FEBRUARY 1995

COMMISSION ORDERS



ADMINISTRATIVE LAW JUDGE DECISIONS



ADMINISTRATIVE LAW JUDGE ORDERS

**FEBRUARY 1995**

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

Secretary of Labor, MSHA v. Bluestone Coal Corporation, Docket No. WEVA 93-165-R, 94-117. (Judge Barbour, December 27, 1994)

Secretary of Labor, MSHA v. Holst Excavating, Inc., Docket No. LAKE 94-191-M. (Chief Judge Merlin, Default Decision of November 14, 1994 - unpublished)

Secretary of Labor, MSHA v. Asarco, Inc., Docket No. WEST 94-445-M, etc. (Judge Cetti, unpublished Dismissal dated November 21, 1994)

Secretary of Labor, MSHA v. Amax Coal Company, Docket No. LAKE 94-197. (Judge Amchan, January 17, 1995)

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

Lion Mining Company v. Secretary of Labor, MSHA, Docket No. PENN 93-420-R. (Judge Fauver, December 28, 1994)

Secretary of Labor, MSHA v. Buck Creek Coal Company, Docket No. LAKE 94-72, etc. (Interlocutory Review of Judge Hodgdon's Stay Order, dated September 8, 1994 - unpublished)

# COMMISSION ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 1995

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | |
| v. | : | Docket No. LAKE 94-191-M |
| HOLST EXCAVATING, INC. | : | |

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

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 November 14, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Holst Excavating, Inc. ("Holst") for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's August 16, 1994, Order to Respondent to Show Cause. The judge assessed civil penalties of $995.

In a letter to the judge dated December 12, 1994, Holst's office manager states that, on September 13, 1994, Holst contacted an attorney in the Office of the Department of Labor's Regional Solicitor in Chicago, Illinois, and subsequently sent copies of Holst's "bankruptcy filings" to him as requested. She states that Holst is still awaiting a reply and that she has tried to contact that attorney by telephone to no avail.

The judge's jurisdiction over this case terminated when his default order was issued on November 14, 1994. 29 C.F.R. § 2700.69(b). 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 filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. § 2700.5(d). Holst's December 12 letter was received by the Commission on December 16, more than 30 days after issuance of the default order. Thus, the judge's default order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

The filing of a petition in bankruptcy does not automatically stay the instant proceeding or foreclose the entry of judgment against Holst. 11 U.S.C. § 362(b)(4); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.* 12 FMSHRC 1521, 1530 (August 1990) (citations omitted). However, relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in absence of applicable Commission rules). *E.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Holst, proceeding without benefit of counsel, asserts that, within 30 days after issuance of the show cause order, it informed the Solicitor's Office of its bankruptcy proceedings. Holst may have assumed that filing a petition in bankruptcy stayed the instant proceeding and relieved it of its obligation to file an answer.

On the basis of the present record, we are unable to evaluate the merits of Holst's position. In the interest of justice, we reopen the proceeding, treat Holst's letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See, e.g., Bentley Coal Co.*, 12 FMSHRC 1197-98 (June 1990); *Westrick Coal Co.*, 10 FMSHRC 853 (July 1988). We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 17, 1995

| | | |
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| ASARCO, INC. | : | |
| | : | |
| | : | Docket No. WEST 94-445-M |
| v. | : | 94-446-M |
| | : | |
| | : | |
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |

ORDER

In this case, the Commission granted a petition filed by the Secretary of Labor requesting review of Administrative Law Judge August Cetti's November 21, 1994 Order of Dismissal, in which he dismissed civil penalty proceedings against ASARCO, Inc. ("ASARCO") based on the Commission's decision in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (January 1994). The Secretary has now moved to reverse and remand the judge's decision, based on our decision in *ASARCO, Inc.*, 17 FMSHRC __, Docket No. SE 94-362-RM (January 19, 1995), in which we explained that *Keystone* addressed only the procedural validity of single shift samples in determining violations of the respirable dust standard for underground coal mines. Slip op. at 5. He has also moved to stay further proceedings in this case pending the outcome on remand in *ASARCO*, 17 FMSHRC __.

ASARCO has concurred in the Secretary's motion to reverse and remand, but opposes his motion to stay.

Upon consideration of the Secretary's motion and the opposition filed by ASARCO, we vacate the judge's Order of Dismissal and remand this matter to the judge for further appropriate proceedings. The Secretary's request that the Commission stay proceedings on remand is denied without prejudice to his renewing such a request before the judge.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc L. Marks, Commissioner

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# ADMINISTRATIVE LAW JUDGE DECISIONS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 0 1 1995

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|---|---|---|
| SAVAGE ZINC, INC., Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. SE 95-11-RM |
| | : | Citation No. 3882702; 10/14/94 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. SE 95-57-RM |
| | : | Order No. 4357221; 11/18/94 |
| | : | Elmwood-Gordonsville Mine |
| UNITED STEELWORKERS OF AMERICA (USWA), Intervenor | : | Mine ID 40-00864 |

**DECISION**

Appearances: Henry Chajet, Esq., and James G. Zissler, Esq., (Maris E. McCambley, Esq., on brief), Jackson & Kelly, Washington, D.C. for Contestant;
Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent;
Henry Tuggle, Safety and Health Specialist, United Steelworkers of America, Pittsburgh, Pennsylvania for Intervenor.

Before: Judge Hodgdon

These cases are before me on notices of contest filed by Savage Zinc, Inc. against the Secretary of Labor and his Mine Safety and Health Administration (MSHA) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of Citation No. 3882702 to it on October 14, 1994, and the issuance of Order No. 4357221 to it on November 18, 1994. For the reasons set forth below, both the citation and the order are affirmed.

A hearing in the cases was held on December 7 - 9, 1994, in Nashville, Tennessee.[1] Randy G. Helm, Kenny G. Hensley, David Park, James B. Daugherty and Randy W. Dennis testified for the Secretary. In addition, the Secretary called Roy L. Bernard as

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[1] The transcript incorrectly states that the hearing was held on "September 7 - 9, 1994."

an adverse witness. Charles E. Hays and H. John Head testified on behalf of Savage Zinc and Allan Cole, Richard E. Pulse and Martin Rosta[2] were called as adverse witnesses by the company. The parties have also filed briefs[3] which I have considered in my disposition of these cases.

## BACKGROUND

The essential facts in this case are undisputed. The Elmwood-Gordonsville Mine is a random room and pillar zinc mine operated by Savage Zinc, Inc. near Franklin, Tennessee. The mine can be entered by a portal onto a roadway which continues from the portal to the Stonewall production area. The mine can also be exited through six shafts, the No. 5 Shaft in the OMZ area, the Nos. 1 and 2 Shafts in the Elmwood area, the No. 4 Shaft in the South Carthage area, and the Nos. 3 and 7 Shafts in the Gordonsville area. Some of these shafts, e.g. No. 3, are also used as entrances to the mine.

The roadway is approximately five miles long and, after an initial decline from the portal which levels off some five hundred feet below the portal, goes up hills (inclines), down hills (declines) and is level in places as it traverses through the mine. The roadway begins in the Gordonsville area of the mine, goes along the West B Drift and through the Elmwood area of the mine. From the Elmwood area of the mine, the roadway becomes known as the Stonewall Drive and terminates in the Stonewall production area. The Stonewall Drive is a decline which is about a mile long and descends, on a 15 percent grade, in elevation about 500 feet.

Development of the Stonewall Drive and the Stonewall production area was begun in 1987, and completed in 1988. Construction of the No. 6 Shaft, which goes to the Stonewall production area, was initiated in 1987 and completed in 1988.

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[2] Mr. Rosta, who had been *subpoenaed*, did not appear at the hearing. His testimony was taken by deposition in Washington, D.C., on December 16, 1994. The deposition is admitted into evidence as Contestant's Exhibit K.

[3] The Contestant has also filed a Reply Brief. The Secretary has filed a motion to strike the reply brief and his motion has been joined in by the Intervenor. Reply briefs were not contemplated in our discussion of a briefing schedule at the hearing, (Tr. 820, 834), nor provided for in my December 21, 1994, order scheduling briefs. Consequently, while I deny the motion to strike, I have given no weight to the Contestant's Reply Brief in this decision.

A hoist was installed in the shaft in November 1988. "Stonewall is the lowest elevation of the [mine] complex . . . ." (Tr.698.)

From 1988 until sometime in the spring of 1993, the Stonewall Drive and the No. 6 Shaft were designated in the mine's evacuation plan as the two escapeways from the Stonewall production area. In the spring of 1993, the mine operators concluded that the No. 6 Shaft was no longer safe, due to deteriorating ground conditions, to use as an escapeway and took it out of use.

On August 25, 1993, Savage Zinc was issued Citation No. 4092045 for failing to maintain an escape route, the No. 6 Shaft, in a travelable condition in violation of Section 57.11051 of the Secretary's Regulations, 30 C.F.R. § 57.11051. (Resp. Ex. 10.) In September 1993, the company inquired of Mr. Daugherty, the local MSHA metal and nonmetal mine supervisor, whether a refuge chamber could be used instead of a second escapeway. He advised them that he could not authorize it.

In December 1993, Savage Zinc filed a petition for modification with MSHA seeking modification of the application of Section 57.11050(a), 30 C.F.R. § 57.11050(a), to the mine by replacing a second escapeway with a refuge chamber. The petition was denied on June 23, 1994. The company then requested a hearing on the petition before an Administrative Law Judge assigned to the Department of Labor. The hearing was scheduled for November 1, 1994. At Savage Zinc's request the hearing was stayed until January 23, 1995. Savage Zinc filed an amended petition for modification on October 17, 1994.

On October 14, 1994, Inspector Daugherty issued Citation No. 3882702 to Savage Zinc for a violation of Section 57.11050(a). The citation stated that:

> The mining and production area of Stonewall, the lowest level of the mine, does not have two separate properly maintained escapeways to the surface as required by 30 CFR 57.11050(a). The No. 6 shaft which was formerly designated as one of the two separate escapeways to the surface from the lowest level of the mine, is not travelable in the event of an emergency, nor is it presently designated on the mine evacuation plan as an escapeway.

(Resp. Ex. 5.) The company was given until November 14, 1994, to abate the violation.

The Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 638 (1968), defines "level," as pertinent to this case, as:

> a. 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. . . . 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 the shaft. . . . c. In pitch mining, such as anthracite, there may be a number of levels driven from the same shaft, each being known by its depth from the surface or by the name of the bed or seam in which it is driven. . . . d. Mine workings that are approximately at the same elevation. . . . j. All openings at each of the different horizons from which the ore body is opened up and mining started. . . .

As can be seen, all of these definitions have a common element that goes back to the basic definition, that is that a "level" is essentially on the "horizontal."[5] On the other hand, the Contestant's argument that this is a single level mine is based on a distorted definition of "level" which leaves out all references to the horizontal.

Thus, Mr. Bernard, an expert testifying for Savage Zinc, defined "level" as "a main underground passageway that connects stopes and working places and provides ventilation and haulage for the removal of ore from the mine." (Tr. 19.) Mr. Hays, the company's Safety Supervisor, defined "level" as "an underground passage or opening providing access to stopes or workings. It also provides ventilation and haulage ways for the extraction of ore." (Tr. 646-47.) Mr. Head, another expert witness for the Contestant, said that "level" "is defined as a main underground road or passageway that leads to production areas, stopes that may be above or below that level, and the main road is used for ventilation, for access, and for haulage of ore from working places." (Tr. 763-64.)

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[5] The other definition of "level" mentioned in this case, "[t]he horizon at which an ore body is opened up and from which mining proceeds. The term is often used in the same sense as a drift or to cover all horizontal workings on one horizon . . . ." found in Peele's *Mining Engineer's Handbook* § 10, 3 (3d Ed. 1941), also conforms to this central element.

Finally, in its brief, the Contestant argues that:

> [t]he primary definition for "level" provided in the BOM Dictionary and discussed by Bernard and Head is related to function rather than distance or elevation. According to that definition, a "level" is:
>
> > a main underground passageway that connects stopes and working places and provides ventilation and haulage for the removal of the ore from the mine.

(Cont. Br. at 26.)

All of these definitions purport to be a paraphrase of the first definition in the *Dictionary of Mining, Mineral, and Related Terms*. All of them leave out the phrase "*driven along a level course*" from the definition. By leaving out these words, the most significant characteristic of "level" is removed from the definition. Followed to its logical conclusion, a mine with a continuous roadway which declined into the earth at a 15 percent grade for 5 miles and off of which were working areas at various elevations would still, by this definition, be a one level mine.

Contrary to Savage Zinc's assertions, I find that it is Savage Zinc's definition of "level" and what it means in this regulation that is irrational and inconsistent with MSHA enforcement actions, not MSHA's definition. Based on any, or all, of the definitions of level from the *Dictionary of Mining, Mineral, and Related Terms*, set out above, I conclude that the Elmwood-Gordonsville Mine has more than one level.[6] I further conclude that the production levels found in the Stonewall area are the lowest levels of the mine.[7]

The obvious purpose of the regulation is to insure that miners have two separate ways to get out of the mine in the event of an emergency. I conclude that a reasonably prudent person familiar with the mining industry and the purpose of this standard would find that there is only one escapeway from the Stonewall area, the Stonewall Drive, that the Stonewall area is

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[6] Unlike *Magma Copper*, which turned on whether an area was a level based on the type of activity performed in the area, 16 FMSHRC at 332-33, there is no dispute that mining is performed in the Stonewall area.

[7] I also conclude that the Stonewall Drive is not part of the Stonewall area of the mine, although whether it is or not makes no difference to my conclusion that the Stonewall area has the lowest levels of the mine.

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

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

By their very nature, escapeways only become important in the event of an emergency. Therefore, continued normal mining operations, in evaluating this violation, must assume the existence of an emergency. The evidence indicates that there are several types of emergencies that might require the use of an escapeway which could occur in this mine. Among these are roof falls, fire, explosions and inundation. Further, it is not the likelihood of one or more of these disasters occurring which determines whether this violation is S&S, but the likelihood of serious injury occurring during an emergency situation when there is not a second escapeway available.

Viewing the violation in this light, I have already concluded that the violation occurred. I also conclude that the failure to have two escapeways results in a discrete safety hazard in that blockage of the primary escapeway means that the miners are trapped in the mine. I further conclude that there is a reasonable likelihood that the failure to have a second

escapeway in an emergency will result in an injury and that the injury will be reasonably serious. Accordingly, I conclude that the violation was "significant and substantial."[11]

**Reasonableness of the Abatement Period**

Savage Zinc argues that it is unreasonable to have expected them to abate the violation in this case in 30 days. Consequently, the company asserts that the 104(b) order issued to it for failing to abate the violation should be vacated. Since it is uncontroverted that it would take any where from nine to 18 months to install a second escapeway, this claim has superficial appeal. However, the testimony of Inspector Daugherty makes it clear that MSHA did not expect the company to perform the impossible and complete construction in 30 days, but only that Savage Zinc begin taking steps to abate the violation. (Tr. 509-10.)

In fact, at the time the 104(b) order was issued, Savage Zinc had taken no action on the citation other than to contest it. Nor is there evidence that the company had communicated to MSHA any intention of abating the citation. Under these circumstances, I conclude that the 30 day abatement period was reasonable and that the 104(b) order was appropriate.

**ORDER**

I conclude that Savage Zinc, Inc. violated Section 57.11050(a) of the regulations by not having two escapeways from the Stonewall area of its Elmwood-Gordonsville Mine, and that this violation was "significant and substantial" and the result of, at least, moderate negligence. I further conclude that the time given for abatement of this violation was reasonable. Accordingly, it is **ORDERED** that Citation No. 3882702 and Order No. 4357231 are **AFFIRMED**.

T. Todd Hodgdon
Administrative Law Judge

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[11] In reaching this conclusion, I have considered whether the presence of the refuge chamber reduces the gravity of the violation and have concluded that it does not. As everyone agrees, the best place to be in a mine emergency is on the surface. I find that it is reasonably likely that a mine emergency can be so devastating, e.g. an explosion, massive cave-in, or wide ranging fire, that a serious injury could occur to miners in the refuge chamber.

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/lbk

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 1995

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 93-974 |
| Petitioner | : | A.C. No. 15-16492-03540 |
| | : | |
| v. | : | Docket No. KENT 94-51 |
| | : | A.C. No. 15-16492-03541 |
| NATS CREEK MINING COMPANY, | : | |
| Respondent | : | Docket No. KENT 93-877 |
| | : | A.C. No. 15-16492-03537 |

**DECISION**

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, Pikeville, Kentucky, for the Respondent.

Before: Judge Fauver

These are consolidated civil penalty cases under § 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 **et seq**.

Docket No. KENT 93-877 involves five § 104(a) citations issued on December 1, 1992, alleging significant and substantial violations due to a moderate level of negligence. Four of the citations allege that certain scoops were not equipped with operative methane monitors. The fifth alleges that a fire suppression system on a scoop was rendered inoperative by a missing hose.

Docket No. KENT 93-974 involves two § 104(a) citations and a § 107(a) imminent danger withdrawal order issued on December 8, 1992. The citations allege significant and substantial violations due to high negligence. One citation alleges that an underground battery charging station was not housed in an adequate fireproof structure and was in return air. The other

alleges that non-permissible battery chargers were used while the battery charging station was ventilated with return air.

Docket No. KENT 94-51 involves three § 104(a) citations and a § 107(a) order issued on June 24, 1993. The citations allege significant and substantial violations due to high negligence. One citation alleges that an automatic fire sensor warning device for four conveyer belts was inoperative. The second citation alleges accumulations of combustible material around the conveyor belts. The third citation alleges that there were damaged, broken and stuck rollers on a conveyor belt and the belt came into contact with accumulations of combustible material.

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

## FINDINGS OF FACT

1. Nats Creek Mining Co., Inc., operates Sugarloaf No. 2 Mine in Floyd County, Kentucky, as a contract miner for JRC Land and Equipment Company of Lexington, Kentucky. The mine produces about 160,000 tons of coal per year from one production section, operating three shifts, five or six days a week. The coal is sold in or with substantial effect upon interstate commerce.

### Scoops

2. Scoops are used to load and haul coal from the face to a conveyor belt system.

3. The mine liberates about 17,600 cubic feet of methane daily. At that rate of liberation, methane could accumulate to an explosive concentration (5 to 15 percent) in about a 12-hour period if the mine fan were off.

4. On Saturday evening, November 28, 1992, there was a fatal accident when a scoop operator was crushed between the rib and his vehicle.

5. Inspector Mark Bartley went to the mine on December 1, 1992, to perform a spot electrical inspection and to assist in the investigation of the fatal accident. The investigation was handled jointly by MSHA and the Kentucky Department of Mines and Minerals.

6. MSHA issued a work-stoppage order to preserve the accident site and equipment. Under the MSHA order, the equipment was to be kept in the same condition as it was on November 28, 1992.

7. Because the coal seam was only 34 to 38 inches high, MSHA ordered all the scoops to be brought out of the mine so that Inspector Bartley could examine them more thoroughly. Nine scoops were brought out of the mine. All were found in violation of at least one safety standard. Inspector Bartley issued 20 citations on the scoops.

8. All of the scoops were subject to being used to load coal at the face. Nats Creek acknowledged that seven of the nine scoops routinely were used at the face, but the company could not tell Inspector Bartley which three or four scoops were in service at the time of the fatal accident. No records were maintained to showed whether a scoop was used inby or outby the last open crosscut on any given date.

9. None of the nine scoops was tagged out of service or listed as out of service in the company's books as of November 28 through December 1, 1992.

10. All nine scoops were operative and subject to being used inby the last open crosscut. Inspector Bartley observed all of the scoops come out of the mine under their own power. Nats Creek's electrician confirmed that the scoops came out of the mine under their own power.

11. Methane monitors on the scoops are designed to give a warning when one percent methane appears in the atmosphere. At two percent, the methane monitors are designed to de-energize the machine to prevent a methane ignition.

12. Inspector Bartley tested the methane monitor on scoop No. 105A/R11079-210. When he found that it was inoperative, he issued § 104(a) Citation No. 4017965. The methane monitor display on the scoop was missing and the whole internal component had been taken out of the monitor. The display was three inches in diameter, so that it was easy to see that the display was gone.

13. Inspector Bartley examined the AR-4 Elkhorn scoop and found that there was no methane monitor on the scoop. He then issued Citation No. 4017967. Nats Creek's electrician confirmed that there was no methane monitor on the scoop. This is the scoop that was involved in the fatal accident.

14. Inspector Bartley examined scoop No. 486-1193 and found that the read-out methane monitor display was missing and the monitor did not work. He then issued Citation No. 4017975.

15. Inspector Bartley determined that all four of the methane monitor violations were significant and substantial. There was a known history of methane liberation at the mine. There was no other automatic de-energization device on the equipment. There was no other automatic methane detection device on the section. The inoperative methane monitors could significantly and substantially contribute to an explosion or an ignition.

16. Inspector Bartley determined that a moderate level of negligence was involved in each of the methane monitor violations.

17. Inspector Bartley examined the AR-4 Elkhorn scoop, the one involved in the fatal accident, and found that, in addition to missing a methane monitor, it had an inoperative fire-suppression system. A hose to the activator was missing. Because of this condition, he issued Citation No. 4017968.

18. The manual activator is a pressurized cylinder. A button on the one-time-use cylinder is designed to pop a bladder cap on the cylinder seal to release pressure out of the cylinder. The pressure travels through a hose to force a chemical discharge to put out a fire. The hose is 1/4 to 1/2 inch in diameter and about eight feet long. The system is manually activated; that is, the operator has to hit the button on the cylinder to cause the system to work. The button is within arm's reach of the operator's compartment. The hose is an essential part of the fire-suppression system. Without it, there is no way to discharge the chemical to suppress a fire. The fire-suppression system is an enclosed, self-contained system. The missing hose rendered the system inoperative. Nats Creek's superintendent and electrician told Inspector Bartley that the scoop was subject to being used in and inby the last open crosscut. There was no indication on the scoop that it was restricted to use outby the last open crosscut.

19. Inspector Bartley determined that the violation was significant and substantial. If there had been a fire on the vehicle, there would have been no way to extinguish the fire readily. If the scoop operator had been trapped, he could have been burned alive. The scoop came out of the mine under its own power. It was not tagged out of service and it was subject to being used anywhere in the mine.

20. Inspector Bartley determined that a moderate level of negligence was involved in this violation. He could not tell how long the hose had been missing, but noted that the hose connections were dirty, indicating that the hose had been missing for a substantial period.

**Battery Charging Station**

21. On December 8, 1992, Inspector Donnie R. Johnson found that the battery charging station was ventilated with return air and that no intake air was supplied to the station.

22. Inspector Johnson determined that the observed conditions constituted an imminent danger. Non-permissible equipment was in the charging station. There were open energized circuits in the charging units. Return air was coming into the battery charging station from the face area. A worked-out coal panel to the right of the station could produce methane or toxic fumes. Coal dust coming from the face could cause an ignition or an explosion. An ignition or explosion could blow out permanent ventilation controls. Coal dust could propagate an explosion or fire throughout the mine. The charging station was 20 or 25 crosscuts outby the working section. Based upon the conditions observed, Inspector Johnson issued imminent danger withdrawal Order No. 3516672.

23. Inspector Johnson issued § 104(a) Citation No. 3516674 on December 8, 1992, charging a violation of 30 C.F.R. § 75.340(a)(1). The regulation requires that underground battery charging stations be located in noncombustible structures or areas or be equipped with a fire-suppression system. The equipment must be ventilated by intake air that has not been used to ventilate working places. The battery charging station was not housed in a fireproof structure or equipped with a fire-suppression system. It was not ventilated with intake air. Two brattices had been removed to allow the return air from the 001-0 section to pass through and ventilate the battery charging station, where six energized 480-volt batteries were charging scoop batteries.

24. The coal ribs that formed the battery charging station were not insulated or fireproofed. The station was located between pillar blocks of coal that were left when the entries were mined and developed with crosscuts connecting the entries. There was no enclosing structure. The exposed coal ribs and coal dust on the floor were combustible. The station was littered with empty cardboard boxes and open cans which contained hydraulic fluid. Inspector Johnson found about 45 empty cardboard boxes piled up between batteries and a brattice.

