S.M. Hood, President, Huntington Piping, Incorporated, for Respondent.

Before: Judge Barbour

In this proceeding, arising under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820, the Secretary of Labor (Secretary) on behalf of his Mine Safety and Health Administration (MSHA) petitions for the assessment of civil penalties against Huntington Piping, Incorporated (Huntington), for two alleged violations of certain mandatory safety standards for surface coal mines found at 30 C.F.R. Part 77. In addition, the Secretary asserts the violations were significant and substantial contributions to mine safety hazards (S&S violations) and were the result of Huntington's unwarrantable failure to comply with the cited standards. The proceeding was the subject of an evidentiary hearing in Huntington, West Virginia, at which Heather Bupp-Habuda represented as counsel for the Secretary and S.M. Hood, president of Huntington, represented the company.

STIPULATIONS

At the commencement of the hearing, counsel for the Secretary read into the record the following stipulations:

> 1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide [this] penalty proceeding ....

2. Huntington ... is not the owner or operator of Mine No. 1 which [was] operated by the Kermit Coal Company at the time the [c]itation [and] [o]rder at issue in this case [were] written.

3. Huntington ... is an independent contractor pursuant to [Section] 3[d], [30 U.S.C. § 802(d)] of the Mine Act.

4. The actions of Huntington ... on August 4, 1992 at ... Mine No. 1 are subject to the jurisdiction of the Mine Act.

5. Huntington ... may be considered a small [,] independent contractor as defined by 30 C.F.R. [§] 100.3(b), Table Five, as the number of hours worked at all mines per year [was] 2,158.

6. [MSHA] Inspector Billy R. Sloan was acting in an official capacity as an authorized representative of the Secretary ... when he issued Order [No.] 3729920 and Citation [No.] 3725795.

7. MSHA Inspector Birkie Allen was acting in his official capacity as an authorized representative of the Secretary ... when he issued Citation [No.] 3729927.

8. True copies of Order [No.] 3729920 and Citation [Nos.] 3729927 and 3725795 were served on Huntington ... [as] required by [the] Mine Act.

9. Order [No.] 3729920, marked [Gov. Exh. 1], is authentic and needs to be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements therein.

10. Citation [No.] 3729927, marked [Gov. Exh. 2], is authentic and may be admitted into evidence for [the] purpose of establishing the issuance and not ... the accuracy of any statements therein.

11. Huntington ... abated Citation [No] 3729227 and Order [No.] 3729920 in a timely manner.

12. Citation [No.] 3725759, marked [Gov. Exh. No. 4], is authentic and may be admitted into evidence for the purpose of establishing its issuance and not ... the accuracy of any statements asserted therein.

13. The only issues before the [Administrative Law Judge] are[:] [A] whether the condition described in the body of Order [No.] 3729920 ... is accurate and constitute[d] a violation of ... [s]ection 75.205(a); ... [B] whe[ther] the conditions described in the body of Citation [No.] 3729927 ... [are] accurate and constituted a a violation of ... [s]ection 77.1710(g); ... [C] what degree of gravity is associated with the [alleged] violations found in the above-referenced [o]rder [and] ...[c]itation, including whether the [alleged] violations were [S&S]; ... [D] what degree of negligence is associated with the violations found the ... [o]rder and the [citation]; ... [E] whether the [alleged] violation in Order [No.] 3729920 was the result of an unwarrantable failure by ... [Huntington] and the amount of civil penalties for the [o]rder and [c]itation.

14. MSHA's proposed assessment data sheet, marked [Gov. Exh. 7] accurately sets forth three as the number of assessed ... violations charged to Huntington ... from the period January 1989 through May 1992.

15. MSHA's narrative findings for assessment, marked [Gov. Exh. 8] set forth [the] formula pursuant to 30 C.F.R. [§] 100.5, for assessing the proposed penalties for Order [No.] 3729920 and Citation [No.] 3729927.

16. MSHA's assessed violations history report and R-17, marked [Gov. Exh. 9], may be used in determining the appropriate civil penalty assessments for the alleged violations.

Tr. 7-12.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

Birkie Allen

Birkie Allen, a MSHA inspector for the past 23 years, inspects construction sites at coal mines. On August 4, 1992, Allen, along with MSHA inspector Billie Sloan, conducted such an inspection at the No. 1 Mine of Kermit Coal Company, an underground coal mine located in Mingo Country, West Virginia. Huntington was constructing a bathhouse at the mine.

At approximately 9:00 a.m., Allen and Sloan parked their car facing the bathhouse and as they looked through the windshield observed Fred Crockett, Huntington's project foreman, and Kenny Walters and Jimmy Bantam, two Huntington employees under Crockett's supervision, on the bathhouse roof. Tr. 20, 53, 64. Allen estimated he and Sloan were from 50 feet to 75 feet away from the employees. Tr. 21.53. Crockett and the other men were on the right side of the roof as the inspectors faced the building. All were within 6 to 8 feet of one another. They were about 3 feet from the edge of the roof. Tr. 24-25, 48.

The men were in the process of installing metal roofing on the steel frame of the bathhouse. Allen testified he could see that none of the employees was wearing a safety belt. Tr. 20-21.

When the men saw the government car in which the inspectors were riding they scrambled down from the roof. Crockett climbed down an I beam on the front side of the building. Tr. 22. Walters and Bantam came down in back of the building, out of the inspectors' sight. Tr. 21.

Allen and Sloan got out of the car, spoke with Crockett and walked around the bathhouse. They did not notice a ladder or other device for gaining access to the roof. They assumed, therefore, the two employees that they could not see getting down from the roof had come down on I beams. Tr. 23.

Allen maintained that once down from the roof, Walters and Bantum put on their safety belts. Tr. 55. Crockett did not put on his safety belt. Id.

Allen identified a drawing he made of the bathhouse. Gov. Exh. 10. He testified that he and Sloan measured the bathhouse with a 50 foot tape and determined that on the side of the building where the men had been working the roof line started 21 feet 7 3/8 inches above the ground. Tr. 24; Gov. Exh. 10. The peak of the roof was 23 feet 9 inches above the bathhouse floor. Id. (Huntington's representative stated that Huntington agreed the distance was "somewhere around 20 feet." Tr. 32.)

According to Allen, he and Sloan orally issued the subject citation and order of withdrawal to Crockett. Tr. 21. They also asked Crockett to convene a meeting of all of the employees. At the meeting, Allen and Sloan discussed the hazards of working without safety belts and lines and reviewed with the employees a memorandum issued by MSHA on August 14, 1978, regarding the requirements of section 77.1710(g), the mandatory safety standard requiring the wearing of safety belts and lines where there is a danger of falling. Tr. 38; Gov. Exh. 5. Allen stated Crockett had been given a copy of the memorandum on May 28, 1992, during an inspection, when Sloan had issued a previous citation to Huntington for a violation of section 77.1710(g). Tr. 40, 50, 52.

Allen believed that if Crockett or one of the other employees had suffered a muscle cramp or a dizzy spell or had slipped, he could have fallen from the roof and been fatally injured. Tr. 43. The men were not working close enough to grab one another, so it was most likely that only one would have fallen. Tr. 48.

Allen believed further that the violation was the result of unwarrantable failure on Huntington's part because Crockett was involved, and Crockett was on notice regarding the need for safety belts and lines. Tr. 49. According to Allen, Crockett explained the lack of safety belts and lines by stating it was "just a stupid mistake." Tr. 52. Allen agreed, however, that Huntington was not habitually unsafe or habitually in violation of the mandatory standards and he stated that he continued to have a good working relationship with Crockett. Tr. 58.

Billy R. Sloan

Sloan, who also is a MSHA inspector, testified that on May 28, 1992, he conducted an inspection of another Huntington construction project at Mine No. 1. During that inspection he observed an employee walking on a metal beam about 30 feet above the ground. While he was walking on the beam the employee was "snapping and unsnapping his safety belt." Tr. 71. Sloan stated, "any time ... [persons] are moving from one place to another and they have any kind of an obstacle in their path if they're not using two lanyards then they unsnap." Tr. 101. Thus, Sloan believed that although the person had on a safety belt and lines, he was not using them properly because at times the lines were unattached. Tr. 102, 107. As a result, Sloan served Crockett with a citation for a violation of section 77.1710(g). Id., Gov. Exh. 4. To abate the citation, Sloan discussed with Crockett and the employees, under Crockett's supervision, MSHA's policy regarding the use of safety belts. In addition, he gave Crockett a copy of the MSHA memorandum regarding section 77.1710(g). Tr. 72.

Turning to August 4, 1992, Sloan stated that even though there was a manlift in the bathhouse that could have been used to get the men down from the roof, Crockett, Walters and Bantam reached the ground by descending on the I beams. Tr. 76, 81. He speculated the men came down because they recognized him and Allen as inspectors. Tr. 77. He explained that section 77.205(a) requires a safe means of access to be provided to all work areas and that climbing down on the frame of the building subjected the men to the danger of falling to the concrete floor of the building or to the surrounding ground. Tr. 86. He considered it highly likely that a fall would have resulted in an injury. Id.

Because Crockett was one of the persons who had climbed down and in so doing had violated the regulation, Sloan believed there was "high" negligence on Huntington's part. Tr. 88.

HUNTINGTON'S WITNESS

Fred Crockett

Crockett was asked about the August 4 incident and he admitted that he was not wearing a safety belt. He stated, however, he believed Walters and Bantam were wearing such belts, but he agreed that they were not using them, they were not tied off. Tr. 123. Crockett explained that on August 4, 1992, he and the men were putting steel sheets over the building's structure in order to finish the roof. The sheets were 38 inches wide and 30 to 31 feet long. Tr. 124. The area being roofed was advancing across steel roof support beams. The area ahead of the sheets was open to the floor, but Crockett maintained that workers did not approach the open area and always laid the sheets of metal ahead of them. Tr. 147-148, 155. (On cross-examination, however, he agreed that when a sheet of steel was laid, those doing the task stood "close to the edge." Tr. 158.) The slope of the roof was 2 inches per foot. Tr. 149.

Crockett stated that safety belts were not used because he did not think they were required. Tr. 125, 127. Use of the belts would have resulted in the lanyard trailing behind and would have created a tripping hazard. Tr. 126. However, since receiving the citation Crockett stated he had come to believe that failure to use safety belts under the subject circumstances "definitely [was] a violation." Id.

When asked why he and Walters and Bantam had hurried off the roof when they saw the inspectors, Crockett responded that "everybody on the job ... [is] scared of the federal inspectors." Tr. 127. He also stated that he told Walters and Bantam to get off of the roof because he was nervous about having the inspectors visit the site. Tr. 127-128. As for himself, he admitted, "I did come down wrong." Tr. 138.

Crockett testified he and the employees reached the roof by going up in the manlift and they planned to use it to come down but they had "panicked" when they saw the inspectors. Tr. 128-129, 131.

He stated that after the May 28 citation he was present at a meeting with the MSHA inspectors who explained how and when to wear safety belts and lines so as to comply with the regulations. Tr. 151. He also was told by his supervisor he should make certain all employees wore safety belts in similar situations and that he had done so, except on August 4. Tr. 145.

Following the incident of August 4, he was told by mine management that he was wrong, that safety belts and lines, as well as a safe means of access, should have been used, but he was not disciplined. Tr. 137.

DISCUSSION AND FINDINGS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
3729927	8/4/92	77.1710(g)	$300

THE VIOLATION

Citation No. 3729927 states:

> A foreman and two workmen were observed working on top of the bathhouse being constructed without being protected from a fall of about 20 feet. The equipment and materials to stay tied off were present on the job site.
>
> The foreman was Fred Crockett and the workmen were Kenny Walters and Jimmy Bantam.

Gov. Exh. 2. Section 77.1710(g) requires in pertinent part that "Each employee working in a surface mine ... shall be required to wear protective ... devices [including] [s]afety belts and lines where there is danger of falling."

All of the witnesses agree that Crockett, Walters and Bantam were working on the roof of the bathhouse when they were observed by Sloan and Allen. Further, there is no real disagreement about the distance from the edge of the roof to the ground being approximately 20 feet. Also, it is agreed that Crockett was not wearing a safety belt or lifeline and that if Walters and Bantam were wearing safety belts, they were not tied off.

Thus, the question is whether there was a danger of falling, and I conclude there was. Admittedly, the roof had but a slight slope to it. Nonetheless, I infer from the testimony that laying

the steel plates over the beams supporting the roof required Crockett, Walters and Bantum not only to occasionally be near the side edge of the roof, but as the roof advanced, to also be near the edge of the plates already laid. In particular, I note Crockett's testimony that this part of the job required the workers to stand "close to the edge." Tr. 158.

A number of things, including a slip, stumble or a simple inattentive misstep, could have caused any one of the three to lose his balance. Had this happened at the roof's side edge or at the edge of the plates there was nothing to have prevented Crockett, Walters or Bantum falling to the rock or concrete below. Therefore, I find that on August 4, 1992, the three men were in danger of falling and their failure to wear and use safety belts and lines violated the standard.

S&S

The test set forth by the Commission in Mathies Coal Co. for determining whether a violation is S&S is by now well known:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum [3 FMSHRC 822, 825 (April 1981], the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (January 1984). I have concluded the violation of mandatory safety standard 77.1710(g) existed as charged. Moreover, the evidence establishes a discrete safety hazard contributed to by the violation in that there was a possibility of one or more of the three employees falling a distance of approximately 20 feet to the hard surfaces below the roof. Any such fall could have caused a serious injury or death.

The remaining question is whether the Secretary established the reasonable likelihood of a fall. In other words, if normal roofing operations had continued, would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834, 1864 (August 1984).

I conclude, the answer is yes. I recognize that the day the violation was cited the circumstances were not unduly conducive

to one of the employees stumbling or tripping and falling from the roof. It was not windy and the roof was dry. Nonetheless, I must view the violation in the context of continued normal roofing operations and certainly, in that regard, I must consider the effects of sudden and unexpected wind gusts and/or rain, both of which would increase the likelihood of a fall. I do not doubt, as Huntington maintains, that it is a fundamental construction practice never to lay sheet steel on a breezy day, but I also recognize that weather conditions are not fully predictable and are subject to sudden and unexpected change. I conclude that sooner or later an employee would have slipped on a wet and slick roof, lost his or her balance due to the wind or taken a misstep and that the result would have been a disabling or fatal fall.

Moreover, I take judicial notice of the recent report of the National Institute for Occupational Safety and Health that 26 percent of all construction deaths are fall-related. 23 O.S.H. Rep. (BNA) 216 (July 28, 1993). Obviously, full compliance with section 77.1710(g) will go far to eliminate the cause of such deaths in the mining industry.

Given the fact that in the context of continued normal construction an errant slip, stumble or misstep was almost bound to occur at some time and given the statistical prevalence of falls as a cause of death, I cannot help but find the failure of Huntington's three employees to wear safety belts and/or use of safety lines made it reasonably likely a serious injury or fatality would have resulted and therefore that Allen properly found the violation to be S&S.

UNWARRANTABLE FAILURE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent, careful person would use, characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991), citing Emery, 9 FMSHRC at 2001.

I conclude the violation was the result of conduct that was not justifiable or inexcusable and was properly found by Allen to have been caused by Huntington's unwarrantable failure to comply. The violation not only occurred in the presence of the foreman, he participated in it. A foreman is held to a high standard of

care. It is the foreman who gives on-site direction to the workforce. It is the foreman's duty to assure compliance with mandatory safety standards and his is the initial responsibility for safety. Any breach of his duty is attributable to the operator.

While situations may exist in which a foreman and miners under his direction violate a standard and the foreman's conduct is justifiable or excusable, this is not one. I credit Allen's and Sloan's testimony, and indeed Crockett's corroborating testimony, that the use of safety belts and lines was discussed with the foreman on May 28, 1992. Further, I find that the MSHA Memorandum of August 14, 1978, regarding the use of safety belts and lines at all times where there is a danger of falling, was brought to Crockett's attention. While Crockett, by virtue of his position already was on notice of the requirements of the standard, these events should have reinforced in his mind the necessity for its observance.

It may be true, as Crockett maintains, that because the May citation concerned a miner working on an elevated steel structure Crockett did not think the standard applicable to miners working on a relatively flat roof, but if such was his interpretation of the standard, it was woefully inadequate. As the MSHA memorandum makes clear, the standard applies where there is a danger of falling and Crockett and the others were working under that very condition. Allen testified that Crockett stated the failure to wear safety belts and lines was "just a stupid mistake." Tr. 58. It also was an unwarrantable failure to comply.

Order No.	Date	30 C.F.R. §	Proposed Penalty
3729920	8/4/92	77.205(a)	$300

THE VIOLATION

Order No. 3729920 states:

> Safe means of access to the roof top of the new building being constructed at the shaft site was not provided for the two workers and foreman observed working about 20 feet off the ground. These workers were observed climbing on and around the support beams to get to the work area.

> The necessary equipment and materials needed to provide safe access were on the job site but were not being used when this condition was observed.
>
> Foreman - Fred Crockett
> Workers - Kenny Walters, Jimmy Bantam

Gov. Exh. 1. Section 77.205(a) states: "Safe means of access shall be provided and maintained to all working places."

Despite the fact that the citation states that the workers were observed climbing on and around the support beams to get to the work area, the testimony makes clear that if there was a violation it consisted of the lack of a safe means to leave the work area, for I fully credit Crockett's testimony that the manlift was used by the men to reach the roof. While Sloan could have been more precise in describing the alleged violation, there is no doubt that Huntington understood the allegation underlying the order. All witnesses agreed that Crockett and the employees hurriedly left the roof by climbing down the steel I beams of the building upon seeing the inspectors and Huntington at no time expressed objection or surprise at MSHA's assertion that their exit from the roof violated section 77.205(a).

While the standard is written in terms of access, which connotes a way by which a work area may be approached or reached, to be effectively implemented, the standard also must be interpreted to include the way by which the work area is left. Thus, the issue is whether use of the I beams was safe, and I agree with Sloan that it was not. The beams did not contain hand or toe holes and, as Sloan testified, climbing down on the metal framework in itself created the hazard of a fall to the floor or ground below. Tr. 86. The manlift had provided a safe means of access to the roof. In failing to maintain the manlift in a position where it could have been used and in failing to provide other safe means to leave the roof, Huntington violated section 77.205(a).

S&S

I further conclude that Sloan properly found the violation to be S&S. The evidence supports the Mathies criteria in that there was a violation of a mandatory safety standard which greatly contributed to the danger of one or more of the three employees falling from heights of up to 20 feet to the concrete floor of the unfinished building or to the rock surrounding it. Had such a fall occurred there was a reasonable likelihood the resulting injuries would have been serious, indeed, even fatal. In addition, in the context of continued mining operations it was reasonably likely such a fall or falls would have occurred. As I have noted, there were no hand or toe holes on the beams and the

very reason such beams are not acceptable as a means of access is because they are conducive to falls. It is just common sense. Further, as referenced above, I again note the prominence of falls as a cause of death in the construction industry.

UNWARRANTABLE FAILURE

I also conclude that Sloan was correct in citing Huntington for an unwarrantable violation. Crockett was on the scene. The manlift was in the unfinished building. As I have observed, Crockett was responsible for assuring compliance with all applicable safety standards and his lapses in this regard are attributable to Huntington. Crockett told the employees to get off the roof when he knew their only way to coming down was via the beams. Tr. 127. (The manlift was in a folded position and was not ready for use.) His "excuse" that "everyone on the job [is] scared of the federal inspectors" is no excuse. If true, it indicates a dangerous failure of communication at the mine. It certainly does not warrant putting in danger himself and others for whom he is responsible. The violation of section 77.205(a), like the violation of section 77.1710(g), was not justifiable.

OTHER CIVIL PENALTY CRITERIA

Gravity and Negligence

The potential injuries to miners that could have resulted from falls off of the roof or the beams and the likelihood of the falls occurring made both violations serious.

Crockett's failure to use the care required of him as foreman to assurance he and his men complied with the cited standards was negligence on his part and thus on that of his employer, Huntington.

Abatement, Size, Ability to Continue in Business

The parties have stipulated that Huntington abated the citation and order in a timely manner and I therefore find that Huntington exhibited good faith in abatement. Stipulation 11. They have further stipulated that Huntington is a small, independent contractor with a small history of previous violations. Stipulations 5 and 14. Finally, the record lacks any evidence to indicate that the assessment of civil penalties for the violations will have an effect on Huntington's ability to continue in business and I find they will not.

CIVIL PENALTY ASSESSMENTS

The Secretary has proposed civil penalties which I conclude are appropriate. I therefore assess a civil penalty of $300 for the violation of section 77.1710(g) and a civil penalty of $300 for the violation of section 77.205(a).

I will add that while I have found the violations to have been caused by Crockett's unwarrantable failure to ensure compliance with the cited standards, I do not believe he sought deliberately to act and to have the other miners act in defiance of the law. Rather, the violations represent Crockett's impulsive and unthinking disregard of his and his mens' safety. Allen emphasized that he has a good working relationship with Crockett and that Huntington is not an habitually unsafe employer or in repeated violation of the standards, as the company's history of previous violations establishes. Crockett must be more mindful of his responsibilities as a person on the front line of safety and of his obligation under the Mine Act to ensure compliance with the regulations both by his man and by himself. The assessments, which are approximately three times larger than the highest penalty assessed previously for Huntington, are imposed with that goal in mind.

ORDER

Huntington IS ORDERED to pay civil penalties of three hundred dollars ($300) for the violation of section 77.1710(g) as cited in Citation No.3729927 and three hundred dollars ($300) for the violation on section 77.205(a) as cited in Order No. 3729920. Payment is to be made within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 23 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-505
Petitioner	:	A. C. No. 15-17241-03501
v.	:	
	:	Docket No. KENT 93-638
MOUNTAINTOP RESTORATION, INC.,	:	A. C. No. 15-17236-03505
Respondent	:	
	:	Docket No. KENT 93-961
	:	A. C. No. 15-17236-03508

DECISION

Appearances: Darren L. Courtney, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Danny Patton, Safety Director, Mountaintop Restoration, Inc., Paintsville, Kentucky, for Respondent.

Before: Judge Hodgdon

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor against Mountaintop Restoration, Inc. pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege 24 violations of the Secretary's mandatory health and safety standards. For the reasons set forth below, I find that Mountaintop committed all of the violations as alleged.

The cases were heard on December 22, 1993, in Paintsville, Kentucky. Inspector Danny Tackett testified on behalf of the Petitioner. Mountaintop's Safety Director, Danny Patton, testified on behalf of the Respondent.

FINDINGS OF FACT

With respect to Docket Nos. KENT 93-505 and KENT 93-638, the Respondent admitted that the violations had occurred as alleged, i.e. that the violations were committed by Mountaintop and that they were of the gravity and degree of negligence indicated on the citations (Tr. 8-9). Therefore, the only issue at the hearing with regard to the 23 citations in those two dockets was the assessment of appropriate civil penalties for the violations.