25. There was no fire-suppression system or automatic fire-fighting equipment at the charging station. Two small hand-held five-pound fire extinguishers were in the area. There were hoses and jugs of water in the charging station. However, Respondent's superintendent was aware that firefighting problems would be compounded by trying to use water to fight an electrical fire. At least two of the battery chargers and the batteries were against the coal ribs. Batteries being charged generate heat. The charging unit also produces heat. Hydrogen is a by-product of the battery charging process. It is very explosive, with an explosive range of 4 to 74 percent. As the plates in the batteries expand, they push up liquid. Any hydrogen on top of the liquid in the cell is pushed out into the atmosphere.

26. Return air was used to ventilate the battery charging station. The air passed through the last working place in the active section before it ventilated the charging station. Inspector Johnson observed that the battery charging station was energized. He could hear the chargers humming, the batteries bubbling, and he could smell the distinctive odor associated with charging batteries. The cords for the charges and the batteries were plugged together. Three scoops and four sets of batteries were being charged.

27. Inspector Johnson determined that this was a significant and substantial violation. The mine liberates methane. If return air containing methane and coal dust from the face passed over the energized electrical components in the charging station, and a spark was released, the spark could have caused a fire or an explosion. The battery chargers were not permissible equipment. If there had been an explosion, it could have blown out the ventilation controls between the return and intake air courses. If the ventilation controls had been blown out, the fresh air going to the working face could have been contaminated. If the single mine fan had been blown out by an explosion, there would have been no ventilation in the mine.
It was highly likely that if mining had continued, the conditions found by the inspector would result in serious injury.

28. Inspector Johnson determined that high negligence was associated with the violation charged in Citation No. 3516674. The violation had existed for a substantial period, probably a month. The mine superintendent concurred in this estimate. He told Inspector Johnson, before they went underground, that there was a problem with the charging station. He did not mention then that it was being ventilated with return air, but confirmed later that it was ventilated that way. There was no evidence of any efforts to fireproof the battery charging station, to ventilate it with intake air, or to keep the return air out of it. The

conditions found by the inspector were obvious to anyone with a reasonable knowledge of mining practices and ventilation control. The cited conditions should have been discovered and corrected during the routine preshift examinations, but they were not reported in the preshift examination records.

29. The citation was terminated after abatement of the violative conditions. The coal ribs were insulated with a noncombustible sealer to form a fire protection barrier between the coal ribs and the charging units. The mine floor was cleaned up. Rock dust was applied to all the areas. The cardboard containers, plastic containers and empty oil cans were removed from the underground area of the mine. Double airlock doors were installed. A brattice and regulators were installed. The changes allowed intake air to ventilate the charging station. After ventilating the station, the air coursed out into the return air course. All the corrective actions were completed in one day.

30. Inspector Johnson issued § 104(a) Citation No. 3516675 on December 8, 1992. Originally, the citation cited a violation of 30 C.F.R. § 75.503. During the hearing an amendment was allowed to conform to the proof. The cited regulation was changed to 30 C.F.R. § 507-1(a), which provides that electric equipment used in return air outby the last open crosscut must be permissible equipment. Non-permissible 480-volt battery chargers were found at the charging station in return air.

31. For the same reasons given for his findings as to Citation No. 3516674, Inspector Johnson determined that this was a significant and substantial violation involving a high level of negligence, and was highly likely to result in fatal injuries.

**Conveyor Belt System**

32. On June 24, 1993, Inspector Johnson began a quarterly inspection of the mine. Advance mining was underway. When he arrived at the mine, he met with the superintendent, who told him that because a rock-picking table was being repaired the conveyor belts were not moving. Inspector Johnson informed the superintendent that he would start traveling the conveyor belts that day, since they would not be operating. Inspector Johnson entered the No. 2 belt entry portal to crawl the belts. Along the No. 1 conveyor belt Inspector Johnson observed three conditions that caused him to issue § 107(a) Order No. 4027494, finding an imminent danger: The automatic fire sensor warning device was inoperative. There were damaged and stuck rollers. There were extensive accumulations of loose coal, coal dust and float coal dust. Inspector Johnson saw no evidence of efforts to

correct these conditions. Methane was being liberated at the rate of about 17,600 cubic feet per day. Inspector Johnson feared that when the conveyor belts started again, the three conditions would combine to result in a serious mine fire or a coal dust explosion. He immediately returned to the surface to issue a § 107(a) order and to put a red tag on the No. 2 portal canopy for the belt conveyor to show that it was closed by a § 107(a) order.

33. When Inspector Johnson advised the mine superintendent that he had issued an imminent danger order, the mine superintendent called the section by phone to have miners from the face start to abate the cited hazards. The superintendent did not express disagreement with the order or assert that miners already were on their way to address the cited violations. When the inspector had arrived at the mine and said he was going to crawl the belts, the superintendent said, ". . . I don't think it looks too good, probably dirty. . . ." Mine Manager Travis Miller acknowledged the condition of the belts: "We had been there and like Billy [Martin, the superintendent] said, well, they're probably dirty." The superintendent testified further, "I did go straight to the phone right then and I called inside and I told the boss, the section foreman, to get people down there on the number one belt. That's the reason . . . I didn't go up the belt with him. . . . I called to get people to correct the problem if there was anything wrong with the belt line because, I knew he was going to check it." Tr. 356-359. It was not until the MSHA inspectors came to the mine that the superintendent called to have miners clean up the belts.

34. The imminent danger order was terminated the following afternoon after the fire sensor was repaired, the accumulations were cleaned up, and the rollers were repaired or replaced.

**Fire Sensor System**

35. The first condition that contributed to issuance of the above imminent danger order was cited in § 104(a) Citation No. 4027495, dated June 24, 1993. The regulation cited (30 C.F.R. § 75.1103-1) requires that a fire sensor system be installed on each underground belt conveyor, to give warning automatically when a fire occurs on or near the belt and to provide both audible and visual signals that permit rapid location of the fire. The fire sensor system was not maintained in an operative condition for the Nos. 1, 2, 3, and 4 conveyor belts. The fire sensor cable had been severed between the automatic indicator and the alarm signal box. The cable also had been severed at several locations along the No. 1 conveyor belt.

36. At Inspector Johnson's request, the company electrician, George Bush, tried to activate the fire sensor system. It would not function. As he crawled the belt, Inspector Johnson found that the fire sensor cable had been cut or worn through in several locations, where the cable had dropped down beside the belt conveyor, which rubbed against the cable until it was severed or badly worn.

37. Fire sensors are contained in the cable, spaced at intervals of 125 feet. If a fire occurs, when the sensor is heated to 125 degrees the circuit opens and automatically indicates which belt conveyor is on fire. There were four belts underground. The fire sensor would not work for any of them. One or two miners were assigned to monitor more than a mile of belts. Each belt was 1,400 to 2,000 feet long. The belt entries also served as secondary escapeways.

38. The fire sensor system was needed to respond to a fire quickly, to extinguish it or to try to keep it under control. Without the system, a fire could be raging out of control before being detected. In the event of fire, the ventilation system would pull the smoke to the face where the miners were working. The only firefighting system in place was the manually activated water line which extended along the belt conveyors.

39. Although the belts were not running, the section was engaged in advance mining. Miners could blast and extract coal at the face to have it ready to load when the belts started to run again. Inspector Johnson observed that some miners were at the face and some were repairing the rock-picking table on the outside.

40. Inspector Johnson determined that the fire sensor violation was significant and substantial. Without the system, there was no way to detect a fire on the belt conveyors until someone encountered smoke or flames. Inspector Johnson expected that the belts would be turned back on as soon as the repairs were completed on the picking table. He believed that the observed conditions were likely to result in a mine fire or explosion if normal mining operations were resumed. There was friction between the belt and the damaged rollers. There were areas where the combustible accumulations touched the bottom of the belt. If the friction resulted in a fire, there was no system in place to warn of it or to locate it.

41. Inspector Johnson determined that the violation involved high negligence. The fire sensor system was required to be checked weekly. The belt line was required to be checked daily, within three hours after the beginning of a production shift.

The miners had been underground 2 hours 50 minutes when Inspector Johnson issued the citation. The cable had been severed in several locations. The control box for the fire sensor system has a warning light to show any short-circuit in the system. The severed cable should have short-circuited the system, but Inspector Johnson found that the warning light control box was not functioning, perhaps because of dead batteries. It did not appear that the control box had been touched in a long time. All that had to be done was to push an easily accessible test button once each week to see if the system was working. There was no mention of the non-functioning system or of the severed cable in the preshift examination records or in the weekly examination records. There was no evidence that the company was about to begin repairs of the cable and the fire sensor system.

42. Citation No. 4027495 was terminated the next day, after the automatic fire sensor system was restored.

**Accumulations of Combustible Material**

43. The second condition that contributed to issuance of the imminent danger order was cited in § 104(a) Citation No. 4027496, on June 24, 1993. The cited regulation (30 C.F.R § 75.400), prohibits the accumulation of coal dust, float coal dust, loose coal, and other combustible material in active workings or on electric equipment in active workings. Inspector Johnson found accumulations of loose coal, coal dust, and float coal dust alongside and beneath the No. 1 conveyer belt and in the connecting crosscuts. The accumulations extended about 1,440 feet, from 1 inch to 30 inches deep. In the areas where Inspector Johnson saw one inch of float coal dust it was scattered across the entire entry, from rib to rib. The area was dry. The accumulations were black. The energized 4,160-volt cable was buried in the loose coal and float coal dust alongside the belt conveyor.

44. Inspector Johnson measured the accumulations with a measuring tape, using his hand to rake the coal back until he reached the mine floor. His close inspection of the accumulations verified that it was loose coal, coal dust and float coal dust. Large quantities of coal dust were raised into the air as he crawled through the accumulations. Miners had worked or traveled in the area where the combustible accumulations were found. The area was required by regulation to be traveled daily during the preshift examination.

45. For the same reasons given for his findings as to Citation No. 4027495, Inspector Johnson determined that this was a significant and substantial violation and involved high

negligence. It was reasonably likely to result in serious injuries to 12 miners working on the head drive and at the face. The 4160-volt cable buried in the accumulations was energized and was the main power cable. Roof conditions were fair, but some loose material had fallen out from between the roof bolts. The power cable went through the area where the roof had sloughed. If a piece of the roof fell on the cable in the accumulations, the cable could have been cut, resulting in a hot flash. The hot flash could have ignited the float coal dust. When the belt was running again, there would be friction between the belt and the rollers that were broken or stuck. Also, there would be friction as the belt rubbed against the metal frame of the belt assembly. The belt runs 250 to 450 feet per minute. There were shiny and worn places on the steel frame, indicating that the belt had rubbed against it. Additionally, there were rollers with shiny, smooth and worn places, indicating that the belt was rubbing on them, rather than rolling over them. Inspector Johnson saw no evidence of efforts to clean up the accumulations. The accumulations were easily visible alongside the belt, as was the 2 1/2-inch power cable where it dropped down into the accumulations from the mine roof. Inspector Johnson estimated that the accumulations would fill one, or possibly two, coal trucks. There was no mention of the accumulations in the preshift examination records.

46. The citation was terminated the next day, after the accumulations had been cleaned up and rock dust had been applied to the area.

**Conveyor Belt Rollers**

47. The third condition that contributed to the issuance of the imminent danger order was cited in § 104(a) Citation No. 4027497, on June 24, 1993. The cited regulation (30 C.F.R. § 75.1725) requires that machinery and equipment be maintained in safe operating condition and that machinery and equipment in unsafe condition be removed from service immediately. Inspector Johnson found damaged, broken, or stuck rollers at several locations along the No. 1 belt conveyor, beginning at the No. 2 mine portal and extending to the conveyor tail piece, about 1,440 feet. The damaged, broken, or stuck rollers allowed the conveyor belt to contact the dry accumulations of loose coal, coal dust, and float coal dust beneath the belt.

48. There are two layers of 3-inch steel rollers. The top rollers are five to six feet apart. The bottom rollers are 10 to 12 feet apart. The rubber conveyor belt is designed to reduce friction by moving on rotating rollers rather than rubbing against them.

49. Inspector Johnson found that 19 rollers were defective. The conveyor belt had not been taken out of service. Some rollers were broken. The belt had cut through the tops of some of the rollers. Some rollers had dropped down in the middle. Some had broken off the end of the supporting frame. Some would not roll because there was coal jammed between the frame and a roller. Inspector Johnson tried to turn some of the rollers with his hands; he could not move them. In addition to the 19 stuck and broken rollers, Inspector Johnson saw rollers with shiny, smooth and worn places, indicating that the belt was rubbing on them, rather than rolling over them.

50. Some of the rollers were in accumulations of coal dust. For the same reasons given for his findings as to Citations Nos. 4027495 and 4027496, Inspector Johnson determined that this was a significant and substantial violation and involved high negligence.

51. The damaged rollers were obvious and clearly visible to anyone crawling along the belts to make the belt examinations. There were two production shifts a day. The belts and rollers were required to be examined twice every work day. There was no report of defective rollers in the preshift examination records.

## DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

### Scoops

Four citations charge a violation of 30 C.F.R § 342(a)(1) for having a defective or missing methane monitor on a scoop.

Respondent contends that the four citations should be vacated because the inspector could not testify that the cited scoops were used to load coal while having a defective or missing methane monitor.

Section 75.342(a)(1) provides:

> MSHA approved methane monitors shall be installed on all face cutting machines, continuous miners, longwall face equipment, loading machines, and other mechanized equipment used to extract or load coal within the working place.

"Working place" is defined as "the area of a coal mine inby the last open crosscut." 30 C.F.R. § 75.2.

Respondent states that its evidence shows that all scoops were checked to be sure the methane monitors were operative

before a scoop was used to haul coal and that if a scoop was not in permissible condition it was rendered inoperative by not hooking the necessary wiring back up to the circuit breaker. It states that if a methane monitor became inoperative during the production shift, the scoop was returned to the battery barn where it was replaced with a new scoop or the methane readout or display unit was replaced.

The Secretary contends that no records or other identification was used to restrict any scoops from being used inby the last open crosscut, and that when the inspector asked the company which scoops had been used at the face it was unable to identify them. Scoops with defective methane monitors were not listed in the examination records, nor were they tagged out of service or marked in any way to prevent their use inby the last open crosscut.

The company acknowledged that seven of the nine scoops routinely were used to load or haul coal at the face, but the company could not tell the inspector which three or four scoops were in service at the time of the fatal accident. No records were maintained to show whether a scoop was used inby or outby the last open crosscut on any given date.

On balance, I find that the inspector properly found that the cited scoops were subject to being used to load coal at the face at any time. The defective or missing methane monitors therefore constituted violations of 30 C.F.R. § 75.342(a)(1).

The evidence also supports the inspector's finding that the violations were significant and substantial. There was a known history of methane ignitions at this mine. There was no other automatic de-energizing device on the equipment. There was no other automatic methane detection device on the section. The defective methane monitors could significantly and substantially contribute to an explosion or ignition. It was reasonably likely that the violations would result in serious injury. The violations were therefore significant and substantial. Mathies Coal Company, 6 FMSHRC 1 (1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573 (1984).

The evidence supports the inspector's finding of a moderate degree of negligence. The operator failed to take reasonable steps to ensure that scoops with defective or missing methane monitors were not used to load coal inby the last open crosscut.

A fifth citation alleges that the AR-4 Elkhorn scoop, the one involved in the fatal accident, had an inoperative fire suppression system (in addition to missing a methane monitor), in

violation of 30 C.F.R. § 1100-3. A hose to the activator on the fire suppression system was missing.

The company contends that the AR-4 scoop was not used to load coal but was used only to transport persons and supplies, and therefore was not required to have a fire suppression system.

I find that the inspector properly determined that the scoop was not "transportation" equipment within the meaning of the regulations, based upon the representations of company personnel to the inspector and the fact that a scoop is designed to haul coal and is not designed to transport people.

Moreover, § 75.1100-3 requires that "All firefighting equipment shall be maintained in a usable and operative condition." If a vehicle has a fire suppression device, it compromises safety and violates this section if the firefighting device does not work.

By regulation, Nats Creek was required to adopt a program for the instruction of all miners in the location and use of firefighting equipment, including operation of fire suppression equipment available in the mine. Presuming Nats Creek's compliance with the training regulations, drivers of the cited scoop would have been trained in the operation of the fire suppression system on the equipment. The scoop was not equipped with any other firefighting equipment. It is likely that a scoop driver would have relied on the fire suppression system available within arm's reach. A scoop driver's reliance on the inoperative fire suppression system could have significantly and substantially contributed to a serious fire hazard, resulting in serious injury. The violation was reasonably likely to result in serious injury and therefore was significant and substantial.

**Battery Charging Station**

Two citations were issued in conjunction with a § 107(a) imminent danger order on December 8, 1992.

Citation No. 3516674 charges a violation of 30 C.F.R. § 75.340(a)(1), which requires that underground battery charging stations be located in noncombustible structures or areas or be equipped with a fire suppression system. Additionally, the regulation requires that battery charging stations be ventilated by intake air. The citation was issued for several reasons. The inspector found 45 combustible cardboard boxes piled between batteries and a brattice in one area of the station. The battery charging station was littered with empty oil cans. The coal ribs which formed the battery charging station were not adequately

insulated or fireproofed. The station was located between pillar blocks of coal; there was no enclosing structure. The exposed coal ribs and coal dust on the floor were combustible. At least two of the battery chargers and the batteries were against the coal ribs.

No fire suppression system was in place. There was no automatic firefighting equipment. Two small hand-held 5-pound fire extinguishers were in the area. There were hoses and jugs of water in the charging station, but using water on an electrical fire would only compound the problem. The batteries and the charging units generate heat. Hydrogen, which can quickly reach an explosive level, is a by-product of the battery charging process.

Return air, with potentially high quantities of coal dust, float coal dust, toxic or explosive fumes, methane, and carbon monoxide, was ventilating the battery charging station. The air came from the last working place on the active section.

Citation No. 3516675, as amended, charges a violation of 30 C.F.R. § 75.507-1(a), which requires that electric equipment used in return air outby the last open crosscut be permissible. The citation was issued because non-permissible 480-volt battery chargers were being used in the battery charging station.

The company contends that the two citations are duplicative in that they involve only one violation, i.e., ventilating the battery charging station with return air. It states that both citations were terminated through one action taken by the operator, i.e., changing the ventilation of the battery station to intake air.

However, the battery charging station was not housed in a fireproof structure, it was ventilated with return air, and non-permissible equipment was being used in it while it was ventilated with return air. These are distinct, separate violations. Despite the fact that the violations arose out of a single mining activity (battery charging) there were separate violations of two separate regulations. Separate proof was offered for each violation. See: Southern Ohio Coal Company, 4 FMSHRC 1459, 1462 (1982). Thus, to abate the violation of § 75.340(a)(1), substantial separate actions were required besides changing the ventilation to intake air. The coal ribs housing the station were insulated with a noncombustible sealer to form a fire protection barrier between the coal ribs and the charging units. The mine floor was cleaned. Rock dust was applied to all the areas. The cardboard containers, plastic

containers and empty oil cans were removed from the underground area of the mine.

The company also contends that the two violations were not due to high negligence because there were mitigating circumstances. It states that the battery charging station was being ventilated pursuant to directions given by a prior MSHA inspector and had been ventilated that way for a substantial period before the citations.

Three or four days before the citation was served, the Mine Superintendent, Billy Martin, told Inspector Johnson that he had a ventilation problem concerning the battery charging station, and showed him a small drawing or map to indicate the problem. The problem he described did not indicate that station was in return air. The inspector was leaving and stated that when he returned (several days later) he "would try to help him on the ventilation" problem. Tr. 234. When the inspector returned, on December 8, 1992, he examined the battery charging station and found that it was in return air. The inspector testified that Martin had not told him, several days earlier, that the station was in return air.

In looking back at the situation, the inspector testified that "when I issued the imminent danger [order] [it] was my understanding that Mr. Martin didn't know that he could use this neutral air to dump into this charging station ...." Tr. 232.

Travis Miller, the Mine Manager, testified that the battery station "was ventilated pursuant to the direction of [Inspector] Sloan and to his satisfaction." Tr. 273. However, Mr. Miller had no firsthand knowledge of the condition of the battery station prior to December 8, 1992. I do not find that the prior inspector, Marcus Sloan, approved the ventilation pattern for the battery station that was later found by Inspector Johnson on December 8, 1992.

However, I find that Mr. Martin's effort to get advice from Inspector Johnson concerning the ventilation of the battery station several days before December 8, 1992, is a mitigating factor that serves to reduce the operator's negligence from high to moderate as to the violations involving ventilating the battery station in return air. This factor does not mitigate the high negligence involved in the failure to maintain the battery station in a noncombustible structure or area, which is an important part of the violation of § 75.340(a)(1).

The evidence sustains the inspector's finding of significant and substantial violations as to the battery charging station.

## Belt Conveyors

Three § 104(a) citations were issued in conjunction with a § 107(a) imminent danger order on June 24, 1993.

The imminent danger order was issued based upon the inspector's finding that a combination of hazards constituted an imminent danger: the automatic fire sensor system for four conveyor belts was inoperative; extensive accumulations of loose coal, coal dust and float coal dust were present; and there were damaged, broken, and stuck rollers.

The imminent danger order was terminated the following afternoon, after the fire sensor system was repaired, the accumulations were cleaned up, and the rollers were repaired or replaced.

The company contends that the imminent danger order was improper because the conveyor belts were not running and were in the process of being cleaned and repaired at the time of the inspection.

However, when Inspector Johnson arrived at the mine on June 24, 1993, advance mining was underway in the active workings. He met the mine superintendent, who told him the belt conveyors were not running because a rock-picking table was being repaired. Inspector Johnson crawled the belts. Even though the shift had begun three hours earlier, he saw no evidence of any effort to repair the fire sensor system, the rollers, or to clean up the extensive accumulations of loose coal, coal dust, and float coal dust.

The evidence sustains the imminent danger order and the three § 104(a) citations. The violations were significant and substantial, as they were reasonably likely to cause serious injury. The violations were obvious and demonstrated high negligence.

## Claim of Financial Hardship

Travis Miller, the mine manager, testified concerning Nats Creek's ability to pay the penalties proposed by the Secretary. In general, he stated that the price of coal was low and the cost of mining it was high. These are common complaints in the mining industry. He testified that the Sugarloaf No. 2 Mine was losing money, but he had no information about assets, liabilities, owners' salaries, business structure, or any other financial data. To support his testimony, he offered a one-page unaudited

and unsigned consolidated income statement for the five months ending May 31, 1994 (Respondent's Exhibit 2). The preparer of the statement was not identified. No company records or tax returns were offered to support the figures in the statement.

At the close of the hearing the judge gave Nats Creek 15 days from the date of the hearing to submit an audited financial statement. No such statement was submitted.

The burden is on a mine operator to establish that payment of the assessed civil penalties will adversely affect its ability to continue in business. Absent proof that the imposition of civil penalties would adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Co., 5 FMSHRC 287 (1987), aff'd. 736 F.2d 1147 (7th Cir. 1984).

Mr. Miller's testimony and the one-page unaudited income statement do not meet Nats Creek's burden of proof that payment of the penalties assessed would affect the operator's ability to continue in business.

**Civil Penalties**

Respondent produces about 160,000 tons of coal a year.

From June 30, 1990, to June 30, 1994, Respondent had 135 violations of mine safety and health standards, for which it paid $17,320 in civil penalties, and was cited with 48 other violations with proposed civil penalties of $86,290 which are in litigation.

As to each of the violations in the cases at bar, Respondent made a good faith effort to achieve rapid compliance after being notified of the violation. The factors of negligence and gravity are discussed above.

Considering all of the criteria for assessing civil penalties in § 110(i) of the Act, I find that the following civil penalties are appropriate:

| Citation No. | Date | Civil Penalty |
|---|---|---|
| 4017965 | 12/1/92 | $ 235 |
| 4017967 | 12/1/92 | $ 235 |
| 4017975 | 12/1/92 | $ 235 |
| 4017980 | 12/1/92 | $ 235 |
| 4017968 | 12/1/92 | $ 235 |
| 3516674 | 12/8/92 | $6,500 |

| | | |
|---|---|---|
| 3516675 | 12/8/92 | $4,500 |
| 4027495 | 6/24/83 | $2,000 |
| 4027496 | 6/24/83 | $5,000 |
| 4027497 | 6/24/83 | $4,000 |

## CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated the mine safety standards as alleged in each of the 10 citations involved in these cases.