The evidence concerning Citation 4029809 in Docket No. KENT 93-961 was undisputed. Inspector Tackett testified that he went to Mountaintop's Deep Mine No. 1 during the midnight shift on April 8, 1993, to perform a quarterly inspection. The mine's check-in/check-out board indicated that two people were in the mine. In fact, there were six people in the mine, none of whom were the two listed on the board. The two listed on the board worked on the day shift.

As a result, Inspector Tackett issued Citation 4029809 which stated that:

> The operators (sic) established check in - check out system was not kept in an accurate condition because (6) employees of the owl shift were underground and not checked in [,] (2) day shift employees were check in (sic) but were not on mine property.

The violation was promptly abated by placing the employees' tags on the proper place on the check-in/check-out board.

Mr. Patton testified that all employees are instructed on the proper use of the check-in/check-out board, but that it is hard to get them to use it. He said that the mine is wet, muddy and sloppy so that the first thing a miner thinks about coming out of the mine is getting out of his muddy clothes and going home. He also said that because of the condition of the mine they had a hard time keeping employees.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.1715 of the Secretary's Regulations, 30 C.F.R. § 75.1715, is taken verbatim from Section 317(p) of the Act, 30 U.S.C. § 877(p), and requires, in pertinent part, that:

> Each operator of a coal mine shall establish a check-in and check-out system which will provide positive identification of every person underground, and will provide an accurate record of the persons in the mine kept on the surface in a place chosen to minimize the danger of destruction by fire or other hazard.

Obviously, Mountaintop's check-in/check-out system did not provide positive identification of the six men underground on the midnight shift on April 8, 1993. Nor did it provide an accurate record of the persons in the mine. Accordingly, I conclude that the Respondent violated Section 75.1715 of the Regulations.

The inspector determined that this violation was the result of high negligence on Mountaintop's part. He based this on the fact that the company had been cited for the same violation at the same mine just three months earlier (Gov. Ex. 2). In fact, the current violation involved some, if not all, of the same employees as the previous one (Tr. 18). Based on this evidence, I agree that this violation resulted from the Respondent's high negligence.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a total of $3,150.00 in penalties for the 24 citations in these three cases. With respect to the statutory criteria to be considered in assessing civil monetary penalties, which is set out in Section 110(i) of the Act, 30 U.S.C. § 810(i), the parties have stipulated that: (a) Deep Mine No. 1 is a small mine with an average annual production of 62,832 tons, (b) all of the mines owned by B. W. McDonald (the owner of Mountaintop Restoration) have an average annual production of between 1,500,000 and 2,000,000 tons and (c) the Respondent demonstrated good faith in abating the violations (Tr. 4-5).

The Respondent asserts that payment of the proposed forfeitures will adversely affect its ability to continue in business. It further specifically challenges the appropriateness of the special assessment for Citation 4029809.

The burden of establishing that payment of civil penalties would adversely affect a company's ability to stay in business is on the company. See Sellersburg Stone Co. v. Fed. Mine Safety and Health, 736 F.2d 1147, 1153 n.14 (7th Cir. 1984). To meet this burden, Mountaintop has offered an income statement for the period ending December 31, 1992 (Resp. Ex. A), a balance sheet and income statements for the period ending August 31, 1993 (Resp. Ex. B), and three Payment Default Notices from Caterpillar Financial Services Corporation dated December 2, 1993 (Resp. Exs. C, D and E). In addition, Mr. Patton testified that Mountaintop is no longer operating Deep Mine No. 1 (Tr. 29).

Mountaintop's evidence fails to demonstrate that it's ability to continue in business would be adversely affected by imposition of the proposed forfeitures. The financial statements

are unaudited. Although Mr. Patton stated that they had been prepared by "[t]he company's CPA" (Tr. 28), they are not only not certified, they are not even signed by the "CPA." In fact, Mountaintop and it's owner, B. W. McDonald, have steadfastly refused to provide any meaningful information concerning it's or it's owners financial situation (Tr. 30-33, Gov. Exs. 3 and 4). Consequently, I conclude that imposition of the proposed forfeitures would not adversely affect the company's ability to remain in business.

Mountaintop argues that the proposed $500.00 penalty for Citation 4029809 is unwarranted for what is essentially a technical violation (Tr.23-24, 38). Section 100.5 of the Regulations, 30 C.F.R. § 100.5, permits the special assessment of civil penalties when any of eight special circumstances are present. Of those eight circumstances, this case could only come within the purview of Section 100.5(h), "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances."

I conclude that the special assessment was appropriate in this case. Mountaintop committed the same violation at least twice within four months. As Mr. Patton stated: "It's a Government law. You have to abide by the Government laws. And it's a common notice issued at every underground coal mine" (Tr. 25). He further acknowledged that most mines made sure the check-in, check-out procedure was followed by having someone monitor the shifts entering and leaving the mine (Tr. 25). Yet Mountaintop's concern for this common problem was so lacking that not one miner had properly checked in for the midnight shift, the exact same shift that had previously been cited. In the event of a disaster, there was no way that Mountaintop could be sure who was, or was not, in the mine.

Mountaintop has not demonstrated that the proposed civil penalties would adversely affect it's ability to remain in business, nor has it shown that the proposed $500.00 penalty for Citation 4029809 was unmerited or excessive. Taking into consideration all of the criteria in Section 110(i) of the Act, I conclude that the $3,150.00 in civil penalties which the Secretary has proposed in these cases is condign.

ORDER

Citation Nos. 4029511, 4029513, 4027026, 4027027, 4027028, 4027029, 4027030, 4027031, 4027032, 4027034, 4027036, 4027037, 4027040, 4030222, 4030223, 4030224 and 4030225 in Docket No. KENT 93-505; Citation Nos. 4030256, 4030257, 4030258, 4030259,

4030401 and 4030403 in Docket No. KENT 93-638; and Citation No. 402809 in Docket No. KENT 93-961 are **AFFIRMED** as written. Mountaintop Restoration, Inc. is **ORDERED** to pay civil penalties in the amount of $3,150.00 for these violations within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 23 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-356-M
Petitioner	:	A.C. No. 38-00344-05509
v.	:	
	:	Docket No. SE 93-384-M
G & C MINING COMPANY, INC.,	:	A.C. No. 38-00344-05510
Respondent	:	
	:	G and C Quarry

DECISIONS

Appearances: Stanley E. Keen, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Walden B. Graham, President, G & C Mining Company, Aynor, South Carolina, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for six (6) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests and hearings were conducted in Florence, South Carolina. The parties waived the filing of posthearing briefs, but I have considered their oral arguments at the hearing in the course of my adjudication of these matters.

Issues

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

Applicable Statutory and Regulatory Provisions

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

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

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

Stipulations

The parties stipulated to the following (Tr. 3):

1. The respondent is a small limestone mine operator and its mining operation is subject to the jurisdiction of the Mine Act.

2. The presiding Commission judge has jurisdiction to hear and decide these matters.

3. Payment by the respondent of the proposed civil penalty assessments for the violations in question in these proceedings will not adversely affect its ability to continue in business.

4. All of the cited conditions were timely abated by the respondent in good faith.

5. The MSHA computer violations history print out covering the period April 12, 1991, through April 11, 1993, reflects the respondent's relevant compliance record (Exhibit ALJ-1).

Discussion

Docket No. SE 93-356-M

Section 104(a) non-"S&S" Citation No. 3881004, April 12, 1993, cites an alleged violation of 30 C.F.R. § 56.9100(a), and the cited condition or practice states that "the mine site was not provided with traffic control rules governing speed".

Section 104(a) non-"S&S" Citation No. 3881005, April 12, 1993, cites an alleged violation of 30 C.F.R. § 56.12018, and the cited condition or practice states that "5 circuit breakers located in the mine shop building were not labeled to show which units they control".

Section 104(a) non-"S&S" Citation No. 3881006, April 12, 1993, cites an alleged violation of 30 C.F.R. § 56.14132(b)(1), and the cited condition or practice states as follows:

> The service truck at the mine site was not provided with a backup alarm system, and the operator has an obstructed view to the rear. The service truck was parked at the shop, and was not tagged out, and was ready for use.

Docket No. SE 93-384-M

Section 104(a) non-"S&S" Citation No. 3881007, April 12, 1993, cites an alleged violation of 30 C.F.R. § 56.14101(a)(2), and the cited condition or practice states as follows:

> The parking brake on the cat road plow at the mine site was not capable of holding the road plow with its typical load on the maximum grade it travels. The road plow was parked at the time, and was not tagged out, and was ready for use.

Section 104(a) "S&S" Citation No. 3881008, April 12, 1993, cites an alleged violation of 30 C.F.R. § 56.14101(a)(1), and the cited condition or practice states as follows:

> The service brakes on the cat road plow were not capable of stopping and holding the road plow with its typical load on the maximum grade it travels. The road plow was parked at the time, not tagged out, and was ready for use. The road plow was also taken out of service, and was tagged out.

Section 104(a) non-"S&S" Citation No. 3881009, April 12, 1993, cites an alleged violation of 30 C.F.R. § 56.14132(a), and the cited condition or practice states as follows:

> The backup alarm on the cat road plow was not properly maintained as an automatic reverse activated alarm. The backup alarm was being manually operated. The road plow was parked at the time, was not tagged out, and was ready for use. The road plow also was removed from service and was tagged out.

Petitioner's Testimony and Evidence

Docket No. SE 93-356-M

MSHA Inspector Salvador Iturralde confirmed that he inspected the respondent's mining operation on April 12, 1993, and that he was accompanied by foreman Mike Graham, the mine operator's son (Tr. 8). The inspector stated that as he drove up

to the mine entrance he observed two loaded dump trucks traveling out of the mine "stirring up quite a bit of dust", and he got out of the way to allow them room. He then proceeded to the shop and did not observe any posted speed limit signs and found none posted on the property. Under the circumstances, he issued citation No. 3881004, because the respondent had no posted speed limit sign (Tr. 8-9).

The inspector confirmed that during his inspection of the mine shop he found that certain circuit breakers were not labeled, and when he asked Mr. Mike Graham to identify the electrical units controlled by the circuit switches, Mr. Graham stated that he did not know. The inspector issued the citation for failure to label the circuits (Tr. 10).

The inspector stated that he next inspected a long bed pickup truck and found that the brakes were fine. However, the truck was not equipped with a backup alarm, and the inspector determined that the view directly to the rear of the truck was obstructed by a square fuel tank mounted in the truck bed behind the operator's cab (Tr. 11-12). He cited the truck because it had no backup alarm.

On cross-examination, the inspector stated that he did not observe a master disconnect switch on the ground circuit breaker box in question (Tr. 14-16). He was informed that the breakers controlled a water pump, the shop lights, and other shop equipment, and he believed that there were six unlabeled switches (Tr. 18).

The inspector stated that the cited truck was used for fueling equipment at the mine. He confirmed that he got into the truck and determined that there was an obstructed view directly to the rear because of the full tank mounted behind the cab. The inspector confirmed that the truck had side view mirrors, but the fuel tank obstructed the driver's view directly to the rear of the truck, and he confirmed this by sitting in the truck and turning and looking to the rear (Tr. 25-26).

The inspector estimated that the trucks he observed leaving the mine were traveling about 30 to 35 miles an hour, and he did not stop the trucks or speak with the drivers (Tr. 38-39).

Docket No. SE 93-384-M

Inspector Iturralde stated that he observed the cited cat road plow parked at the shop area, and Mike Graham confirmed that he had used it during the past week or weekend. The machine was not tagged out, and he informed Mr. Graham that he wanted to

inspect the machine. Mr. Graham started the machine and tested the parking and service brakes, and they would not hold the machine. The inspector found that two of the hydraulic brake lines had been "pinched off" at the two rear wheels (Tr. 42-45).

The inspector believed that the lack of operable service brakes made it reasonably likely that an accident would occur if the vehicle were placed in service and operated on mine property and that "permanently disabling" bodily injuries would result from the lack of operable service brakes (Tr. 46-47). He confirmed that customer trucks travel in and out of the mine property, but he did not observe the grader in operation at the time of the inspection. However, given the layout of the mine, he believed that in the absence of any brakes, it was reasonably likely the machine in question would encounter another vehicle and that an accident would occur at one time or another (Tr. 59-60).

The inspector confirmed that the road plow was equipped with a backup alarm, but he did not believe it was properly maintained because it was operated manually and was not automatic. He confirmed that he observed Mr. Graham activate the alarm manually (Tr. 47).

The inspector confirmed that the parking brake was tested on a slope and would not hold the plow which was described as a "regular" sized motor grader with a blade mounted on the front (Tr. 54-56). He confirmed that the machine was taken out of service after all three of the citations were issued. He also confirmed that the machine had no brakes and "was free wheeling" when the brake pedal was applied (Tr. 57-58).

Respondent's Testimony and Evidence

The respondent opted not to call any witnesses in defense of the citations (Tr. 64). However, mine operator Walden Graham asserted that he is a safety minded operator and he was afforded an opportunity to state his case and explain the circumstances under which the citations were issued with respect to the lack of circuit breaker labels. Mr. Graham asserted that his personnel are trained to disconnect the main power switch located on the breaker box if there is a problem. He also believed that a backup alarm on a vehicle "doesn't make it safe" (Tr. 16-17). Mr. Graham did not deny the absence of the labels, but he took the position that his employees are trained to use test equipment and to disconnect the main power switch rather than relying on labels, but he did not disagree that a breaker may be mislabeled (Tr. 23-24).

Mr. Graham produced photographs of the cited truck, and he pointed out the side view mirrors (Exhibits R-1 through R-3; Tr. 28-29). Mr. Graham stated that the mirrors were installed as a safety measure for a view to the rear beyond the view obstructed by the fuel tank. He also indicated that he wanted his drivers to be able to see to the rear for themselves rather than to depend on a backup alarm for safety, particularly when the noise level of other equipment is such that the alarm cannot be heard (Tr. 31).

Mr. Graham stated that all of the drivers and operators that come on his property are given safety training and are advised of the mine safety rules. He stated that the roads are such that drivers maintain a prudent speed, and trespassing signs are posted (Tr. 33-36; Exhibits R-5 through R-7).

With regard to the citations concerning the road plow, Mr. Walden Graham did not dispute the inspector's findings with respect to the cited brake and backup alarm conditions that he observed (Tr. 52). Mr. Graham stated that the machine was a 1963 model, and he admitted that the brake lines were blocked off, but he denied that he did it, or that they were intentionally pinched off. He explained that certain adjustments were made to the lines to provide better braking, and that moisture affects the brakes (Tr. 52-54).

Mr. Graham stated that the cited road grader was repaired and returned to service, and he confirmed that there have been no road grader accidents at the mine (Tr. 61). He also indicated that his operators are trained to keep the scraper blade down, and he did not believe that graders and plows should he treated like trucks because "they don't move as fast" (Tr. 63).

Mr. Graham stated that he was concerned about the citations that were issued in these proceedings because he believes that he conducts a safe mining operation and has always complied with MSHA's regulations and taken the necessary corrective action (Tr. 65).

Mr. Graham's son, Kenneth, confirmed that the motor grader backup alarm was operational and that it was activated manually by "a little switch" (Tr. 68). With regard to the lack of circuit breaking labeling, Mr. Graham stated that nothing was hooked up to the breakers, but he admitted that they were not tagged or labeled. He suggested that the breakers were labeled at one time, but that the labels fell off (Tr. 69). He did not dispute the other cited conditions and stated that "they were like he (the inspector) said" and that had he known the brakes did not work, he would not have started up the engine for the

inspector and would have tagged it out (Tr. 69-70). He stated that he or his brother operated the grader "once every two months" to grade off the road and that he "felt comfortable" operating it with no brakes, and that "all you got to do is mash the clutch for it to stop" (Tr. 70).

Findings and Conclusions

All of the citations in these proceedings were issued by Inspector Iturralde in the course of an inspection on April 12, 1993. With the exception of Citation No. 3881006, citing an alleged violation of section 56.14132(b)(1), for failure to provide a backup alarm for the service truck which purportedly had an obstructed view to the rear, the respondent did not dispute the remaining existing conditions (Tr. 4-5; 67-69).

With regard to the cited fuel service pickup truck, the respondent took the position that the two side view mirrors installed on either side of the driver's cab (photographic Exhibits R-1 through R-3) provided an unobstructed view to the rear of the truck. However, the credible testimony of the inspector, who got into the truck and turned to the rear, establishes that he had no clear view directly to the rear of the truck because of the presence of a large full tank that was installed in the bed of the truck directly behind the driver's rear window compartment. The photographs, particularly R-2 and R-3, corroborate the inspector's testimony, and having viewed them, I agree with the inspector. Although the side view mirrors may have provided the driver with a "line of sight" view directly to the rear of the mirrors, I cannot conclude that the driver had a clear and unobstructed view directly to the rear of the truck bed because of the large fuel tank which obviously blocked the driver's view through the rear cab window. Under the circumstances, I conclude and find that a violation has been established and the citation IS AFFIRMED.

Citation No. 3881004. 30 C.F.R. § 56.9100(a).

The respondent here is charged with a violation for not providing the traffic control rules governing speed at the mine. Section 56.9100, provides as follows:

> To provide for the safe movement of self-propelled mobile equipment-
> (a) Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine; and
> (b) Signs or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine.

The inspector testified that he cited the respondent with a violation of subsection (a), of section 56.9100, because he found no posted speed limit sign at the mine (Tr. 8-9). The citation was abated after "a sign governing speed was posted at the mine site".

Mr. Walden Graham testified credibly that all drivers on mine property are given safety training, which includes written notice of the mine speed limit of 25 miles per hour, and he produced a file which contained a company memorandum dated August 3, 1992, advising truck drivers of the hazard training required by MSHA (Exhibit R-7). He also produced two signed hazard training forms dated August 10, and October 13, 1992, signed by drivers who apparently received the training (Exhibits R-5 and R-6). The form specifically states that the mine speed limit is 25 miles per hour, and it contains a list of safety procedures and rules applicable to vehicles and other mobile equipment operating on mine property. Mr. Graham confirmed that these hazard training forms are given to all drivers and customers (Tr. 37). The inspector did not dispute the fact that the respondent had such a training program (Tr. 35).

Mr. Graham explained that speed limit signs have been posted at the mine but that "we've had a hurricane or two and our mine hasn't been as active as it was before we had the recession" (Tr. 34). He also confirmed that trespassing signs are posted, that there are a limited amount of visitors to the mine site, and that it is difficult to speed on the mine roads because of their configuration (Tr. 34-35).

I find nothing in the cited section 56.9100(a), that requires the posting of a speed limit sign. The only requirement for posting signs is found in subsection (b), and that only requires signs warning of hazardous conditions.

The respondent's credible and unrebutted evidence establishes that it had a safety hazard training program at the mine, and it included notice of the mine speed limit and other "rules of the road". Although the copies produced by Mr. Graham, who represented himself in this case, are dated in 1992, they stand unrebutted, and the petitioner has not proved that this training program was not in effect at the time the citation was issued. Under the circumstances, and after careful evaluation of all of the available evidence, I conclude and find that the respondent was in compliance with the cited standard, and that the petitioner has failed to prove a violation. Accordingly, the citation IS VACATED.

Citation No. 3881009. 30 C.F.R. § 56.14132(a)

In this instance, the respondent is charged with an alleged violation of section 56.14132(a), for failing to properly maintain the manually operated backup alarm on the cited road grader "as an automatic reverse activated alarm". The cited standard section 56.14132(a), provides as follows:

> (a) Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

The inspector confirmed that he issued the citation because the backup alarm that was on the grader in question was not properly maintained in that it had to be operated manually rather than automatically (Tr. 47). He confirmed that he interpreted the cited standard to require an automatic reverse alarm, and suggested that the grader operator had an obstructed view to the rear because "the machine engine is in the back and they can't see directly behind them" (Tr. 51-52).

I find no credible evidence to establish that the grader operator had an obstructed view to the rear of the machine that would require an automatic reverse-activated signal alarm pursuant to section 56.14132(b)((i). However, in this case, it would appear to me that the grader was equipped with a reverse-activitated automatic alarm that was being operated manually rather than automatically. The cited section 56.14132(a), requires that such an audible warning device be maintained in functional condition. Since the evidence shows that the alarm had to be manually operated, I conclude and find that it was not maintained in a functional condition in that it did not function as an automatic "other audible warning device" as required by the standard. Accordingly, the citation IS AFFIRMED.

Citation Nos. 3881005, 3881007, and 3881008.

I conclude and find that the credible and unrebutted testimony of the inspector supports each of these citations, and THEY ARE AFFIRMED.

Significant and Substantial Violation. Citation No. 3881008.

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). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, 3 FMSHRC 327, 329 (March). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citation No. 3881008

Based on the inspector's credible and unrebutted testimony concerning the lack of service brakes on the cited road grader, I conclude and find that his "S&S" finding was warranted. The evidence establishes that the grader was "free wheeling" because it had no brakes, and I agree with the inspector's belief that an

accident was reasonably likely if the machine were placed in service and operated on the roadways that were used by vehicular traffic. If an accident had occurred, I believe it would be reasonably likely that injuries of a reasonable serious nature would result. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

Size of Business and Effect of Civil Penalty Assessments on the Respondents Ability to Continue in Business

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

History of Prior Violations

The MSHA computer printout concerning the respondent's compliance record reflects that for the period April 12, 1991 through April 11, 1993, the respondent paid a civil penalty assessment of $50, for one (1) section 104(a) non-"S&S" citation for a violation of mandatory safety standard 30 C.F.R. § 56.12025. I conclude and find that the respondent has an excellent compliance record and I have taken this into account in these proceedings.

Good Faith Compliance

The parties stipulated that the respondent timely abated all of the cited conditions in good faith, and I adopt this stipulation as my finding and conclusion on this issue.

Gravity

I conclude and find that all of the non-"S&S" violations were nonserious, and that the "S&S" violation concerning the lack of brakes on the cited road grader was serious.

Negligence

I agree with the inspector's "moderate" negligence findings, and I conclude and find that all of the violations were the result of the respondent's failure to exercise reasonable care.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the civil penalty criteria found in section 110(i) of the act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable.

Docket No. SE 93-356-M

Citation No.	Date	30 C.F.R. Section	Assessment
3881005	4/12/93	56.12018	$25
3881006	4/12/93	56.14132(b)(1)	$35

Docket No. SE 93-384-M

Citation No.	Date	30 C.F.R. Section	Assessment
3881007	4/12/93	56.14101(a)(2)	$25
3881008	4/12/93	56.14101(a)(1)	$75
3881009	4/12/93	56.14132(a)	$25

ORDER

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

Section 104(a) non "S&S" Citation No. 3881004, April 12, 1993, citing an alleged violation of 30 C.F.R. § 56.9100(a), in Docket No. SE 93-356-M, IS VACATED, and the proposed civil penalty assessment is DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 2 4 1994

MORTON INTERNATIONAL, INC., MORTON SALT, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 93-237-RM
	:	Citation No. 3897764; 6/15/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 94-49-RM
	:	Citation No. 3897982; 6/15/93
	:	Weeks Island Mine
	:	I.D. No. 16-00970
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 93-259-M
v.	:	A.C. No. 16-00970-05660
	:	Weeks Island Mine
MORTON INTERNATIONAL, INC., MORTON SALT, Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esquire, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor; Henry Chajet, Esquire, Jackson and Kelly, Washington, D.C., for Morton International, Inc., Morton Salt.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., the "Act," to challenge two citations issued by the Secretary of Labor against Morton International, Inc., Morton Salt (Morton) at its Weeks Island domal salt mine. It is undisputed that this mine is a Subcategory II-A Mine under 30 C.F.R. § 57.22003(a)(2)(i).

Citation No. 3897764 alleges a violation of the mandatory standard at 30 C.F.R. § 57.22235 and charges as follows:

> Methane readings were taken on top of a berm which was positioned across the entrance to 10 EWN. The berm was about 9' high and readings at about 15' were 1 %. A extended pole was used to reach to heights of about 24 feet. As the pole with the methane detector was extended upward the readings continued to climb. The methane detector was shut off at 3.25 % but readings would've read higher. This is a II A mine that was a potential for outburst when methane reaches explosive limits.

The cited standard, applicable to Subcategory II-A mines, provides, in relevant part, as follows:

> (a) If methane reaches 1.0 percent in the mine atmosphere, all persons other than competent persons necessary to make ventilation changes shall be withdrawn from affected areas until methane is reduced to less than 0.5 percent.

Citation No. 3897892 alleges a violation of the standard at 30 C.F.R. § 57.22232 based upon the same methane readings. This citation charges as follows:

> Ventilation changes had not been made to reduce the level of methane to below 0.5 % in the mine atmosphere on June 15, 1993. Methane was detected at the entrance to 10 EWN heading and upon advancement into the abandoned area where a large outburst cavity was located at the face, the detector readings began to rise. A reading was again taken while standing upon an approximate 9 feet high berm being used to close off the room and the detector was extended upwards while positioned in the right hand. It indicated a concentration of 1 % methane. The approximate distance from the floor would be 16 feet. A second reading was taken using an extension pole and it indicated 3.25 % methane.

30 C.F.R. § 57.22232, also applicable to Subcategory II-A mines, provides as follows:

> If methane reaches 0.5 percent in the mine atmosphere, ventilation changes shall be made to reduce the level of methane. Until methane is reduced to less than 0.5 percent, electrical power shall be deenergized in affected areas, except power to monitoring equipment determined by

MSHA to be intrinsically safe under 30 CFR part 18. Diesel equipment shall be shut off or immediately removed from the area and no other work shall be permitted in affected areas.

There is no dispute that the Mine Safety and Health Administration (MSHA) inspector in this case in fact obtained the cited one percent and 3.25 percent methane readings and that he obtained those readings within an abandoned area of the subject Weeks Island Mine.[1] It is further undisputed that the berm noted in the citation properly identified a boundary of that abandoned area of the mine and that miners were prohibited in accordance with law from entering that abandoned area. It has been stipulated that the "affected area" in these cases was entirely within this abandoned area so that no withdrawal of miners or deenergization of equipment was required.

Morton denies both violations arguing that the cited standards were never intended to apply to abandoned areas of mines and that the Secretary's contrary interpretation is, in essence, inconsistent with the regulations and plainly erroneous. The Secretary argues, on the other hand, that the applicable definition of "mine atmosphere" referenced in the cited standards does not distinguish between active and abandoned areas, but rather sets forth the locations where methane readings are to be taken in both active and abandoned areas of a mine. The term "mine atmosphere" is defined, for purposes of this part of the regulations, as "any point at least 12 inches away from the back, face, rib, and floor in any mine ... ." 30 C.F.R. § 57.22002.

It is well-settled that an agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Udall v. Tallman, 380 U.S. 1, 15 L.Ed. 2d 616, 85 S.Ct. 792 (1965); Bowles v. Seminole Rock Co., 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L.Ed. 1700 (1945); Secretary v. Western Fuels-Utah, 900 F.2d 318, 321 (D.C. Cir. 1990). For the reasons set forth herein, I find that the Secretary's present interpretation in these cases that the cited standards apply to "abandoned areas" of mines is indeed inconsistent with those standards and the applicable definition of "mine atmosphere" incorporated in those standards and is plainly erroneous.

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[1] The term "abandoned areas" is defined as relevant hereto in § 57.22002 as "areas in which work has been completed, no further work is planned, and travel is not permitted."

That the Secretary's proferred interpretation is both inconsistent with the regulations and plainly erroneous is apparent in the first instance from the use of the term "face" in the applicable definition of "mine atmosphere." Common usage in the mining industry clearly limits the term to only active workings of a mine. In A Dictionary of Mining, Mineral and Related Terms, U.S. Dept. of Interior, 1968, the term "face" is variously defined as "a working place from which coal or mineral is extracted," "the exposed surface of coal or other mineral deposit in the working place where mining, winning, or getting is proceeding," and "the point at which material is being mined."

The use of the term "face" in defining the "mine atmosphere" where specified levels of methane trigger withdrawal and remedial action under the cited standards is therefore clearly inconsistent with the application of the standards to abandoned areas (i.e., areas in which work has been completed, no further work is planned and travel is not permitted) and where there is accordingly no "face." The Secretary's attempt to extend application of these standards to abandoned areas is therefore both inconsistent with the regulations and plainly erroneous.

In addition, all of the actions required by the cited standards upon the specified levels of methane, except ventilation changes, i.e., deenergization of equipment, cessation of work and removal of personnel, are clearly relevant only to active workings where miners and functioning equipment are present. These actions are meaningless in abandoned areas where work and travel have already been prohibited. Moreover, in order to make ventilation changes, miners would no doubt, as in this case, be required to enter the dangerous environment of abandoned areas. For this additional reason the Secretary's present interpretation appears to be both inconsistent with the regulations and plainly erroneous.

That the Secretary never intended the cited standards to apply to abandoned areas is also supported by circumstantial evidence. For example, while the Secretary does in fact permit unsealed abandoned areas to exist in Subcategory II-A mines he does not in the regulations require that such unsealed, abandoned areas be tested for methane or specifically ventilated (Stipulation No. 40, Tr. 163). Indeed, the regulations governing the locations where methane testing must be performed in such mines specify only locations in active areas. See, e.g., 30 C.F.R. § 57.22228 and § 57.22230. In addition, the methane monitors required by § 57.22301 to test the "mine atmosphere" are to be located only in active areas. See 30 C.F.R. § 57.22301 (Tr. 67). Significantly, the Secretary's regulations do require the ventilation of unsealed abandoned areas but only in Subcategory III mines.

Furthermore, under the maxim expressio unius est exclusio alterius, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated in a regulation, there is an inference that all omissions should be understood as exclusions. See Sutherland Stat Const § 47.23 (5th Ed.).[2]

The Secretary's present interpretation of the cited standards is inconsistent with this rule of construction. The regulations specifically list areas where methane testing is required to determine methane action levels in the mine atmosphere. MSHA mandates preshift methane testing at all work places (30 C.F.R. § 57.22229), as well as weekly methane testing at the following locations: (1) active mining faces and benches; (2) main returns; (3) returns from idle workings; (4) returns from abandoned workings; and (5) seals. 30 C.F.R. § 57.22230. Only active working areas are tested to determine the methane content of the mine atmosphere by atmospheric monitoring systems under 30 C.F.R. § 57.22301 (Tr. 67).

On the other hand, there are no testing requirements for the "mine atmosphere" in abandoned areas and MSHA acknowledges this fact (Stipulation No. 40). Accordingly, under the maxim expressio unius est exclusio alterus, since the Secretary has listed specific locations for methane testing in Subcategory II-A mines and concedes that abandoned areas are not required to be tested for methane, it is apparent the Secretary did not intend to apply the cited standards to abandoned areas and that his present interpretation is inconsistent with these standards and plainly erroneous.

The Secretary's attempted application of the cited standards to abandoned areas is also contrary to the regulatory history. As noted in Morton's Brief, from 1969 until 1987, the Secretary's regulations required abandoned areas of gassy mines to be sealed or ventilated. An MSHA proposed rule would have instituted this requirement for Subcategory II-A mines, but was rejected by the Secretary (Stipulation No. 39; 52 Fed. Reg. 24924, 24926 (1987)). In the case of Subcategory II-A mines, the Secretary expressly found that the proposed rule was unnecessary and duplicative of the protection provided by existing 30 C.F.R. § 57.8528, which permits abandoned areas without ventilation. In contrast, MSHA did promulgate a rule, § 57.22223, requiring the ventilation of unsealed, abandoned areas of Subcategory III mines under certain conditions. There is no such requirement applicable to Subcategory II-A mines.

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[2] When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning. Id. § 31.06.

Significantly, MSHA acknowledges in essence that the result of enforcement of the citations in these cases is the imposition of the rejected regulatory requirement, i.e., the ventilation of unsealed abandoned areas in Subcategory II-A mines (Stipulation No. 38; Exh. C-4 at page 27). The Secretary's attempt to enforce a provision which he previously proposed but rejected is inconsistent with the principle that the consideration and rejection of a provision is clear evidence of the intent to exclude its requirement. Sutherland, supra, § 48.04 at 325; § 48.18 at 369. The adoption by the Secretary of a provision applicable only to one class of regulated entities, i.e., Subcategory III mines, also strongly suggests his intent not to apply such provisions to excluded classes, i.e., Subcategory II-A mines. Id. § 31.06. Thus, for these additional reasons, it is apparent that the Secretary's present interpretation of the cited standards is inconsistent and plainly erroneous.

In this regard, it is also significant to note the history of non-enforcement of the Secretary's present interpretation both before and after the issuance of the citations at bar. It is undisputed that MSHA had never previously attempted to enforce the cited standards in the manner now taken. Since promulgation of the gassy mine standards in 1987, and prior to the issuance of Citation No. 3897764 on June 15, 1993, MSHA inspectors always tested for methane in the active areas of the mine. More particularly, the MSHA inspectors in this case acknowledged that they had inspected the mine at issue dozens of times and had never previously tested for methane in an abandoned area.

In addition, the instant citations were abated without requiring ventilation changes to reduce the amount of methane in the abandoned areas to below the prescribed 0.5 percent action level set forth in § 57.22232. When the corresponding citation was terminated, MSHA Inspector Olivier found 0.6 percent methane in the cited abandoned area (Stipulation No. 12). Indeed, Olivier maintains that he expected he would find higher readings for methane as he traveled further into the abandoned area (Stipulation No. 12).

Finally, it should be reemphasized that, as a matter of safety, the Secretary himself has acknowledged that the ventilation of abandoned areas of Subcategory II-A mines is not necessary. See 52 Fed. Reg. at 24926 (1987). It is further acknowledged that methane emanating from those areas is subject to present regulatory controls.

For the above reasons, I find that the Secretary's present interpretation of the cited standards is both inconsistent with the regulations and plainly erroneous. In the alternative, if the language of the cited standards and the related regulatory

definition of "mine atmosphere" should not be considered plain (and plainly inconsistent with the Secretary's present interpretation of that language), a Chevron II analysis demonstrates that the Secretary's interpretation is not reasonable. The preceding discussion applies as well for this demonstration. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); Secretary v. Keystone Coal Mining Corp., 16 FMSHRC 6 (1994).

Accordingly, under either theory, since the methane readings cited as a basis for the instant charges were taken within an abandoned area of the Weeks Island Mine, an area I find to be outside the ambit of the cited standards, there could be no violation of the standards and the citations must accordingly be vacated.

ORDER

Citation Nos. 389764 and 3897982 are hereby vacated. Contest Proceedings Docket Nos. CENT 93-237-RM and CENT 94-49-RM are GRANTEd and Civil Penalty Proceeding Docket No. CENT 93-259-M is DISMISSED.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 2 4 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 93-15
	:	A. C. No. 36-07270-03526
v.	:	
	:	L & J Energy Company
L & J ENERGY COMPANY, INC., Respondent	:	
	:	
	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner; Laurance B. Seaman, Esq., Gates & Seaman, Clearfield, Pennsylvania, and Henry Chajet, Esq., Jackson & Kelly, Washington, DC for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary" or "Petitioner") seeking civil penalties and alleging violations by L & J Energy Company, Inc. ("L & J" or "Respondent") of volume of the Code of Federal Regulations. The orders and citations for which penalties are sought were issued by MSHA inspectors subsequent to an investigation of a rock fall at Respondent's Garmantown Mine, (No. 3 Pit), in which one miner was killed, and another was seriously injured. An Answer was duly filed, and pursuant to notice, and subsequent to discovery engaged in by the parties, the case was heard in Johnstown, Pennsylvania on May 17 - 20, 1993, and August 24 and 25, 1993. The parties filed Post Hearing Briefs and Proposed Findings of Fact on November 19, 1993.

I. FINDINGS OF FACTS

A. Highwall Development and Auger Operation

1. On February 5, 1991, L & J operated the Garmantown Mine, (No. 3 Pit) in Cambria County, Pennsylvania. This mine consisted of a surface pit area and a highwall.

2. In developing the highwall, a bulldozer removed the surface trees, grass, and ground cover. As each layer of the highwall was developed by removal of ground cover, it was scaled by the teeth on the bucket of a front-end loader.[1] John Woods, an employee of L & J at the No. 3 Pit in February 1991 and a certified highwall examiner, examined the highwall daily for loose material during its development.

3. On December 6, 1990, 60 holes were blasted into the highwall at the No. 3 Pit. At that location, the highwall was 34-40 feet high, plus two feet of coal seam. The highwall faced west and had a slope of 15 degrees.

4. L & J Energy completed strip mining at the No. 3 Pit on January 15, 1991.

5. On January 25, C.B. Holms, Inc. ("Holms") commenced, under contract with L & J, an auger operation to remove coal from the seam at the bottom of the highwall. In this process, holes were bored into the coal seam, and coal was extracted.

6. Shad Spencer, L & J's superintendent and a certified highwall examiner, examined the highwall at least two times a day, and sometimes three times a day, between January 25 and February 4. During this period, Spencer did not observe any hazards.

7. On January 28, John DeHaas and Ronald McCracken, Pennsylvania Department of Environmental Resources ("DER") Mine Inspectors, inspected the highwall and determined that it appeared to be safe.

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[1] MSHA Inspectors Charles Lauver and John Kopsic testified that the highwall did not contain any scratches or teeth marks when observed on February 6, and opined that the highwall had not been scaled. I place more weight on the testimony of John Woods, an L&J employee certified to examine highwalls, who stated that L&J developed the highwall with a bulldozer and that, in fact, the highwall was scaled with a loader bucket as it was developed layer by layer.

8. On February 4, Donald Warner, L & J's head mechanic, was at the No. 3 Pit to repair some equipment. Warner did not make an examination, but he looked at the highwall to see if he could work under it. Warner testified that there was no loose material on the pit floor or loose rocks in the highwall.

9. Doug Todd, the auger operator for Holms, and supervisor of the auger crew, inspected the highwall regularly since January 25. Todd examined it hourly between his activity of loading trucks. He looked up to the top of the highwall for 25 feet on each side of the auger. While augering, Todd continued to observe the highwall in the area immediately above where he worked for 1 to 2 minutes at a time. Todd did not observe any hazardous conditions in the highwall prior to the incident that occurred on February 5.

B. February 5, 1991

10. On February 5, Spencer examined the highwall three times between 7:00 a.m. and 12:30 p.m., looking for loose material. Spencer did not see any loose material, nor did he see any rocks on the floor of the pit. Spencer, referring to 25 feet on each side of the auger up to the top of the wall, said that he "really looked it over good" (Tr. 100, May 19, 1993).

11. Todd made an examination in the afternoon of February 5. While standing on the platform of the auger. Todd did not see any hazardous conditions, and did not see any dribbling, i.e., falling of small stone and debris, warning that a heavy fall may be imminent.

12. At approximately 4:50 p.m., two rocks fell from the highwall--one, 28 inches by 30 inches by 11 inches, struck and killed Donald Lawton, and the other struck Lawrence Fulmer, seriously injuring him. The rocks hit the men simultaneously and then some additional rocks fell--one the size of a gallon paint can, another the size of a fist, and some that were the size of gravel.

13. None "DER" inspectors or any of the MSHA inspectors who arrived on the scene that evening were able to observe the condition of the highwall due to nightfall.

C. February 6, 1991

14. On February 6, MSHA Inspector Charles Lauver arrived at the site at 7:30 a.m., and he observed loose material along the entire length and height of the highwall. He testified that there were rocks in the highwall that did not have any support. He noted cracks, one of which was 2 to 3 feet long, over the auger hole and at other areas of the highwall. According to Lauver, there was an overburden to the left of the auger area leaving an undercut 5 feet deep and 20 feet long. He stated that at some point in time this overburden would fall. He also observed mud slips in several areas. Lauver observed rocks falling for the entire length of the highwall. He said there was a "constant rain of material," consisting of rocks, dirt, and shale. (Tr. 96, May 28, 1993) Photographs were taken of some of these conditions between 10:00 a.m. and noon.

15. MSHA Inspector John Kopsic testified that there was loose material in areas of the highwall not shown in these photographs. Kopsic observed dribbling, cracks, crevices, and some rock "hanging" near the auger (Tr. 63, May 18, 1993). He also noted dribbling, and opined that half of the highwall needed scaling. Ronald Gresh, an MSHA inspector and supervisor, observed "loosened" and "fractured" areas, and "broken pieces of rock" (Tr. 108, May 19, 1993). MSHA inspector Ronald Miller observed rock, dirt and loose material along the face and sides of the highwall.

16. DER Inspector John DeHaas observed loose rocks and cracks in the highwall face, and DER Inspector Donald McCracken observed cracks. DeHaas and McCracken also observed falling rocks.

17. According to Lauver's observations, the loose material was scattered along the full length of the highwall; 30 percent of the highwall was comprised of loose material. He estimated that loose material covered 75 percent of the highwall, at a minimum. Lauver estimated that more than 100 pounds of material was sticking out on the highwall.

18. The inspectors also observed an undercut overhang. The overhang was not barricaded or dangered off. Lauver stated that if the overhang fell, rocks above it will fall out into the pit. Lauver testified that rocks which were unsupported by this overhang could likely bounce and hit a truck parked nearby.

19. Lauver, accompanied by Miller, took photographs of the pit between 10:00 a.m. and 12:00 p.m.on February 6. See Exhibits G-2a through G-2n and G-2aa through G-2nn.[2] The photographs do not show all the loose material on the highwall.

20. According to Lauver, the photographs show unsupported rock (photographs 2aa, 2dd, circles "A" and "B"), and cracks developed behind the rocks and shale on the highwall. (Photographs 2A, circle D).

Lauver pointed out a large crack extending diagonally from left to right (Exhibits 2b, 2e, 2n, circle "J"), and loose rock (Exhibits 2, circles "M" and "N", Exhibits 2h, 21, circle "0", circle "C", and circle "J"). He opined that photograph 2A shows non-scaled material pushed away from the highwall (circle A), and unsupported rock (circle C).

21. On February 6, 1991, issued a Section 107(a) Withdrawal Order citing an imminent danger covering the entire highwall, and also issued a Section 103(k) Order.

D. DID THE HIGHWALL DETERIORATE OVERNIGHT?

22. Respondents' witnesses were not present at the site on February 6 when it was examined and photographed by MSHA Inspectors, and observed by Pennsylvania Inspectors. However, they examined the photograph taken on February 5, (Exhibit G-2).

a. Testimony of Lay Witnesses

John Woods, who was employed by L & J on February 5, and who was certified to examine highwalls, and Todd, testified that the crack depicted was "A" in the photographs that comprise Exhibit G-2 as not present on February 5. With regard to the loose material that Lauver explained existed in the area marked "B", (Exhibit G-2), Woods and Todd opined that what is shown is not loose material.

23. Spencer testified that in his examination on February 5, he did not notice hazardous material in the area circled as "C" (Exhibit G-2).

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[2] Exhibits G-2a through G-2n were enlarged for use at the continued hearing on August 24 and 25. The enlargements were admitted as Exhibits G-2aa through G-nn. Collectively, these photographs are referred to as Exhibit G-2.

24. Todd stated that this material is loose rock, but it was not present on February 5.

25. Woods stated that the material marked as "1" in "C" (Exhibit G-2) looked loose, but it was not present on February 5. Woods could not say if the gap "E" was in existence on February 5. Woods did not see any mud slip at "F". (Ex G-2) Woods opined that the material depicted at "H" (Exhibit G-2) and identified by Lauver as loose did not constitute a hazard. Woods conceded that the crack "G" was unsafe. (Ex. G-2) However, Todd explained that there was no intention to auger in that area due to the unsafe condition. He indicated that there were not any trucks or conveyor belts located under that point.

26. Todd stated that the crack depicted at "J" (Exhibit G-2) was not in existence on February 5. Also, Todd stated that the crack depicted at "K" (Exhibit G-2) was not present on February 5, and that he was certain that this crack (Exhibit G-2) was not present prior to the accident. He indicated that if the crack was present he would not have allowed miners to work until the condition was fixed or taken care of.

27. Woods opined that the rocks depicted at "L" (Exhibit G-2) were not loose as testified to by Lauver, but only were chipped. Both Woods and Todd agreed that the material depicted at "M" (Exhibit G-2) was loose rock, but maintained that this condition was not present prior to February 6.

28. Todd could not remember the existence of loose material as depicted at "N". (Exhibit G-2) Woods testified that the material depicted could be loose rock, but that he could not tell from looking at the photograph. He indicated that there were no loose rocks in the area of "N" and "O" (Exhibits G-2) when he made his examination on February 5.

29. Woods testified that those rocks marked in circle "C" noted by MSHA Inspector Ronald Miller, as being loose and looked loose, but "it wasn't there the day I inspected the high wall they were not there on February 5." (sic) (Tr. 219, May 18, 1993).

30. The undercut in G-2d "G" was in the far left side of the pit, and it was 30' to 35' from nearest piece of equipment. The auger crew never intended to mine under the overhang, and did not do so.

31. Dr. Kelvin Wu, a professional b expert testimony regarding the photographs (Exhibit G-2) engineer employed by MSHA, examined the photographs (Exhibit G-2), and opined that

loose material was depicted in 2aa, circles 1, 2, 3 and 4, which he termed unstable. He also opined that a crack was depicted in 2(g) as well as material without support depicted in 2ff.