3. The evidence sustains the two § 107(a) orders involved in these cases.

## ORDER

1. The 10 citations and the two § 107(a) orders involved in these cases are AFFIRMED.

2. Respondent shall pay civil penalties of $23,175 within 30 days of this Decision.

William Fauver
Administrative Law Judge

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/lt

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 94-247 |
| Petitioner | : | A.C. No. 46-06958-03578 |
| v. | : | |
| | : | Mountaineer Mine |
| MINGO LOGAN COAL COMPANY, | : | |
| Respondent | : | |

## DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Fauver

This civil penalty case involves three citations issued under § 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 **et seq**.

At the hearing the parties moved for approval of a settlement of two of the citations. The motion is granted in the Order below.

The case was heard on Citation No. 3966956.

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

## FINDINGS OF FACT

1. Mingo Logan is the owner and operator of the Mountaineer Mine, which produces coal for sales in or substantially affecting interstate commerce.

2. On December 6, 1993, during an inspection of the Mingo Logan Mountaineer Mine, MSHA Inspector Robert A. Rose was accompanied by Matt Murray, the safety coordinator for Mingo Logan. Inspector Rose traveled to the 8 Left section. A contractor of Mingo Logan, Golden Chance Mining, Inc., was responsible for the mining activity in the 8 Left section, which was operated entirely by employees of Golden Chance Mining. Golden Chance was performing advance mining in the conventional pillar and retreat mining cycle, and was extracting coal. Inspector Rose met Kentucky Mine Inspector Eugene White, who was also inspecting the mine. Inspector White was accompanied by Phil Adkins, a safety representative of Mingo Logan. No employee of Golden Chance Mining accompanied either Inspector Rose or Inspector White.

3. Inspector White informed Inspector Rose that he had found smoking materials on a Fletcher roof bolter in the 8 Left section. The smoking materials were 13 cigarettes and one butane lighter. Based on this information, Inspector Rose issued § 104(a) Citation No. 3966956 to Mingo Logan Coal Company for a violation of 30 C.F.R. § 75.1702.

4. Section 75.1702 forbids taking smoking materials into an underground coal mine. It also requires the operator to institute a smoking materials search program, approved by the Secretary, "to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters." Mingo Logan's smoking materials search program, approved by MSHA, provides in part: "The search program is systematic and conducted at least weekly on an irregular interval and as often as necessary to ensure the effectiveness of the program." Exhibit G-3.

5. Under its agreement with Mingo Logan, Golden Chance followed Mingo Logan's approved search program to search its own employees. In doing so, it made random searches by having the miners empty their pockets and relying on their honesty in representing that they were not carrying smoking materials into the mine. The search program did not involve patting down the employees.

6. Golden Chance was not issued an identification number by MSHA and was not regarded by MSHA as being subject to the regulation requiring an operator to submit a smoking materials search program for approval by MSHA. MSHA held Mingo Logan responsible for any violations committed by Golden Chance or its employees.

7. Under its contract, Mingo Logan held Golden Chance accountable for any civil penalties Mingo Logan was assessed for violations committed by Golden Chance or its employees. It deducted such civil penalties from its contract payments to Golden Chance.

## DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

### Liability

Section 75.1702 of the regulations repeats a statutory mandatory safety standard, which provides:

> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

The inspector issued Citation No. 3966956 alleging a violation of 30 C.F.R. § 75.1702 as follows:

> The company was not following their approved smoking program in that while writer was on regular inspection he came in contact with state inspector Eugene White that informed me that he had found smoking material, cigarettes (13) and a (1) lighter on the fletcher roof bolting machine on 8 left section 006-0 MMU. He was accommened [sic] by Phil Adkins company Safety. This smoking material was not observed by writer but a citation was issued basic [sic] on the State inspector findings. This is a contractor unit at this mine.

The Secretary contends that, since smoking materials were found underground, Mingo Logan is strictly liable for a violation of § 75.1702. He reasons that the regulation requires the operator to follow a search program that insures that smoking materials are not taken underground; therefore, finding smoking materials underground "reveals the ineffectiveness of the operator's searches . . . ." Reply Brief, p. 10.

Respondent argues that it is not responsible for violations by its independent contractor, Golden Chance, and that, moreover, the contractor was in compliance by making searches in accordance with Mingo Logan's search program approved by the Secretary.

The Act imposes strict liability on mine operators for violations of safety or health standards at the mine regardless of fault and regardless whether the violation was committed by an independent contractor engaged by the mine operator. Western Fuels - Utah, Inc. v. FMSHRC et al, 870 F.2d 711, 716 (D.C. Cir. 1989); Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359 (1991); Republic Steel Corp., FMSHRC 5, 8-10 (1979).

The first sentence of § 75.1702 is a strict prohibition:

> No person shall . . . carry smoking materials . . . underground . . . .

If smoking materials are found underground, there is a violation of § 75.1702 and the operator is liable without regard to fault. Thus, it is not relevant in determining an operator's liability whether an independent contractor committed the violation and could also be found liable. A mine operator may not shield itself from liability by contracting with another to carry out part of the mining activity at its mine.

The second sentence of the safety standard is a separate requirement:

> The operator shall institute a program, approved by the Secretary, to insure that any person entering the mine does not carry smoking materials, matches, or lighters.

Citation No. 3966956 alleges a violation of § 75.1702 in a somewhat round-about way:

> The company was not following their approved smoking program in that [smoking materials were found underground]. * * *

This amounts to a charge of strict liability for the act of allowing smoking materials to be carried underground. That is, the Secretary is saying that finding smoking materials underground means, per se, that the operator was not following its search program because under § 75.1702 the program must "insure that any person entering the underground area of the mine does not carry smoking materials . . . ." I find this reasoning to be round-about and unnecessary. The violation proved in this case is simply the act of allowing smoking materials to be carried underground. Questions of the adequacy of the search program, how it was carried out, and the reasonableness of the operator's reliance on an independent contractor to make the searches, relate to the factor of negligence in assessing a civil penalty. They are not relevant to the question of the operator's liability for allowing smoking materials to be carried underground.

The strict liability of § 75.1702 imposes an obligation on the operator to keep smoking materials out of its mine. It has a duty to submit a search program to the Secretary for approval. However, it may enhance this program in any way it sees fit, e.g., by searching miners every shift, patting them down, using a dog to sniff for tobacco, paying a reward for reporting violations, etc. Such decisions are left up to the operator.

I conclude that the citation, while somewhat awkwardly written, sufficiently charges a violation of the first sentence of § 75.1702. That issue was adequately and fairly tried at the hearing. Mingo Logan is therefore liable for the violation of § 75.1702.

## Civil Penalty

Section 110(i) of the Act provides six criteria for assessing a civil penalty:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charges, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Mingo Logan is a large operator. In the two-year period before the instant violation, it had 393 violations of mine safety and health standards of which 167 were significant and substantial within the meaning of the Act.

The operator demonstrated good faith in an effort to achieve rapid compliance after the instant citation was issued. Whether it succeeds in maintaining compliance will depend on future events.

The violation was very serious, since the presence of smoking materials in an underground coal mine is highly dangerous.

I find that the violation was due to ordinary negligence. Mingo Logan had at least one prior occurrence of finding smoking materials underground. Its method of executing its approved search program was not thorough. For example, it did not pat down the miners and it relied upon their honesty in representing[1] that they were not carrying smoking materials underground. Since a prior infraction was known by Mingo Logan, there was a duty to increase the effectiveness of its search program (which was used by Golden Chance as an agent).

Considering the criteria for civil penalties in § 110(i), I find that a civil penalty of $1,800 is appropriate for this violation.

## CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent, Mingo Logan Coal Company, violated 30 C.F.R. § 75.1702 by allowing smoking materials to be carried into the underground area of its Mountaineer Mine.

## ORDER

1. Citation No. 3966956 is AFFIRMED.

2. The motion to approve settlement of Citation Nos. 3973786 and 3973787 for $100 in penalties is GRANTED.

3. Respondent, Mingo Logan Coal Company, shall pay total civil penalties of $1,900 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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[1] **A miner's representation could be verbal or by gesture (emptying pockets to represent that no smoking materials are on the miner's person).**

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 6 - 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 94-1274-D |
| ON BEHALF OF CHARLES H. | : | PIKE CD 94-16 |
| DIXON, BERNARD EVANS, | : | |
| RICHARD GLOVER, EDGAR OLDHAM, | : | |
| MARK MARCH, AND ELEVEN (11) | : | |
| UNNAMED EMPLOYEES OF PONTIKI | : | |
| COAL CORPORATION, | : | |
| Complainant | : | |
| v. | : | Pontiki No. 2 Mine |
| | : | Mine ID 15-09571 |
| PONTIKI COAL CORPORATION, | : | |
| Respondent | : | |

ORDER GRANTING PARTIAL DISMISSAL

Before: Judge Melick

This case is before me upon the Respondent's Motions to Dismiss raising the following issues: (1) the Commission lacks jurisdiction in this case over those persons who have not filed complaints under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act" and in cases where the Secretary has not made a written determination whether such complaints have merit (under Sections 105(c)(2) and (3) of the Act); (2) that the complaint of Charles H. Dixon must also be dismissed for lack of jurisdiction because he was not a member of a class of persons protected under Section 105(c) when the alleged discrimination occurred; (3) that the complaint is defective under Commission Rule 44(a), 29 C.F.R. § 2700.44(a); and (4) that the complaint herein is untimely. [1]

[1] The Secretary's Motion for Summary Decision on the merits filed January 13, 1995, is premature as the Motions to Dismiss may be dispositive on preliminary issues. The Secretary's Motion also appears to be based upon facts still at issue. See Commission Rule 67, 29 C.F.R. § 2700.67.

The undisputed record shows that Charles H. Dixon, alone, filed a complaint of discrimination pursuant to section 105(c)(2) of the Act [2] on April 26, 1994, alleging the following discriminatory actions:

> Pontiki Coal Corporation, through and by management personnel, advised miners that they could not choose a representative of miners who was a representative of the United Mine Workers of America. The miners were further advised that if they chose a UMWA representative that Pontiki would be forced to spend thousands of dollars to defend their position and that only employees of Pontiki will be recognized as a representative of miners.
>
> Management for Pontiki, on or about March 11, 1994, further implied that the miners' jobs would be less secure as a result of the company having to spend thousands of dollars to defend their position and that if the company was not forced to spend this money on lawyers that it would mean more money for them.
>
> Management for Pontiki on April 15, 1994, properly received by certified mail pursuant to 30 C.F.C. [sic] part 40 a certificate of representation of which they have failed to properly recognize.

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[2] Section 105(c)(2) provides, in part, as follows:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of the subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief.

In a letter to Mr. Dixon dated September 15, 1994, the Secretary advised Dixon in relevant part as follows:

> Your complaint of discrimination, under section 105(c) of the Federal Mine Safety and Health Act, has been investigated and the results carefully considered.
>
> Based on the results of this investigation, the Mine Safety and Health Administration (MSHA) has determined that, in its opinion, a violation of section 105(c) of the Act has occurred and that you have been discriminated against. MSHA, through the Office of the Solicitor, has prepared and filed a complaint on your behalf, requesting that Federal Mine Safety and Health Review Commission order relief which would remedy the discrimination.

Thereafter on September 6, 1994, presumably under section 105(c)(2) of the Act, the Secretary filed a complaint of discrimination with this Commission alleging in part as follows:

> 5. The following non-employees of Pontiki Coal Corporation have been appointed as duly authorized representatives of miners for the Pontiki No. 2 mine all within the meaning of section 105(c) of the Act [30 U.S.C. 815(c)]: Charles Dixon, Bernard Evans, Don Riley, Charles Johnson, Richard Glover, Edgar Oldham, and Mark March. Said representatives of miners were appointed by eleven employees of Pontiki Coal Corporation working at the Pontiki No. 2 mine.
>
> 6. From March 1994 to present, Pontiki Coal Corporation has discriminated against the non-employee representatives of miners and the eleven Pontiki Coal Corporation employees who appointed said non-employee miners' representatives. The acts of discrimination are in violation of section 105(c) of the Act 30 U.S.C. 815(c). The acts of discrimination engaged in by Pontiki Coal Corporation include but are not limited to the following: (a) refusal to recognize the non-employees as representatives of miners; (b) posting the appointment notice with the names of the non-employees representatives of miners on the mine bulletin board with the admonishment that Pontiki Coal Corporation would not recognize or honor the appointment of non-employees as miners' representatives; and (c) holding meetings with hourly paid employees, to include the eleven employees described above, and threatening said hourly paid employees with job

dispute on the issue of compliance with the certification requirements and that issue cannot be resolved without evidentiary hearings.

The Respondent further maintains that the Complaint should be dismissed as untimely. It is undisputed that Dixon's initial Complaint was received by the Secretary on April 26, 1994. The Complaint was not filed with this Commission until September 2, 1994, some 129 days later. The Secretary's written determination that Dixon had been discriminated against, which also states that a complaint had already been filed at the Commission on his behalf, was dated September 15, 1995. This filing delay exceeded the time limits set forth in section 105(c)(3) of the Act. However, as this time limit is not jurisdictional, a hearing will also be needed for the parties to present evidence on the issues of whether such delay was justified and whether the operator has been prejudiced by such delay. Oral argument will also be held at such hearings on the issue of whether the Secretary has complied with Commission Rule 44(a) and, if not, what sanctions should be imposed.

## ORDER

The Complaint herein, insofar as it purports to name as individual Complainants persons other than Charles H. Dixon, is dismissed. The Complaint of Charles H. Dixon is further limited as provided in this Order.

Hearings will be scheduled in the near future on the issues presented in the motions to dismiss which have not been decided herein.

Gary Melick
Administrative Law Judge

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FEB 6 1995

| | | |
|---|---|---|
| BLAKE SORENSEN, Complainant | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. WEST 94-594-D |
| v. | : | DENV CD 94-10 |
| | : | |
| INTERMOUNTAIN MINE SERVICES, Respondent | : | Apex Mine |

## DECISION

Appearances: Blake Sorensen, Ferron, Utah, pro se;
Thomas J. Erbin, Esq., Prince, Yeates & Geldzahler, Salt Lake City, Utah, for Respondent.

**Before: Judge Manning**

This case is before me on a complaint of discrimination brought by Blake Sorensen against Intermountain Mine Services under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1988)("Mine Act"). For the reasons set forth below, I find that Mr. Sorensen did not establish that his discharge by Intermountain Mine Services ("Intermountain") was motivated by his protected activity. Accordingly, I find that Mr. Sorensen was not discriminated against by Intermountain in violation of the Mine Act.

Mr. Sorensen filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). MSHA concluded that the facts disclosed during its investigation did not constitute a violation of section 105(c). Mr. Sorensen then instituted this proceeding before the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3). A hearing was held on January 11, 1995, in Salt Lake City, Utah. The parties elected not to file post-hearing briefs.

## FINDINGS OF FACT

Mr. Sorensen was employed by Intermountain from June 21, 1993 through March 15, 1994. During most of this period he was a roof bolter at the Apex Mine, an underground coal mine. The mine is owned by Andalex Resources and operated by Intermountain. On the day shift on March 15, 1994, Mr. Sorensen and Scott Olsen, another miner, installed roof bolts in an entry that had been

mined with a continuous mining machine earlier that shift. After they finished roof bolting, they applied rock dust to the recently mined area using the rock duster on the roof bolting machine. During the rock dusting operation, Mr. Sorensen slowly trammed the roof bolting machine back out of the entry and Mr. Olsen applied rock dust to the roof and ribs by holding the end of the hose attached to the duster. They were the only miners in the entry.

An MSHA inspector was at the mine on March 15, and Mr. Olsen was wearing a dust pump supplied by MSHA to sample for respirable dust. The shift began at 7:00 a.m. and was scheduled to end at 3:00 p.m. At about 10:00 a.m., Matt Brenemen, the miners' foreman, arrived in the entry along with the MSHA inspector. Olsen and Sorensen had bolted the area and were about finished rock dusting. They turned off the rock duster when Mr. Brenemen signaled with his cap light. Mr. Brenemen asked the crew, "What the fuck are you doing?" Mr. Sorensen replied that he was just doing his job, rock dusting like he always does. Mr. Brenemen told them that they could not rock dust while a respirable dust pump was on. Mr. Sorensen replied by saying "fuck you" to Mr. Brenemen. Mr. Brenemen then said, "if you say that to me again, you are out of here." Mr. Sorensen replied by saying "fuck you" again. Mr. Brenemen said "let's go" and told Mr. Sorensen to get his stuff. Mr. Olsen and the MSHA inspector were present during this conversation, which lasted no more than 20 seconds. (Tr. 23, 51).

A moment later, as they were preparing to leave the mine, Mr. Brenemen told Mr. Sorensen that he could not say that to him. Mr. Sorensen replied by saying that if Brenemen could swear at him, then he could swear back at Brenemen. Mr. Brenemen escorted Mr. Sorensen out of the mine. While Mr. Sorensen was preparing to take a shower, Mr. Brenemen asked him what was bothering him. Mr. Sorensen did not reply. After he showered and dressed, Mr. Sorensen filled out his time card and left the mine. It was Mr. Sorensen's understanding that he had been fired. He was not issued a discharge slip by Intermountain. These events are not disputed by the parties and are supported by the testimony of Sorensen and Olsen, and by Mr. Sorensen's statement to MSHA's special investigator, Ex. R-1. Mr. Brenemen is no longer employed by Intermountain and he did not testify at the hearing.

As a general matter, there is a lot of cursing at the Apex Mine. Mr. David Drips, president of Intermountain, testified that it is "a very crude society that takes place down there." (Tr. 58). He stated that the responsive "fuck you" is not "totally improper" and he has been responded to that way. Id. He went on to state, however, that when a supervisor tells an employee to stop cursing at him, he must do so or face disciplinary action. (Tr. 55, 58). He testified that a miner cannot continue to curse his supervisor in front of other miners, after

having been told to stop, because it will "erode his supervising capabilities." (Tr 55). He also testified that if a miner is told to leave the mine for continuing to curse at his supervisor after being warned not to do so, the miner would generally be given the opportunity to explain his behavior, to see "if we can understand what his problem was." (Tr. 55, 57, 59). In such a situation, the discipline, if any, is usually less than a discharge. Id. Mr. Olsen testified that he does not know of an instance in which a miner has continued to say "fuck you" to a supervisor after being warned not to do so. (Tr. 47). I credit the testimony of Drips and Olsen in this regard. There is no specific evidence as to whether any other miner has been discharged or otherwise disciplined by Intermountain for using similar language.

**SUMMARY OF THE LAW**

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if 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." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and 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 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

Because direct evidence of actual discriminatory motive is rare, illegal motive may be established through circumstantial evidence or a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

Examples of circumstantial evidence that tend to show discriminatory intent on the part of the mine operator include: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. Chacon, 3 FMSHRC at 2510.

## DISCUSSION WITH FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

There is no doubt that Mr. Sorensen had a statutory right to voice his concerns about the safety of his workplace without fear of retribution by management. It is evident that he believed that MSHA regulations required that the dust pump on Mr. Olsen be operating during the entire 8-hour shift, including when the crew was rock dusting. (Tr. 13, 30; Exs. R-1, R-2). It appears that he may have been concerned that if the crew obeyed Mr. Brenemen's order not to rock dust with the dust pump running, the health and safety of his work environment would have been adversely affected. His response to Mr. Brenemen's order could be construed as a safety complaint or a work refusal and, thus, protected activity.

Mr. Sorensen also presented evidence that Mr. Brenemen had asked him and other miners to work in an unsafe manner in the past. (Tr. 38, 61; Exs. R-1, C-2, C-3). He testified that he had confronted Brenemen when he was asked to do anything that was unsafe or illegal. Tr. 61. Such statements are protected activity. Based on the foregoing, and evaluating all of the evidence in a light most favorable to Complainant, I conclude that Mr. Sorensen engaged in protected activity.

I find, however, that the adverse action complained of was not motivated by Complainant's protected activity. I base this finding primarily on the evidence presented by Mr. Sorensen, but I also rely on credible evidence presented by Intermountain. First, Mr. Sorensen testified that he doubts that Mr. Brenemen terminated him because of his past safety complaints. (Tr. 39-40, 61-62). In addition, there is no other evidence in the record, including circumstantial evidence, linking Mr. Sorensen's past safety complaints with his termination. Although Mr. Sorensen stated, in documents submitted in this case, that Mr. Brenemen "did a lot of things that were against the law," he testified that he and Brenemen "got along all right." (Ex. R-2; Tr. 32-22). I cannot draw an inference from the evidence that Brenemen or Intermountain discharged Mr. Sorensen for his past safety complaints.

Second, I find that Mr. Sorensen has not established that he was terminated from his employment with Intermountain as a result of his protected activity on March 15. Mr. Sorensen contends that he was discharged because he questioned Mr. Brenemen's order

to stop rock dusting while the dust pump was running. Mr. Sorensen testified, however, that he does not really know why he was terminated. (Tr. 14-15). He stated that he was just doing his job when Mr. Brenemen fired him "apparently" for rock dusting while Scott Olsen's dust pump was operating. Id. He testified that the crew always rock dusts an entry after bolting the roof and that he had followed that procedure while under Brenemen's supervision, including when a dust pump was operating. (Tr. 10, 12, 30). Mr. Olsen testified that he has rocked dusted while wearing a dust pump and that, on at least one previous occasion, Brenemen has asked him to turn off the dust pump. (Tr. 47). Brenemen did not ask him to turn it off on March 15. Id.

It does not appear that any miner, including Mr. Sorensen, has ever been disciplined in the past for rocking dusting an entry while a dust pump was operating. Because Brenemen did not testify at the hearing, it is not clear why he did not want the crew to continue rock dusting. I find, however, that the record does not contain evidence of past hostility towards or discipline to a miner who rock dusted while a dust pump was operating.

Mr. Sorensen testified that "more than likely" he would have kept on working without complaint if Brenemen had asked the crew, in a civil manner, to stop rock dusting the entry, or if Brenemen had similarly asked Mr. Olsen to turn off his dust pump. (Tr. 35). I find that Sorensen's rather aggressive and contemptuous response to Mr. Brenemen's statements was the direct result of the manner in which Brenemen addressed him. He believed that he had been cussed out by his supervisor and assumed that he had the right to curse him back. (Tr. 14, 23, 27; Ex. R-1). As he stated at the hearing, if "he cursed me, why can't I curse him." (Tr. 23).

I conclude that Mr. Sorensen continued to say "fuck you" to Mr. Brenemen because of Brenemen's language, rather than because Brenemen was telling him to turn off the rock duster. In turn, I find that Brenemen's response and subsequent actions were caused by Mr. Sorensen's contemptuous "fuck you" reply and his refusal to talk about the matter further before he left the mine. The evidence reveals that he might not have been discharged if he had talked about the matter with his supervisor before leaving the mine.

I also find that the evidence does not support an inference that Brenemen terminated Mr. Sorensen because he engaged in protected activity. In reaching this conclusion, I have considered whether Intermountain used Mr. Sorensen's contemptuous response to Brenemen as a pretext for terminating him in order to mask the real reason for his termination: his protected activity. A mine operator cannot hide behind a miner's abusive language to shield an otherwise unlawful discharge. In this case, however, I find

that Mr. Sorensen would have been discharged for his contemptuous response to Mr. Brenemen alone.

In support of his contention that he was fired for making a safety complaint, Mr. Sorensen introduced a copy of an unemployment compensation form entitled "Employer Notice of Claim Filed". (Ex. C-1). The form, which is addressed to Intermountain, advised Intermountain that Mr. Sorensen had applied for unemployment compensation and that he reported the reason for his termination as "[f]ired for obscene language." Id. In the part of the form to be filled out by the employer, Intermountain's Office Manager, John Drips, wrote that Mr. Sorensen was discharged for "insubordination in front of crew and inspector" and "failure to follow directions." Id. The Office Manager also stated: "I do not believe Blake was fired for obscene language..." Id. Mr. Sorensen relies on this language to support his claim that he was actually fired for raising a safety issue, rather than for cussing at his supervisor.

I do not believe that the form supports Mr. Sorensen's position. It is clear from the record that he was not discharged for using profanity, cursing is common at the mine. Rather, a preponderance of the evidence establishes that he was discharged for continuing to say "fuck you" to his supervisor in front of Mr. Olsen and an MSHA inspector, after being warned to stop. As David Drips testified, contemptuous responses like those of Mr. Sorensen will tend to "erode" the ability of a supervisor to manage his crew. (Tr. 55; Ex. C-1).

I do not have the authority to determine whether Mr. Sorensen's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). I conclude that Mr. Sorensen's discharge did not violate section 105(c) of the Mine Act.

## ORDER

It is **ORDERED** that the complaint filed by Blake Sorensen against Intermountain Mining Services for violation of section 105(c) of the Mine Act is **DISMISSED.**

Richard W. Manning
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

FEB 10 1995

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE AND SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 94-532-D |
| ON BEHALF OF | : | MSHA Case No. WILK CD 94-02 |
| WILLIAM PLOXA, | : | |
| Complainant | : | Knickerbocker M-112 |
| v. | : | |
| | : | |
| READING ANTHRACITE COMPANY, | : | |
| Respondent | : | |
| | : | |

**ORDER OF DISMISSAL**

Before: Judge Feldman

The Secretary has filed a settlement motion that seeks my approval of his request to withdraw the discrimination complaint filed in this matter on behalf of William Ploxa pursuant to Section 105(c)(2) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The settlement terms include Mr. Ploxa's withdrawal of his subject complaint filed with the Mine Safety and Health Administration as well as the recision of the $5,000 civil penalty proposed by the Secretary against the respondent in this case. In return, the respondent has agreed to expunge Mr. Ploxa's personnel file of any and all evidence of disciplinary action taken against him as a result of his conduct on or about March 25, 1994, and any related subsequent conduct.

Under the circumstances herein, permission for the Secretary to rescind the proposed civil penalty and withdraw the complaint filed on behalf of William Ploxa **IS HEREBY GRANTED.** Upon satisfaction of the terms of the settlement agreement, the above captioned discrimination complaint **IS DISMISSED** with prejudice.

Jerold Feldman
Administrative Law Judge

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/rb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 10 1995

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF Harold J. Wilson, | : | TEMPORARY REINSTATEMENT PROCEEDING |
| | : | Docket No. LAKE 95-177-DM |
| | : | MSHA Case No. NC-MD-95-05 |
| Complainant | : | Mine: Monon Quarry |
| v. | : | |
| | : | Mine I.D. No. 12-00194 |
| VULCAN MATERIALS COMPANY, MIDWEST DIVISION, | : | |
| Respondent | : | |

## ORDER OF DISMISSAL

Before: Judge Melick

The Secretary of Labor, in essence, requests to withdraw its Application for Temporary Reinstatement on behalf of Harold J. Wilson on the basis of an agreement accepted by Mr. Wilson, providing an economic settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This Temporary Reinstatement Proceeding is therefore dismissed.

Gary Melick
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 15 1995

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEVA 93-392<br>A. C. No. 46-06958-03561 |
| v. | : | |
| | : | Mountaineer Mine |
| MINGO LOGAN COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
David J. Hardy, Esq., Linden R. Evans, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Maurer

## STATEMENT OF THE CASE

In this civil penalty proceeding, brought by the Secretary of Labor (Secretary) against the Mingo Logan Coal Company (Mingo Logan) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary charges Mingo Logan with a violation of the training requirements found in Part 48, Title 30, Code of Federal Regulations.

Pursuant to notice, the case was heard in Beckley, West Virginia, on October 20, 1994. At the hearing, Inspector Robert A. Rose testified for the Secretary. Messrs. Matthew Murray and James Mullins testified for Mingo Logan. The parties simultaneously filed briefs on January 17, 1995, which I have duly considered in making the following decision.

## STIPULATIONS

At the hearing, the parties entered the following stipulations into the record (Tr. 40-43):

1. Mingo Logan is the operator of the Mountaineer Mine and operations of the Mountaineer Mine are subject to the Mine Safety and Health Act.

2. Robert A. Rose is an authorized representative of the Secretary of Labor.

3. The Administrative Law Judge has jurisdiction to hear this case.

4. True copies of Citation No. 3999455, and the January 8, 1993 modification changing the violation to a section 104(g)(1) order, were served on the respondent.

5. The imposition of the proposed civil penalty will not affect the ability of Mingo Logan to continue in business.

6. The proposed assessment data form (MSHA Form No. 1000-179) contained in Exhibit A attached to the Secretary's Petition, accurately sets forth the size of Mingo Logan in production tons per year, the size of the Mountaineer Mine in production tons per year, the total number of assessed violations for a 24-month period preceding the citation at issue and the total number of inspection days for a 24-month period preceding the date the citation was issued.

7. Timothy Sargent received newly employed experienced miner training when he should have received newly employed inexperienced miner training [new miner training].

## FINDINGS, CONCLUSIONS, AND DISCUSSION

Mingo Logan operates a large underground coal mine known as the Mountaineer Mine, located in Mingo County, West Virginia. Beginning in the late summer of 1991, Mingo Logan contracted with Mahon Enterprises (Mahon), an independent contractor registered with MSHA, for the performance of various mining-rated services at the mine. One such contract, dated March 2, 1992, was for the performance of construction work at the mine; more specifically, the installation of an underground 72-inch belt conveyor system. Mahon started the job in late May or early June of 1992, and completed the work in September of 1992.

On August 3, 1992, MSHA Inspector Robert A. Rose, during a regular quarterly inspection of the Mountaineer Mine, issued Section 104(a) Citation No. 3999455 to Mingo Logan for a violation of 30 C.F.R. § 48.5, after an audit of the training records for Mahon revealed that four employees of Mahon had received newly employed experienced miner training when in fact, according to the records provided at the time, the four employees did not qualify as experienced miners, and therefore, should have received newly employed inexperienced miner training [new miner training]. On January 8, 1993, Inspector Rose modified the citation to a section 104(g)(1) order, and it was assessed a civil penalty of $5500 for the violation. However, on April 28, 1993, Inspector Rose modified the then (g)(1) order back to the

original section 104(a) citation, apparently without effective notice to Mingo Logan, and in any event, the civil penalty was never reassessed after the last modification. Furthermore, at hearing, the Secretary requested that the citation at bar be further modified to delete the names of three of the four employees identified by Inspector Rose as not having received the proper training. This proposed modification was not objected to and is appropriate because, although the records were not available to Inspector Rose at the time of the original issuance of the citation, documentation has been subsequently provided which indicates that the three miners had in fact been properly classified and trained as newly employed experienced miners. Accordingly, the citation was modified to reflect that the only individual who did not receive the proper training was Mahon employee Timothy Sargent.

It is undisputed that Timothy Sargent did not meet the regulatory definition of an experienced miner, and therefore, was improperly trained to the wrong standard. Mahon itself was also cited and has already paid a civil penalty of $1300 for the uncontested (by Mahon) violation.

The Secretary alleges in this case that Mingo Logan, the production-operator, also violated 30 C.F.R. § 48.5 by failing to ensure that an employee of Mahon, its independent contractor, working at its Mountaineer Mine was properly trained. This in accordance with his "overlapping" compliance theory which is contained in the MSHA Program Policy Manual.[1]

Timothy Sargent was hired by Mahon and given the newly employed experienced miner training required by 30 C.F.R. § 48.6 on May 27, 1992, based on the now known to be erroneous belief that he was an experienced miner who had just been laid off at a coal mine in Kentucky. Mr. Lenville Mahon had relied on verbal representations made by Sargent and others rather than upon the written application Sargent submitted. For some reason he failed

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[1]Volume III, Part 45 of MSHA's Program Policy Manual 6 (07/01/88 Release III-1) states in pertinent part that:

> This "overlapping" compliance responsibility means that there may be circumstances in which it is appropriate to issue citations or orders to both the independent contractor and to the production-operator for a violation. Enforcement action against a production-operator for a violation(s) involving an independent contractor is normally appropriate in any of the following situations: . . .(3) when the production-operator's miners are exposed to the hazard; . . . . In addition, the production-operator may be required to assure continued compliance with standards and regulations applicable to an independent contractor at the mine.

to review the written application Sargent submitted. It was this same document, that when reviewed by MSHA provided the basis for the instant citation, i.e., that Sargent did not meet the regulatory definition of an experienced miner.

Mingo Logan's major complaint about being cited in this instance is that Mahon was contractually responsible for hiring, training, and supervising its own employees, and it did so. Mingo Logan had no authority to dictate to Mahon who to hire or fire, nor did Mingo Logan have any control over Mahon employees once on the job. In short, Mingo Logan objects to being held liable for a training regulation violation committed entirely by Mahon.

Unfortunately for Mingo Logan, as the operator of the Mountaineer Mine, it is within the wide discretion of MSHA to hold them strictly liable for all violations of the Act which occur on the mine site, whether committed by one of their own employees or an employee of one of their contractors, in the performance of its contractual obligations to the production operator. This includes the discretion to cite both the production-operator and the independent contractor for a violation committed by a contractor's employee. See, e.g., Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (August 1984), rev'd on other grounds, Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir 1986); Consolidation Coal Co., 11 FMSHRC 1439 (August 1989); Bulk Transportation Services, Inc., 13 FMSHRC 1354 (September 1991); and W-P Coal Co., 16 FMSHRC 1407 (July 1994).

In fact, my reading of the Commission's latest pronouncement on this point, the W-P Coal Co. case, cited supra, indicates to me that the Secretary has virtually unbridled discretion to cite whomever he pleases in a multiple operator scenario, including, as here, both operators. The Commission has reserved only a review of the Secretary's enforcement decision for an abuse of discretion, i.e., is it unconscionable, arbitrary or capricious. If not, it is permissible.

The facts of this case demonstrate at least an arguable basis for believing that because of the failure to provide the required training to Sargent, Mingo Logan employees were potentially exposed to the hazards resulting from the violation. This is one of the grounds specifically stated in the Program Policy Manual as justification for enforcement action against a production-operator for a violation actually committed by an independent contractor. And this is in fact the basis upon which Inspector Rose cited Mingo Logan. Mahon employees worked in an adjoining entry no more than 80 feet from the belt line Sargent was working on and in the same split of air as Mingo Logan

employees. Additionally, they utilized the same buses and haulageways and they traveled in and out of the mine through the same entry. At times, Mingo Logan employees were required to cross under the belt line being constructed by Mahon and their employees were intermingled on this and other occasions underground in the mine. Thusly, in the opinion of the inspector, the inadequately trained Mahon employee potentially exposed Mingo Logan employees to those hazards created by the inadequate training. I cannot find that he abused his discretion in citing Mingo Logan, as well as Mahon for the violation at bar even through the inspector did not have any positive proof that Mr. Sargent actually interacted with any Mingo Logan employees. The assumption was that he did and I do not think it can be absolutely ruled out in the record. At any event, the issue before me is not whether or not Sargent mingled with Mingo Logan employees, but rather, whether Inspector Rose abused his discretion in citing Mingo Logan for the violation. As I have stated before, I cannot find that he did.

Accordingly, I find that Mingo Logan violated 30 C.F.R. § 48.5, as alleged.

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 825 (April 1981).

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U. S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

A violation of 30 C.F.R. § 48.5 is found to have occurred. The discrete safety hazard contributed to by the violation is that of a miner being unprepared for the hazards he might encounter underground, as well as the hazard, that he, the untrained miner, might present to others he comes into contact with in the course of his work underground.

What is at issue in this case are the third and fourth elements of the Mathies test.

The Secretary's argument is that because of the difference in the nature and length of the training which should be given to a newly employed inexperienced miner vice a newly employed experienced miner, Mr. Sargent was dangerously short-changed in the training department. The regulations require a minimum of 40 hours of training for inexperienced miners, whereas there is no minimum time requirement for training of experienced miners. Furthermore, the training required for newly employed experienced miners does not include instruction in the subjects of health, cleanup, rockdusting, electrical hazards, first aid or mine gases. And even in the subjects which are covered in both experienced and inexperienced miner training, the training given to an inexperienced miner is generally much more in depth than the training provided to an experienced miner.

In this particular case, the training which Mr. Sargent received did, in fact, cover some of the subjects which are specifically required for inexperienced miner training even though not required for the experienced miner training he was given. However, the Secretary points out that his training only took approximately 4 to 5 hours versus the 40 hours training that he properly should have received. He later received 20 additional hours of training from Mahon to abate the section 104(g)(1) order that was issued to Mahon for this violation.

The Secretary also points out that Mr. Sargent was involved in an accident during his employment with Mahon as further justification for making this citation "S&S". Sargent attempted to lift a moving conveyor belt with his back in order to release a co-worker whose arm had been caught between the belt and a bottom roller. The Secretary argues that had Mr. Sargent received the proper training, he would have been more aware of the hazards associated with underground coal mines, including moving belts and therefore more capable of dealing with an emergency situation rather than reacting as he did, which resulted in multiple lacerations and bruises to himself.

Mingo Logan, on the other hand, argues that a fair reading of the evidence would demonstrate that Sargent's accident resulted from a lack of common sense, rather than any lack of appropriate training. I agree. And so does Inspector Rose for that matter. He testified that he could not "foresee why an individual would do that for any reason. . . . I do not think I would ever try anything like that. I am sure I would not." (Tr. 68-71). Matt Murray, the Safety Technician for Mingo Logan, characterized Sargent's action in putting his body against a running belt as "stupid" (Tr. 144) and stated that additional training would not have prevented this accident.

As to the Secretary's more general theory for making this an "S&S" violation, it is too general. There are no specific facts in the record to show the chance of an injury resulting from this training violation is more than remote or speculative. For example, Inspector Rose, the Secretary's only witness, testified that he did not know anything about what kind of work Sargent performed in the mine, what equipment he used, if any, or even where he was assigned to work. I find therefore, that the inspector's opinion that an injury to someone was "reasonably likely" is purely conclusory and does not satisfy the Secretary's burden of establishing that there was a reasonable likelihood of an injury producing event as a result of this training violation. I thus conclude that the violation herein was not significant and substantial.

The remaining critical issue in this case concerns the negligence of Mingo Logan. The Secretary seeks a finding of "low" negligence with regard to Mingo Logan's failure to monitor more closely the training provided to Mahon's employees.

Mingo Logan's Matt Murray (Safety Technician) acknowledges that Mingo Logan does have a responsibility to ensure that Mahon has complied with the training regulations vis-a-vis Mahon's employees. In fact, Mingo Logan regularly reviewed Mahon's training records for compliance. The disagreement between the parties arises as to whether those reviews were sufficient to ensure compliance. The crux of the matter is that Mingo Logan relied on the training certificate itself to determine

compliance. In this case, the training certificate stated on its face that Tim Sargent had received newly employed experienced miner training. Mingo Logan relied on that fact and did not investigate further. Apparently, the violation was set in motion when Mahon took Sargent's word that he was an experienced miner. Mahon therefore trained him as an experienced miner. Mingo Logan's check of the training records thusly only established that he had been trained and had a proper certificate on file.

The Secretary seems to be saying that you cannot rely on a training certificate, that you must look behind that certificate. Perhaps conduct background investigations on the contractor's employees. It occurs to me that a production-operator, as a separate corporate entity, could very quickly involve itself in privacy-related liability while conducting investigations into the past lives of employees of another corporation.

Both Mahon and its employees retain privacy interests in the medical and other records contained in Mahon's personnel files, since the files contain records not required to be kept under the Act. Murray testified that he refrains from delving into Mahon's personnel files and looks only at the training certificates during his periodic audits, because he has been instructed by his superiors not to invade Mahon's personnel files, because of privacy considerations.

Accordingly, I find that a reasonably prudent production operator could not have anticipated that MSHA would require a production-operator to ensure compliance with the training regulations in this instance by violating the privacy rights of persons employed by its independent contractor.

Moreover, I decline to impute the negligence of Mahon to Mingo Logan under some sort of agency theory because Mahon was separately cited for the identical violation and was assessed a penalty and has paid a substantial civil penalty based on, amongst other criteria, its own negligence, which was in fact causative of this violation. Rather, I have evaluated the negligence factor applicable to Mingo Logan in this case in its own right, and I find, for the above reasons that respondent's negligence herein was nil. Any reasonably prudent operator in Mingo Logan's position would have reasonably believed that its duty of due care in monitoring Mahon's training program was fulfilled by the periodic audits of the contractor's training certificates and training classes.

Abatement was accomplished entirely by Mahon. Mingo Logan was not involved in abatement.

Taking into account the remaining factors contained in section 110(i) of the Act, as stipulated to by the parties, I conclude that a penalty of $100 is appropriate for the violation cited in Citation No. 3999455.

**ORDER**

It is **ORDERED** that, within 30 days of this decision, respondent shall pay $100 as a civil penalty for the violation found herein.

Roy J. Maurer
Administrative Law Judge

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 94-189 |
| Petitioner | : | A.C. No. 36-07230-03742 |
| v. | : | |
| | : | Docket No. PENN 94-383 |
| CONSOL PENNSYLVANIA COAL CO., | : | A.C. No. 36-07230-03752 |
| Respondent | : | |

**DECISION**

Appearances: Susan Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for the Secretary of Labor;
Elizabeth S. Chamberlin, Esq., Consol Plaza, Pittsburgh, Pennsylvania for Consol Pennsylvania Coal Company.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., the "Act", charging Consol Pennsylvania Coal Company (Consol) with five violations of mandatory standards and seeking civil penalties of $19,241 for those violations. The general issue is whether Consol violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

At hearing, the parties agreed to a settlement of Order No. 3659993 and Citation Nos. 3659994 and 3659995 and, as supplemented post hearing, proposed a reduction in penalties from $8,241 to $1,870. I have considered the representations and documentation submitted in support of the proposed settlement and conclude that it is acceptable under the criteria set forth in section 110(i) of the Act. This settlement will be incorporated in the order accompanying this decision.

Order No. 3559982

Order No. 3659982, issued pursuant to section 104(d)(1) of the Act, [1] alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.400 and charges as follows:

> The cleanup program established at this mine was not being complied with in the 12B section longwell belt entry, for a distance of 3,440 feet, between the stageloader and transfer point, and this entire area was preshifted on the previous shift by a certified person who should have observed the following conditions: 1. Float dust (black in color, float coal dust up to 5 inches deep, and loose coal were observed accumulated on the mine floor, right side of stageloader and tailpiece, and on the flat surface areas on the right side over a 40 foot long area; 2. Accumulations of float dust (black in color) on top of the rock dusted surfaces of the mine floor under the entire belt, including on the right untraveled side, on all belt structures, in numerous

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

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and 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.

crosscuts; 3. Belt air dump crosscut, very heavy concentrations on the 300 foot long area on the right side of the belt storage area; 4. and float coal dust up to 2 inches deep on the belt transfer area structure; 5. dry loose coal under numerous areas of the entire belt entry and excessive rib sloughage on the right untraveled side within 24 inches of belt and around four (4) bottom belt rollers at the belt storage unit.

The accumulations have existed for more than one shift and the preshift examiners on all three (3) shifts did not observe any hazardous conditions during their examinations, as no entries were made in the preshift book on the mine surface. The belt in this area was very dry except at the belt spray area.

The belt can only be used to transport coal which is being cleaned up, and shall not be used until the loose coal around the four (4) bottom belt rollers is cleaned up, and then only to transport the coal cleaned up. During the previous quarter "6" citations for 75.400 were issued at this mine.

The cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electrical equipment therein."

Inspector Joseph Reed of the Mine Safety and Health Administration (MSHA) testified that around 7:40 a.m. on October 20, 1993, before conducting a regular underground inspection of Consol's Bailey Mine, he reviewed the 12B Section preshift report for the examination conducted between 5:20 and 7:20 that morning. The report, based upon the preshift examination of Section Foreman Todd Shumaker, indicated that no "violations, dangers or hazardous conditions" were observed (Government Exhibit No. 6).

Reed thereafter continued his inspection underground accompanied by Consol Safety Inspector, Lou Sleeva. Approaching the 12B section loading point, Reed was told by midnight shift section foreman, Todd Shumaker, that no coal had been mined on the previous (midnight) shift. At the 12B belt entry under the stage loader and on the right (untravelled) side of the entry Reed found loose coal, float coal dust and coal dust accumulations. According to Reed, the accumulations under the stage loader were 40 feet long, up to 5 feet wide and 6 to 8 inches deep and were also dry to the touch.

Reed left the stage loader and walked the belt entry toward the belt drive and transfer point to take an air reading and

methane measurement. He walked down the belt entry about 75 to 100 feet where he took the air readings. According to Reid, a short distance beyond this point, he observed that the travelway had less than 24 inches of clearance. A fire hose outlet was projecting waist high into the 33 inch wide travelway about 18 inches making it necessary to turn sideways to get around it. The fire hose outlet was a pipe perpendicular to the belt and extending from the main sprinkler pipe. Normally these outlets are in a vertical position aimed down toward the floor.

According to Reed, between the stage loader and this fire hose outlet, there was additional float dust, black in color, along the belt structure and beneath the belt. Reed maintains that he then observed extraneous material in several locations in the travelway along the belt. There were discarded supplies, including pipes, pieces of belt structure and roof materials lying in the travelway. Reed had to step over the materials as he walked along the belt. According to Reed, there were additional accumulations of float dust on the mine floor and on the belt structure as he proceeded down the belt entry. He maintains that he also observed coal dust accumulations on the floor in several crosscuts.

At the drive area, he purportedly found heavy float dust accumulations, dark black in color, on the mine floor and on the right side of the belt structure. According to Reed, there was no rock dust on the float dust and the float dust covered the entire drive area. Reed also observed that a guard was missing at the belt drive on the right side. The guard had purportedly been removed to perform maintenance and was propped against the rib. Moving parts were thereby exposed on the right side of the belt drive.

Inspector Reed walked the entire 3,400 foot length of the belt to the transfer point where the 12B belt dumped onto the main belt. At the belt transfer, he observed additional accumulations of float coal dust. They were two inches deep and covered the top surfaces of the belt structure. Reed testified that on his return he observed several areas where coal from the right rib had sloughed and fallen into the tight side along the belt. In several locations this sloughage was several feet deep and had fallen into the walkway on the left side of the belt reducing the clearance to less than 24 inches.

I find the disinterested testimony of Reed to be credible and, therefore, conclude that, indeed, on October 20, 1993, there were accumulations of coal and float coal dust as alleged, that these accumulations were combustible and that the violation is proven as charged. Moreover, in essential respects, that testimony is corroborated by that of Mine Foreman Kostelnick. Kostelnick acknowledged, for example, that Reed showed him some float coal dust on the tight side of the stage loader but claimed

only that it "wasn't an excessive amount". He further acknowledged the accumulations cited by Reed in and around the stageloader area which he characterized as "a problem or if you want to call it, [but] it's just a part of mining with a longwall mine". Kostelnick also recognized "drippings" under the beltline as including coal but maintained this was not hazardous because it was damp and not yet in contact with any belt rollers. In addition, he admitted there was rib sloughage along the belt including coal and, approaching the storage unit, there was some float dust 24 inches wide and 180 feet long which was "more than I was happy to see at that area."

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

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

The Secretary maintains that the safety hazard contributed to in this case was a mine fire or explosion and that loose coal in an active working where possible ignition sources exist presents a "measure of danger" to the safety of miners. The Secretary further argues there was a reasonable likelihood that fire or smoke would result from the accumulations had the conditions been left to exist, noting that the accumulations were

extensive and affected the entire belt. He notes that although the belt was not then in operation, the section was scheduled to produce that day and the crew was on the section.