32. Respondent's expert, Vincent Scovazzo, a professional engineer, opined that the material depicted in circles 1 and 2 in 2aa, when depicted from a different angle in 2cc appeared stable and well supported. He also opined that as depicted in 2cc there appeared to be sufficient material below the items within circle 4 to prevent these items from sliding. He indicated that he could not comment on the stability of the material within circle 3 in 2aa as the picture was hazy. However, he said that as depicted in 2ll the material appeared to be a loose rock. He also indicated that 2m depicted loose rock, and 2h showed a crack. He agreed that the pictures depicted more loose rocks than those that were circled.

E. Weather Conditions

33. In essence, the parties stipulated to accept the weather data compiled by J. Donald Krise with the exception of his data on precipitation.[3] The data collected by Krise is based upon his contemporaneous readings of meteorological instruments located at a site 12 miles from the subject mine.

34. In summary, in the days immediately preceding January 25, 1991 and the start of auger mining in the No. 3 Pit, the temperature did not rise above the freezing mark. From January 26, 1991 to January 30, 1991, a period of freezing and thawing took place: the low temperatures were below freezing, while the high temperatures were above freezing. Then, 2 days of below-freezing temperatures on January 31, 1991 and February 1, 1991, were followed by temperatures which beginning on February 3, 1991, were consistently well above freezing.

35. The detailed temperature data compiled by J. Donald Krise, is as follows:

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[3] The parties did not stipulate to be bound of Krise's data regarding precipitation. However, I accept Krise's records regarding precipitation, as they are based upon contemporaneous empirically based data. In contrast, the testimony proffered by the witnesses for both parties is not accorded much weight as the testimony was subjective, not based upon empirical data, and related to events that occurred two years prior to the hearing.

Date	Temperature	Date	Temperature
1/21	low: 6 hi: 32	1/26	low: 2 hi: 33
1/22	low: -1 hi: 22	1/27	low: 13 hi: 35
1/23	low: -1 hi: 34	1/28	low: 27 hi: 37
1/24	low: 9 hi: 26	1/29	low: 12 hi: 44
1/25	low: 0 hi: 20	1/30	low: 32 hi: 45
1/31	low: 15 hi: 32	2/4	low: 37 hi: 56
2/1	low: 13 hi: 28	2/5	low: 34 hi: 58
2/2	low: 28 hi: 46	2/6	low: 44 hi: 48
2/3	low: 37 hi: 50		

36. As compiled by Krise, the rainfall for February 5 was .01, and for February 6, up to 8:00 a.m. the rainfall was .03.

F. Expert testimony

37. The parties stipulated that in analyzing the issue of whether the conditions that were observed on February 6 had existed the day before and the testimony of the expert witnesses, Wu and Scovazzo, is to be relied on exclusively.

38. Kelvin Wu testified as an expert witness for MSHA. Wu holds a doctorate in mine engineering from the University of Wisconsin, awarded in 1971.

Wu taught mining, geology, advanced strata control, longwall mining, mine evaluation, surface mining equipment, and safety and health laws. To university undergraduates and graduate students, Dr. Wu has published articles on slope stability analysis and material instability hazards.

39. Vincent Scovazzo testified as an expert witness for respondent. Scovazzo is a professional engineer. He estimated that 25 percent of his billings involve highwall work. He has completed his course work towards his doctorate, but has not completed his dissertation.

40. Wu and Scovazzo agreed that a freeze/thaw effect could lead to a rapid deterioration of a highwall. A freeze/thaw occurs when either rain or ground water is present in the cracks and crevices of a highwall and freezing temperatures transform the liquid water to ice. As the water hardens into ice, it expands, pushing particles and rocks in the highwall away from each and away from the highwall. While the highwall remains frozen, the ice holds loosened particles and rocks in place However, once the temperatures have been above freezing long enough to melt the ice holding a rock to the highwall, the rock will fall.

41. Wu identified in Exhibit 2aa loose material which he circled 1, 2, 3 and 4. He opined that these materials were unstable and constituted a safety hazard. He opined that these conditions could not have developed in a 24 hours time period based upon his review of Krise's temperature and precipitation data. He explained that cracks and loose materials develop naturally and continuously during the mining operation. In addition, removal of the overburden and blasting can cause these conditions. He indicated, however, that although the depicted conditions "probably" could not have been produced by one day of freezing and thawing temperatures, their production was "possible" depending of how extreme the change were between thawing and freezing. (Tr. 61, August 24, 1993).

42. Wu stated that the rock that struck the miners could not have fallen without being preceded by fall of other materials. He indicated that it was possible, but not probable that the supporting materials came out only a few seconds before.

43. The inability to predict when rock or loose material is going to come down makes dealing with this kind of material uncertain and dangerous. Not all readjustment in the strata is visible on the highwall; a great deal of deterioration would not be immediately visible.

44. Dr. Wu opined that the eroded conditions were visible on the day of the accident, because the thawing in the two to three days prior to the accident impacted the highwall.

Dr. Wu testified that under such conditions, "All those loose material on the face have much higher chance to become loose." (sic) (Tr. at 89, August 24, 1993). As Wu explained, the gradual thawing of the ice in the highwall contributed to its dangerous state. "When you have water . . . it loosens anything ready to fall down. The [highwall] is already cracked and when gets in there, they expand and freeze. They push the material out a little bit, but the ice will be holding the material together. Once the ice melted, there was nothing to hold them, gravity takes over . . . [they] fall." (sic) (Tr. 89-90, August 24, 1993).

45. Wu testified that augering causes the rock strata to readjust itself continuously to reach equilibrium. As a result, these loose materials are developed. Once these materials lose support, they will fall from the face.

46. Wu described the highwall depicted in exhibits G-2 as a very "jagged" and "rugged" (Tr. 67, August 24, 1993)." He testified that even more precaution is necessary with such loose material than during normal mining operations.

47. Wu opined that, from his review of the photographs, the area had not been adequately scaled.

48. Wu testified that the highest reach of a front-end loader is twenty feet. He opined that a front-end loader could not have reached the top of a highwall in the 30 to 50 foot range for scaling purposes.

49. According to Scovazzo, the amount of precipitation recorded in Krise's weather logs would have had a negligible effect on highwall erosion. Only "heavy" rain would have substantially added to the erosion caused by thawing. (Tr. at 166, August 24, 1993).

50. Scovazzo also agreed that, in general, it was probable that a highwall which was 75 percent covered with loose materials, did not develop that condition in 24 hours.

51. According to Scovazzo "[f]or a highwall to deteriorate quickly, you would have to have a weather event that would thaw the highwall after deep freezing". (Tr. 148, August 24, 1993). He opined that two or three days of high temperature are needed to significantly thaw the highwall. He testified that the night of February 5, 1991, was a very warm night which could have caused dramatic thawing.

52. According to Scovazzo, for the deterioration of the highwall to have occurred between February 5, and February 6, the highwall would have to have been partially frozen followed by a increase in temperature above freezing. He explained that for overnight deterioration to have occurred, the highwall had to have been partially frozen on February 5, 1992, along with thawing after the accident and before the photographs were taken.

53. According to Scovazzo, the whether conditions could have caused the deterioration between February 5, and February 6. He explained that prior to February 3, there was a period of freezing and thawing. Between January 21 and January 27, since temperatures were below freezing, the highwall was deeply frozen. After January 28 and before February 3, since daytime temperatures were about freezing, but nighttime temperatures were below freezing, a thaw occurred that extended only a few inches into the highwall, but whatever melted was refrozen at night. He said that commencing February 3, the daily high and low temperatures were above freezing during the day and night. He said that during that time the few inches of thaw did not refreeze and the highwall continued to thaw. Scovazzo opined that by February 5, the partially frozen wall had thawed approximately a few inches to a foot depending upon how much ground water was delivered to the face, the amount of rainfall, the amount of sun on the face, and the roughness of the surface of the face. He explained that if material sticks out of the face it thaws faster. He said that the night of February 5, was warm and as a result there was a deeper thaw i.e., to a greater depth of the highwall. He said that all these conditions led him to the conclusion that possibly during the night of February 5, there was enough of a thaw to explain the difference between the observations of the highwall on February 5, and the observations on February 6, of the highwall by the MSHA inspectors. In reaching this conclusion, Scovazzo, also took into account Krise's notation for the date of February 6, as follows: "snow 99% gone." (Exhibit G-22) Scovazzo concluded, based upon this notation, that there had been no substantial ground thaw until February 6, and therefore there could have been a substantial thaw the night of February 5. He said that, in general, snow thaws easier than the ice in a highwall, as snow is usually only a few inches deep whereas ice penetrates a highwall to a greater depth. He opined that contributing to the thaw, the night of February 5 was the constant drizzle in the evening. However, he said that the effect on the thawing of the amount of precipitation reported by Krise is insignificant.

54. According to Scovazzo, since the temperature was above freezing from February 3, until February 7, significant thawing occurred in that period.

55. Scovazzo opined that on February 5, the wall was partially frozen. He said that it takes a long time for a thaw to penetrate and unfreeze the wall. Hence, a deep thaw is needed to cause deterioration.

G. Ground Control Plan

56. The ground control plan in effect for the No. 3 Pit at the time of the accident states as follows: "Any loose material observed is taken down. If unable to remove loose material, the area next to the highwall is barricaded to protect the workmen." (Exhibit G-32, p. 2).

H. Training and Examinations

57. C.B. Holms, Inc., ("Holms") had performed auger mining at the Garmantown Mine for both the current and former owners of L & J, during the four years prior to the accident at issue.

58. Holms'employees who were in the No. 3 Pit on the day of the accident were Don Lawton, an auger miner with 16 years experience; Doug Todd, a coal auger operator with 14 years experience and the son-in-law of Lawton; Larry Fulmer, an auger miner with 14 to 15 years experience; Alan Cessna, an auger miner employed on a part-time basis by Holms during the prior two years; and Gary Pershing, who was working his first day with Holms.

59. Todd told Lauver that he did not have a card authorizing him to perform pre-shift examinations. Lauver testified that Todd admitted, "no he did not [perform exams]; because he did not have the certification for it." (Tr. 149, May 17, 1993). Lauver testified that Todd told him that he depended on the company to perform the examinations. id.

60. The Holms auger crew worked eight to eleven hour days during auger operations. The crew with the exception of Cessna, worked in the No. 3 Pit for at least five consecutive days prior to the accident, that is, on January 25, 28, 29, 30, 31, and February 1, 1991. Holms and its employees had performed auger mining at the L & J Garmantown Mine for at least 4 years prior to the day of the accident.

61. Lauver reviewed Respondents' record books for records of hazard training. According to Lauver, both Spencer and Woods stated that they were aware of the requirements of hazard training.

62. Spencer admitted that he knew MSHA's training requirements, but "I assumed they [the auger employees] had their training." (Tr. at 101, May 19, 1993).

63. None of the auger crew members had received valid MSHA refresher training and the new auger crew member had no training. According to Todd, the auger crew knew that they needed training, but Lawton instructed them to wait until after the job was finished.

64. Spencer did not record his examinations, because he did not know the results were to be recorded. However, he told Inspector Lauver that he had inspected the highwall three times before 12:30 p.m. on February 5, 1991, and found it to be safe.

I. Citations and Orders

65. Lauver issued imminent danger Order No. 3490035, under Section 107(a) of the Mine Safety and Health Act ("the Act") and accompanying Citation No. 3490036, under Section 104(a) of the Act. He issued the order based on the dangerous condition of the highwall at the No. 3 Pit on February 6, 1991. He issued the citation for violations of 30 C.F.R. § 77.1005.

66. Inspector issued Citation No. 2892100, under Section 104(a) of the Act, on February 13, 1991, citing a violation of 30 C.F.R. § 77.1000. He issued this citation for the operator's failure to follow the ground control plan.

67. Lauver issued Citation No. 3490202, under Section 104(a) supra, on February 13, 1991 citing a violation of 30 C.F.R. § 77.1000-1. He issued the citation for the operator's failure to note hazardous conditions on the highwall during its pre-shift inspection.

68. Lauver issued Citation No. 3490201, under Section 104(d)(1) supra on February 13, 1991 for violations of 30 C.F.R. § 48.31(a). He issued the citation for the operator's failure to provide hazard training to the employee of C.B. Holms.

69. Miller issued Citation No. 3486001, under Section 104(a) supra, on February 13, 1991 for violations of 30 C.F.R. § 77.1000-1. He issued the citation for failure to file a ground control plan with MSHA showing auger mining taking place. Lauver issued Citation No. 3490203, under Section 104(a) supra,

on February 13, 1991, for violations of 30 C.F.R. § 77.1501(a). He issued the citation for a lack of records showing examination of the highwall for a distance of 25 feet where augering was taking place.

70. Lauver issued Citation No. 3490204, under Section 104(a) supra, on February 13, 1991, for violations of 30 C.F.R. § 77.1501(b). He issued the citation for a lack of records showing frequent examinations of the highwall during periods of freezing and thawing.

71. Douglas C. Shimmel, a licensed CPA prepared a pro forma review of L & J's financial statements, based on L & J's cash receipts and distributions. He did not review the actual bills, nor did he determine if there statements given to him by L & J employees were accurate nor did he test L & J internal control.

J. L & J ability to continue in business

72. L & J Energy has assets of over $1,600,000.00 in mining equipment. These assets have risen by $200,000.00 in the past two years.

73. The pro forma statement prepared by Shimmel shows, as of December 31, 1992, current liabilities of $417,812.00, and current assets of $89,408. Also shown is net income of $161,063.00, and net cash provided by operating activities of $366,435.00.

74. L & J showed total income on its IRS return for 1992 of $687,421.00 and $595,696.00 for 1991.

75. L & J had sales of nearly 2 million dollars in 1992. L & J's sales increased by $100,000.00 from 1991 to 1992.

76. L & J incurred notes payable of $195,000.00 in 1992.

77. L & J incurred nearly $400,000.00 of loans to purchase new equipment in 1992.

78. L & J has at least two affiliates - Cloe Mining and Hepburne Mining - owned by shareholder Robert Spencer. Respondent has provided no information on the financial condition of these companies.

79. L & J is owned by one shareholder, Robert Spencer. Respondent supplied no information on the financial status of Spencer and has not established that it will be a personal hardship for Spencer to pay a civil penalty.

80. Robert Spencer received $300,000.00 in distributions in 1991, and $260,000.00 in distributions in 1992. These distributions are used to pay the former shareholder for L & J.

81. According to Shimmel of the reclamation liabilities of L & J are taken to account, along with current liabilities, current liabilities would exceed assets by $1,028,422.00[4]

II. DISCUSSION

A. Order No. 3490035

On February 6, 1991, MSHA Inspector Charles Lauver issued a withdrawal order under Section 107(a) of the Act. This withdrawal order prohibited persons from entering L & J Energy No. 3 Pit due to an imminent danger posed by erosion of the highwall.

No witness seriously contests the state of the highwall on this date.[5] All the witnesses who saw the highwall of February 6 - the MSHA inspectors and the Pennsylvania DER inspectors - said that loose rocks covered the highwall, cracks and "slips" ran throughout the highwall, and an unbarricaded overhang existed in the highwall. The testimony of MSHA

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[4] According to William E. Maines, a professional engineer, who prepared an estimate of reclamation liability, (Respondent's Exhibit No. 4) as of December 31, 1992, some reclamation costs are incurred when mining starts. However, the costs that he calculated were based upon the reclamation costs to all Respondent's mines, assuming they would be shut down. However, as of December 31, 1992, only at the Garmantown No. 2 was mining completed, Respondents other mines, including an active pit at Garmantown No. 2 were still considered active. Hence, it has not been established that the figures set forth by Maines for reclamation, are obligations in full for L & J in the category of current liabilities as there is no proof that the full amount of the reclamation or indeed of any specific amount is to be satisfied within the next year of December 31, 1992.

[5] As counsel for MSHA stated in the conference call, the imminent danger order was issued for February 6, 1991. All other citations concern the state of the highwall prior to the accident on February 5, 1991.

Inspectors Lauver, Miller, and Kopsic that they saw rocks and stones falling from the highwall on that date was uncontradicted. Lauver's, Miller's and Kopsic's testimony that on February 6, 1993, the entire highwall face was covered with loose materials, and that 75 percent of the highwall face on February 6, 1993 was covered by loose rocks is uncontradicted.

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

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

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

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

As the Commission has recently stated:

> [A]n inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger.

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statue 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. [Citation omitted.] Wyoming Fuel Co., 14 FMSHRC 1282, 1291.

The conditions observed on February 6 constituted an imminent danger to persons entering the pit. Rocks and stones were falling from the highwall. Loose materials covered the highwall. Inspector Lauver had Inspector Miller watch the wall while he entered the pit to make sure rocks did not fall on him, and Lauver stayed at least 15 feet away from the highwall. The day before, falling rocks had already killed one miner, and seriously injured a second miner. I find that the threat of serious injury was clear at the time this order was issued. Accordingly, it is concluded Lauver did not abuse his discretion, and the withdrawal order under Section 107(a) was properly issued.

B. Citation Numbers 3490036, 2892100, 3490202, 3490203

Citation No. 3490036 alleges a violation of 30 C.F.R. § 105(a) which, as pertinent, requires that hazardous areas of a highwall shall be scaled before work is performed. Citation No. 2892100 alleges a violation of 30 C.F.R. § 77.1000 in that the operator failed to follow at its ground control plan ("Plan"). The plan requires the operator to remove loose material, or to barricade the area next to the highwall if unable to remove loose material. Citation No. 3490202 alleges a violation of 30 C.F.R. § 77.1713 which, in essence, requires the examination of the highwall for hazardous conditions. Section 77.1713, supra, further provides that any hazardous condition noted shall be reported and corrected. Citation No. 3490203 alleges a violation of 30 C.F.R. § 77.1501, which, as pertinent, requires the inspection of a highwall 25 feet on both sides of each the drilling site, at least once a shift, and the removal of loose material. Hence, in deciding whether these violations have been established, it must first be evaluated whether, on February 5, 1991, the highwall contained a hazardous area or loose material.

In essence, the testimony of MSHA and DER inspectors that on February 6, 1991, there were numerous loose materials on the highwall, materials were falling from the highwall, and the

highwall contained cracks and mud slips, was not contradicted or impeached.[6] Specifically, Lauver estimated that loose material covered, at a minimum, 75 percent of the highwall. He estimated that more than an 100 pounds of material was sticking out of the highwall. I conclude, based upon this uncontradicted testimony that on the morning of February 6, the highwall contained loose material, and was hazardous.

In order for Citation Numbers 3490036, 2892100, 34906202, 3490203 to be sustained, it must be initially determined whether it is more likely than not that these conditions existed the previous day. In analyzing this issue, pursuant to the parties' stipulation, I rely exclusively on an analysis of the opinions proffered by Wu and Scovazzo.

1. Freeze/Thaw Effect

Both Wu and Scovazzo agreed, in essence, that hazardous conditions are created by a freeze/thaw effect. Essentially, they explained that as result of a freeze the water present in the cracks and crevices of a highwall is transformed to ice. As the water changes into ice, it expands, and rocks in the highwall are pushed away from each other, and from the highwall. While the highwall remains frozen, the ice holds these particles and rocks in place. However, once the temperatures have been above freezing long enough melt the ice holding the rocks to the highwall, the rocks then lose their support and will fall. Wu and Scovazzo also agreed that 2 to 3 days of temperatures above freezing would be unnecessary to cause rapid deterioration of a highwall that had been previously been frozen. They also agreed that there is no linear relationship between changes in temperatures from below to above freezing, and changes in the conditions of a highwall.

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[6] None of Respondent's witnesses observed the conditions of the highwall on February 6. Although Respondent's witnesses Scovazzo, Todd and Woods, opined that, in essence some of the materials depicted in the photographs (Exhibit G2) were not hazardous or loose, it is significant to note that Scovazzo conceded that circle, "3" in photograph Exhibits 2ll, and 2mm depicts loose rock, and Exhibit 2h depicts a crack. He also admitted that the pictures contain more loose rock than those that are circled. Todd recognized the existence of cracks, and opined that the material circled as "C" was loose rock. In the same fashion, Woods indicated that the item depicted as "1" within circle "C" looked loose. Both Todd and Woods conceded that the material depicted as "M" looked loose.

2. Scovazzo's Analysis

In essence, according to Scovazzo, based on the weather data recorded by Krise, it is probable that the conditions observed on February 6 had developed overnight. In this connection Scovazzo noted the period between January 21 and January 27, in which the temperature remained below freezing, followed by a five day period between January 28 and February 2 when the temperature fluctuated between above and below freezing. He opined that by February 5, the highwall had only thawed from a few inches to a foot depending upon exposure to sun and the roughness of the surface. He said that the night of February 5 was "very warm" (Tr. 162, August 24, 1993) which could have caused a dramatic thaw on the highwall. He noted that by the morning of February 6, the temperatures had been above freezing for at least 3 days.

In reaching his conclusion that there was no substantial thaw on the highwall until February 6, Scovazzo took into account the following notation by Krise relating to February 6: "snow 99 percent gone." (Ex G-22). Scovazzo indicated that, in general, if loose material covered 75 percent of a highwall it is probable that these conditions developed in 24 hours. However, he indicated that, assuming the observers were truthful regarding the lack of any hazardous conditions February 5, on the highwall at issue, he could not say that it was not probable that these conditions developed in 24 hours.

3. Wu's Analysis

Wu explained that cracks in rocks develop naturally, and are revealed when the highwall is developed. He also said that exposure to weather elements causes deterioration of materials on the highwall. Also, with the development of a highwall, additional cracks are developed as a consequences of the auger mining which causes the strata to readjust itself. Wu also said that it impossible to predict when a loose rock will fall out of the highwall. None of this testimony has been impeached or contradicted, and I accept it.

Wu opined that a 2 to 3 day thaw made visible erosion that had previously occurred. In essence, he further opined that the conditions depicted in Exhibit 2 possibly developed in one day, depending upon how extreme the change was between a thaw and freeze, but that it was not probable. In this connection, Wu reviewed the weather data recorded by Krise. He opined that the data did not indicate a sudden frost or dramatic rise in temperatures prior to February 6.