Finally, the Secretary points to several potential ignition sources and related concerns. The Bailey Mine is a gaseous mine producing over one million cubic feet of methane per 24 hours. MSHA records show that for 1993 the average daily methane liberation was 3.9 to 4.7 million cubic feet of methane per 24 hour period. The belt itself also presented ignition sources. Four rollers under the belt drive appeared to have been turning in coal. According to the credible testimony of Inspector Reed, there was an "indentation where the coal was piled around the rollers and the rollers had been running in it". Reed further noted the belt was rubbing on the metal support legs and this was also an ignition source. I agree with the Secretary on this issue. The credible evidence, indeed, supports the significant and substantial findings.

The Secretary further argues that the violation was the result of unwarrantable failure and high negligence on the basis that the violative conditions were "extensive and obvious". According to the Secretary the conditions had existed for more than one shift, no effort had been made to clean up the conditions and the Respondent had been previously cited for similar violations. Unwarrantable failure is conduct that is "not justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. See, Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987); Rochester & Pittsburgh Coal Co. 13 FMSHRC 189, 193-194 (1991).

In support of his position, the Secretary argues that the violative conditions were extensive and obvious, involving nearly the entire length of the 3,400 foot belt and with most of the accumulations visible from the travelway. The Secretary further argues that the conditions had existed for at least one and one-half shifts. He notes that this belt entry was required to be examined during preshift and on-shift examinations by a certified mine examiner, that the preshift examination book showed that no coal had been run during the previous shift (the midnight shift on October 20th), that coal had last been run during the afternoon shift of October 19th, and that, accordingly, the accumulations had "existed for at least one and a half or more shifts". The Secretary maintains that the violative conditions should have been observed during any one of the examinations of the area.

As another independent basis for unwarrantability, the Secretary maintains that accumulations of combustible materials were a continuing problem on belt lines at this mine. He notes that Inspector Reed had personally issued several citations for

violations of 30 C.F.R. § 75.400 on belt lines at this mine -- two in this same longwall belt entry within the last 8 months and one on another beltline in October 1993. In this regard, the Secretary further notes that the Bailey Mine was cited 42 times for violations of this standard in the two year period preceding the issuance of the subject order and maintains that such a significant history of problems with accumulations places an operator on notice that greater clean-up efforts are necessary, citing Mid-Continent Resources, 16 FMSHRC 126 (1994).

Consol suggests in an unauthorized "supplemental" brief, but without factual record support, that these 42 citations for accumulations may have been for such things as "trash in a dinner hole" and that it was "inherently unfair" for the Secretary to rely on such evidence because it was provided only two days before hearing. Consol overlooks that it not only failed to object at hearing to the admissibility of this evidence but that it stipulated to its admissibility. It is also reasonable to infer that Consol was aware of the 42 citations it had received. Moreover, if they were for violations of "trash in a dinner hole", such evidence must be presented at hearing on the record and not by off-the-record suggestion in an unauthorized post-hearing "supplemental" brief. In any event, regardless of the specific nature of the 42 prior violations of the standard at issue this evidence shows a serious problem of disregard for cleanup of combustible accumulations. The Secretary notes, finally, that Inspector Reed did not see anyone working or preparing to work along the belt in any clean-up efforts and, after the conditions were cited, Respondent used the remainder of the shift and part of the next to clean up the cited accumulations, using a total of 19 miners.

I agree with the Secretary that this violation resulted from aggravated conduct and omissions constituting more than ordinary negligence and, accordingly was the result of "unwarrantable failure". This conclusion is clearly supported by the credible and disinterested testimony of Inspector Reed corroborated, in part, by the testimony of Mine Foreman Kostelnick. I can give but little weight to the self-serving testimony of a "good faith belief" that violations of the cited standard did not exist as charged.

Citation No. 3659981

Citation No. 3659981 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75,360(a) and charges as follows:

> An improper preshift examination was being made in 12B longwell section belt entry, from the stageloader to the transfer point, by a certified person on all (3) shifts, as

the following conditions which constitute serious hazards along the 3,440 foot long area were not recognized by such persons: 1.) Float dust (black in color), on top of the rock dusted surfaces of the mine floor under the belt, on belt structures, tailpiece area, on untravelled right side, heavy accumulations near storage area for 300 feet on right side, loose coal on right side, in numerous locations along the entire area and four (4) bottom belt rollers at storage unit which had coal around them: 2.) Less than 24 inches of clearance on both sides of the belt due to either firehose outlets, old belt rollers, belt and roof or rib material, or excessive coal rib sloughage obstructing the walkway; and 3.) Inadequate guarding at the belt storage roller area due to guards previously installed being down and not re-installed to prevent persons from accidentally contacting moving large roller.

Due to this citation covering all three shifts, (24 hours) will be given so that the preshift examiners on all three shifts can be made aware of the requirements of 75.360.

No coal was mined on the previous shift and these conditions have apparently existed for several shifts, and the preshift book on the mine surface did not indicate any hazards were observed by the examiners.

During the previous quarter, "1" citation for 75.360 was issued at this mine.

The cited standard provides in essential part that "[w]ithin 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination."

The Secretary argues that several hazardous conditions existed on the morning of October 20th that had not been reported in the examination record books, namely the conditions cited by Inspector Reid in Order No. 3659982, Citation No.. 3659983 and Citation No. 3659984. (Government Exhibits 2, 3 and 4, respectively). As charged therein, there were hazardous accumulations of coal, coal dust and float dust, there was less than the required 24 inches of clearance in the travelway along the belt due to the protruding sprinkler pipe and extraneous roof materials and rib sloughage, and there was a missing guard for the drive roller at the belt drive. As found previously in this decision, the coal and coal dust accumulations cited in Order No.3659982 existed as charged and, based on the credible testimony of Inspector Reed, were of an obvious nature.

The latter two conditions cited herein were the subject of citations that have become final and their existence is not therefore subject to dispute (nor the related "significant and substantial" findings). I again accept the disinterested credible testimony of Inspector Reed that these conditions were also obvious. I agree with Consol, however, that the Secretary has not sustained her burden of proving that the guard for the drive roller had been removed prior to the required pre-shift examination. It may reasonably be inferred that the other cited conditions existed during the time of the pre-shift examination and accordingly should have been detected and reported in the preshift examination of the belt entry.

It is undisputed that the entry is required to be examined during preshift and onshift examinations by a certified mine examiner. It is further undisputed that the preshift examination book showed entries for preshift examinations for the midnight shift on October 20th and the afternoon shift on October 19th when checked by the MSHA inspector and that no hazards were reported on either examination. The violation is accordingly proven as charged. Again, Mine Foreman Kostelnick corroborates Inspector Reed in essential respects. In addition to his admissions regarding the presence of accumulations, Kostelnick acknowledged that the 24 inch clearance was not maintained along the belt in that rib sloughage had, indeed, restricted passage at four or five locations, a fire hydrant obstructed the walkway and several belt rollers were in the walkway.

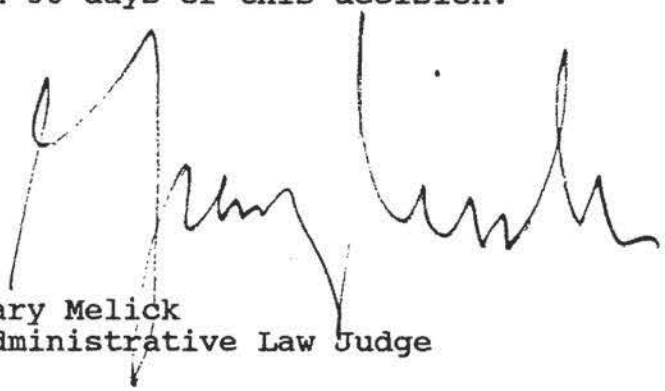
I further find that the violation was "significant and substantial". A violation of 30 C.F.R. § 75.360(a) has been established with a number of related safety hazards. The safety hazard related to the coal accumulations is that of mine fires and explosions previously discussed in this decision and the likelihood of a fire and injury was reasonable. The hazard associated with the inadequate clearance would be tripping. The record shows that persons do travel along this belt entry performing maintenance and clean-up work and conducting examinations. I find that persons traveling along the belt therefore reasonably likely to slip or trip over the cited materials and would have fallen in close proximity to a moving belt. They could twist or sprain an ankle or come into contact with moving parts of the belt. These events, I conclude, were reasonably likely to result in an injury of a reasonably serious nature.

The violation was also the result of "unwarrantable failure". Again, the credible testimony of Reed shows that these conditions were obvious and had existed at least since the afternoon shift of October 19th without corrective action. The failure to have reported any of these violative conditions, therefore, constitutes aggravated negligence.

Under all the circumstances and considering the criteria under Section 110(i) of the Act, I find that the proposed civil penalties of $7,500 for Order No. 3659982 and $3,500 for Citation No. 3659981 are appropriate.

## ORDER

Order Nos. 3659982 and 3659993 and Citation Nos. 3659981, 3659994 and 3659995 are affirmed. Consol Pennsylvania Coal Company is hereby directed to pay civil penalties of $12,870 for the violations therein within 30 days of this decision.



Gary Melick
Administrative Law Judge

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FEB 2 2 1995

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|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. WEST 93-343 |
| | : | A.C. No. 42-01697-03648 |
| | : | |
| | : | Docket No. WEST 93-344 |
| v. | : | A.C. No. 42-01697-03649 |
| | : | |
| | : | Docket No. WEST 93-399 |
| | : | A.C. No. 42-01697-03654 |
| C.W. MINING COMPANY, Respondent | : | |
| | : | Docket No. WEST 93-491 |
| | : | A.C. No. 42-01697-03655 |
| | : | |
| | : | Docket No. WEST 93-517 |
| | : | A.C. No. 42-01697-03656 |
| | : | |
| | : | Bear Canyon No. 1 |

## DECISION

**Appearances:** Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent.

**Before:** Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA"), charges Respondent C.W. Mining Company ("CWM") with violating safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

After a hearing on the merits was held in Salt Lake City, Utah, the parties submitted post-trial briefs.

## SETTLEMENTS IN WEST 93-343

The parties reached an amicable settlement as to certain citations and a motion to approve a partial settlement and order payment was filed.

The settlement motion is formalized in this decision.

The agreement provides, in part, as follows:

**Citation Nos. 3582877, 3582905, and 3582919:** There is insufficient evidence to support these citations, and the Secretary moved for their dismissal.

**Citation No. 3582910:** The operator stipulates to this violation and agrees to pay the proposed penalty of $50.00.

**Citation No. 3582904:** The operator stipulates that this violation occurred and that it was "significant and substantial"; the Secretary further determined that the negligence of the operator was less than originally assessed. The amended penalty is $345.00.

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved and such approval is formalized in the Order of this decision.

## Stipulation

In connection with the issues, the parties further stipulated as follows:

1. CWM is engaged in mining and selling bituminous coal in the United States and its mining operations affect interstate commerce.

2. CWM is the owner and operator of Bear Canyon No. 1 Mine, MSHA I.D. No. 42-01697.

3. CWM 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 date and 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.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect CWM's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. CWM is a small mine operator with 353,377 tons of production in 1992.

## FURTHER CITATIONS IN WEST 93-343

### Citation No. 3582908

The above citation, issued under Section 104(a) of the Act, alleges a violation of 30 C.F.R. § 75.316.[1]

The citation reads as follows:

> The current approved (Oct. 18, 1990) ventilation system for methane and dust control plan was not being complied with on the north mains [MMU 002] working section.
>
> The water spray system on the continuous miner was not maintained. When tested, 10 of the 28 water sprays did not function, exceeding the approved 90 percent that must be operative. [Page 9, Item 5.]
>
> The machine was not in use but available for use.

### Discussion

CWM asserts as a preliminary matter that Citation No. 3582908 should be vacated because the cited code (§ 75.316) was not in effect at the time of the inspection.

CWM states that Citation No. 3582908 alleges the company violated 30 C.F.R. § 75.316. The citation was issued on October 29, 1992. However, the July 1, 1992, edition of 30 C.F.R. parts 1 to 199, skips from § 75.313 to § 75.321 (pages 517-518). There was no § 75.316. The next edition, which was revised as of July 1, 1993, skips from § 75.315 to § 75.320 (pp. 541-542). There still was no § 75.316.

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[1] The requirements for ventilation, methane, and dust control plans in contest are now recodified at § 75.370(a)(1).

CWM correctly states the changes in the Code of Federal Regulations in 1992. Section 75.316 no longer appeared as such. However, it was still a requirement as it had been recodified in Section 75.370 (pp. 531, 1992 C.F.R.). Ventilation plans were required.

CWM had a ventilation plan and was fairly apprised of the ventilation requirements imposed by § 75.370. In sum, citing an incorrect regulation does not vitiate otherwise valid citations. Accordingly, the preliminary motion to vacate Citation No. 3582908 is again **DENIED.**

**Additional Evidence as to Citation No. 3582908**

Inspector Gibson testified the methane and dust control plan for the continuous miner was not maintained. Upon being tested, it was found that 10 of the 28 water sprays failed to function. This failure rate exceeded the permitted ratio. After testing the equipment, Inspector Gibson circled the plugged sprays in red on Exhibit P-7. He further explained the importance of the spray system. It serves to control respirable dust, to cool the cutting bits on the rotating drum, and to aid in preventing a coal dust or methane ignition. (Tr. 40, 41).

On the merits, CWM states there was no violation of the plan because the machine was out of service and not available for use. On this credibility issue I credit Inspector Gibson's testimony that the equipment was available for use. It is uncontroverted that the miner was parked in a crosscut on the working section and it was not tagged out.

A dispute between the witnesses exists as to whether the continuous miner's power and lights were on and whether the panel covers were off (i.e., was the machine energized?). On this issue I credit Inspector Gibson's conclusion because it was supported by his inspection notes recorded that day.

Further, the evidence is also confirmed by the statements made to the Inspector by Mine Foreman Defa. Mr. Defa asked the Inspector to check permissibility on the miner while the roof drill was being repaired. Once the roof drill was repaired and supports installed, they could cut through the crosscuts. Obviously, the continuous miner was to be used for this effort. (Tr. 35, 36).

The Secretary's evidence establishes a violation. CWM's evidence is insufficient to support a contrary view.

Citation No. 3582908 should be affirmed and a civil penalty assessed.

## Civil Penalties

Section 110(i) of the Act authorizes the Commission to assess civil penalties. The evidence relating to certain of the criteria are common to all the citations here. These include the appropriateness of the penalties to the size of the business of the operator charged. The assessed penalties in these cases are also appropriate in relation to CWM's coal production in 1991.

Further, the assessed penalties will not affect CWM's ability to continue in business.

Finally, CWM is entitled to statutory good faith for attempting to achieve rapid compliance after notification of a violation.

The remaining criteria of prior history, negligence, and gravity will be considered as they relate to the individual citations.

Concerning **Citation No. 3582908**, the operator's history indicates there were 14 prior violations under former Section 75.316 in the previous two years.

The operator's negligence is considered "moderate" because the operator did not know that certain sprays were not functioning. (Tr. 47). However, a routine check would have disclosed the defective sprays.

The gravity should be rated "moderate." However, the Inspector did not find this violation was "significant and substantial."

Considering all the statutory criteria, I conclude that the proposed penalty of $50.00 is appropriate.

## Citation No. 3582909

The above citation, issued under Section 104(a) of the Act, alleged a violation of § 75.1107-16(b). The Secretary moved to

amend the citation to allege a violation of § 75.1100-3.[2] The motion to amend was granted over CWM's objection.

The citation reads as follows:

> The water-type fire suppression system being used on the Lee Norse continuous miner in the north mains working section was not being maintained. When tested, three of the fire nozzles did not function.
>
> The continuous miner was not being used but was available for use. The section was very wet.

**Threshold Issues**

CWM renews its objection to the Secretary's amendment to his citation.

Cyprus Empire, 12 FMSHRC 911, 916 (May 1990), was cited as authority for permitting such an amendment. However, CWM asserts Cyprus is not controlling because Cyprus admitted it was not prejudiced by the amendment.

In arguing its position, CWM asserts it was prejudiced because the evidence to establish a violation of § 75.1100-16(B) was substantially different from that required under § 75.1100-3.

CWM's arguments are without merit. The underlying facts did not change; the change was in the Secretary's legal theory of the case. No prejudice has been demonstrated by the operator.

It is well established that leave to amend "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182, 82 S.Ct. 227, 9 L.Ed. 222 (1962); Rule 15(a), FRCP.

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[2] The regulation reads as follows:

> **§ 75.1100-3 Condition and examination of firefighting equipment.**
>
> All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined every 6 months and the date of the examination tag attached to the extinguisher.

On the merits involving Citation 3582909, CWM further argues the continuous miner had been removed from service. However, this is a renewal of the argument made in connection with Citation No. 3582908. The same continuous miner was involved and the same ruling is appropriate.

The evidence shows that when Inspector Gibson inspected the continuous miner, he also inspected the fire suppression system and observed that three fire nozzles were "either partly working or not working at all." (Tr. 53).

At the hearing, Inspector Gibson explained that the fire suppression system on the continuous miner is used "to sequester the fire or put the fire out and/or hopefully prevent it from spreading beyond the machine to the coal ribs, coal floor." (Tr. 53). Further, "[t]he nozzles are located at locations [on the miner] that would produce heat, such as the electrical control boxes, main controller." If three of the fire nozzles are plugged up, a fire hazard may result and a fire could occur on the machine. (Tr. 54)

Inspector Gibson observed accumulations on the machine around the tram motor, the cutter control box and in the front compartment. The accumulations were six inches deep in places. In addition, the inoperative nozzles were near the equipment with the accumulations covering it. Further, the tram motor and cutter control motors would also have been running hotter with accumulations of coal dust covering them. In addition, water from dust suppression system was not flowing due to the plugged nozzles. (Tr. 54-59).

On the credible evidence, Citation No. 3582909 should be affirmed and a civil penalty assessed.

## Civil Penalties

The assessed violation history report indicates no prior violations of Section 75.1100-3 occurred during the two years prior to this citation. (Ex. P-1).

The operator's negligence was moderate because the miner was available for use, but it was not in use. (Tr. 61).

Concerning gravity, the MSHA Inspector did not find this violation to be of a "significant and substantial" nature. The gravity appears to be low.

Considering all of the statutory penalty criteria, a civil penalty of $50 is appropriate for Citation 3582909.

**Docket No WEST 93-344**

**Citation No. 3852372**

The above citation, issued under Section 104(a) of the Act, alleges a violation of § 75.1702.[3]

The citation reads as follows:

> The weekly examination for smoker articles was made in the bleeder section kitchen on 1/03/93. The check was not made before miners entered the mine.
>
> There were no violations indicated on the report conducted in the kitchen.

Paragraph 2 of the operator's smoking prohibition program (Ex. P-14) provides:

> All persons entering the mine shall be subject to a systematic search for smoking articles. The searches shall be conducted at least weekly, at irregular intervals not to exceed seven (7) days.

**Discussion**

According to MSHA Inspector Marietti, the check for the smoking materials must be made at the portal or in the proximity

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[3] The regulation reads as follows:

**§ 75.1702 Smoking; prohibition.**

[STATUTORY PROVISIONS]

> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

to where the miners are "entering" the mine. (Tr. 112). This analysis is based on the Inspector's experience with smoker's checks at the mines he has worked in, his knowledge of how the checks are conducted at other mines, and MSHA's policy. (Tr. 99, 102, 110).

Mr. Defa, CWM's foreman, explained why the check is occasionally made in the kitchen area. This is the first place workers go when they enter the underground area. If a miner wanted to hide or conceal his smoker's articles and he knew that the checks were always made on the surface, he could hide them on the mantrip before the check, remove them when he exited the mantrip at the kitchen area, and have them underground without detection. By changing the time and location of the checks, the operator discourages such attempts and more fully conforms to the requirement of the law, which is to make certain that no one carries such articles underground. By conducting the checks at the first point the miners reach underground, in the event a miner did take such articles underground either by mistake or design, the articles could be removed before an opportunity to use them would arise.

Mr. Defa's testimony that other MSHA inspectors agreed with CWM's interpretation of the regulation and of its own plan, is supported by CWM's lack of violations. Further, no citation has ever been issued to CWM for conducting the searches at the kitchen area. (Tr. 108, 518).

CWM's reasons for conducting searches in the kitchen are commendable. However, this case requires a ruling on the issues as presented. CWM's program, as noted above, simply states that all persons entering the mine shall be subject to the search.

The regulations do not define the term "enter." However, the common meaning of "enter" is 1. "to go or come in; 2. to come or gain admission into a group; join. Webster's New Collegiate Dictionary, 1979 at 377.

This ordinary meaning of "enter" causes the Judge to conclude that examination for smoker articles should be made where the workers "enter" the mine. Examinations for such articles at such places as the kitchen are laudable but they do not comply with the smoking prohibition program.

Citation No. 3852372 should be affirmed and a penalty assessed.

**Civil Penalty**

The assessed violation history report indicates there were no prior violations of the cited section in the two-year period prior to the issuance of this citation.

The operator's negligence was "low" because most of the smoker's checks were made on the surface and none of the underground checks produced any smoker's articles. (Tr. 106).

The Inspector did not consider this violation to be of a "significant and substantial" nature. The operator's gravity should be considered "low."

A civil penalty of $10.00 is appropriate.

**Docket No. WEST 93-399**

**Citation Nos. 3852375, 3852376, 3852377**

These citations, issued under Section 104(a) of the Act, allege violations of three separate but related regulations. All of the citations relate to a bathhouse trailer fire on December 26, 1992.

The violations are for a failure to report, failure to preserve evidence, and failure to file an MSHA form.

**Citation No. 3852375**

This citation alleges CWM violated 30 C.F.R. § 50.10. [4]

The citation reads:

> The mine experienced a reportable mine fire on 12/26/92 between 1 a.m. and 2 a.m. A bathhouse trailer on the surface burnt [sic] to the ground and partially burnt [sic] an adjacent wall and electrical system in the shop.

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[4] The regulation reads as follows:

**§ 50.10 Immediate notification.**

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Washington, DC, by telephone, toll-free at 202-783-5582.

The mine operator did not immediately or did they ever notify MSHA until they applied for bathhouse waiver received in District 9 on January 4, 1993.

**Citation No. 3852376**

This citation alleges a violation of 30 C.F.R. § 50.12.[5]

The citation reads:

> The mine experienced a mine fire on December 26, between 12:01 and 1 a.m. The fire completely destroyed a bathhouse trailer and did extensive damage to an adjacent shop wall and electrical equipment mounted on it. The trailer was scooped into a pile about 50 feet from accident site and the damaged electrical equipment was taken down and discarded.

**Citation No. 3852377**

This citation alleges a violation of 30 C.F.R. § 50.20-1.[6]

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[5] The regulation reads as follows:

**§ 50.12 Preservation of evidence.**

Unless granted permission by an MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

[6] Regulation 30 C.F.R. § 50.20-1 contains general instructions for completing and filing MSHA Form 7000-1.

The citation reads:

> There was no MSHA Accident Form 7000-1 submitted within 10 days for a trailer bathhouse fire that occurred on December 26, 1992, between 12:01 a.m. and 1 a.m.

## Discussion of the Evidence

The central issue is whether a reportable fire occurred. If the fire was reportable, then the operator must immediately notify MSHA, preserve the evidence, and submit a Form 7000-1 report to MSHA.

In order to resolve the issues, it is necessary to consider the uncontroverted evidence and the definition of an "accident" as defined in 30 C.F.R. § 50.2.

The uncontroverted evidence shows that a fire occurred on December 26, 1992. CWM did not immediately notify MSHA of the fire, did not preserve the evidence, nor did it submit a Form 7000-1 to MSHA. (Tr. 116, 117, 126).

MSHA has no policy other than the text of Section 50.10 (supra, concerning notification). (Tr. 117).

MSHA Inspector Marietti estimated the fire burned for more than 30 minutes considering the appearance and extent of the remains. He also volunteered it had been "quite a blaze." (Tr. 126).

## Further Discussion

CWM contends that this was not a "mine" fire, in view of the definition of a mine as contained in 30 C.F.R. § 50.2. Specifically, CWM states the showerhouse was used by employees to shower and change clothes. Since it was not used to extract coal from its natural deposit or used in the milling of coal, or in preparing the coal therefore the showerhouse was not a "mine."