4. Evaluation of the Experts' Analyses

Scovazzo's opinion that the conditions observed on February 6 developed overnight, is predicated, inter alia, upon the presence of a significant thaw resulting from a 2 to 3 days of high temperatures prior to February 6, "a very warm" night on February 5, (Tr. 162, August 24, 1993) and a notation by Krise on February 6 as follows: "snow 99% gone." (Ex. G-22) This latter notation led him to conclude that there was no substantial thaw until February 6. However, Krises' records do not indicate how much snow had melted during the day of February 2, or on February 3, 4 and 5 all of which days the temperatures were above freezing.[7] Thus, in the absence of such data, Scovazzo's reliance upon the notation of February 6 that the snow was 99 percent gone, to establish that a significant thaw had occurred overnight on February 5 is not well founded. Thus the probative weight of his conclusions are diminished. Further, the weather data does not specifically, convincingly, establish any dramatic change in the 24 hours preceding February 6. Indeed, on February 5, the temperature remained above freezing, and fluctuated between 34 and 58 degrees. Also, Krises' weather data does not indicate any dramatic rainfall on February 5. The measured rainfall of .01 inches was described by Scovazzo as having an insignificant effect on the highwall conditions.[8]

Since Scovazzo's testimony has some diminished probative value, I assign more weight to the analysis and opinions of Wu.

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[7] On February 5 the temperature had reached an high of 58 degrees. However, the day before it had reached 56 degrees, and the day before that it was 50 degrees. Also, Krises' data indicated that although in the 24 hour period of February 2, the low was 28 degrees, at 8:00 a.m. the temperature was 33 degrees and it reached a high of 46 degrees at 6:20 p.m. At 11:03 p.m. the temperature was 38 degrees. The temperatures on February 3, 4 and 5 were all above freezing. Thus, by the morning of February 5 the temperature had been above freezing for at least two 24 hour periods, i.e. February 3, and 4. In addition, it is likely the thaw had extended back to 8:00 a.m., February 2.

[8] In this connection, I accord considerable weight to the precipitation data recorded by Krise, as it is based upon contemporaneous measurements. I accord not much probative value to the subjective recollection of various witnesses of the quality or quantity of rainfall that occurred more than two years prior to their testimony.

5. The physical condition of the highwall on February 5.

The testimony of the inspectors that, on February 6, at a minimum, loose materials covered 75 percent of the highwall, was not contradicted or impeached. The photographs in evidence (Exhibit G-2) do not depict all of the loose material. Scovazzo agreed that the two of the items noted by Wu in the photographs depict loose rock. He also recognized a crack. In the same connection, Todd recognized the existence of loose material in the area circled "C". Woods indicated that the area marked "1" in circle "C" looked loose. Both Woods and Todd recognized loose rock in area marked "M" in the photographs. Also recognized were cracks. Todd and Woods both maintained to indicated that the loose rocks and cracks that they saw depicted on the photographs were not in existence on February 5.

Based upon all the above, I conclude that it is more likely than not, that at least some of the hazardous and loose material observed on the highwall on February 6 were in existence and evident the day before on February 5.

6. Citation Number 3490036 (violation Section 77.1005(a) supra Citation Number 2892100 (violation of Section 77.1000 supra). [9]

I accept the testimony of Respondents' witnesses, based upon observations of their demeanor, that the highwall had been scaled as it was being developed. Essentially, it appears to be the position of Respondent that the highwall had been scaled when needed, and that scaling was not required if no loose or hazardous materials were observed in the days prior to accident. In this connection, it is Respondent's position that the highwall was stable prior to the accident. Inasmuch, as I have concluded that, prior to the fall of the rock at issue on February 5, the highwall did contain loose and hazardous materials, and since there is no evidence that these materials had been scaled, or that the area in question had been barricaded, I conclude that Respondent herein did violate it's ground control plan, Section 77.1000 supra, and Section 77.1005(a) supra.

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[9] Section 77.1000 supra, provides, in essence, that the operator shall follow its Ground Control Plan ("Plan"). Respondent's Plan provides, as pertinent, that any loose observed material is to be taken down. If it is unable to remove loose material the area next to the highwall is to be barricaded.

a. Significant and Substantial

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

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

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

Some rocks fell from the highwall at issue on February 5, 1991, killing one miner and permanently disabling a second miner. These injuries occurred as result of loose material falling from the highwall. An auger crew worked eight hours a day underneath this highwall. If the area had been adequately scaled, such loose material would have been removed in the scaling process. If the area had been barricaded, no miner would have been standing below the highwall when loose materials fell. The failure to scale the highwall left loose materials, cracks and other unstable features on the highwall. The failure to barricade allowed persons to work near these unstable features. The violation allowed the exposure of miners to the discrete

safety hazard of falling materials. Miners were exposed to these hazards for an entire working shift. Since a fatal accident occurred, I conclude that the reasonable likelihood of an injury from these falling materials, and a resulting serious injury have been demonstrated.

For essentially the same reasons, the violation of the ground control plan is also to be found to be significant and substantial.

7. Citation No. 3490202 (violation of Section 77.1713(a))

Section 77.1713(a) requires that a certified person inspect a surface coal mine daily, and that hazardous conditions be reported and corrected as a result of this inspection.

John Woods, a machine operator, was the certified examiner for L & J. He was the only certified person examining the mine, as no certified person worked for C.B. Holms. Woods had the responsibility to report hazardous violations at this highwall, and to correct them. Woods and Spencer testified that they examined the area in question.

The credible evidence established that hazardous loose unconsolidated materials existed on the highwall on the morning when Woods made his examination (II(B), infra). Woods did not note these hazardous conditions in the examination book, and did not have them corrected. Instead, his entry in the examination book states the highwall was "OK". Therefore, the operator violated Section 17.1713.

Significant and Substantial

Essentially for the reasons set forth above (II(B)(b)(a) infra)), I conclude that the violation was significant and substantial. Specifically, I find that failure to note and correct the loose materials contributed to the hazards caused by presence of these materials in an area where persons were permitted to work, and in the ordinary course of mining would continue to work.

8. Citation Numbers 3490203 (violation of Section 77.1501(a) and Citation 3490204 (violation of Section 77.1501(b)).

Lauver issued Citation Number 3490203 alleging a violation of Section 77.1501(a) supra, which requires that a certified person shall inspect a surface coal mine for an distance of 25

feet on both sides of each drilling site, at least once during each coal producing shift, and all loose material shall be removed, and the results recorded.

Woods testified that he made an examination of the highwall on February 5. He was not certain of the time of the day when he made his inspection. He said that in his opinion the condition of the highwall was safe, and he did not see any dangerous loose material, or cracks. Woods said that he recorded the examination in the "job book." (Tr. 208, May 18, 1993).

Spencer testified that he examined the highwall "at least two times, sometimes three times, maybe even more than that." (Tr. 95, May 19, 1993). He indicated that on February 5, he examined the highwall where the accident occurred at least three times. He said that his examination would have been from 7:00 a.m. to 12:30 p.m. He said that he did not observe loose material or rocks, and did not record his examination.

As set forth above, (II(B) infra)), I have found that it was more likely than not that the hazardous conditions observed on February 6 existed on February 5. I also have found these should have been noted in an examination. Also, as discussed above, II(B) infra, the weather records show a period of thawing and freezing for a week prior to February 5, 1991. Section 77.1501(b) supra requires in essence that a certified person "frequently" inspect the face of the highwall in a period of freezing and thawing. Neither Woods nor Spencer testified to any examination made on the basis of the thawing and freezing that occurred a week prior to February 5, 1991. Nor was any such examination entered and recorded during this time period.

For these reasons, I conclude that Respondent did violate Section 77.1501(a) and Section 77.1501(b).

9. Citation No. 38406001.

Citation No. 3846001 alleges a violation of 30 C.F.R. § 77.1001-1 which requires that an operator shall file revisions to its ground control plan. The last ground control plan that the operator filed with MSHA did not indicate any auger mining taking place at the No. 3 Pit at issue. There is no evidence that any revised plan was filed with MSHA. I, therefore, conclude that Respondent did violate Section 77.1000-1 as alleged.

10. Order No. 38490201

None of the auger crew who had been employed by Holms prior to February 5, had received any hazard training within the immediate preceding 12 month period. Gary Pershing, who had started to work for Holms on February 5, was spoken to only by Todd, who was not an MSHA certified trainer, for about 15 to 20 minutes, and was told to watch the highwall and specific equipment. Pershing did not receive any training from any MSHA certified trainer. Lauver issued an order alleging a violation of 30 C.F.R. § 48.31. Section 48.31(a) provides, as pertinent, as follows: "Operators shall provide to those miners, as defined in § 48.22(a)(2). (Definition of miner) of this subpart B, a training program, before such miners commence their work duties." The training program includes hazard recognition and avoidance.

The obligation of an operator to train under Section 48.31 supra, pertains to the limited class of miners "as defined in Section 48.22(a)(2)." Section 48.22(a)(2) provides, as pertinent, that the term "miner", for purposes of Section 48.31 supra means a person working in a surface mine ". . . excluding a person covered under paragraph (a)(1) of this section . . . ." Hence, the obligation of an operator to train a miner under Section 48.31 excludes the class of persons covered under paragraph (a)(1) of Section 48.22. Section 48.22(a)(1), after stating that a "miner" means "for purposes of Section 48.22 through Section 48.30" a person working in a surface mine who is engaged in the extraction and production process provides as follows "short-term specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process . . . may in lieu of subsequent training for each new employment, receive-training under Section 48.31 (Hazard training.)" Since all members of the auger crew were working in a surface mine, and were engaged in the extraction and production process, they fell within the meaning of the term "miner" as forth in Section 48.22(a)(1), for purposes of training as provided in Section 48.23-48.30. As such, they were "covered" under paragraph (a)(1) of Section 48.22 and hence, pursuant to Section 48.22(a)(2), were excluded from the class of miners for whom Section 48.31 hazard training is required to be provided by operator.

Petitioner argues, in essence, that since the auger members crew were short-term specialized contractors, they were "eligible" for hazard training under Section 48.31. However, applying the clear language of Section 48.22, since these individuals were engaged in the extraction and production process, they were within the class of miners to whom, training should be provided in Section 48.23-48.30, but they "may in lieu

of subsequent training for each new employment receive retraining under hazard training." (Emphasis added.) As such, an option is provided for these individuals, to "receive" training under Section 48.31 "in lieu of" training under Section 48.23-48.30. There is no obligation for operators to train these persons under Section 48.31. Hence, since the auger crew members were not in the class of miners to whom L & J was required under Section 48.31 to train regarding hazards, L & J did not violate Section 48.31, and accordingly Order No. 3490201 shall be dismissed.

11. Penalty

1. The effect of a penalty on the L & J's ability to continue in business.

Douglas Shimmel, a licensed, CPA, prepared a review of L & Js financial statements based on L & Js cash receipts, and distributions. This report is not an audit, and it is not based upon a review of L & Js actual bills. Nor did Shimmel probe the accuracy of statements provided him by L & J employees, nor did he test L & Js internal control. Shimmel indicated that, in general his report is substantially less in scope than an examination in accordance with generally accepted accounting standards.

Shimmel noted that, as of December 1992, the difference between current liabilities and current assess was $328,000.00. He said that this constituted an increase over the difference that had resulted in 1991. This led him to conclude that the company may be unable to continue as a going concern.

Shimmel indicated that in 1992 the net cash flow from operating expenses was $366,435.00. He was concerned that this amount does not reflect the decreasing working capital based on the difference between current liabilities and current asset which is based in part, on a increase in accounts payable in 1992, compared to 1991, and a correspondent decrease in accounts receivable in those years. [10]

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[10] According to Shimmel, L & J's financial condition would be even worse if the liability for land reclamation is taken into account, and included its current liabilities. I do not consider this obligation to be a part of L & J financial picture. According to William Maines, a professional engineer who prepared an estimate of reclamation liability, (Exhibit R4), some reclamation cost are incurred when mining starts. The costs that he calculated were based on the cost to all of L & Js mines, assuming that they would be shut down. As of December 31, 1992,

In general, the operator bears the burden of establishing that payment of civil penalty would adversely effect its ability to continue in business (See, Sellerburg Stone Company v. FMSHRC 736 F2d 1147, 1153, n.14 (7th Cir. 1984) citing, Buffalo Mining Company, 2 IBMA 226, 247-48-251-252 (1973)). In the instant case, it significant to note that the evidence adduced by L & J consists of a report prepared by its' accountant. The report is not an audit, and does not comply with general accounting principles. Further, this report indicates that income and net profit have risen in the last two years. Also, the tax returns filed by L & J show a profit. Further, L & J's revenue is in excess of a million dollars. In view of these facts, I conclude that it has not been established that the imposition of penalties would significantly impair L & J ability to continue in business.

2. Other Factors set forth in Section 110(i) of the Act.

I find that the violations herein contributed to a fatality, and to serious injuries suffered by another miner. Hence, I conclude that the violations were of a very high level of gravity. Also, above I have concluded that it is more likely than not that some of the conditions that were observed as being hazardous on February 6, had existed on February 5. Hence, they should have been observed and reported. As such, I conclude that Respondent's negligence was of more than a moderate degree. Taking all of these factors into account, I conclude that the

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only at the Garmantown No. 2 Mine was mining completed. L & J's other mines, were considered active. Hence, it has not been established that the figures set forth by Maines for reclamation are obligations in full in the category of a current liability, as there is not adequate evidence of the full amount of a reclamation, or indeed any specific amount, to be satisfied within the year after December 31, 1992.

following penalties for the following citations and orders are appropriate: Number 3490036-$50,000; Number 2892100-$25,000; Number 3486001-$500; Number 3490202-$11,000; Number 3490203-$500; and 3490204-$500.[11]

ORDER

It is ORDERED as follows:

1. Order No. 3490035 be sustained.

2. Order No. 3490201 be dismissed.

3. Respondent shall within 30 days of this Decision, pay a civil penalty of $87,500.00.

Avram Weisberger
Administrative Law Judge

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[11] The facts supporting these violations, Citation Numbers 3490203 and 3490204, are the same as those that support the violations cited in Citation Numbers 3490036 and 2892100. The high level of gravity, and Respondents negligence have been considered by me in finding a significant penalty to be appropriate for the violations set forth in citation numbers 3490036 and 2892100. Accordingly, I find that, to avoid imposing a double penalty for essentially the same violations, it is appropriate to set a substantially lower penalty for the violations alleged in citation numbers 3490203 and 3490204.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 25 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 93-370-M
	:	A. C. No. 09-00265-05516
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND COMPANY, Respondent	:	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Carl Brown, Steve Brown and Greg Brown, Brown Brothers Sand Company, Howard, Georgia, pro se, for Respondent.

Before: Judge Hodgdon

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor against Brown Brothers Sand Company pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. The petition alleges a violation of the Secretary's mandatory safety standards. For the reasons set forth below, I find that Brown Brothers committed the violation as alleged.

The case was heard on February 1, 1994, in Butler, Georgia. Inspector Steve Manis testified on behalf of the Petitioner. Mr. Jessie J. Lucas testified for the Respondent.

FINDINGS OF FACT

Inspector Manis inspected Brown Brothers Sand Company on March 25, 1993. During his inspection, he observed that the guard on the tail pulley for the railroad car conveyor belt was not in place, but was lying on the ground. As a result, he issued Citation No. 3603315 which stated that: "The guard for the R R car belt conveyor tail pulley was left off. R R car loading area of the tunnel" (P.Ex. 2). Inspector Manis issued the citation as a violation of Section 56.14112(b) of the Secretary's Regulations, 30 C.F.R. § 56.14112(b).

Inspector Manis returned to Brown Brothers on April 15, 1993. At that time, he saw that the tail pulley guard had been replaced and terminated the citation.

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 56.14112(b) provides that: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." In this case, there is no doubt that the tail pulley guard was not securely in place (Tr. 14, 50) and that testing or making adjustments were not being performed (Tr. 17, 37, 50). However, there was a question raised at the hearing as to whether the belt was in operation.

Inspector Manis testified that the belt was in operation and loading sand into a railroad car when he observed the violation (Tr. 21-22, 31). Mr. Lucas testified that the belt was not running while Inspector Manis was in the area of the conveyor (Tr. 34-36). On the other hand, Mr. Lucas also testified that he did not see Mr. Manis inspect the conveyor belt because he (Lucas) was not in the area of the belt while Mr. Manis was inspecting and that sand may have been loaded on that day (Tr. 34-37).

Fact of Violation

I conclude that the conveyor belt was in operation when Inspector Manis observed the missing guard. The inspector's testimony is unequivocal on this point and was not tested or challenged at the hearing. Conversely, Mr. Lucas' assertion that the belt was not running is diminished by the fact that he did not see the inspector examine the belt and by the fact that sand had probably been loaded that day. Consequently, he does not know exactly when the citation was issued and he does not directly contradict Manis' testimony or make what the inspector said that he saw impossible to have occurred.

I find that on March 25, 1993, the tail pulley on the railroad car conveyor belt was not securely in place; that the belt was in operation; and that no testing or adjusting of the belt or tail pulley, requiring removal of the guard, was being performed. Accordingly, I conclude that Brown Brothers violated Section 56.14112(b) of the Regulations as alleged.

Negligence

The inspector found that this violation resulted from Brown Brothers' moderate negligence. In view of the fact that Brown Brothers had previously been cited and penalized for this exact same violation [Secretary v. Brown Brothers Sand Company, 9 FMSHRC 636 (March 1987, Judge Koutras)] and the fact that the guard could have been off for as long as two days (Tr. 50), this would seem to be a generous assessment of the degree of Brown Brothers' negligence. However, it does not appear that anything would be gained by changing the degree of negligence at this stage, so I conclude that the violation in this case resulted from Brown Brothers' moderate negligence.

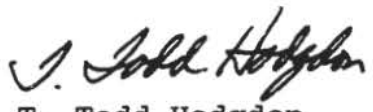
CIVIL PENALTY ASSESSMENT

With regard to the criteria to be considered when assessing a civil penalty, which are set out in Section 110(i) of the Act, 30 U.S.C. § 820(i), the parties have stipulated that: (1) Brown Brothers is a small operator employing nine to ten people; (2) the payment of the proposed civil penalty will not adversely affect Brown Brothers' ability to continue in business; (3) Brown Brothers has a history of nine prior citations during the period between September 25, 1990, and September 24, 1992; and (4) the citation in this proceeding was time abated in good faith by Brown Brothers (Tr. 4).

The Secretary has proposed a penalty of $50.00 for the violation in this case. In view of the information above, as well as the fact that the inspector found that an injury was unlikely to result from this violation and that Respondent's negligence was moderate, I conclude that the proposed penalty of $50.00 is appropriate.

ORDER

Citation No. 3603315 is **AFFIRMED** as written. Brown Brothers Sand Company is **ORDERED** to pay a civil penalty of $50.00 for this violation within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 25 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-408
Petitioner	:	A.C. No. 01-01401-03905R
v.	:	
	:	No. 7 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner;
R. Stanley Morrow, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding initialy concerned proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for twenty (20) violations of certain safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The parties settled nineteen (19) of the violations, and I issued a Partial Settlement Decision on June 3, 1993, approving the settlement. The parties were unable to settle the remaining violation, section 104(d)(1) "S&S" Citation No. 3013115, May 20, 1991, alleging a violation of mandatory safety standard 30 C.F.R. § 75.202, and a hearing was held in Birmingham, Alabama. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the alleged violation was "Significant and Substantial" (S&S), (3) whether the alleged violation was the result of an unwarrantable failure by the respondent to comply with the cited

standard, and (4) the appropriate civil penalty to be assessed for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

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

2. 30 C.F.R. § 75.202.

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

Stipulations

The parties stipulated as follows (Tr. 39-40):

1. The respondent is subject to the jurisdiction of the Act, and the presiding judge has jurisdiction to hear and decide this matter.

2. The respondent is a large mine operator and the payment of a civil penalty assessment for the violation will not adversely affect the respondent's ability to continue in business.

3. The issuance of the section 104(d)(1) citation was procedurally correct in that the mine was on a "(d)" chain.

4. The respondent has an "average" history of prior violations for an operation of its size.

Discussion

The section 104(d)(1) "S&S" citation No. 3013115, issued on May 20, 1991, by MSHA Inspector Terry Gaither, citing a violation of 30 C.F.R. § 75.202, states as follows:

> People on the No. 2 longwall, including managers, were traveling in the cross-cut between No. 3 and No. 4 entry inby the shields and the gob line. The longwall face was approximately 10 feet outby the outby corner of the intersection. The cross-cut was inby spad No. 7677, 1 cross-cut. The traveled area was not provided with additional supports and or otherwise controlled to protect persons from the hazard related to falls from roof or ribs.

Petitioner's Testimony and Evidence

MSHA Inspector Terry Gaither, testified as to his prior mining industry experience of 22 years, including his experience as an MSHA inspector. He confirmed that he is currently employed as a health specialist conducting underground respirable dust and noise surveys, and has engaged in this work for the past four years (Tr. 45). He confirmed that he had previously inspected all of the respondent's longwall sections during regular inspections, as well as longwalls in other areas (Tr. 46-47).

Mr. Gaither stated that he was at the mine on May 20, 1991, conducting a respirable dust technical investigation in connection with a dust plan submitted by the respondent (Tr. 48). Referring to a "representative" sketch of the number 2 longwall area (Exhibit G-1), Mr. Gaither explained the basic operation of the longwall, including the mining of the coal, the advancement of the face, and the operation of the shields as the face is advanced (Tr. 49-52). He confirmed that when the roof falls behind the shields as they are advanced, it will always fall all the way to the yield pillars inby and outby the area identified as crosscut A on Exhibit G-1 (Tr. 52). The yield pillars themselves remain intact depending on the yield and pressures, but they become "sloughed and oval shaped". He confirmed that many times, the roof fall will "ride over into the crosscut", and on many occasions he has observed it "fall plumb into the intersection". He further explained as follows at (Tr. 53-54):

> You know, the question here is not if the roof is going to fall, but when is it going to fall in relationship to where the face and the shields are at because this thing is moving.
>
> You wouldn't have any danger if the shield tips -- this tip right here and right here, you wouldn't have any problem using Crosscut A. But as that thing comes on out, the roof behind the shields is continuously falling.
>
> I think when I read my notes the face was approximately ten feet outby, the outby corner on this yield pillar. The flat surface of this shield is approximately 13 foot the part that goes against the roof.
>
> After that the shield breaks down in the back and the down to the base. Usually your roof at that break line -- I consider that the break line of a temporary support, and anything beyond that break line on that shield is subject to fall into the intersection. And

when that break line of this shield gets into this intersection there's no additional support. And that intersection is hazardous to anybody walking through there to roof bolting and the roof falls.

Mr. Gaither confirmed that he has observed a roof fall in between the face and the tip of the shields, and he explained what occurs during a "squeeze" when the roof falls between the coal seam and shields (Tr. 58). He confirmed that the entry is been bolted as it is driven and advanced, and that the roof falls behind the anchorage of the roof bolts as the roof begins to fall behind the shields (Tr. 59).