CWM's position lacks merit; it has long been held that a "coal or other mine" is not limited to an area of land from which minerals are extracted but, as is noted, it also includes facilities, equipment, machines, tools, and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals. See, e.g., Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982). In determining coverage, it is necessary to give effect to Congress's clear intention

in the Mine Act, discerned from "text, structure, and legislative history." Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989). Congress determined to regulate all mining activity. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and ... doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

This broad interpretation has been adopted by the courts. See, e.g., Carolina Stalite Co., supra at 1554. The definition of "coal or other mine" has been applied to a broad variety of facilities that are not "an area of land from which minerals are extracted." See, e.g., Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981) (operator loaded previously extracted and prepared coal onto railroad cars for transportation); Stoudt's Ferry, 602 F.2d 589 (3d Cir. 1979) (operator separated sand and gravel from material that has been dredged from a river by the Commonwealth of Pennsylvania); Carolina Stalite, supra at 1547 (D.C. Cir. 1984) (operator heated previously mined slate in a rotary kiln to create a lightweight material used in making concrete blocks.

CWM also asserts the three citations should be vacated because they are all premised on the requirement of an "accident" as defined in Section 50.2. This section reads, in part, that an (h) accident means (6) an unplanned mine fire not extinguished within 30 minutes of discovery. (Tr. 118). CWM contends this fire occurred on a holiday; it was not observed until it was cold. Therefore, it fails to meet the definition contained in (h)(6).

On this issue, I credit the testimony of Inspector Marietti. He testified the bathhouse, one wall of the shop on the outside and the inside, all of the wiring on the wall, and the electrical components had burned. (Tr. 118, 119). (Exhibit P-8 contains the investigation concerning the fire.)

The electrical panel conduit and wire on the inside wall were "wiped out." (Tr. 122-124).

That portion of the definition in (h)(6) reciting the element of "not extinguished within 30 minutes" is merely a measure of the intensity of the fire. That intensity is established by the Inspector's opinion that the fire was "quite a blaze" and his opinion that it would have burned for longer than 30 minutes. (Tr. 126). Further, the fire would have taken longer than 30 minutes to extinguish due to the operator's primitive fire-fighting equipment. In addition, the closest volunteer fire depart-

ment was in Huntington, Utah, nine miles away. (Tr. 128-130, 161).

A fire that burns longer than 30 minutes is a large fire and serious enough to call for an MSHA investigation. To say that such a fire is not reportable because it was not discovered until after it had extinguished itself, is not warranted. Such an interpretation would encourage operators not to "discover" a fire at all in some circumstances if the operator does not want MSHA to investigate the causes of the fire.

This fire was also unplanned within the meaning of the regulation. The verb "plan"[7] is defined as: 1. to arrange the parts of: DESIGN; 2. to devise or project the realization or an achievement of <~ a program; 3. to have in mind: intent. There is no evidence or inference that the fire was anything but unplanned.

Inspector Marietti could not determine the cause of the fire because the remains of the 12-foot by 60-foot aluminum type mobile home structure had been pushed into a 12-foot by 30-foot pile. (Tr. 120-122, 125, 126).

In connection with these three citations, the evidence establishes that CWM failed to immediately notify MSHA of the fire, altered the accident site, and failed to submit a Form 7000-1.

Citation Nos. 3852375, 3852376, and 3852377 should be affirmed and civil penalties assessed.

## Civil Penalties

Considering the remaining statutory penalty criteria, the record establishes the operator had no violations of the regulations during the two years before these citations were issued.

CWM was moderately negligent since it knew or should have known it was required to report the fire and preserve the scene. CWM's actions prevented MSHA from investigating the accident to determine what preventive measures should be taken to avoid a fire in the future.

Gravity should be considered "low" in connection with the citations involving a failure to report. Gravity is otherwise "moderate."

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[7] Webster's New Collegiate Dictionary, 1979 at 870.

Considering the statutory criteria, I believe the following penalties are appropriate:

Citation No. 3852375: reportable fire; MSHA not notified - $200.00.

Citation No. 3852376; evidence from fire not preserved - $300.00.

Citation No. 3852377; Form 7000-1 not filed - $100.00.

**Docket No. WEST 93-491**

**Citation No. 3583053**

This citation, originally issued under Section 104(a) of the Act, was later modified to a Section 104(g) citation.

The citation alleges a violation of 30 C.F.R. § 48.11(e).[8]

The citation reads:

> The operator was not complying with the approved training plan for Hazard Training. Two vendors were observed driving their diesel truck into the mine and they were not accompanied by an experienced miner. There was no one accompanying them. The two did have the required training prior to going underground. The truck met the requirement of 30 C.F.R.

**Evidence**

John B. Plant of Duchesne, Utah, one of CWM's vendors is a welder and machinist for Uinta Machine and Manufacturing. The majority of Uinta's work is for coal mines. (Tr. 388, 389).

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[8] The regulation reads as follows:

**§ 48.11 Hazard training.**

(e) Miners subject to hazard training shall be accompanied at all times while underground by an experienced miner, as defined in § 48.2 (b) (Definition of miner) of this subpart A.

On February 3, 1993, they arrived at CWM to do some welding machine work on one of their miners. (Tr. 391).

They talked to Inspector Marietti who inquired about their mine certification, service training, and respirator training. The Inspector doubted if he (Plant) and his partner (now deceased) were properly certified to go into the mine. This resulted in some debate; some time was then spent in respirator training and surface training. Also, the Uinta vehicle was checked and cleaned several times. (Tr. 394, 395).

Subsequently, the two vendors proceeded into the portal in their vehicle. Company representative Robert Brown said they were going to the shop 500 feet underground. The Inspector indicated the company's training plan required vendors to have hazard training and they must be accompanied by an experienced miner. (Tr. 165, Ex. P-15). The Inspector then withdrew the vendors from the mine. (Tr. 165, 167; Ex. P-15). The Inspector modified the 104(a) citation to a 104(g)(1) order. (Tr. 170).

CWM contends it complied with the provisions of its plan in two respects. Specifically, when the vendors entered the mine in their vehicle, they followed the vehicle of CWM's Robert Brown. (The entryway was 20 feet wide, curved, and there were blind corners. Tr. 574, 578). Another vehicle could have pulled out between the two trucks as the lead vehicle was 50 to 100 feet in front to the vendors' vehicle. The shop itself was 500 to 800 feet underground. (Tr. 570-578). In addition, there was no way for Mr. Brown to verbally communicate from his truck to the vendors' truck following him. (Tr. 600).

In this situation, the facts establish that Mr. Brown was not "accompanying" the vendors. "Accompany" means to go with or attend as an associate or companion. Webster's New Collegiate Dictionary (1979) at 7. The vendors could hardly be said to accompany an experienced miner when they were in a different vehicle and 50 to 100 feet away.

The second argument by CWM focuses on the testimony of vendor Robert Plant. He testified that they were accompanied by an experienced miner, namely, CWM employee Israel Peterson. (Tr. 395, 396). Mr. Peterson was allegedly sitting between the two men on some hard hats and coveralls. (Tr, 414).

Inspector Marietti denies such a scenario; he testified he would certainly have seen a third person sitting in the truck. (Tr. 743). Mr. Robert Brown testified he did not recall that Mr. Peterson was in the truck. (Tr. 577).

It appears Mr. Plant was mistaken about the facts: If Mr. Peterson had been in the truck, Inspector Marietti would not have issued his order. If Mr. Marietti were mistaken, Mr. Defa

would have likely raised the issue at the scene that Mr. Peterson was in the truck. However, Mr. Defa did not raise that point.

Further undermining Mr. Plant's version of this incident is the fact that if it were true, Mr. Brown would have no reason to drive his vehicle into the mine in front of the vendors to go underground. (Tr. 578).

In sum, the credible evidence establishes that the vendors were not accompanied underground by an experienced miner.

Accordingly, Citation No. 3583053 should be affirmed and a penalty assessed.

**Civil Penalty Criteria**

The assessed violation history report indicates no violations occurred during the two years before this citation was issued.

The operator's negligence should be considered "moderate" because CWM gave the vendors some training for underground activities.

Inspector Marietti did not find this violation to be of a "significant and substantial" nature but he considered it serious enough to immediately withdraw the vendors from the mine.

A civil penalty of $200.00 is appropriate for the violation of Citation No. 3583053.

**Docket No. WEST 93-517**

**Citation Nos. 3583044 and 3583050**

The above citations issued under § 104(a) of the Act are factually similar and allege violations of 30 C.F.R. § 370(a)(1).[9]

Citation No. 3583044 reads:

> The approved ventilation plan was not being complied with in the Main North Return on the inby side of No. 27 crosscut overcast. There were three 4' x 8' x 1/2" plywood panels over

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[9] This regulation deals with ventilation, methane, and dust control plans. See Citation No. 3582908, supra, p. 3, this decision.

> the opening regulating the air from the idle Main North Entries. The Plywood was not treated to make them incombustible. The area has been idle for about one month. The area was clean and well-rock dusted. There were no ignition sources.

Citation No. 3583050 reads:

> The approved ventilation plan was not being complied with. The lower seam regulator doors were 5/8" x 4' x 7' plywood. They were not constructed or coated with incombustible material. The area was well rock-dusted and there were no ignition sources in the area.

The relevant portion of the ventilation plan adopted by CMW reads:

> All exposed wood in the construction of any ventilation control shall be coated with an MSHA-accepted fire retardant sealant. (Ex. P-9, p. 6, ¶ 5).

Inspector Marietti observed two wooden panels. One was in the main north return and another was in the return from the lower seam mine to the upper seam return. The wooden panels were partly covered with a silver-looking paint. (Tr. 203, 220).

CWM's evidence shows the doors had been coated with accepted MSHA coating in 1985 and 1986. Mr. Defa was the one who coated the doors when they were originally installed. (Tr. 646). Although Mr. Defa no longer had the container or specifications from the material used seven or eight years previously at the mine so that he could "prove" to Mr. Marietti that the material was MSHA-accepted, he was able to subsequently obtain that information from his supplier. The specifications were introduced at the hearing. (Ex. R-4). The doors were "coated with an MSHA-accepted fire retardant sealant."

As Mr. Defa further explained, the sealant soaks into the wood and if subjected to heat, it would expand to fill any chips or small areas not covered. (Tr. 654).

I find Mr. Defa's testimony on this point to be credible. His testimony is essentially uncontroverted.

The Judge is aware of the uncontroverted observation by Inspector Marietti that "the boards were water-soaked for some reason or another; they weren't completely covered with this

silver looking paint." (Tr. 203). Further, "there was exposed wood where the coating had worn away." (Tr. 225).

In weighing the total evidence, I conclude that Inspector Marietti's observation establishes more of a situation where CWM failed to fully maintain its ventilation control. This citation does not deal with maintenance.

In sum, the Secretary failed to prove that CWM violated its ventilation plan.

Accordingly, Citation Nos. 3583044 and 3583050 should be vacated.

**Citation No. 3851921**

The above citation alleges a violation of 30 C.F.R. § 75.1403-10(l).[10]

The citation reads:

> The audible alarm did not operate on the John Deere No. 1 tractor that is used in the east bleeder section, MMU006.

On February 10, 1993, Inspector Marietti inspected the John Deere No. 12 tractor in the east bleeder section. He and Mr. Defa found the horn did not work. Mr. Defa told the Inspector that the tractor was out of commission because its tie rods were broken; the rods were lying on the ground. The Inspector did not issue a citation that day.

The following day, February 11, 1993, Inspector Marietti returned to the area and determined the vehicle's tie rods had been repaired. He determined the rods had been repaired by climbing on the tractor and testing the steering wheel. (Tr. 235). When Mr. Defa could not get the horn to operate (Tr. 227), Inspector Marietti issued Citation No. 3851921 on February 11, 1993.

The citation was abated on February 24, 1993, when the horn button was pushed; at that time the horn did sound. (Tr. 229).

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[10] The cited regulation reads:

> (l) All self-propelled rubber-tired haulage equipment should be equipped with well-maintained brakes, lights, and a warning device.

Inspector Marietti explained that the instant citation was issued pursuant to a safeguard dated April 23, 1982. The safeguard was written under section 75.1403-10(1) which provides that, "all self-propelled rubber-tired haulage equipment should be equipped with well-maintained brakes, lights, and a warning device." The safeguard states in pertinent part,

> This is a notice to provide safeguard requiring all self-propelled rubber-tired haulage equipment to be equipped with well-maintained brakes, lights, on one or both ends if equipment is capable of being operated in either direction, and a warning device (audible)." (Emphasis added). (Ex. P-10).

As Inspector Marietti further explained, once a safeguard is issued, it is recorded on a list which the inspectors review prior to every inspection. It constitutes the law until the mine closes or is abandoned. (Tr. 239).

As a threshold matter, it is apparent that a horn is a warning device within the meaning of the safeguard and the citation.

CWM contends its John Deere haulage equipment was out of service and did not work. Therefore, the operator did not violate the regulation.

I am not persuaded by CWM's views. Mr. Marietti stated he would not have issued the citation if he believed the vehicle was out of service. On February 10, 1993, the vehicle was out of service because its tie rods were broken and lying on the ground. No citation was issued at this time. The following day the Inspector tested the steering wheel and found the tie rods had been repaired. However, at this time the horn did not function and he properly issued his citation. The equipment was not tagged nor marked as being out of service.

Citation 3851921 should be affirmed and a penalty assessed.

**Civil Penalty**

CWM has no adverse prior history for violations of the cited section during the two years prior to the issuance of the citation. (Ex. P-5B).

The operator's negligence is "moderate." The operator repaired the tie rods but not the horn.

Gravity should be considered "low." Further, Inspector Marietti did not conclude that the violation was "S&S."

The proposed penalty of $50 is appropriate.

## Citation No. 3851922

The above citation alleges a violation of 30 C.F.R. § 75.400.[11]

The citation reads:

> The air compressor in the east bleeder section, MMU006, was observed with accumulations of combustible material. The accumulations were on the lower part of the cylinders and the crank case. They were heavy on the crank case and the base and on the tank under the compressor. The accumulations were oil mixed with coal dust. It appeared that they had been there for a considerable period of time. The compressor was mounted in a trailer with the welder.

Inspector Marietti described an air compressor as a device that pressurizes air. The air in turn is used to operate air tools and drills. The compressor was located on a trailer with a welding machine parked in a crosscut. (Tr. 319, 320).

The compressor was a piece of electrical equipment in active workings. It measured approximately 18 inches wide by 2 feet high. (Tr. 315, 316, 322). Attached to it was an electric motor with a power cable and a receptacle. (Tr. 316, 320).

The lower part of the cylinders, the crank case, and the section underneath the compressor on the air tank were covered with a heavy coating of oil and coal dust. Inspector Marietti concluded that, due to their thickness, the accumulations had been there for quite some time. (Tr. 316).

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[11] The regulation reads:

**§ 75.400 Accumulation of combustible materials.**

[Statutory Provision]

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

CWM contends the issue here is whether or not the electrical air compressor was in use or available for use.

It is apparent the compressor was not in use at the time of the inspection but was it available for use? I conclude that the total record establishes that the compressor could not be used.

Inspector Marietti agreed that Mr. Defa told him that the compressor had not been used for some time and was not being used in the mine. (Tr. 321). He also admitted that he did not test it to see if it worked. Moreover, he did not remember if he checked the electrical book to see if it was in service. (Tr. 330, 338). Further, he did not see any air hose that could be used to make the compressor operable. (Tr. 344).

Mr. Nathan Atwood, who installed the compressor and welder on the trailer, testified that the compressor had not been used for at least two years and the cable inside the electrical box for the compressor had been removed so it could not be energized. (Tr. 636-639). Both Messrs. Atwood and Defa testified that the compressor was among the abandoned equipment that was being pulled back as they retreated from the pillar section, and that it could not be operated. It was effectively taken out of service by making it impossible to energize it in its present condition.

I am persuaded by the testimony of Messrs. Atwood and Defa that the abandoned equipment was not operable.

The Secretary attacks CWM's evidence because there was fresh oil around the motor and the compressor. (Tr. 322).

I am not persuaded. The fresh oil around the motor could have come from the motor itself or sources other than the air compressor.

Citation No. 3851922 should be vacated.

**Citation No. 3851927**

This citation alleges a violation of 30 C.F.R. § 75.1100-3.[12]

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[12] The cited regulation reads:

**§ 75.1100-3 Condition and examination of firefighting equipment.**

All firefighting equipment shall be maintained in a usable and operative condition. Chemical extinguishers shall be examined

The citation reads as follows:

> The fire hose at the No. 46 crosscut Main North No. 4 Belt Entry was not being maintained fully usable and operative. There was no nozzle with the hose. The hydrant was 30 feet outby. The belt has been idle since Nov. '92. The belt serves the Main North idle section and the 3d West idle entries.

The Secretary's evidence shows that on February 24, 1993, Inspector Marietti observed a fire hose. The hose was missing its nozzle. (Tr. 348, 350).

Inspector Marietti explained that a nozzle is essential if a miner is going to use the hose to fight a fire because it allows the miner to direct a steady stream towards the fire from a safe distance of approximately 60 feet. (Tr. 348-349). Without the nozzle, the miner would be forced to come much closer to the fire and it would place the miner in a greater danger of being injured. (Tr. 349, 353). It also allows the miner to more effectively combat the fire since the concentrated stream from the nozzle can be used to break up the materials of the fire, such as coal or wood, which will remove heat from the fire and put the fire out. (Tr. 348).

CWM argues no violation occurred since its equipment was in a non-working section, the power was locked out, and there was no water in the hose line.

I disagree. This equipment was obviously for firefighting. It may be called into use in a nonworking section. Power and water are only required when there is a need for the firefighting capabilities.

Citation No. 3851927 should be affirmed.

**Civil Penalty**

The assessed violation history (P-5) indicates 12 violations of § 75.1100-3 during the two-year period prior to this citation.

The operator's negligence was moderate because Mr. Defa did not know the nozzle was missing. (Tr. 356).

Inspector Marietti did not find this violation "significant and substantial".

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> 6 months and the date of the examination shall be written on a permanent tag attached to the extinguisher.

The proposed civil penalty of $50.00 is appropriate for Citation No. 3851927.

**Citation Nos. 3851928 and 3851939**

These related citations allege a violation of 30 C.F.R. § 75.1100-2 (cited in a previous citation).

The conditions cited in Citation No. 3851928 are as follows:

> The fire extinguisher hanging in [the] 46 crosscut in the Main North No. 4 belt entry had not been examined since February 1992. The belt is idle and there was no electrical equipment in the vicinity. The operator did not check it.

The conditions cited in Citation No. 3851939 are as follows:

> The fire extinguisher provided for the pump in the Main North Return No. 72 crosscut did not have an examination since June of '92 indicated by the tag attached. The pump was connected to an energized transformer in the idle Main North Section.

The evidence is uncontroverted. There were two fire extinguishers without tags to show they had been examined every six months.

CWM agrees the extinguishers had not been checked and dated (as required by the regulation). However, they believed there was no violation because they were fully charged and operational and not even required at that location.

CWM's views are without merit. The only way to insure that the fire extinguisher is operative is to check it. The operator failed to follow this procedure and it is not the function of the Commission to rewrite the regulation.

**Civil Penalty**

**History:** The assessed violation history (P-5) shows 12 violations of § 75.1100-3 in the two-year period prior to these citations.

**Negligence:** The operator's negligence was designated "moderate." (Tr. 365, 444-445).

**Gravity:** The Inspector did not designate these violations as "significant and substantial."

The proposed civil penalty of $50.00 is appropriate for each citation.

**Citation No. 3851938**

This citation alleges a violation of 30 C.F.R. § 75.1100-2(e)(2).[13]

The citation reads:

> There was not 240 pounds of rock dust provided at the temporary electrical installation in the idle Main North Section's transformer. The transformer was energized and supplying power to pump circuits. There was a fire extinguisher provided and rock dust about 300 feet outby.

On February 24, 1993, Inspector Marietti observed an energized transformer supplying power to two pumps. (Tr. 375). The transformer itself advanced (and retreated) with the working section. (Tr. 375-376).

The Inspector issued MSHA's citation because there was no rock dust provided at the transformer.

CWM contends it has always interpreted § 75.1100-2(e) as applying to electrical installations that are not part of a working section. Other inspectors who have inspected CMW's mine have interpreted the regulation in that manner. (Tr. 680-685).

**§ 75.1100-2(a)** provides

> (1) Each working section of coal mines producing 300 tons or more per shift shall be provided with two portable fire extinguishers and 240 pounds of rock dust in bags ... .

Mr. Defa testified that all of the equipment required by § 75.1100-2(a) was provided in the working section, therefore CMW argues there was no violation. (Tr. 680-681),

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[13] The cited section reads:

> One portable fire extinguisher and 240 pounds of rock dust shall be provided at each temporary electrical installation.

I am not persuaded by CWM's argument. A critical difference exists between the two regulations. Section 75.1100-2(e)(2) requires a fire extinguisher and rock dust at each temporary[14] electrical installation. Since this installation advanced and retreated with the working section, it was necessarily of a temporary nature.

On the other hand, the term "temporary" does not appear in § 75.1100-2(a).

If the construction of the regulation as urged by CWM is followed, the protection afforded miners at temporary electrical installations would be essentially negated.

MSHA's policy manual (Ex. P-25) further supports Inspector Marietti's views.

Citation No. 3851938 should be affirmed.

**CIVIL PENALTIES**

CWM was assessed a single penalty of $50.00 for the violation of § 75.1100-2(e)(2).

| | |
|---|---|
| **Prior history:** | There have been no violations of § 75.1100-2(e)(2) during the two years prior to this citation. (Ex. P-5). |
| **Negligence:** | The operator's negligence was moderate because the weekly examiner should have been checking for rock dust at these temporary locations. (Tr. 380). |
| **Gravity:** | The Inspector did not find this violation "significant and substantial." |

The penalty of $50.00 is appropriate for the violation of Citation No. 3851938.

**Citation Nos. 3851935 and 3851936**

On February 25, 1993, Inspector Marietti issued the above citations alleging violations of 30 C.F.R. § 75.1101-23(a).

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[14] If this had been a permanent electrical installation, the operator would have been required to install it in a fireproof enclosure, isolated from the designated escapeway. (Tr. 376).

The cited section requires each operator of an underground mine to adopt a program to instruct all miners in the proper evacuation procedures in the event of an emergency. The evacuation plan in effect at the Bear Canyon #1 Mine was admitted in evidence as Exhibit P-12. It states in pertinent part as follows:

> **Location of SCSR units**
>
> **Mantrips** Each mantrip carries enough units for number of men on trip. Units are stored in a metal container on "Mantrips to protect SCSR's. Units are checked at least every 24 hours by operator, trained to inspect units, before entering mine.

Inspector Marietti observed a Duetz-Allis tractor getting ready to go underground with two miners on board. He asked them about their SCSR units and they indicated that they did not have any. He observed that the SCSR unit storage box had a broken lid and was being used to store tools. He then issued Citation No. 3851935 in which he described the condition as follows:

> The approved self-contained self-rescue storage plan was not being complied with. The Duetz-Allis mantrip tractor was observed getting ready to go underground. There were two miners on the tractor. There were no SCSR's on the tractor. The tractor operator indicated that they never had any SCSR's. I tried to question, but the miners spoke no or very little English, and could not determine the knowledge of the SCSR storage plan.

Shortly thereafter, Inspector Marietti went underground and observed an Allis-Chalmers tractor with one person driving, going from underground in the mine to the outside. (Tr. 492). Again he questioned the driver about whether he had an SCSR unit. The driver indicated that he did not have an SCSR unit and Inspector Marietti observed that there was no SCSR storage box. (Tr. 494). Inspector Marietti then issued Citation No. 3851936 in which he described the condition as follows:

> The approved self-contained self-rescue storage plan was not being complied with. The Allis-Chalmers mantrip was observed operating in the main west designated intake escapeway. When the machine was checked outside, there was no SCSR for the miner operating it. He said or indicated he could speak no English so I could not determine his knowledge of the

> SCSR storage plan. I tried to tell him he needed one and he appeared to understand I am not sure. Refer to Citation Nos. 3851935 and 3851936.

The Code of Federal Regulations does not define "mantrip," however, Inspector Marietti's understanding of the meaning of "mantrip" is supported by the definition of "Mantrip" contained in A Dictionary of Mining, Mineral, and Related Terms, at 679. It defines "mantrip" as:

> a. A trip made by mine cars and locomotives to take men rather than coal, to and from the working places. B.C.I. b. Trip made by a man cage in a shaft to take men rather than ore, to and from a working place in a mine.

Although this definition does not refer to what types of vehicles are considered mantrips, it specifies trips containing men, instead of mineral, going in and out of the mine.

Mr. Defa, on behalf of CWM, testified that the vehicles cited by Mr. Marietti were not mantrips but were non-face mobile equipment used to transport supplies, not men. (Tr. 700-702).

I am not inclined to follow CWM's views. The common issue is whether miners were being transported. For example, in connection with Citation No. 3851935, two miners were observed in a Duetz-Allis tractor ready to go underground. This constituted a mantrip.

In connection with Citation No. 3851936 the Inspector observed two miners on an Allis-Chalmers tractor getting ready to go underground. This was also a mantrip.

It matters not at all that some vehicles were non-face mobile equipment because when cited they were being used to transport men, thus they were "mantrips."

Citation Nos. 3851935 and 3851936 should be affirmed.

## Civil Penalties

CWM was assessed a total penalty of $697.00 for the violations alleged in Citation Nos. 3851935 and 3851936.

**Prior History:** There have been no prior violations of § 75.1100-2(e)(2) during the two years prior to this citation. (Ex. P-5).

**Negligence:** The operator's negligence was moderate because CWM's equipment lacked SCSR units.

**Gravity:** The Inspector did not find the violation to be "significant and "substantial."

A penalty of $100.00 is appropriate for each violation.

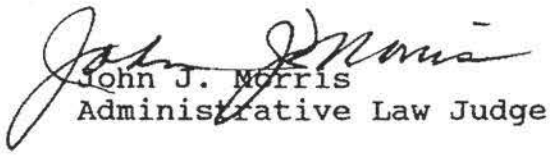
For the foregoing reasons, I enter the following:

## ORDER

1. The following citations are **VACATED:** Nos. 3582877, 3582905, 3582919, 3583044, 3583050, 3851922.

2. The following citations are **AFFIRMED** and penalties as indicated are **ASSESSED:**

| Citation No. | Penalty |
|---|---|
| 3583053 | $200.00 |
| 3852372 | $ 10.00 |
| 3852375 | $200.00 |
| 3852376 | $300.00 |
| 3852377 | $100.00 |
| 3582904 | $345.00 |
| 3582908 | $ 50.00 |
| 3582909 | $ 50.00 |
| 3582910 | $ 50.00 |
| 3851921 | $ 50.00 |
| 3851925 | $ 50.00 |
| 3851927 | $ 50.00 |
| 3851928 | $ 50.00 |
| 3851935 | $100.00 |
| 3851936 | $100.00 |
| 3851938 | $ 50.00 |
| 3851939 | $ 50.00 |



John J. Morris
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 2 3 1995

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-648 |
| Petitioner | : | A.C. No. 11-02636-03871 |
| v. | : | |
| | : | Docket No. LAKE 94-680 |
| BRUSHY CREEK COAL CO., INC., | : | A.C. No. 11-02636-03872 |
| Respondent | : | |
| | : | Brushy Creek Mine |

**DECISIONS**

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Karl F. Anuta, Esq., Boulder, Colorado, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These cases concern civil penalty proceedings 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 certain mandatory safety standards found in Parts 70 and 75, Title 30, Code of Federal Regulations.

The respondent filed timely answers contesting and denying the alleged violations and the cases were part of a group of cases involving these same parties heard in Evansville, Indiana, during the hearing term January 18-19, 1995.

Issues

The issues presented in these proceedings include the fact of violation, whether one of the violations was "significant and substantial," whether one of the violations constituted an "unwarrantable failure," and the appropriate civil penalty assessments to be made for the violations.

## Applicable Statutory and Regulatory Provisions

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

2. Sections 110(a) and 110(i) of the Act.

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

The parties stipulated to jurisdiction, the admissibility of copies of the citations and exhibits, and the fact that the citations were properly served on the respondent by duly authorized representatives of the Secretary of Labor. They also agreed to the annual company and mine coal production tonnage for the 1993 calendar year, the respondent's good faith abatement, the assessed violations' history for the two-year period prior to March 29, 1994, and that the proposed penalties will not affect respondent's ability to continue in business (Joint Exhibit 1).

## Discussion

### Docket No. LAKE 94-648

This proceeding concerns a proposed civil penalty assessment of $6,500 for an alleged violation of mandatory health standard 30 C.F.R. 70.100(a), as stated in section 104(d)(2) "S & S" Order No. 9941891, issued on April 11, 1994, and subsequently modified to a section 104(d)(1) "S & S" citation on May 11, 1994. The cited condition or practice states as follows:

> The results of five (5) respirable dust samples collected by the operator as shown by computer message No. 001, dated April 5, 1994, indicates the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit No. 001-0 (036) was 2.3 $mg/m^3$ which exceeded the applicable limit of 2.0 $mg/m^3$. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five (5) valid samples are taken.

### Docket No. LAKE 94-680

This proceeding concerns a proposed civil penalty assessment of $2,072, for an alleged violation of mandatory safety standard 30 C.F.R. 75.1101-1(b), as stated in section 104(a) non-"S & S" Citation No. 4267432, issued on July 6, 1994. The cited condition or practice states as follows:

The nozzles in the branch line on deluge type fire suppression system were not directed at the upper surface of the top belt.

The inspector fixed the abatement time as 5:00 p.m., July 6, 1994. At the hearing, the petitioner's counsel produced a copy of section 104(b) Order No. 4267436, issued at 10:15 a.m., July 7, 1994, for the failure of the respondent to totally abate the citation. The order reflects that four of the eight cited nozzles were directed at the upper surface of the top belt, and the inspector concluded that "no effort was being made to direct the remaining nozzles at the upper surface of the top belt." This order was not included with the initial pleadings and proposed penalty assessment filed by the petitioner in this case, and counsel filed it with me in the course of the hearings. Further, the section 104(b) order is not in issue in this case and the proposed penalty assessment relates only to the section 104(a) citation.

Prior to the taking of any testimony or evidence in these matters, the parties informed me that they reached a proposed settlement of both cases, and pursuant to Commission Rule 31, 29 C.F.R. 2700.31, they were afforded an opportunity to present arguments on the record in support of the settlement disposition of the cases (Tr. 18-31).

With regard to section 104(a) non-"S & S" Citation No. 4267432, the petitioner's counsel stated that taking into consideration the respondent's attempts to comply with the requirements of the cited regulation, and only one prior violation in 1993, the parties have agreed that a civil penalty assessment of $1,036, in settlement of the violation is reasonable, and that the citation will stand as issued (Tr. 21).

In addition to the arguments advanced by the petitioner in support of the settlement, I take note of the low gravity level associated with the violation. (non-"S & S"). The proposed settlement was approved by me from the bench (Tr. 23), and my decision in this regard **IS REAFFIRMED.**

With regard to section 104(d)(1) "S & S" Citation No. 9941891, the petitioner's counsel asserted that the parties agreed to settle the matter by a civil penalty assessment of $3,250, and that the citation would stand as issued (Tr. 23). The respondent's counsel agreed with the settlement, and presented mitigating arguments in support of the agreement (Tr. 28, 31). The proposed settlement was approved by me from the bench (Tr. 30), and my decision in this regard **IS REAFFIRMED.**

## Conclusion

Upon further review of the arguments advanced in support of the settlements, and taking into account the six statutory civil penalty criteria found in section 110(i) of the Act, I conclude and find that the proposed settlements are reasonable and in the public interest. Accordingly, as previously indicated, they are **APPROVED**.

## ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. The respondent shall pay a civil penalty assessment of $1,036, in satisfaction of section 104(a) non-"S & S" Citation No. 4267432, July 6, 1994, 30 C.F.R. 75.1101-1(b).

2. The respondent shall pay a civil penalty assessment of $3,250, in satisfaction of section 104(d)(1) "S & S" Citation No. 9941891, April 11, 1994, 30 C.F.R. 70.100(a).

3. Payment of the aforesaid civil penalty assessments shall be made to MSHA within thirty (3) days of the date of these decisions and order, and upon receipt of payment, these matters are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

FEB 2 3 1995

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| JIM WALTER RESOURCES, INC.,<br>Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. SE 94-126-R<br>Order No. 3197626; 12/29/93 |
| SECRETARY OF LABOR,<br>MINE AND SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | No. 4 Mine<br>Mine ID 01-01247 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS<br>Docket No. SE 94-306<br>A.C. No. 01-01247-04106 |
| v. | : | Docket No. SE 94-407 |
| JIM WALTER RESOURCES, INC.,<br>Respondent | : | A.C. No. 01-01247-04118 |
| | : | No. 4 Mine |
| | : | Docket No. SE 94-384<br>A.C. No. 01-01322-03949 |
| | : | No. 5 Mine |
| | : | Docket No. SE 94-383<br>A.C. No. 01-01401-04000 |
| | : | Docket No. SE 94-389<br>A.C. No. 01-01401-03998 |
| | : | Docket No. SE 94-390<br>A.C. No. 01-01401-03999 |
| | : | No. 7 Mine |
| SECRETARY OF LABOR, HEALTH<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDING<br>Docket No. SE 94-446<br>A.C. No. 01-01247-04126-A |
| CARL W. HARLESS, employed by<br>JIM WALTER RESOURCES, INC.,<br>Respondent | : | No. 4 Mine |

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner<br>v.<br><br>WILLIAM E. WILSON, employed by<br>JIM WALTER RESOURCES, INC.,<br>Respondent | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 94-453<br>A.C. No. 01-01247-04125-A<br><br>No. 4 Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner<br>v.<br><br>HILBURN HULSEY, employed by<br>JIM WALTER RESOURCES, INC.,<br>Respondent | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 94-454<br>A.C. No. 01-01247-04127-A<br><br>No. 4 Mine |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner<br>v.<br><br>C. DON SIMS, employed by<br>JIM WALTER RESOURCES, INC.,<br>Respondent | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 94-511<br>A.C. No. 01-01247-04124-A<br><br>No. 4 Mine |

**DECISION**

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Dept. of Labor, Birmingham, Alabama, for Petitioner;
J. Alan Truitt, Esq., Maynard, Cooper & Gale, Birmingham, Alabama, for Individual Respondents;
R. Stanley Morrow, Esq., Jim Walter Resources, Inc.; Brookwood, Alabama, for Contestant and Respondent.

Before: Judge Barbour

These cases are brought 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, 820. In the contest proceeding, Jim Walter Resources Inc. (Jim Walter) challenges the validity of an order of withdrawal issued at its No. 4 Mine. In the civil penalty proceedings, the Secretary of Labor (Secretary), on behalf of the Mine Safety and Health Administration (MSHA), seeks the assessment of penalties against Jim Walter and three individuals for alleged violations that occurred at the No. 4 Mine, No. 5 Mine and No. 7 Mine.

Pursuant to various orders of consolidation and notices of hearing, the matters were heard in Hoover, Alabama.

At the commencement of the hearing, counsel for the Secretary stated that the parties had settled all of the proceedings, with the exception of Docket No. SE 94-126-R and its associated civil penalty proceeding, Docket No. SE 94-407 (Tr. 11-12). Counsels explained the details of the settlements and I indicated that I would approve the settlements when I decided the contested cases (Tr. 18).

DOCKET NOS. SE 94-126-R and SE 94-407

In Docket No. SE 94-126-R, Jim Walter challenges the validity of Order No. 3197626. The order was issued pursuant to Section 103(k) of the Act (30 U.S.C. § 813(k)). Section 103(k) provides that if an accident occurs, an inspector, when present, may issue such orders as he or she deems appropriate to insure the safety of any person in the mine.

The order was issued by MSHA Inspector Gerald Tuggle on December 29, 1993. It states:

> An accident to the hoisting equipment located in the production shaft has happened and interfered with the use of the equipment for more than thirty minutes. This order is issued until an investigation can be completed to assure the safety of the miners or persons in the production shaft (Gov. Exh. 1).

Tuggle also issued Citation No. 3197627, pursuant to Section 104(a) of the Act (30 U.S.C. § 814(a)). The citation charges Jim Walter with a violation of 30 C.F.R. § 50.10. This mandatory standard requires an operator to "immediately contact" the MSHA district or subdistrict office having jurisdiction over its mine, "[i]f an accident occurs."

The citation states:

> A reportable accident [occurred] to the hoisting equipment in the production shaft in which the hoisting equipment was out of service for more than thirty minutes and MSHA was not notified immediately. The accident happened at 11:08 p.m. on December 28, 1993 and MSHA was notified on December 29, 1993 at approximately 8 a.m. (Gov. Exh. 2).

The Secretary proposed a civil penalty of $500 for the alleged violation.

## STIPULATIONS

The parties stipulated that:

1. The Commission has jurisdiction over the proceeding.

2. The hoisting equipment referenced in the order and the citation went out of service at 11:08 p.m. on December 23, 1993.

3. MSHA was not notified by Jim Walter that the hoisting equipment had gone out of service until 7:00 a.m. on December 29, 1993.

4. The hoisting equipment was put back into service at 9:30 a.m. on December 29, 1993 (Tr. 20-21).

## THE SECRETARY'S WITNESS

### GERALD TUGGLE

Inspector Tuggle was the Secretary's only witness. Tuggle has been a MSHA inspector for more than 13 years. During this time he has inspected both underground and surface coal mines, including the underground mines operated by Jim Walter.

Tuggle testified that coal at the No. 4 Mine is transported by conveyor belts from the production sections to a location at the bottom of a shaft where a hoisting system is used to raise the coal to the surface (Tr. 23). The hoisting system includes two skips. Tuggle described the skips as large containers. The skips are attached to wire ropes and a hoisting mechanism on the surface raises the skips from the production shaft to the surface. Tuggle explained that the skips operate alternatively. While one skip is being loaded at the bottom of the shaft, the other skip is being emptied on the surface (Tr. 25). When a loaded skip has ascended the shaft and is at the top of the shaft head frame, the skip trips a switch and a door on the bottom of the skip slides open. The coal falls onto a chute. The chute leads to a conveyor, which carries away the coal (Tr. 28).

Skips are the sole means by which coal is removed from the No. 4 Mine. Tuggle estimated that a loaded skip holds approximately 22 tons of coal (Tr. 26). The skips move up and down the production shaft at the rate of approximately 900 feet per minute. The shaft is approximately 2,000 feet deep (Tr. 27). The skips are used during every production shift (Tr. 29).

The production shaft is used also as an emergency exit, in that it contains a hoist used for emergencies only. The emergency hoist can carry approximately 10 miners to the surface (Tr. 27).

Tuggle testified that on December 29, he was sent to the mine by his supervisor (Tr. 30, 111). Tuggle was instructed to investigate an accident that involved the skip hoisting equipment.

Upon arriving at the mine, Tuggle discussed the situation with Frankie Lee, a member of Jim Walter's mine management team. Lee told Tuggle the hoist had ceased operation around 11:00 p.m. the previous evening, that repairs had been made, and that the hoist was back in use (Tr. 104, 112). Following the discussion, Tuggle issued the contested Section 103(k) order (Tr. 114).

As Tuggle remembered, Lee told him that on December 28, toward the end of the 4:00 p.m. to 11:00 p.m. shift, the skips were shut down for lack of coal. The shift changed at 11:00 p.m., and at about that time coal was delivered to the bottom of the production shaft. Shortly after 11:00 p.m., the control man at the bottom of the shaft called the telephone operator and reported that power to the hoist had gone off. An alarm also sounded on the surface to indicate that the hoist had stopped.

Management personnel went to the surface hoist house to determine what was wrong. The hoist house, which contains the hoist motor and the hoist drum, was full of smoke. The personnel opened all of the windows and doors. The hoist system uses four metal hoist ropes. There are four grooves on the hoist drum into which the ropes wind and unwind. Each groove has a neoprene wearing strip. The strips, which are changed periodically, help to maintain proper tension on the ropes. When the smoke cleared, the personnel could see that the metal hoist ropes had been slipping on the wearing strips. Friction caused by the slipping ropes had heated the strips to the point where they had begun to melt and to smoke (Tr. 31-32).

The strips have to wear equally in order for the skips to run smoothly (Tr. 38). Because of the uneven wear caused by the slipping ropes, the neoprene strips had to be regrooved (Tr. 35, 38, 40, 44).

In addition to the problems on the surface, management personnel found that the loaded skip had become stuck at the bottom of the shaft. The skip was wedged into the wooden frame that cradles the skip. Using a torch, mine personnel severed several bolts and cut away part of the skip (Tr. 34, 35). This freed the skip so that it could be raised to the surface (Tr. 37).

Once the skip was raised out of the wooden frame, personnel found that the skip control line (a wire cable that stretches across the bottom of the shaft) had been broken (Tr. 34, 39). When the control line breaks, the hoisting system shuts down (Tr. 34). The control line had to be replaced before the system could be put back into service (Tr. 39-40).

Tuggle also was informed that before the hoisting system ceased to function, Jim Walter had removed from the system a device that shut the system down if the RPMs of the drum were "out of sync" with the speed of the ropes. The device was removed because lubrication on the ropes caused the device to function erratically and to shut the system down in the middle of a skip's ascent or

descent (Tr. 41). Tuggle believed Jim Walter concluded it was hazardous to have a skip traveling at 900 feet per minute come to a sudden and totally unexpected stop (id.). In Tuggle's opinion, if the device had been in place, it would have "picked up the hoist drum turning and the cables ... not moving and it would [have] shut the system down, which would have prevented the melting of the wearing strips" (Tr.42).

Tuggle was asked about previous incidents involving skips at the No. 3 Mine. (The No. 3 Mine, which is not the site of any of the citations and orders at issue in these cases, is owned and operated by Jim Walter.) He stated that in one instance the failure of a control switch had caused a skip to hit the head frame, the ropes had broken, and the skip had fallen down the shaft. As a result, Tuggle believed the No. 3 Mine was unable to operate for three to four weeks (Tr. 45).

Tuggle stated that he issued the Section 103(k) order in part to make certain the skips and ropes had not been damaged to the extent that they might fall down the shaft and injure miners at the bottom (Tr. 45). Tuggle stated that he was concerned about the safety of miners who traveled near the shaft and miners who might have had to use the emergency hoist (Tr. 46, 116-117). Tuggle explained that if the skips and cables had fallen down the shaft, the damage caused could have extended beyond the shaft bottom and endangered miners who might be in adjacent areas (Tr. 117). Tuggle stated he wanted "[t]o preserve the site ... [so that MSHA] could investigate it to see if it was safe or not" (Tr. 53, See also Tr. 105).

When asked why he issued the order after everything apparently was back to normal, Tuggle replied, "[to] shut it down to where I could investigate and make sure that it was safe for miners that were in the area and underground" (Tr. 68). Tuggle acknowledged that when he issued the order at 11:05 a.m., Jim Walter had already advised him that the defects in the hoisting system had been corrected and that the hoist had been back in service for approximately one hour and a half (Tr. 68). As a result of his investigation, Tuggle found that all necessary repairs in fact had been made and he concluded that the hoisting system was safe to operate (Tr. 69).

Tuggle testified that MSHA Inspector William Zimmerman had gone to the mine around 7:00 a.m. on December 29, 1993. Zimmerman was told that the hoist had been inoperative all night. This was the first time MSHA was informed about the hoist being inoperative. Zimmerman then reported the incident to MSHA and Tuggle was sent to the mine to investigate. Tuggle did not know why Zimmerman had not issued a Section 103(k) order (Tr. 66).

Tuggle also issued Citation No. 3197627. He did so because he believed that Section 50.10 requires an operator to "immediately notify" MSHA when an "accident" occurs. In Tuggle's opinion, what had happened to the hoisting system was an "accident." (Tr. 48-49).

Tuggle stated that the regulations require the reporting of all hoisting accidents which result in a hoist being out of service for over thirty minutes, unless the hoist is out of service for routine maintenance (Tr. 70-71). He stated, "[i]f it's mechanical failure, which damages the hoisting system for more than 30 minutes ... it needs to be investigated .... [I]f the mechanical damage is due to an accidental breakdown of the components ... it needs to be investigated. But if it's due to normal wear then, no, I don't think it needs to be investigated" (Tr. 93).

According to Tuggle:

> The accident that happened to the hoisting system was, first, the skip was either overloaded or rain on the lubrication on the hoist ropes caused the drum to slip which, in turn, created friction between the liners and the ropes which, in turn, damaged the liners that it had to be relined which, in turn, something fell in the bottom and broke the control wires.
>
> All of these things right here were different results of the accident which created the hoist being down more than 30 minutes (Tr. 96).

Although Tuggle cited Jim Walter for a violation of Section 50.10, he was unaware of anything in the MSHA Program Policy Manual interpreting the standard (Tr. 81).

Originally, Tuggle cited the violation in an order of withdrawal issued pursuant to Section 104(d)(2) of the Act (30 U.S.C. § 814(d)(2)). Subsequently, he modified the order to a Section 104(a) citation because inspectors "can only issue unwarrantable violations on health and safety standards [and] Part 50 is not a health and safety standard. It's more of a record type thing." (Tr. 47).

Tuggle found the company's negligence to be "high" (Tr. 77). He explained that Jim Walter had knowledgeable people in management positions. They had experience working with hoists and should have known to report the accident immediately (Tr. 56).

Tuggle did not find the violation to be a significant and substantial contribution to a mine safety hazard. He did not believe the violation presented a likelihood of injury or illness (Tr. 57; Gov. Exh. 2). He acknowledged that no miners were injured by the accident (Tr. 61).

With respect to the number of miners endangered, Tuggle stated that normally one person is in the control room at the bottom of the shaft (Tr. 61, 107). However, he believed that the persons most subject to danger were miners, such as firebosses, supervisors and pumpers, who traveled occasionally along the outer edge of the shaft to reach other areas of the mine (Tr. 61, 108). Tuggle estimated that at least one miner would travel daily through the area (Tr. 108). Tuggle did not know if any miners

actually were placed in jeopardy by the accident on December 28, 1993. He emphasized that he was not on hand when the damage to the equipment occurred (Tr. 62). He also acknowledged that there were guardrails around the shaft opening to keep miners from walking into the bottom of the shaft (Tr. 115).

JIM WALTER'S WITNESSES

The company called no witnesses, but relied upon its cross examination of Tuggle (Tr.119).

VALIDITY OF ORDER NO. 3197626

Section 103(k) authorizes a mine inspector, in the event of an accident occurring at a coal or other mines, to "issue such orders as he deems appropriate, to insure the safety of any persons" in the mine (30 U.S.C. § 813(k)(emphasis added)). MSHA's regulations at 30 C.F.R. Part 50 provide several definitions of an "accident." The relevant definition for purposes of this case is the definition found in section 50.2(h)(11). It defines an accident as "[d]amage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than thirty minutes."

Commission Administrative Law Judge George Koutras has summarized the nature of Section 103(k) orders and the wide discretion the section affords inspectors:

> Section 103(k) orders are typically issued by MSHA inspectors to secure the scenes of accidents, to insure the continued safety of mine personnel, to preserve evidence, and to facilitate the investigation of accidents....
>
> Section 103(k) authorizes an inspector to issue such orders as he deems appropriate to insure the safety of miners. Thus, the issuance of such an order by an inspector is discretionary. If an inspector believes that an operator has the situation well in hand, and that the safety of miners is insured, he need not issue any orders at all. On the other hand, if the inspector is in doubt, or has insufficient information to enable him to make a judgement as to the severity of the situation, or the hazard exposure to miners, ... he must be afforded the latitude to act according to the wisdom of his discretion and experience ... [I]n order to successfully respond to such situations, an inspector must be able to do what he believes is appropriate according to the facts as they are known to him, or as they appear to exist, at the time he makes the decision to act....If the order was routinely issued, without regard to the safety or health of miners, then ... it should be vacated. If, on the other hand, it was issued in order to insure the safety or health of the miners, it should be affirmed (Southern Ohio Coal Co., 13 FMSHRC

1783, 1798-99 (November 1991) (citations omitted) (emphasis in original).