Mr. Gaither stated that he reached the longwall face by traveling up the number 3 entry and into intersection B, but did not go into crosscut A. He could see the gob in back of the shields that had advanced into the intersection, and he did not enter crosscut A "because it was hazardous due to roof rib rolls and subject to fall" (Tr. 61). He could see from intersection B that the roof had fallen behind the shields, and he observed no additional roof support or cribs in crosscut A. From his position at intersection B, he observed an electrician, the shear operator, the longwall manager, and the deputy mine manager travelling in crosscut A. After coming through the intersection he instructed the miners to block it off and quit using the crosscut. He then proceeded up the number 4 entry and observed that the roof had fallen in behind the shields, but he could not see "how tight behind" the shields it had fallen, and did not go into the area (Tr. 62).

Mr. Gaither stated that he has "pulled pillars" for years and knows what a "break line" is. He stated that once the shield advanced "out that far", crosscut A would be inby the break line and the roof would be subject to fall, and the crosscut would be hazardous for people to travel through due to rib rolls or falling roof. The potential rib rolls would be caused by the inby or outby ribs of the yield pillars sloughing off, and large lumps of coal or rock can roll off into the walkway. He stated that the pillar corners are usually oval shaped because of sloughage due to the weight of the soft coal seam that cannot support itself (Tr. 64).

Mr. Gaither confirmed that the miners in question were traveling in the crosscut between the Number 3 and 4 entries inby the shields and the gob line, which is the same as the break line. He explained that a break line is the point at which the roof is falling, and it could be over the shields or behind the shields (Tr. 65). Since he did not go into crosscut A, he could not state the exact location of the break line. He only knew

that the roof had fallen "tight in behind the shields". He believed that a break line is predictable, and that it is normally behind the shields where the roof has normally fallen (Tr. 66).

Mr. Gaither confirmed that the miners were not performing any work inby the shields, were not removing any equipment through crosscut A, and were simply walking through the area (Tr. 67). He confirmed that he had recently observed (two weeks before the hearing), that crosscut A and intersection B had fallen in (Tr. 67). He also confirmed that he had observed roof falls in "typical" crosscut A's many times (Tr. 68).

Mr. Gaither confirmed that he did not rely on any MSHA policy in issuing the citation (Tr. 70). He believed that the violation was an "unwarrantable failure" because "management directing the work force, setting an example for the work force, knew or should have know that the crosscut, once the shields were advanced out that far, was hazardous to travel through, the hazard being rib rolls falls from the roof" (Tr. 69-70). He believed that cribs should have been installed as additional roof support in crosscut A, and that this was "typically" done on a longwall section.

On cross-examination, Mr. Gaither stated that crosscut A was approximately 20 feet wide when it was driven, but was probably 25 feet wide due to mining of the longwall and rib sloughage (Tr. 72). The face was approximately ten feet past the edge of the rib. He did not observe that the miners were directly behind the shield, but they were inby the break line in crosscut A behind the cave part of the shield and inby the shields going through crosscut A, and he marked their route of travel by a green dash-line on exhibit G-1 (Tr. 76). He also identified what he believed to be the location of the shield break line (Tr. 78). Since he did not go into crosscut A, he could not determine the actual crosscut roof conditions (Tr. 81).

Mr. Gaither considered the roof "break line" to be the cave area at the back of the shield, and it was his opinion that when the shield cave area, or backside of the shield, is in the crosscut, it would be hazardous to travel in the crosscut without additional support (Tr. 81-83). Assuming that cribs were installed at each corner of the crosscut, if the shield break line was outby the inby crib, he would still consider it hazardous to travel the crosscut and would issue a citation, and the respondent would have to submit a plan to use the travelway under emergency conditions (Tr. 84-85).

Mr. Gaither confirmed that his testimony concerning his recent observation of crosscut A and intersection B pertained to "typical and similar" longwalls, and that the existing areas as

of the time the citation was issued have been mined through and are now inaccessible (Tr. 86-87).

In response to further questions, Mr. Gaither stated that when he observed the miners travelling through crosscut A, they were walking down the middle of the crosscut, inby the breakline identified on exhibit G-1 (Tr. 94-95). Mr. Gaither reiterated that he was not aware of any MSHA unwritten policy when he issued the citation and never discussed with anyone that he should cite a violation of 75.202 (Tr. 102). He explained his theory of the violation as follows at (Tr. 103-104):

Q. Okay. Let me understand your theory here now. If I'm to follow your testimony, whenever that shield gets into that crosscut into the cave line -- the break line into the crosscut, you would require them to take additional roof support precautions, correct?

A. If they wanted to travel through there.

Q. If they wanted to travel through there?

A. Yes, sir

Q. Now, my question always assumes that someone's going to travel through there. So, theoretically, as that break line advances through the crosscut, you would have them put a series of cribs up there?

A. I would do my best to try to get them not to -- to quit using it. Just go around the other way.

Q. To quit using it. All right. Fine. so, this sentence in 75.202 that says that the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled - now, let me ask you this:

Notwithstanding the extent of support, you would interpret "otherwise controlled" to mean that thou shall not pass?

A. True.

Q. So, the other means of controlling then would be -- of controlling that area would be to prohibit anyone from going through there under any circumstances; is that correct?

A. That's correct.

JUDGE KOUTRAS: Is that your understanding of his position, Mr. Lawson?

MR. LAWSON: Judge, it's thou shalt not pass or thou shalt install additional support to permit the passage.

Tommy Boyd, union safety person employed by the respondent as a longwall helper and stage loader, testified that he has 21 years of underground mining experience, including approximately 19 years longwall experience. He confirmed that he works on the number one longwall, but that in his experience, he has observed roof falls and overrides caused by roof pressures in typical areas such as those described in crosscut A and intersection B in this case (Tr. 109-114). He confirmed that his testimony is not based on the conditions that existed on the day that Inspector Gaither issued his citation (Tr. 115). Petitioner's counsel conceded that this was the case, and that Mr. Boyd was not aware of the prevailing conditions at that time, other than the testimony that he has heard in this case, did not know whether the roof would fall that day or not, and that his testimony was offered to support the petitioner's position "that this is what usually happens and what might happen", in order to avoid roof falls by taking additional precautions (Tr. 116).

Mr. Boyd stated that on those occasions when he has observed crosscut A and intersection B roof falls, the face has been in the same relative vicinity of the inby corner of the yield as the face position described by the inspector in this case, and that depending on the roof conditions and override pressures, the roof could fall in less than ten feet from the advanced face (Tr. 119). He confirmed that the shields and pan line on the longwall where he currently works are advanced one or two times during the shift, but he has seen them advanced as much as nine times on the night shift. He has also observed the shields being lowered to advance the shields, and that the roof is broken and drops until the shields are raised again (Tr. 121). He confirmed that the respondent generally installs roof cribs, in addition to roof bolts, in single seams as required by the roof control plan, but does not do so in twin seams (Tr. 122).

On cross-examination, Mr. Boyd stated that there have been two roof fall fatalities in the No. 7 mine, but they did not occur on any longwall sections (Tr. 122).

Inspector Gaither was recalled by the presiding judge, and he confirmed that he spoke with the management personnel who walked through crosscut A and that they offered no explanation and indicated that they would stop using the crosscut in question (Tr. 124). He further explained the basis for his unwarrantable failure finding (Tr. 124-125), and he assumed that mine

management knew that traveling through crosscut A was hazardous (Tr. 136). Mr. Gaither confirmed that he had previously cited the respondent under similar situations, and the petitioner's counsel confirmed that the respondent paid the penalties and did not litigate those citations (Tr. 136). Respondent's counsel also confirmed that this was the case, but he did not know how many previous citations have been issued (Tr. 136-137).

Kenneth Ely, MSHA health and safety group supervisor, Birmingham, Alabama, sub-district office, testified that his duties include the review of roof control plans submitted by mine operators and the making of recommendations to the district manager in connection with those plans (Tr. 141). He has worked for MSHA since 1971, but had no prior underground mining experience. He has served as an MSHA mine inspector and is still an authorized representative of the Secretary. He has also inspected longwalls, has investigated roof falls, and has received training in roof and roof control measures (Tr. 142-144).

Mr. Ely was of the opinion that as the longwall face is mined and advances, and the coal is removed, roof stresses are placed in the area in front of the shields as the coal is extracted from the number 3 and 4 entries (Tr. 151). Evidence of these stresses would be cracks in the roof, or heaving of the floor and sloughing of the ribs between the number 3 and 4 entries (Tr. 152). However, there is no way to predict when the roof will fall behind the shields as the face is advanced (Tr. 153). Further, there is no guarantee that the roof will not "ride over" and fall into crosscut A, and he has witnessed longwall ride over pressures in front of a longwall face (Tr. 156). He further explained that the roof bolts in crosscut A may not be adequate to support the crosscut to prevent it from falling in because they are placed there during the initial development and it is difficult to determine when the roof bolts are subjected to roof pressures nearing their breaking point, and many times crosscut A and intersection B fall in above the roof bolt anchorage zone (Tr. 156).

Mr. Ely stated that with the face located approximately ten feet outby the inby the corner of the yield pillar, as depicted in exhibit P-1, it would be an unsafe practice to travel through crosscut A because of the stresses on the roof and the fact that unplanned roof falls frequently occur in such areas (Tr. 157-158).

Mr. Ely stated that he reviewed the respondent's supplemental roof control plan approved after Judge Fauver's decision in a prior case, and that MSHA permitted the respondent to take equipment through crosscut A after additional roof support was installed (Exhibit P-4, Tr. 159). He was not familiar with any occasion where MSHA prohibited the respondent

from traveling a crosscut as long as it submitted a plan to support the crosscut (Tr. 161).

On cross-examination, Mr. Ely stated that he would consider crosscut A to be unsafe to travel when the face line is in direct line with the inby corner of the yield pillar (Tr. 163-164). He was of the opinion that the "break line" was the line that the roof is expected to break on, and that the roof breaks up on top of the shields regularly (Tr. 166). He confirmed that the sub-district manager's policy was that unrestricted travel through crosscut A and intersection B was to be limited when the face came in line with the inby corner of crosscut A and that no one should be in the crosscut or the intersection (Tr. 168).

Mr. Ely stated that the gob roof area behind the shields will always fall, but that with respect to crosscut A, and whether or not it will always fall in, he stated as follows at (Tr. 190):

> I can't--you know, I cant put a mark on it and say, no, it's not going to fall and, yes, it is going to fall. But from our practice it is an unsafe area for travel because it has a good degree of likelihood to fall.
>
> * * * * * * *
>
> Q. Do you know if crosscut A is going to fall in?
>
> A. No, I don't. I can't testify that it will fall.

Mr. Ely confirmed that pursuant to section 75.202, MSHA would require additional roof support in crosscut A when such areas are to be used as travelways and that a mine operator would be required to submit an additional roof control plan explaining how it intended to supply additional roof support (Tr. 192-193). He explained how such a plan would be reviewed by MSHA and what would be expected of the operator submitting such a plan (Tr. 199-201).

Respondent's Testimony and Evidence

Greg Hendon, respondent's roof control manager, has a 1982 B.S. degree in mining engineering from the University of Alabama, and has been employed by the respondent since 1982. He was admitted as a roof control expert without objection (Tr. 221). He was of the opinion that the only way to determine if a crosscut such as the one in question is adequately supported is to visually observe it (Tr. 222). He stated that he is currently engaged in a study at the mine and recently walked up the mined out No. 3 entry adjacent to the one where the violation was

issued for a distance in excess of 1,000 feet, and past seven crosscuts. None of the intersections were caved in, but half of the crosscuts had caved in, and half had not (Tr. 224).

Mr. Hendon stated that he could not determine from his examination whether or not the face would cave in and that this would be determined by the condition of the roof. He stated that he would not travel in those areas where the roof in the crosscut intersection was bad or thin. In his opinion, the roof break line is at the back of the shield canopy which is designed to break the roof off at the back of the canopy. In his opinion, people should absolutely not go behind the shields (Tr. 225).

Mr. Hendon stated that the break line at the rib line would "cave over to the edge of the pillar", and at some point it possibly comes back into crosscut A (Tr. 226). He explained the roof pressures that ride over the shields as follows at (Tr. 226-227):

> A. Basically, what you have is as you remove the coal, the roof above the coal line bends down behind you, which forms the gob, and that bending of the roof is what causes your pressures.
>
> We've done a good bit of study putting pressure cells in those -- into this coal seam that's left and the yield pillar and the stable pillar, and what we've found is that as the face comes out at some distance outby the face, you have a buildup of pressure.
>
> Q. So, your higher pressure would actually be down below this face line?
>
> A. That's right. That's right.
>
> Q. So, there would be less pressure in Crosscut A than there would be, say, in the crosscut below Crosscut A?
>
> A. That's correct. And that is based on the physical monitoring that we've done. We've put pressure cells in there looking at the leg pressures. We actually have pressure gauges on the shields. And three or four shields at the headgate are historically the lowest pressurized shield that we have.

Mr. Hendon further explained that the yield pillars are designed and monitored not to accept additional loads and to redistribute them. He agreed that excessive pressure on the roof

at crosscut A would cause it to fall in, and if the roof is still standing behind the shields and has not fallen in, there is a greater chance of pressure around the headgate. However, once the roof caves behind the shields, "we always see a pressure relief in front of us and beside us" (Tr. 228). In the instant case, it was his opinion that the fact that the roof had caved right behind the shields indicated that there was less pressure and less chance of a refall in crosscut A (Tr. 229).

Mr. Hendon stated that there was nothing unusual about the inspector looking through intersection B and crosscut A and seeing that rocks had fallen in the gob area, and that from his experience as a longwall foreman, "you see that everyday" (Tr. 22). He stated that he would be more concerned if he saw no rocks because this would indicate that crosscut A was subjected to more pressure than if it was caving behind the shields (Tr. 229). In response to a question as to when it would be safe to travel in crosscut A, Mr. Hendon stated as follows (Tr. 230):

> A. As a longwall person, you feel relatively safe under the shields. Any time you come out from under the shields, you're immediately looking at the roof and seeing what the roof conditions are. You'd look for cracks in the roof, plates bending, evidence of excessive weighting.
>
> Q. So, a visual or a hearing inspection would be the way to --
>
> A. If I came out from under number one shield, I would look at the roof and determine whether it was safe to walk out there or not.
>
> Q. Depending on what you see, you might travel through Crosscut A or you might not?
>
> A. That's correct. If the shield was -- if the face was 100 feet back toward the top and I looked in there and it wasn't safe, you wouldn't go in there.

On cross-examination, Mr. Hendon stated that he walked the No. 3 entry three or four months before the hearing as part of a study with British Coal to determine if two longwalls could be mined with only a yield pillar between them, and he explained where he traveled during the study, the monitoring of the roof, and the crosscuts that had fallen. (Tr. 231-234). He confirmed that the fallen crosscuts were observed from "intersection B", and he described the fallen areas as "basically rock flushing in from the gob", and the roof had fallen in from the sides of the yield pillars into Crosscut A (Tr. 235).

Mr. Hendon confirmed that longwall mining entails the controlled failure of the mine roof and that it is known that the roof will fall behind the shields and that the respondent wants to supplement the roof control plan to control the roof failure. Accordingly, the respondent has implemented a stable yield pillar system of assisting in roof support during longwall mining (Tr. 239). He agreed with inspector Gaither's description of a "break line" as shown on Exhibit G-1. He also agreed that from the break line inby, the roof will fall at some point in time, and that the roof behind the break line will fall over the sides of the yield pillars, and that given the pressures exerted on the mine roof, the roof bolts in the number 4 entry will not stop the fall of the roof behind the break line (Tr. 240).

Mr. Hendon confirmed that when he walked the No. 3 entry and saw evidence of the roof falling or "flushing" into crosscut A from the gob, the existing roof bolts did not stop this flushing into the crosscut (Tr. 241). Mr. Hendon agreed that if a miner were to enter crosscut A to get to the longwall and saw evidence that the roof was taking pressure, such as "popped off roof plates" and cracked roof, this should alert him to add more roof support or not travel the area (Tr. 241). He stated further at (Tr. 242):

> Q. But would you agree, Mr. Hendon, that even mine roof without a roof bolt plate popped off or without a visible crack, even so-called good mine roof can fall without advance warning?
>
> A. That's correct.
>
> Q. And if a miner is traveling through Crosscut A, he does not know at what point in time, if at all, this flushing of the mine roof will take place, does he? He can't sit there and predict when the mine roof will fall, can he?
>
> A. No, sir.

Mr. Hendon agreed that the yield pillar can slough off around the corners, and that it is common to see oval shaped pillars any place, and this could indicate rib sloughing from pressure or the soft coal sloughing off (Tr. 243). He was of the opinion that the location of the longwall face as shown in exhibit G-1, would have relieved any roof pressure according to his studies. However, he conceded that he was not present when the condition was cited, and that he did not monitor that particular location (Tr. 244).

Mr. Hendon stated that given the fact that the roof will fall behind the break line, and the flushing and breaking in

crosscut A, a miner stepping out from under the No. 1 shield and walking through the crosscut inby the break line would have no assurance that the roof pressure on the roof which has fallen and is falling is not going to override into the crosscut and flush out the mine roof and fall (Tr. 244). He agreed that the roof falls behind the break line, and as the face continues to advance, it will fall all the way over to the yield pillars (Tr. 247).

Mr. Hendon stated that given the conditions depicted in exhibit G-1, he would not ask his crew to venture inby the break line into crosscut A and sit against the rib to eat dinner, and that he would be concerned about their safety (Tr. 247-248). He would not consider traveling inby the break line to be a good practice (Tr. 249-250).

In response to further questions, Mr. Hendon stated that during his study he walked inby the roof break line for a distance of one thousand feet and walked into crosscuts similar to crosscut A, but not through them (Tr. 253). He further explained as follows at (Tr. 253-255):

> JUDGE KOUTRAS: Well, I thought you said that you didn't consider it a good mining practice to do that. My hypothetical was if you saw no visible evidence of a roof condition, such as cracks, you still wouldn't think it's a good mining practice for people to be walking in this area. That seems a little contradictory.
>
> THE WITNESS: Well, let me base that on -- there would be -- I can't think of a reason why you would send anyone back there. In my case, I was looking for specific roof control, roof conditions, what was happening at the rib line, was it crushing out the yield pillar. I had a specific reason to be back there.
>
> After visualizing it, looking at it, examining it, and felt like it was safe, I walked over to get a better view. There is no reason that I can think of that I would need to send somebody back there. There's not a hypothetical that I can think of that I would send my men back there.
>
> * * * * * * *
>
> JUDGE KOUTRAS: You wouldn't have any idea as to why these people were walking through there, the people that the inspector observed?
>
> THE WITNESS: It would be purely speculation.

JUDGE KOUTRAS: What would it be, if you were to speculate?

THE WITNESS: If I came off the face, it's much easier to walk straight through the crosscut. Knowing those two men personally, they walked out. They probably walked in that way and didn't see any problems, came up into Intersection B, just as Mr. Gaither testified he did, examined the face, walked through there, came back out and saw no change in the conditions and walked back out the way they came in.

Mr. Hendon was of the opinion that any hazards associated with walking through crosscut A would have to be determined by the existing roof conditions, and he agreed that good roof can fall without advance notice, including the roof in crosscut A. However, the question of whether or not crosscut A is more likely to fall would depend on whether roof pressure has broken the roof, and if it has, it would more likely fall (Tr. 258-259). He confirmed that depending on the roof conditions, when he was a foreman he normally used crosscut A to travel in and out of the longwall area (Tr. 261).

Mr. Hendon stated that the corners of crosscut A would be the most hazardous place and that the respondent routinely installs two cribs at the corners for roof support (Tr. 262). However, based on his pressure surveys, he was of the opinion that intersection B is no more likely to fall in than the others, but there is no guarantee that when the roof falls it will do so evenly and not enter crosscut A (Tr. 265).

Mr. Hendon stated that his roof studies were made at the No. 4, 5, and 7 mines, and that detailed pressure studies are ongoing at the No. 7 mine, but he had no written findings with him. He stated further at (Tr. 268):

Q. Now, despite any studies you may have conducted, any trips you went up to the entry, when you have been a foreman or at any other time when you've been underground at Jim Walter in conditions similar to this as Plaintiff's Exhibit No. 1, you've seen Crosscut A fall in, haven't you, Mr. Hendon?

A. Yes.

Q. And you've seen the roof fall in on top of the shields, haven't you, when the shields have been lowered?

A. Yes, sir.

The Petitioner's Arguments

The petitioner states that after the longwall face has advanced outby crosscut A, that crosscut is not used as a regular travelway, and there is no reason for anyone to go inby the break line into the crosscut. The petitioner asserts that on two or three occasions in the past when the respondent has experienced mechanical breakdowns, and therefore needed to travel through the crosscut to transport machinery and equipment, it has submitted a plan setting forth the additional roof supports to be installed prior to such traveling. However, in the instant case, no such mechanical breakdown or emergency work existed, and respondent's management employees apparently decided to take the easiest path off of the longwall face, which was through crosscut A, but inby the cave break line of the shields. Petitioner concludes that there was no reason whatsoever for the employees to be going through crosscut A, because the longwall and all work associated therewith had advanced outby the crosscut, and that such a course of travel inby the break line is inherently dangerous and subjects the miners to the hazards related to roof falls and rib rolls.

Citing the Commission's decisions in Eastover Mining Co., 4 FMSHRC 1207, 1211 n.8 (July 1982); Consolidation Coal Company, 6 FMSHRC 34, 37 n. 4 (January 1984); and the D.C. Circuit Court's decision in United Mine Workers of America v. Dole, 870 F.2d 662, 664 (D.C. Cir. 1989), the petitioner points out that roof falls have been recognized by Congress, the Secretary of Labor, the mining industry, and the Commission as one of the most serious hazards associated with coal mining.

The petitioner asserts that the respondent's expert mining engineer Hendon agreed with the inspector's definition of break line (Tr. 239), agreed that the mine roof falls behind the break line all the way over into the number 4 entry and over to the yield pillar (Tr. 246-247), admitted that the area inby the break line has higher roof fall potential and that he would not send his men into that area (Tr. 249-251), and admitted that the inby corner of the crosscut was "The most hazardous", and that the respondent normally places two cribs in the crosscut as additional roof support (Tr. 261-262). The petitioner further asserts that Mr. Hendon acknowledged the inherent dangers of crosscut A, confirmed that he has observed similar crosscuts fall in on past occasions, and that there would be no reason why anyone would send anyone inby the break line through crosscut A. Finally, the petitioner points out that safety Committeeman Boyd and inspectors Ely and Gaither confirmed that crosscut A was not a normal travelway.

The petitioner maintains that the respondent's managers were merely taking a convenient shortcut off of the longwall face and were caught by inspector Gaither. The petitioner argues that the

respondent clearly recognized the hazards of travelling inby the break line, normally installs two cribs in the crosscut as additional support, and has no intention of traveling inby the break line through the crosscut on a regular basis.

The petitioner points out that it has not prohibited travel through crosscut A as long as the respondent has submitted a supplemental roof plan showing the additional roof support it would install prior to any travel therein. Given the inherent dangers of the crosscut, the petitioner asserts that it merely wants additional roof support installed prior to any work or travel in the area.

Citing a recent discrimination decision involving the hazards associated with crosscut A, Secretary of Labor on behalf of James Johnson and UMWA v. Jim Walter Resources, Inc., 15 FMSHRC 2367 (November 1993), the petitioner argues that the respondent recognizes the dangers of traveling through such crosscuts when the longwall face has advanced outby the crosscut, and that Judge Fauver noted that when the respondent removes an entire longwall from one section of the mine to another, it advances the face up to a crosscut that is in line with a track entry, and that its approved roof control plan requires additional roof supports such as "timbers set out to the track, cribs set in the No. 3 entry on both sides of the crosscut, timbers set in Crosscut B, additional roof bolts installed in Crosscut B, and the entire face meshed all the way to the tailgate." Petitioner concludes that under such circumstances, the respondent's roof control plan provides for the installation of additional support throughout the crosscut to be traveled, and that in the instant case the respondent failed to even install the minimum two cribs in the crosscut as was normally done, yet two managers were observed walking down the middle of the crosscut.

Citing previous litigation between the parties in Secretary of Labor v. Jim Walter Resources, Inc., 11 FMSHRC 2364 (November 1989), in connection with a ventilation violation of section 75.312, the petitioner states that Judge Weisberger had little difficulty in finding "that crosscut A was unsafe for inspection" in light of the testimony of the respondent's engineer (Franklin) that the advancement of the longwall face causes the roof to fall and transmits pressure on the pillar abutting crosscut A, 11 FMSHRC at 2366.

The petitioner maintains that the cited regulation section 75.202, is designed to protect against the hazards related to roof falls and rib rolls, and that the respondent has recognized these hazards as evidenced by the testimony of Mr. Hendon who described how the inby corner of the crosscut would be the "most hazardous", how the roof falls in from the sides through a process known as "flushing", and how the roof

inby the break line had a "higher potential to fall." (Tr. 235, 251, 261). The petitioner further believes that the respondent's recognition of the hazards of roof falls in crosscut A are further documented by its engineer's testimony in the case decided by Judge Weisberger and by the fact that the respondent routinely installs two cribs in crosscut A for additional roof support (Tr. 70, 121, 171, 262).

The petitioner concludes that given the fact that inspector Gaither observed mine management employees walking down the middle of the crosscut inby the break line without any additional roof support, a violation of the cited standard has been established, and that it is undisputed that traveling inby the break line presents a hazard related to roof falls and/or rib rolls.

With regard to the gravity of the violation, the petitioner asserts that the fact that the roof had not yet started to fall does not minimize the seriousness of the violation. The petitioner cites Secretary of Labor v. Consolidation Coal Co., 6 FMSHRC 34, 38 (January, 1984), where the Commission was confronted with a situation where "every miner on every shift for six months was exposed to the hazard created by the over-wide bolts along the supply track," and held that "the 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 the instant case, the petitioner points out that it is by design that the mine roof falls in behind the shields inby the break line, and that it falls in all the way over through the No. 4 entry and up to the yield pillars, despite the presence of roof bolts in the No. 4 entry.

The petitioner further concludes that the crosscut A area is prone to fall in as well, and that Mr. Hendon testified that he examined seven (7) such crosscuts and about half of them had fallen in, and that the area inby the break line has a higher potential to fall and that he would not send anyone back there. Likewise, Messrs. Gaither, Ely and Boyd all testified as to the roof falls they have observe in such crosscuts. The petitioner concludes that such factors demonstrate the seriousness of walking inby the break line and are the same concerns which prompted Judge Weisberger to deem Crosscut A to be "unsafe for inspection".

The petitioner takes the position that it does not have to resort to rulemaking to prohibit the respondent's managers from walking inby a break line, and that the cited standard section 75.202, is expressed in general terms so that it is adaptable to myriad roof conditions and roof control situations. See generally Kerry-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Petitioner asserts that a formal rule is not necessary to tell industry that walking inby a break line that is designed to

fall is a hazardous practice. Similarly, petitioner believes that the decision to walk inby the break line through crosscut A should not be left to individual decisions, and that "Such a subjective approach ignores the inherent vagaries of human behavior." Secretary of Labor v. Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983).

With regard to the inspector's unwarrantable failure finding, the petitioner asserts that the respondent was aware that MSHA considers crosscut areas inby the break line to be "gob" and not routinely travelable, and that for approximately 10 years, the local MSHA office had an enforcement policy of citing a violation if the forward longwall crosscut was used as a travelway without additional roof support or safeguards. Citing the prior cases concerning the location of the break line and crosscut A, and similar citations issued to the respondent in connection with travel in the crosscut, the petitioner concludes that it is clear that advancement of the longwall face exerts undue pressures on the roof in crosscut A, and the respondent is well aware of this principle of longwall mining, and that for mine management to disregard this and travel beyond the break line into crosscut A constitutes an unwarrantable failure violation.

The petitioner asserts that the prior litigation and the local MSHA policy put the respondent on notice that traveling through crosscut A without additional roof support was prohibited and would result in enforcement action. Citing Drummond Company, Inc., 13 FMSHRC 1362, 1368 (September 1991), and Eastern Associated Coal Corporation, 13 FMSHRC 187 (February 1991), the petitioner concludes that the respondent knew, or "had reason to know", or "should have known" that traveling through crosscut A was prohibited. Petitioner points out that the respondent implemented the practice of installing two cribs in the crosscut and the fact that no work is ever performed behind the break line simply underscores the flagrant conduct of management. Petitioner concludes that the individuals were simply taking a "shortcut" for their own convenience and got caught.

The Respondent's Arguments

In its posthearing brief, the respondent argues that the citation should be vacated because it was based on an MSHA policy that has no basis in law. Rejecting the petitioner's contention that the inspector relied on his experience, rather than on any MSHA policy or manual provision, either written or unwritten, the respondent maintains that it is impossible for an inspector not to be influenced by any "informal" policy, and that MSHA's attempts to enforce its "policy" with respect to the interpretation and application of the cited section 75.202, without proper rulemaking notice and hearing, including the

promulgation of an appropriate mandatory standard, or an amendment or modification of the existing standard, is unlawful.

The respondent further argues that the citation should be vacated because the standard sought to be imposed on it by MSHA is unenforceable due to vagueness because it is unwritten and different MSHA inspectors interpret it in different ways. The respondent states that "the standard" sought to be imposed by the inspector on the longwall in this case is that no miners are allowed to travel in crosscut A (And other typically similar crosscuts) when the break line, located where the canopy meets the cave shield, passes the inby corner of the crosscut. The respondent suggests that it is confused, and it cites a decision by Commission Judge William Fauver on March 10, 1993, affirming a violation of section 75.202(a), in which it contends that a different inspector testified that no miners could travel in the crosscut when the face line passed the outby corner of the crosscut, and a supervisory inspector testified that a violation would occur if anyone travelled in the crosscut, or the adjacent intersection, if the face line had passed the inby corner of the crosscut. Jim Walter Resources, Inc, 15 FMSHRC 432 (March 1993). Further, the respondent asserts that another inspector made a finding that it is not a violation if miners work inby the imaginary line (Attachment to brief).

The respondent argues that section 75.202, concerns the condition of the roof and ribs in question and that its expert witness Hendon testified that the only way to determine whether the roof is adequately supported is by visual observation, and that MSHA's assumptions concerning the pressures associated with longwall mining using yield pillars are erroneous. The respondent maintains that Mr. Hendon's studies proved that the areas prohibited to travel by MSHA actually were under less pressure than the areas through which MSHA desired for miners to be travel. Citing additional testimony by Mr. Hendon that he would not send his crew inby the break line into crosscut A, the respondent points out that he indicated that placing people at the critical rib corner would have to determined by the existing conditions. Respondent also cites Mr. Hendon's testimony that it was not a good practice to be inby the break line without a reason, but points out that Mr. Hendon further testified that he has traveled similar crosscuts inby the break line after visually examing the roof and determining that it was safe, and that he would travel through crosscut A as long as he could, depending on the conditions.

The respondent concludes that Mr. Hendon was of the expert opinion that there should not be a per se rule that crosscut A is not supported based on the position of the breakline, and that each instance must be considered on its own merits. The respondent points out that in the instant case there is evidence of any adverse roof conditions in the area in question.

Assuming that a violation is established, the respondent takes the position that it was not the result of its unwarrantable failure to comply with the cited standard. In support of this conclusion, the respondent relies on its previous argument that the standard sought to be imposed by MSHA is based on various policies which are vague and differ from inspector to inspector, and asserts that it is ludicrous for the petitioner to argue that it knew or should have known which variation of this policy was going to be enforced at the mine on the day of the inspection. The respondent further states that the inspector admitted that he did not question mine management about why they were in the area or if they knew that they were violating his policy. The respondent concludes that the inspector's sweeping statement that "they were aware of the hazards" without further inquiry is not sufficient to raise their actions to aggravated conduct constituting more than ordinary negligence, citing Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1977 (1987), Secretary of Labor v. Gatliff Coal Co., 14 FMSHRC 1982 (1992).

Summarizing its position, the respondent asserts that the citation should be vacated because (1) it was based on an unwritten, unenforceable policy, (2) the standard sought to be imposed by MSHA is vague, and (3) there is no testimony that the roof in the cited area was not supported or otherwise controlled to protect persons from hazards related to falls of the roof, face, or ribs.

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.202, which provides as follows:

> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazard related to falls of the roof, face or ribs and coal or rock bursts.
>
> (b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

The credible and undisputed evidence of the inspector establishes that he issued the citation after observing four miners, including the longwall manager, and deputy mine manager, walking through the cited crosscut inby the longwall roof support shield break or cave line. Although the roof at the crosscut had been supported by roof bolts when the entry was initially driven, it is undisputed that additional roof support such as cribs, was not installed at the crosscut corners. It is further undisputed that the inspector did not go into the crosscut to observe or otherwise determine the immediate roof conditions in the crosscut, but he did observe from an adjacent

entry intersection that the roof had fallen in behind the longwall roof shields.

The petitioner concedes that there is no evidence in this case of any adverse roof conditions, such as a cracked roof, brows, or falling roof around the existing roof bolts. However, the petitioner takes the position that it is an undisputed fact that in longwall mining, the mine roof is going to fall behind the roof shield break line and that there is a real potential for roof pressures and stresses to ride over into the crosscut and cause the roof to fall in that area. Under the circumstances, the petitioner believes that additional roof support must be installed before the crosscut in question is traveled by miners, and since no additional roof support was in place when the inspector observed the miners traveling through the crosscut, the petitioner concludes that a violation has been established and that the inspector was entitled to rely on his 21 years of mining experience in support of his conclusion that traveling through the crosscut without additional roof support in place was an extremely hazardous practice in violation of section 75.202.

The respondent takes the position that in the absence of any observable adverse roof conditions, section 75.202 does not require any additional roof support, and it suggests that MSHA is attempting to enforce a "per se" prohibition against traveling through a crosscut without additional roof support when the longwall canopy shield break line reaches a particular position, namely, just past the inby corner of the crosscut.

Although the respondent's assertion that the existing roof bolts that were installed when the heading was initially driven were in compliance with section 75.202, and its roof control plan, may be true, the question of whether additional roof or rib support was otherwise required pursuant to section 75.202(a), is a matter to be decided on a case-by-case basis. Indeed, the parties agreed that Judge Fauver ruled that MSHA policy is not enforceable, and that any future cases would have to be decided on the actual roof conditions in any given case (Tr. 173). Conceding that Inspector Gaither did not observe any deteriorated roof conditions because he did not travel into Crosscut A, petitioner's counsel nonetheless argued that the face that had advanced ten feet outby the crosscut, in combination with the roof pressures constantly being exerted on the crosscut, constituted a potential hazard that needed to be addressed by the installation of additional roof support if miners intended to travel the crosscut (Tr. 175).

When asked why the parties have not negotiated some agreement as to future roof support requirements, including MSHA's prohibition of any travel through a typical crosscut A on a mine wide basis, the petitioner's counsel stated that after Judge Fauver's decision the parties discussed the filing of a

plan, but that mine management took the position that no plan was required for travel through the intersection (Tr. 117). Respondent's counsel stated that MSHA could easily prohibit travel in the crosscut but that it does not want to do it legally through rulemaking and wants to rely on policy (Tr. 117).

The respondent's assertions that MSHA's insistence on additional roof support at the cited crosscut A was based on a locally or nationally applied policy that is unenforceable, and that Inspector Gaither relied on that policy in issuing the violation, are rejected. While it is true that in the prior litigation before Judge Fauver, MSHA did in fact have a local policy and practice of citing a violation of section 75.202(a), if the forward longwall crosscut was used as a travelway without additional roof support or safeguards, Judge Fauver recognized the fact that such a policy was unenforceable as a mandatory safety standard, and he affirmed the violation based on the evidence presented with respect to the actual roof and mining conditions, irrespective of any such policy. In the instant case, I find no credible support for the respondent's conclusion that the inspector relied on any MSHA policy, and his credible testimony that he was unaware of any such policy and never discussed with anyone that he should cite a violation of section 75.202, stands unrebutted.

I am not persuaded by the fact that the roof did not fall in this case, or that the immediate roof in the crosscut showed no obvious evidence of deterioration. As the U.S. Tenth Circuit has observed "it is clear that Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing", Mid Continent Coal & Coke Co. v. FMSHRC, (10th Cir. September 24, 1981, 2 MSHC 1450). I agree with the petitioner's assertion that serious injuries or death from a roof fall is not a prerequisite to establish a violation in this case. Further, I do not find it unreasonable or onerous to expect a mine operator to take reasonable precautions to protect miners from potentially hazardous roof conditions in a crosscut area that is in close proximity to a roof area that is known to cave or fall in behind the longwall shields as the longwall face is advanced during the coal extraction process. The parties agree that the roof will fall, but disagree as to whether anyone can predict when it will fall.

The respondent's assertion that MSHA's "standard" prohibiting travel in crosscut A when the shield break line passes the inby corner of the crosscut is void for vagueness is rejected. As noted earlier, I have concluded and found that no such regulatory "standard" was in existence a the time the violation in this case was issued. In any event, I conclude and find that the cited section 75.202, language is stated with sufficient certainty to reasonably inform the respondent as to what was required to insure compliance. The regulatory language

clearly requires the respondent to provide adequate protection to protect miners from any roof, face, or rib fall hazards, as well as hazards associated with coal or rock bursts, in areas where they may travel, by supporting or controlling the roof, face, and ribs.

As correctly argued by the petitioner, it is well recognized that roof falls constitute one of the most serious hazards in the coal mining industry, United Mine Workers of America v. Dole, 870 F.2d 662, 669 (D.C. Cir. 1989), and 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 Southern Ohio Coal Company, 10 FMSHRC 138, 139 (February 1988), the Commission affirmed a violation of the roof control requirements of section 75.200, because of the operator's failure to adequately support two of four "brows", or edges, that were created by the excavation of a "boom hole". Roof bolts had been placed in the roof of the boom hole after it was excavated, and the bolts that were in the brows were those that had been placed in the roof of the intersection prior to the excavation of the boom hole. The inspector cited the violation because he believed that the two bolts in question were located too far from the edges of the brows as determined by his two-foot standard as the point at which he considered bolts to be too far from the edge.

In appealing the Judge's decision affirming the violation, SOCCO contended that the brows were adequately supported, that it did not violate its roof control plan, that there was no common industry understanding as to how close to the edge the brows of a boom hole should be bolted, and that all of the witnesses were in agreement that the brows were stable at the time the violation was issued, and that the roof was above average.

The Commission affirmed the violation, and it relied on the language of section 75.200, requiring that "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." This regulatory language is very similar to the language found in the cited section 75.202, in the instant case.

The Commission held that the fact that SOCCO did not violate its roof control plan was not controlling for purpose of determining the existence of the violation predicated on the

regulatory requirement that the roof and ribs be supported or otherwise controlled adequately. The Commission stated as follows at 10 FMSHRC 141:

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

I conclude and find that the question of whether the respondent failed to meet the requirements of section 75.202, must be measured against the standard of whether a reasonably prudent person familiar with all of the facts, would have considered the existing roof bolts that were installed when the entry was initially driven as adequate protection for the miners who were observed walking through Crosscut A, or whether such a person would have installed roof cribs, or other additional roof support, or taken other precautionary measures to protect the miners from roof or rib falls, including dangering off the area, or otherwise prohibiting travel through the crosscut. See: Westmoreland Coal Company, 7 FMSHRC 1338, 1341 (September 1985); United States Steel Corporation, 5 FMSHRC 3 (January 1983); Alabama By-Products Corporation, 4 FMSHRC 2128 (December 1982). In short, the adequacy of any particular roof support must be measured against what the reasonably prudent person would have provided in order to afford the protection intended by the standard. Quinland Coals, Inc., 9 FMSHRC 1614, 1617-18 (September 1987); Canon Coal Co., 9 FMSHRC 667, 668 (April 1987).

The evidence establishes that the respondent has routinely installed cribs at the crosscut corners as additional roof support under circumstances similar to those presented in this case, and it has done so as an added safety measure to protect miners from potential roof falls in the crosscut. Under the circumstances, there is a strong presumption that the respondent recognizes the real and potential hazards of roof and rib falls in those crosscut areas where the longwall face has advanced past the crosscut intersection and the roof is falling in behind the advancing shields.

Inspector Gaither, who has 22 years of mining experience, including the inspection of longwall mining practices, testified credibly that when the break line of the longwall roof support shield reaches the crosscut intersection, that area is hazardous to anyone walking through because no additional roof support is present. He further credibly testified that when the roof falls behind the advancing roof support shield as the coal face is mined and advanced, the roof will fall all the way to the yield pillars at the corners of the crosscut, and that he has on many occasions observed the roof fall in the intersection and "ride over into the crosscut" (Tr. 53-54). He also testified credibly that any travel inby the shield break line would be hazardous because of potential rib rolls caused by sloughage that results from roof pressures on the soft coal seam (Tr. 64).

Longwall helper and stage loader Boyd, who has 21 years of mining experience, including 19 years working on longwalls, testified credibly that he has observed roof falls and "overrides" resulting from roof pressures in areas typical to those described in the crosscut and intersection in question (Tr. 109-114). While it is true that Mr. Boyd did not observe the roof conditions at the time of the inspection, I find his testimony credible and relevant to the issue of the hazards typically presented at the crosscut area in question when the roof is falling behind the advancing longwall shields.

MSHA's Safety Supervisor Ely, who has over 20 years of mining experience, including the review of roof control plans, the inspection of longwalls, and the investigation of roof falls, testified credibly that roof stresses are present at the front of the roof shields as the face is advanced and the coal is removed, and that one cannot predict when the coal will fall behind the shields as they are advanced. He further testified credibly that he has observed roof "ride over" pressures at the front of a longwall face, and that it would be an unsafe practice to travel through the crosscut in question because of the roof stresses and the fact that unplanned roof falls frequently occur in such areas (Tr. 156-158).

Although respondent's expert witness Hendon was of the opinion that any hazards associated with walking through crosscut A would have to be determined by the existing roof conditions, he confirmed that good roof can fall at any time without advance notice, including the roof in crosscut A. He agreed that as the roof falls behind the shield break line as the face is advanced, it will fall all the way to the yield pillars, and that anyone walking inby the break line would have no assurance that the roof pressure on the roof which has fallen and is falling is not going to override into the crosscut and fall (Tr. 244-247). Given the conditions that existed, and as shown in the inspector's sketch, Exhibit G-1, Mr. Hendon who has worked as a foreman, stated that he would not ask his crew to travel inby the break line into

crosscut A because he would be concerned for their safety and would not consider such travel to be a good practice (Tr. 249-250).

Although Mr. Hendon testified to certain roof pressure studies that he had participated in, none of them were produced or introduced for the record, and he conceded that he was not present when the citation was issued and that he did not monitor the particular crosscut location cited by the inspector (Tr. 244). Even so, Mr. Hendon testified that the corners of crosscut A would be the most hazardous place, and that roof cribs are routinely installed at those locations for roof support, and that there was no guarantee that when the roof falls, it will do so evenly and not enter crosscut A (Tr. 265).

After careful consideration of all of the evidence in this case, and the arguments advanced by the parties, I agree with the petitioner's position and conclude and find that it has established a violation of section 75.202, by a preponderance of the evidence. Although it is true that there is no evidence of any objective indications that the immediate roof area at the cited crosscut through which the miners were observed traveling was going to fall, or that the roof had visible signs of deterioration, I am persuaded by the credible testimony of the petitioner's witnesses, corroborated in critical part by the respondent's expert witness, that clearly demonstrates to me that in the course of longwall mining, roof pressures are exerted on the yield pillars as the roof breaks off and falls behind the shields temporarily supporting the roof, and to the edge of the pillars, and that there is a clear and present danger of a roof fall extending out into the crosscut, and that travel through the crosscut without additional roof support would be inherently unsafe and hazardous.

I conclude and find that a reasonably prudent person familiar with longwall mining should recognize that walking through a crosscut immediately adjacent to the face that is being mined, and inby the shield cave line, without the installation of additional roof support, is an unsafe practice that exposes miners walking through the area to hazards related to falls of the roof or ribs, and that such conduct constitutes a violation of section 75.202. Under the circumstances, 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). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

In Consolidation Coal Co., 6 FMSHRC 34, 38 (January 1984), 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." The Commission further noted that despite the generally good roof conditions, the over-wide bolting pattern created "a measure of danger to safety or health".

In the National Gypsum case, 3 FMSHRC 822, 827 (April 1981), the Commission noted that the word "hazard" denotes a measure of danger to safety or health, and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if it could be a major cause of a danger to safety or health. "In other words", stated the Commission, "the contribution to cause and effect must be significant and substantial".

In Halfway Incorporated, 8 FMSHRC 8 (January 1986), 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).

Although traveling through the crosscut in question may not have subjected the miners to any immediate hazard, the inspector observed that the roof had fallen behind the shields, and no additional roof support had been installed. He also indicated that in the event of a roof squeeze between the coal seam and the shield, the roof will fall behind its roof bolt anchorage as the roof falls behind the shields (Tr. 59). Mr. Ely testified credibly that the existing roof bolts that were initially installed when the entry was developed may not be adequate to support the crosscut that is being subjected to roof pressures, and that on many occasions the roof falls above the roof bolt anchorage zone (Tr. 156).

I conclude and find that the failure to provide additional roof support before traveling through the crosscut in question contributed to a discrete hazard of roof or rib falls in that area. In the context of continued mining operations, I further conclude and find that a fall of roof or ribs was reasonably

likely as the shields advanced further, and anyone walking through the crosscut would be exposed to injuries of a reasonably serious nature. Under all of these circumstances, the inspector's "S&S" finding IS AFFIRMED.

Unwarrantable Failure Violation

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. * * *

There is no evidence of any obvious readily observable adverse roof conditions in the immediate crosscut area in question, and it would appear that the hazard exposure was rather brief. Although the inspector alluded to past citations that he had issued for similar incidents, no further evidence was forthcoming with respect to the facts and circumstances surrounding those purported past events. In the absence of any credible evidence to the contrary, I agree with the petitioner's assumption that the miner's walked through the crosscut for their own convenience, and the respondent confirmed that one of the managers is no longer in its employ. None of the other individuals were called to testify in this case.

The inspector testified that he based his unwarrantable failure finding on his belief that the two "management" individuals should have set the example for the work force, and that they knew or should have known that it was hazardous to travel through the crosscut. I conclude and find that these are insufficient grounds for establishing "aggravated conduct" within the meaning of the Commission's precedent decisions. I further conclude and find that the petitioner has not established, through any credible, reliable, or probative evidence, that the violation was the result of the respondent's unwarrantable failure to comply with section 75.202. Under the circumstances, the inspector's finding IS VACATED, and the section 104(d)(1) citation IS MODIFIED to a section 104(a)"S&S" citation.

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

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

History of Prior Violations

The parties stipulated that the respondent has an "average" history of prior violations. In the absence of any evidence to the contrary, I cannot conclude that the respondent's compliance

record warrants any additional increase in the penalty assessment that I have made for the violation in question.

Good Faith Abatement

The record reflects that the citation was terminated within two hours after the affected employees were reinstructed about traveling the crosscut, and the area was dangered off. I conclude and find that the violation was timely abated in good faith.

Gravity

Based on my "S&S" findings and conclusions, I conclude and find that the violation was serious.

Negligence

I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care amounting to a moderately high degree of negligence.

Civil Penalty Assessment

Taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $500, is reasonable appropriate for the violation that I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $500, for the violation. Payment shall be made to the petitioner (MSHA), within thirty (30) days of this decision and Order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

FEB 3 1994

BRYAN WIMSATT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 93-735-D
GREEN COAL COMPANY, INC., Respondent	:	MADI CD 93-08
	:	Henderson County Mine No. 1

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding concerns a complaint of alleged discrimination filed with the Commission by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).

Essentially, the complainant asserts that he was constructively discharged or justifiably refused to work under unsafe working conditions, due to his safety complaints being ignored by the respondent.

Respondent has now moved for summary decision on the grounds that the pleadings, taken together with the complainant's deposition, show that there is no genuine issue as to any material fact and that, therefore, respondent is entitled to summary decision as a matter of law.

Commission Rule 64(b) states that, "A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.64(b). As the Commission has pointed out, summary decision is an extraordinary procedure and must be entered with care, for it has the potential, if erroneously invoked, of denying a litigant the right to be heard. Thus, it may only be entered when there is no genuine dispute as to material facts and when the party in whose favor it is entered is entitled to summary decision as a matter of law. Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). Here, the burden is on the respondent, as the moving party, to establish its right to summary decision, and I conclude that respondent has not met that burden.

In this case, while it would appear that the respondent has repeatedly offered to reinstate the complainant to his former position as an oiler on the 1650 shovel, the complainant has just as steadfastly refused to return to work on that job. Respondent argues that complainant did not and does not refuse to return to this job for safety reasons, but rather, because of his "fear of the highwall." However, the great unanswered question so far is: Was it, in fact, unsafe to work in the pit at the time or times complainant has refused to? This is still a genuine issue of material fact at this point in time. In order to carry his burden of proof on that issue, complainant will have to establish, by a preponderance of the evidence, a reasonable, good faith belief that an unsafe condition existed in the pit that forced him to refuse to perform. I have no idea whether or not he can do that, but he is at least entitled to try.

ORDER

Based on the foregoing findings and conclusions, the respondent's motion for summary decision is **DENIED**. Therefore, this matter will need to be set down for a hearing on the merits in the near future. The parties are invited to submit proposed trial dates.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 0 8 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-702
Petitioner	:	A.C. No. 15-12699-03570
v.	:	
	:	Docket No. KENT 93-418
PECKS BRANCH MINING COMPANY,	:	A.C. No. 15-12699-03580
INCORPORATED,	:	
and	:	
	:	
JERRY SMITH, Employed by	:	Docket No. KENT 93-558
PECKS BRANCH MINING COMPANY,	:	A.C. No. 15-12699-03581A
INCORPORATED,	:	
and	:	
	:	
TROY HUNT, Employed by	:	Docket No. KENT 93-559
PECKS BRANCH MINING COMPANY,	:	A.C. No. 15-12699-03582A
INCORPORATED,	:	
Respondents	:	Mine No. 1

ORDER DENYING MOTION TO APPROVE SETTLEMENT

PROCEDURAL BACKGROUND

These are civil penalty cases in which the Secretary of Labor on behalf of his Mining Enforcement and Safety Administration (MSHA) and pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. §§ 815, 820, seeks the assessment of $123,800 in civil penalties for violations of various mandatory safety and health standards for underground coal mines as set forth in Part 75, Title 30, Code of Federal Regulations. In Docket Nos. KENT 92-702 and KENT 93-418 the Secretary charges Pecks Branch Mining Company, Incorporated (Pecks Branch) with two such violations each; in Docket No. KENT 93-558, the Secretary charges Jerry Smith, as an agent of Pecks Branch with four knowing violations; and in Docket No. KENT 93-559, the Secretary charges Troy Hunt, as an agent of Pecks Branch with two knowing violations. The Secretary's allegations of violation with respect to Smith and Hunt are the same as those against Pecks Branch and all appear to have arisen out of MSHA's investigation of a fatal roof fall accident that occurred at Pecks Branch's No. 1 Mine on August 1, 1992. Thomas A. Grooms represents the Petitioner. William K. Doran represents the Respondents.

CHRONOLOGY OF EVENTS

These matters were the subject of prehearing orders directing the parties to confer to determine, inter alia, whether the cases could be settled. When I was advised a settlement would not be possible the cases were consolidated for a hearing that was scheduled to commence in Pikeville, Kentucky, in early November 1993. At the request of counsels, the hearing was continued and ultimately was rescheduled for December 7, 1993.[1]

In a conference telephone call on December 1, 1993, counsels orally stated the captioned matters had been settled, that Pecks Branch, Smith and Hunt had agreed to accept the alleged violations and to pay the proposed penalties.[2] On the basis of these assurances, I canceled the scheduled hearing and informed counsels that motions to approve the settlement would be due in my office within thirty (30) days.

The motions did not arrive. On January 12, 1994, I telephoned counsel for the Secretary to determine their whereabouts. I was told he was out of the office and would not be back until January 14. I then called counsel for the Respondents who advised me there was no longer a settlement agreement. In a later conference telephone conversation, counsel for the Secretary maintained a valid settlement agreement still existed and that it should be enforced. Counsel for the Secretary then stated that he intended to file a motion to approve the settlement, which he has done.

In the meantime, I reset the matters for hearing in Pikeville, Kentucky, commencing on February 15, 16 and 17, 1994. Upon counsel for the Secretary's statement that he was committed to another trial on that date in a different city and upon counsel for the Respondents agreement, I rescheduled the hearing to commence March 8. I advised the parties that I intended to rule on any pending motions, including any motion to approve a settlement, at the commencement of the March 8 hearing. In a subsequent conference telephone call, counsel for the Secretary argued, I think correctly, that deferring a ruling until the hearing could unnecessarily cost the parties considerable time and expense in trial preparation.

---

[1]In addition to the captioned cases, another civil penalty case, Secretary of Labor, Mine Safety and Health Administration v.Jimmy Daugherty, Employed by Pecks Branch Mining Co. Inc., Docket No. KENT 93-506, also was consolidated for hearing. The facts underlying the Daugherty case appear essentially to be the same as those underlying the captioned cases. William Doran does not represent Daugherty, who is proceeding pro se.

[2]In addition, counsel for the Secretary stated that he would be able to negotiate a settlement in Daugherty.

THE SECRETARY'S MOTION AND ARGUMENTS

Counsel for the Secretary states the parties agreed that the violations alleged occurred, that the gravity of the violations was as characterized on the subject citations and orders and that the negligence of the Respondents also was as characterized. Counsel further asserts that the parties agreed regarding the size of the operator, that although Pecks Branch is no longer in business the proposed penalties would not, if it were still operating, affect Pecks Branch's ability to continue in business, and that the operator demonstrated good faith in attempting to achieve rapid compliance following citation of the violations. The motion to approve the settlement was served by counsel for Secretary on Respondents' counsel on January 19, 1994.

In his memorandum in support of the motion, counsel argures that the parties reached agreement on the settlement on December 1, 1993, the essential term being that Respondents would pay in full the proposed civil penalties. Counsel further states that on December 15, 1993, counsel for Respondents notified him that the Respondents wished to alter the settlement by paying less than the amount to which they had agreed on December 1 and that on December 21, 1993, he forwarded a written settlement agreement setting forth the terms of the settlement as worked out initially to counsel for the Respondents, but that no response was received.

Citing Brock v. Scheuner Corp., 841 F.2d 151, 154 (6th Cir. 1988), counsel for the Secretary argures his client is entitled to an order approving the settlement because there was agreement between the parties as to the material facts, the essential one being the amount of the penalties. Not only would it be contrary to law to disregard the settlement, it would be contrary to sound policy as well. If the settlement is not enforced "the [R]espondents will have flaunted the Commission's authority and procedures and will benefit from their wrongful refusal to comply with a validly entered settlement agreement." Memorandum 4.

Counsel for the Respondents' position is that a post-settlement communication by a MSHA inspector altered the circumstances under which the parties had entered into the agreement and further that despite the purported settlement the parties did not agree upon the material facts.

According to counsel, Respondents' approval of the settlement was "based on its understanding of MSHA's stance on settlement as communicated by counsel for the Secretary." Opposition To Sec.'s Motion 2. However, following the agreement MSHA Inspector James Hager, an inspector who had issued some of the violations alleged in these proceedings, informed Respondent Jerry Smith that Respondents understanding of MSHA's bargaining

stance was incorrect and the Respondents then withdrew their approval. Id. Smith, who is the husband of Phyllis Smith, co-owner of Pecks Branch, states in an affidavit that subsequent to the agreement, Hager told him that a 50 percent reduction in the penalties assessed had never been proposed and Hager implied that MSHA would have considered such a reduction. Affidavit 1. The only reason Respondents had agreed to pay the penalties as assessed was that counsel for the Respondents advised them MSHA was unwilling to accept any lesser penalty.

Counsel for Respondents further argues that counsels never envisioned settlement negotiations completed, until the language of the settlement motion was drafted and agreed upon. A draft settlement agreement was not forwarded to counsel for the Respondents until after the Smith/Hager communication. Moreover, the language of the settlement motion is not consistent with what the Respondents would have accepted -- specifically the provision that "the penalties ... would not affect ... [the operator's] ability to continue in business. " Opposition to Sec.'s Motion 5, citing Motion To Approve Settlement 2.

RULING

Counsel for the Secretary has stated the law correctly. The courts have made clear that a settlement may be enforced even if it has not been reduced to writing, provided there is an agreement on all material terms. Scheuner Corp. at 154; Bowater North American Corp. v. Murray Machinery, Inc., 773 F.2d 71 (6th Cir. 1985; Odomes v. Nucare, Inc., 653 F.2d. 246, 252 (6th Cir. 1981). Counsel, likewise had presented a persuasive argument that despite the absence of a motion stating the terms of the settlement and one presented to the undersigned prior to the initiation of the present dispute, there was a genuine agreement concerning the material facts. In this regard, I particularly note there is no dispute that the Respondents and the Secretary agreed to settle the matters by payment in full of the penalties proposed.

The settlement negotiations were conducted by counsels who had full authority to represent and speak for the parties. If I accept as factual the statements in Smith's affidavit, they amount to Smith (a party) being told by a person not a party to the proceedings or to the settlement negotiations that counsels might have reached a different result had different terms been proposed and accepted. Such might be said of any settlement agreement and it has nothing to do with the material terms of the settlement. The implication of the affidavit is not so much that MSHA would have accepted a different agreement had it been offered, but rather that Smith is unhappy his counsel did not negotiate a different agreement. A party cannot void an agreement, merely because he or she subsequently believes it

insufficient. See Taylor v. Gordon Flesch Co., Inc., 793 F.2d 858, 863 (7th Cir. 1986).

Further, I am not persuaded by counsel for Respondent's statement that the Respondents did not envision the agreement completed until the language of the settlement motion had been drafted and agreed upon. Both counsel were very clear in their joint telephone conversation with me on December 1, 1993, that the matters had been settled. There was no discussion of ongoing negotiations and, indeed, if there had been I would not have canceled the December 7 hearing. What seemed certain at the time was that Respondents had agreed, for whatever reason, to pay the proposed assessments, even though Pecks Branch was no longer in the mining business and that by doing so they had alleviated themselves of further expenses of a trial. There was no mutual mistake among the parties in reaching the agreement and there was no fraud inducing them to agree.

Were these the only considerations, I would be inclined to grant the motion, but they are not. There are interests, inherent in these matters beyond those of the parties. These interests affect the credibility of the Commission as an impartial adjudicator of Mine Act cases. As I have noted, the proceedings apparently have arisen as a result of a fatal roof fall accident and involve significant aggregate proposed civil penalties. In such cases, it is especially important that the record be free of any hint that due process was not completely afforded. It is equally important that all arguments for and against any violations found and any penalties ultimately assessed have been fully raised and considered. The very ability of the Mine Act to provide "a more effective means ... for improving the working conditions and practices in the Nations's coal ... mines ... [and] to prevent death and serious physical harm" rests in large part on public confidence that due process is always available to all litigants and that their concerns can be always aired publicly. 30 U.S.C. § 801(c).

I conclude that to approve the settlement and order compliance with its terms could open the door to subsequent charges -- unfair though they might be -- that Respondents were denied their day in court and to a resulting diminution of public confidence in the Commission. The Commission has emphasized that oversight of proposed settlements is, in general, committed to its sound discretion. Utah Power and Light Co., Mining Division, 12 FMSHRC 1548, 1554 (August 1990); Birchfield Mining Co., 11 FMSHRC 1428 (August 1989). Given the potential for misunderstanding that would be involved in the granting of counsel for the Secretary's motion and given the nature of these cases, I am convinced that sound discretion requires the motion be DENIED.

Counsel for the Secretary fears this result will allow the Respondents to flaunt "the Commission's authority and procedures and ... benefit from their wrongful refusal to comply with a validly entered settlement agreement." Mem. In Support of Motion to Approve Settlement 4. It is important to remember, however, that the Secretary and Respondents now will proceed to hearing, that the hearing will be de novo and that I will in no way be bound by the penalties proposed. Any penalties assessed will fully reflect the evidence adduced at hearing and any may reach the maximum allowed by the statute. The Respondent's should bear in mind that in judicial proceedings as in the market place, shoppers do not always find a better bargain. It is also important to note that my ruling on the Secretary's motion might well have been different had counsel submitted a timely motion to approve the settlement.

David F. Barbour
Administrative Law Judge
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FEB 14 1994

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEVA 94-157-R
v.	:	Citation 3305270; 12/28/93
	:	
SECRETARY OF LABOR, Mine Safety and Health	:	Humphrey No. 7 46-01453
	:	
Administration, (MSHA),	:	Docket No. WEVA 94-158-R
Respondent	:	Citation 3305893; 12/29/93
	:	
	:	Docket No. WEVA 94-159-R
	:	Order No. 3305392; 12/30/93
	:	
	:	Loveridge No. 22 46-01433

ORDER DENYING CONTESTANT'S MOTION FOR EXPEDITED HEARING
ORDER DENYING RESPONDENT'S MOTION FOR CONTINUANCE
NOTICE OF CONSOLIDATED HEARING

These contest proceedings concern two 104(d)(1) citations and a 104(d)(1) order issued at the above captioned mine facilities on December 28 through December 30, 1993. The contestant's January 18, 1994, Notice of Contest regarding the two citations and one order in issue was accompanied by a Motion for Expedited Hearing. Not to be outdone, the Secretary countered on January 27, 1994, by opposing the contestant's request for expedited proceedings and by moving to delay these proceedings by seeking to have these matters continued pending consolidation with the forthcoming civil penalty proceedings. Both parties have filed responsive pleadings opposing each other's motions.

The contestant's motion for expedited proceedings is based on its assertion that the issuance of the instant citations and order have placed it in a "d" chain, which may subject its mines to subsequent withdrawal orders and increased civil penalties. The Secretary, citing the fact that several thousand "d" citations and orders are issued every year, opposes the contestant's request noting there are neither extraordinary nor unique circumstances that warrant the requested relief. In this regard, the Secretary properly emphasizes that there are no closure orders at issue as the alleged violations were apparently promptly abated.

While Commission Rule 52, 29 C.F.R. § 2700.52, sets forth the procedures for requesting an expedited hearing, it is silent with regard to the prerequisites for granting such a request. However, this rule contemplates circumstances exigent enough to permit the scheduling of a hearing on as little as five days notice. (Commission Rule 52(b)). Consequently, my colleagues, in denying similar requests for expedited hearings, have consistently held that for the contestant to prevail, it must bear the burden of showing extraordinary or unique circumstances resulting in continuing harm or hardship. See Energy West Mine Company, 15 FMSHRC 2223 (Judge Hodgdon, October 1993); Pittsburg & Midway Coal Mining Company, 14 FMSHRC 2136 (Judge Fauver, December 1992); and Medicine Bow Coal Company, 12 FMSHRC 904 (Judge Morris, April 1990). For example, the Commission has stated that a closure order that remains in effect, a circumstance which is absent in the current cases, may provide a basis for an expedited proceeding. Wyoming Fuel Company, 14 FMSHRC 1282, 1287 (August 1992).

As a threshold matter, I note the contestant's claimed need for expedited resolution is speculative in that subsequent "d" orders are a condition precedent to any asserted hardship. Moreover, the Commission has recognized that the threat of a 104(d) chain "...provides a powerful incentive for the operator to exercise special vigilance in health and safety matters..." Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987). While I am cognizant the alleged violations and related unwarrantable failure conduct are yet to be proven by the Secretary, the contestant's protestations that it must now exercise "special vigilance" is, on balance, unmoving.

With respect to the issue of unique circumstances, the Commission stated there were 3,572 unwarrantable failure citations issued in 1986. Emery Mining Corp., 9 FMSHRC 1997, 2002 (December 1987). I concur with the Secretary that there is no reason to believe the rate of alleged unwarrantable failure violations has materially changed. While I am certain the contestant finds little comfort in the fact that thousands of "d" orders are issued every year, it is nonetheless not alone in its alleged predicament. Consequently, there are no special circumstances justifying an expedited hearing. Accordingly, the contestant's motion will be denied.

Although I have concluded that the expedited hearing process provided in Commission Rule 52 is inappropriate, there is a statutory basis for providing a hearing forum in these cases on an expeditious basis. The contestant has availed itself of this statutory solution by invoking the contest provisions of Section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), wherein an operator may elect to contest a citation without waiting for a civil penalty to be proposed.

The Secretary, relying on Energy Fuels Corp., 1 FMSHRC 299 (May 1979) seeks to thwart the contestant's desire for a speedy hearing by filing a Motion for Continuance. The Secretary notes that, in Energy, the Commission opined there was no reason why a contestant that "lacked an urgent need" for a hearing could not wait for the docketing of a civil penalty proceeding so the contest and civil penalty proceeding could be consolidated. Id. at 308. (Emphasis added.) However, the Secretary's reliance on Energy is misplaced. In Energy, the Commission, after discussing the "d" chain withdrawal order process, stated:

> Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable (emphasis added). Id. at 308.

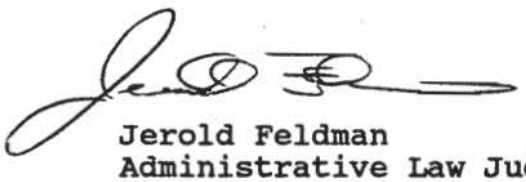
In Energy, the Commission concluded that "...the purposes of the Act and the interests of the parties are best served by permitting an operator [facing a "d" chain] to contest the citation immediately upon its issuance." Id. at 309. Consistent with Energy, the Secretary's Motion for Continuance shall be denied.

Having determined that the relief sought by both parties is inappropriate, I will proceed with routinely setting these cases for hearing. Accordingly, these proceedings are scheduled for hearing on the merits on March 30, 1994, in Morgantown, West Virginia, at a site to be designated by subsequent order. The issues will be whether the contestant has committed the violations as alleged, and, if so, whether the violations occurred as a result of the contestant's unwarrantable failure.

The parties shall send to each other and to me no later than March 16, 1994, synopses of their anticipated legal arguments, lists of exhibits and any stipulations which may be jointly introduced at trial.

ORDER

The contestant's Motion for Expedited Hearing **IS DENIED**. The Secretary's Motion for Continuance **IS DENIED**. As noted above, these cases **ARE SCHEDULED** for consolidated hearing on March 30, 1994.



Jerold Feldman
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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FEB 2 4 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 94-294 A. C. No. 15-17134-03514
v.	:	No. 4 Mine
KYN COAL COMPANY INCORPORATED, Respondent	:	

ORDER TO ADVISE

The Secretary has filed a petition for the assessment of three civil penalties in the above captioned action. The citations allege that respirable dust samples submitted to the Secretary by the operator were invalid because respirable dust had been removed from the samples before submission.

There is presently pending for decision before Administrative Law Judge James A. Broderick a case involving alleged tampering of respirable dust cassettes at the Urling No. 1 Mine of Keystone Coal Corporation (Master Docket No. 91-1). A hearing on this matter was held November 30, 1993, through January 6, 1994. Previously, a common issues trial was held which lasted from December 1, 1992 to February 22, 1993, and a decision on the common issues was rendered on July 20, 1993 (15 FMSHRC 1456).

It does not appear from the record whether the issues in the instant case are identical to those in the Master Docket. However, the Master Docket is a matter of first impression with respect to alleged tampering of dust cassettes. It appears therefore, that at the very least, the decision to be issued in that case might be of general assistance in this proceeding. Accordingly, I propose to place this case on stay pending the decision in the Master Docket.

In light of the foregoing, it is **ORDERED** that within 21 days of the date of this order the parties advise me in writing of their views with respect to a stay.

Paul Merlin
Chief Administrative Law Judge

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