In analyzing Tuggle's use of his discretionary authority to invoke section 103(k), it is important to keep in mind what Tuggle already knew when he arrived at the mine on December 29. He had inspected Jim Walter's underground coal mines for a number of years and he was aware that an accident at the No. 3 Mine had resulted in a skip and hoist ropes falling down the production shaft (Tr. 45). He knew that miners at the No. 4 mine occasionally were required to travel adjacent to the bottom of the production shaft (Tr. 116-117). He also knew that at the No. 4 mine, a hoist used to carry mine personnel in the event of an emergency, shared the production shaft with the skip hoist.

Tuggle testified repeatedly that he issued the Section 103(k) order so that he could "investigate and make sure that it was safe for miners" (Tr. 68; See also Tr. 53, 97-98, 116-117). Given what he knew about the prior accident and the possible exposure of miners to the inherent dangers and what he learned from Lee regarding the events that occurred when the skip became stuck at the bottom of the shaft, especially the slipping hoist rope, the melting of the neoprene wearing strips and the broken control line, I conclude that it was entirely reasonable for Tuggle to halt operations. Tuggle could then investigate and make certain repairs had been adequate to insure safety of the miners. The fact that Tuggle's investigation resulted in a finding that everything was safe does not invalidate his decision to issue the order. The question is the reasonableness of his decision at the time he made it (See Homesteak Mining Co., 4 FMSHRC 1829, 1840 (October 8, 1982) (ALJ Vail)). Tuggle was responsible for determining whether the hoist had been properly repaired and, if not, for protecting miners from resulting safety hazards. This was a considerable responsibility. Therefore, it is natural that any question in his mind would have been resolved on the side of safety (See M.A.E. West, Incorporated, 10 FMSRHC 813, 842 (June 1988) n. 5 (ALJ Koutras)).

I conclude that Zimmerman's failure to issue a Section 103(k) order does not invalidate Tuggle's enforcement effort. In some circumstances, the lack of enforcement action by one inspector might reflect upon the reasonableness of action initiated by another inspector. This is not such a situation. As I have already found, the evidence overwhelmingly supports the proposition that given what he knew when the order was issued, Tuggle's desire "to make sure that it was safe for miners" was eminently reasonable (Tr. 68). Therefore, the order must be affirmed.

## THE VIOLATION OF SECTION 50.10

In deciding whether a violation occurred, I must look to the words of the pertinent standards. If the words are straight forward and apply to specifically described situations as in this instance, I need not go beyond the regulations themselves.

Section 50.10 requires that "[i]f an accident occurs, an operator shall immediately contact ... MSHA." As previously noted, an "accident" is defined as "[d]amage to hoisting equipment in a shaft ... which endangers an individual or which interferes with use of the equipment for more than thirty minutes" (30 C.F.R. § 50.2(11)). The regulation does not distinguish between hoisting equipment used to transport miners and hoisting equipment used to transport coal and/or materials. Moreover, the applicable definition of "accident" is disjunctive -- "which endangers an individual or which interferes with use of the equipment" (30 C.F.R. § 50.10(h)(11)). (I note that although Tuggle was unaware of an official interpretation of Section 50.10 (Tr. 81), Program Policy Letter No. 94-III-2 indicates that MSHA regards damage to hoisting equipment used solely to transport equipment or material, and which interferes with use of the equipment for more than thirty minutes, to be reportable. "Reporting of Damaged Hoisting Equipment" (10/7/94).)

Tuggle's undisputed testimony confirms that there was damage to the hoisting equipment, in particular, damage to the neoprene wearing strips and to the control line that caused the hoisting equipment to be out of service for more than thirty minutes. This was an "accident" within the meaning of Section 50.2(h)(11). Moreover, even if, as Jim Walter argues, the regulations only pertain to situations where miners are exposed to hazards, I would still find there was an accident within the meaning of the definition. I credit fully Tuggle's opinion that the defective production hoist could have exposed those who traveled occasionally at the bottom of the shaft to danger. This being the case, the incident was reportable as an "accident."

Having found there was an "accident," the question is, did Jim Walter "immediately contact" MSHA? It is clear that the condition of the hoist was not reported until many hours after the damage occurred. Jim Walter offers no excuse for the delay. The fact that management personnel incorrectly believed the regulation did not apply cannot excuse their failure to take the "prompt, vigorous" action required by the standard. Consolidation Coal Company, 11 FMSHRC at 1938. I therefore find the violation existed as charged.

## CIVIL PENALTY CRITERIA

### GRAVITY

Tuggle did not believe that injuries to miners were reasonably likely because of the violation (Tr. 52). There was no evidence that miners were placed in danger by the accident (Tr. 62). While I suspect an argument could be made that a violation of the "immediate contact" requirement of section 50.10 is serious in and of itself, it was not made here. I conclude, therefore, that the violation was not serious.

## NEGLIGENCE

Tuggle found mine management to have been highly negligent in failing to report the accident. In his view, management personnel were experienced and should have known of their obligation to contact MSHA (Tr. 77). At the hearing, counsel for the Secretary pointed to the fact that Jim Walter obviously knew of the reporting requirement because it had contacted MSHA when the skip fell down the shaft at the No. 3 Mine (Tr. 124).

Negligence is the failure to exercise the care required under the circumstances. The relevant circumstances here included the fact that not only did Jim Walter failed to act immediately, but that eight or nine hours passed before MSHA was contacted. Moreover, I agree with counsel that the accident at the No. 3 Mine should have heightened Jim Walter's awareness of the requirements of the standard. I conclude therefore that Tuggle's negligence finding was warranted.

## HISTORY OF PREVIOUS VIOLATIONS

The print-out of the mine's prior assessed violations lists a large number of such violations. However, the overall number of applicable previous violations is counter balanced by the fact that there were no prior violations of section 50.10 (Gov. Exh. 4). I conclude that the applicable history of previous violations is such that could either increase or decrease the penalty assessed.

## SIZE OF BUSINESS

Jim Walter is a large operator and the No. 4 Mine is a large mine (Proposed Assessment, Docket No. WEVA 94-407).

## ABILITY TO CONTINUE IN BUSINESS

No evidence was offered that any penalty assessed will affect Jim Walter's ability to continue in business and I conclude it will not.

## GOOD FAITH ABATEMENT

Tuggle indicated that at the time the citation was issued, the company had already abated the violations by notifying MSHA (Gov. Exh. 2).

## CIVIL PENALTY

When I inquired why the violation was subject to a special assessment under the provisions of 30 C.F.R. Part 100, counsel for the Secretary stated that the violation was assessed when it was a Section 104(d)(2) order, prior to the order's modification to a Section 104(a) citation (Tr. 57-58).

Section 100.5(b) provides that the Secretary may elect to specially assess a violation when it is due to the unwarrantable failure of the operator to comply. The unwarrantable finding was eliminated when the order was modified to a section 104(a) citation. Counsel stated, however, that the Secretary continued to believe the proposed penalty of $500 was justified by Tuggle's "high" negligence finding (Tr. 57-58).

Section 100.5(h) provides the Secretary may invoke the special assessment provisions in cases of "an extraordinarily high degree of negligence" (emphasis added). I can not conclude that the lack of care exhibited by Jim Walter in this instance was extraordinarily high.

In view of this and the other civil penalty criteria findings, I find the proposed penalty to be excessive. Therefore, I will assess a civil penalty of $300.

SETTLEMENTS

SE 94-407

| Citation/ Order No. | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 3182293 | 10/28/93 | 75.370(a)(1) | $5,200 | $3,500 |

(Tr. 139-140)

SE 94-306

| Citation/ Order No. | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 2807227 | 08/18/93 | 75.220 | $8,500 | $5,500 |
| 3182263 | 10/28/93 | 75.400 | $1,610 | $ 793 |
| 3182266* | 11/15/93 | 75.370(a)(1) | $1,298 | $ 300 |
| 3182267 | 11/15/93 | 75.400 | $1,298 | $ 793 |
| 3183390* | 11/15/93 | 75.503 | $1,610 | $ 200 |
| 3183399* | 11/16/93 | 77.410 | $ 506 | $ 150 |
| 3183400 | 11/17/93 | 77.202 | $ 595 | $ 595 |
| 3183512* | 11/18/93 | 75.400 | $ 506 | $ 150 |
| 3183515* | 11/18/93 | 75.400 | $ 793 | $ 200 |
| 2807244* | 11/30/93 | 75.370(a)(1) | $1,298 | $ 300 |
| 2807499* | 11/30/93 | 75.1403 | $1,610 | $ 300 |
| 2807245* | 12/06/93 | 75.370(a)(1) | $1,610 | $ 300 |

(Tr. 140-147) (*The Secretary agrees to delete the S&S findings.)

DOCKET NO. SE 94-383

| Order/ Citation | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 3182598 | 12/08/93 | 75.203(e) | $ 595 | $ 200 |

| | | | | |
|---|---|---|---|---|
| 3182235* | 12/09/93 | 75.1106-3(a)(3) | $ 288 | $ 100 |
| 3182605 | 12/10/93 | 75.370(a)(1) | $ 431 | $ 150 |

(Tr.147-149) (*The Secretary agrees to delete S&S finding.)

DOCKET NO. SE 94-384

| Order/ Citation | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 3184808 | 06/24/93 | 50.20 | $ 50 | $ 50 |
| 3195772* | 11/09/93 | 75.380(g) | $1,155 | $ 400 |

(Tr. 149-150) (*The Secretary agrees to delete the S&S finding.)

DOCKET NO SE 94-389

| Order/ Citation | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 318273 | 05/05/93 | 75.202(b) | $2,300 | $1,000 |
| 3182533 | 11/04/93 | 75.340 | $ 793 | $ 309 |
| 3182534 | 11/04/93 | 75.400 | $ 793 | $ 309 |
| 3183388* | 11/04/93 | 75.503 | $1,019 | $ 200 |
| 3182537 | 11/08/93 | 75.203(e) | $ 309 | $ 309 |

(Tr. 150-152) (*The Secretary agrees to delete the S&S finding.)

DOCKET NO. SE 94-390

| Order/ Citation | Date | 30 C.F.R.§ | Assessment | Settlement |
|---|---|---|---|---|
| 3182539 | 11/09/93 | 75.220 | $ 288 | $ 288 |
| 3182543 | 11/09/93 | 75.220 | $ 288 | $ 288 |
| 2182545 | 11/09/93 | 75.400 | $1,019 | $ 309 |
| 3182549* | 11/10/93 | 75.333(b)(3) | $1,019 | $ 250 |
| 3102551* | 11/12/93 | 75.370(a)(1) | $ 431 | $ 125 |
| 2182553* | 11/12/93 | 75.1713-7(a)(3) | $ 288 | $ 50 |
| 3182227 | 11/15/93 | 75.400 | $ 309 | $ 100 |
| 3182554 | 11/16/93 | 75.400 | $ 595 | $ 595 |
| 3182555* | 11/16/93 | 75.400 | $ 595 | $ 150 |
| 3182556 | 11/16/93 | 75.1719-1(a) | $ 288 | $ 288 |

(Tr. 152-156) (The Secretary agrees to delete the S&S finding.)

DOCKET NO. SE 94-446

| Citation/ Order No. | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 2807227 | 02/18/93 | 75.220 | $ 300 | $ 200 |

(Tr. 13-18)

DOCKET NO. SE 94-453

| Citation/ Order No. | Date | 30 C.F.R. § | Assessment | Settlement |
|---|---|---|---|---|
| 2807227 | 02/18/93 | 75.220 | $3,500 | $ 200 |

(Tr. 13-18)

APPROVAL OF THE SETTLEMENTS

After consideration of the information in support of the settlements provided on the record by counsels, I find that the proposals are reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the settlements are **APPROVED.**

WITHDRAWAL OF PENALTY PETITIONS

DOCKET NO. SE 94-454 and DOCKET NO. SE 94-511

Counsel for the Secretary moved to withdraw the Secretary's petitions for assessment of civil penalty in two of the individual civil penalty cases on the grounds that the Secretary could not establish that the Respondents knowingly violated the standards alleged (Tr. 12-13). The Commission's rules provide that a party may withdraw a pleading at any stage of a proceeding with the approval of the judge (29 C.F.R. § 2700.11). The motion is **GRANTED.**

ORDER

In Docket No. SE 94-126-R, Order No. 3197626 is **AFFIRMED** and the proceeding is **DISMISSED.**

In Docket No. SE 94-407, Citation No. 3197627 is **AFFIRMED** and Respondent, Jim Walter, is **ORDERED** to pay a civil penalty of $300 for the violation of section 50.10.

In Docket Nos. SE 94-407, SE 94-306, SE 94-383, SE 94-384, SE 94-389 and SE 94-390, Respondent, Jim Walter, is **ORDERED** to pay civil penalties as agreed to in the settlements. The Secretary is **ORDERED** to modify the referenced citations and orders by deleting the S&S findings.

In Docket No. SE 94-446, Respondent, Carl W. Harless, is **ORDERED** to pay a civil penalty of $200 for the violation of section 75.220.

In Docket No. SE 94-453, Respondent, William E. Wilson, is **ORDERED** to pay a civil penalty of $200 for the violation of section 75.220.

Payment shall be made to MSHA within 30 days of the date of this decision, and upon payment, the referenced proceedings are **DISMISSED.**

Finally, civil penalty proceedings Docket Nos. SE 94-454 and SE 94-511 are **DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution:

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P.O. Box 133, Brookwood, AL 35444 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 4 1995

| | | |
|---|---|---|
| RANDALL PATSY, Complainant | : | DISCRIMINATION PROCEEDING |
| v. | : | Docket No. PENN 94-132-D |
| | : | MSHA Case No. PITT CD 93-27 |
| BIG "B" MINING COMPANY, Respondent | : | |

## DECISION

Appearances: Daniel Hilliard and Susan Mackalica, West Sunbury, Pennsylvania, for the Respondent.

Before: Judge Feldman

The threshold issue in this discrimination proceeding brought under color of authority of section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(3), is whether Randall Patsy was a "miner" at the time of his alleged October 26, 1992, discriminatory discharge. It is undisputed that on the day of his discharge, Patsy was working at the Peter Rabbit Campground preparing mobile home sites. Patsy's discrimination complaint was investigated by the Mine Safety and Health Administration (MSHA). On December 1, 1993, MSHA advised Patsy that it had concluded that a violation of section 105(c) of the Act had not occurred because Patsy was not "...a 'miner' at the time of the alleged discharge and MSHA does not have jurisdiction over the campground job site."

This matter was originally scheduled for hearing on June 7, 1994, and subsequently rescheduled for September 20, 1994. However, Patsy's complaint was dismissed on May 13 and August 16, 1994, after a series of statements evidencing that he was no longer interested in pursuing his discrimination complaint. For example, Patsy stated: "...there [may be] no sense in pursuing this any farther (sic)" (April 7, 1994, letter); "I feel I would be better off to pursue this as a civil suit locally" (April 18, 1994, letter); "I can not (sic) prove I was a miner at the time I was fired" (July 20, 1994, letter); and, "I don't have a leg to stand on" (July 25, 1994, statement to secretary Linda Hudecz).

Each dismissal was vacated by the Commission and remanded for further consideration after Patsy, contrary to the above statements, expressed a desire to proceed. See Commission Orders at 16 FMSHRC 1237 (June 1994) and 16 FMSHRC 1937 (September 1994). Consequently, on November 25, 1994, a Notice of Hearing Site was sent by certified mail once again scheduling this matter for hearing on December 13, 1994, in Pittsburgh, Pennsylvania.

On November 25, 1994, contemporaneous with the mailing of the hearing notice, Raymondria Ballard, my office secretary, telephoned Patsy at his telephone number of record to advise him of the time, date and location of the upcoming hearing. On December 8, 1994, Ms. Ballard left a message on a telephone answering machine at his telephone number reminding Patsy of the hearing. On December 9, 1994, Ms. Ballard again called Patsy's telephone number and left a message about the hearing with an unidentified female who stated she did not know where Patsy was. These messages were attempts to prevent hearing expenditures in the event Patsy was no longer interested in prosecuting his complaint.

The hearing convened as scheduled at 9:00 a.m. on December 13, 1994, in Pittsburgh. Daniel Hilliard and his daughter, Susan Mackalica, appeared on behalf of the respondent. Hilliard is the sole proprietor of Hilliard Mining which owns and operates the Big "B" Mining Company. Patsy failed to appear. At 9:20 a.m. I left a message on Patsy's answering machine requesting that he immediately call my office to explain his absence at the hearing. Patsy failed to respond. The trial record was opened at 10:25 a.m., at which time Hilliard and Mackalica testified.

Hilliard testified that he operates several business ventures associated with activities involving the ownership and management of rental properties, road construction, sewer plant construction and mining. Hilliard stated that Patsy was a general handyman at Hilliard's rental properties. Patsy also operated small construction equipment and the fuel truck which serviced the equipment at Big "B" Mining's Isacco mine site as well as the equipment at several of Hilliard's other non-mining construction sites.

Hilliard testified that on the morning of Patsy's discharge on Monday, October 26, 1992, Patsy reported for work at the Peter Rabbit Campground. The Peter Rabbit Campground is a subsidiary company owned by Hilliard Mining. The campground property was being converted into a mobile home park. Patsy was operating a small dozer for the purpose of clearing brush and trees and

leveling site locations in preparation for the installation of water, sewer and electric lines. The dozer broke down and was taken out of service. Patsy was discharged on the afternoon of October 26, 1992, after he refused to tow a low-boy trailer with a replacement dozer from Hilliard's equipment shop located at 551 Mahood Road in Butler, Pennsylvania to the campground, a distance of approximately four miles. Patsy refused to tow the low-boy because its state inspection had expired. Consistent with Hilliard's testimony, Patsy has stated, "I was eating lunch at a mobile home park when I was fired." (Undated letter filed October 19, 1994).

Hilliard testified that the campground is approximately eight miles from the Isacco mine site. The equipment shop is a fenced area with a 3,000 square foot building with tin siding, a flat roof and a cement floor. The equipment shop is used to store mining and excavating equipment for Hilliard's business activities. It is located equidistant between the campground and the mine site and is not on mine property.

The hearing concluded at 11:45 a.m. At approximately 3:00 p.m. that afternoon, Patsy telephoned my office and spoke to Raymondria Ballard. Patsy stated that he had just received my recorded message about his failure to attend the hearing. He stated that he was out of town, that he never received the "certified mail" hearing notice, and, that he had just returned from California. When reminded that he had been advised of the hearing date and location by Ms. Ballard on November 25, 1994, Patsy did not respond. Although Patsy claims he did not receive the certified hearing notice,[1] the hearing notice has not been returned by the post office as unclaimed.[2] Therefore, I find the certified mailing of the hearing notice, the November 25, 1994, telephone conversation with Patsy, and the two subsequent

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[1] This is not the first time that Patsy has alleged improper service in this proceeding. In a letter dated May 16, 1994, Patsy stated that he was not served with the respondent's answer to the February 24, 1994, Prehearing Order. However, the record reflects the respondent's response was sent to Patsy by certified mail (No. P 240 182 672) and returned to the respondent as unclaimed.

[2] The return receipt card was not returned. The Brady, Pennsylvania Post Office has been unable to trace this mailing. Brady, Pennsylvania Postmaster Tony Ruiz has advised me that, unfortunately, certified mailings are occasionally delivered to the addressee without removing the return receipt post card.

messages left at Patsy's telephone number of record conveying the information in the hearing notice, as adequate notice of the hearing date and location.

In an unsolicited letter dated January 30, 1995, following Patsy's December 13 conversation with Ms. Ballard, Patsy stated:

> We were out of town for two weeks prior to December 13th. The only notice we received were messages on our answering machine. We returned the afternoon of Dec. 13th, to find out there was hearing (sic) scheduled that morning. (Emphasis added).

On February 7, 1994, Patsy was ordered to show cause why his complaint should not be dismissed as a result of his failure to appear at the hearing. Patsy was ordered to specifically admit or deny that he had received the messages concerning the hearing date and location provided by Ms. Ballard on November 25, December 8 and December 9, 1994. In addition, Patsy was ordered to provide evidence demonstrating the dates and location of his reported out of town trip such as airline, hotel or credit card receipts.

The February 7 Order also noted that the testimony of Hilliard, who is not an attorney, was construed as a request for summary decision. Consequently, Patsy was also ordered to show cause, by filing an opposition, why summary decision for lack of jurisdiction should not be granted in favor of the respondent.

Patsy responded to the Order to Show Cause on February 10, 1995. Patsy stated he was out of town from November 20 through December 13, 1994. With respect to travel receipts, Patsy stated he traveled in a recreational vehicle and that he did not use motels, airlines or credit cards. Patsy did not identify where he purportedly traveled. Thus, Patsy provided no objective probative evidence of his trip.

Notwithstanding Patsy's inability to provide documentation of his trip, it is noteworthy that Patsy has been unable to remember the trip's duration. In a letter dated January 10, 1995, Patsy stated he was out of town for eight days. In a letter dated January 30, 1995, Patsy stated he was out of town for two weeks. Finally, in his response to the Order to Show Cause dated February 10, 1995, Patsy stated he was out of town for 23 days (November 20 through December 13, 1994.)

In addition, Patsy has failed to furnish the requisite documentation to support his denial of the November 25, 1994,

telephone conversation with Ms. Ballard and his denial of timely knowledge of the subsequent hearing messages of December 8 and December 9, 1994. Accordingly, Patsy has failed to demonstrate just cause for his failure to attend the hearing. Patsy's lack of credibility with regard to his alleged trip and his on again off again interest in his discrimination complaint evidences a contempt for this hearing process. Consequently, Patsy is in default and his complaint shall be dismissed with prejudice.

Alternatively, Patsy's February 10, 1995, response to the Order to Show Cause failed to demonstrate why summary decision should not be granted for the respondent. Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that summary decision shall be granted if (1) there is no genuine issue as to any material fact and (2) the respondent is entitled to summary decision as a matter of law.

Whether the low-boy trailer was located at the shop as the respondent claims, or, at the mine site as Patsy alleges, is not dispositive or otherwise material. For it is undisputed that Patsy was requested to tow the low-boy trailer in furtherance of his job duties at the mobile home site. Thus, the alleged location of the low-boy on mine property was incidental to its non-mining use and does not provide an adequate nexus to afford Patsy 105(c) statutory protection as a miner.[3] Rather, the only material and dispositive issue of fact as it relates to the jurisdictional question in this case, i.e., that Patsy was not working in a mine at the time of his alleged discriminatory discharge, is not in dispute. In this regard, in correspondence dated July 20, 1994, Patsy stated:

> I can not (sic) prove I was a miner at the time I was fired. I was employed by a mine operator, though I was working at a mobile home park he was developing. (Emphasis added).

Section 3(g) of the Mine Act defines a miner as "any individual working in a coal or other mine (emphasis added)." 30 U.S.C. § 802(g). In analyzing this definition of "miner" the court has stated "the [mine] statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction activities. National Industrial Sand Ass'n v. Marshall, 601 F. 2d 689, 704 (3rd Cir. 1979). Similarly, the Commission has concluded that an individual's status as a "miner" under the Act at a given point in time is determined by whether the individual

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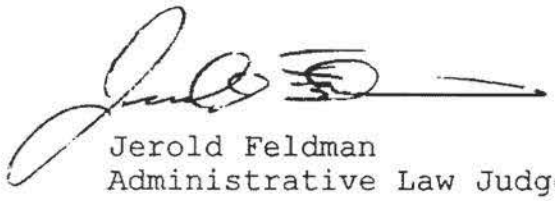
[3] See f.n. 4, infra.

works in a mine and not by whether one is employed by a mine operator. Cyprus Empire Corporation, 15 FMSHRC 10, 14 (January 1993). Simply put, a mobile home park is not a "coal or other mine" under section 3(h)(1) of the Act, 30 C.F.R. § 802(h)(1).[4] Likewise, an individual working at a mobile home park is not a section 3(g) "miner." Accordingly, the respondent is entitled to summary decision in this proceeding as a matter of law.

## ORDER

The complainant has failed to show cause why his complaint should not be dismissed as a result of his failure to appear at the December 13, 1994, hearing. Accordingly, Randall Patsy's discrimination complaint against the Big "B" Mining Company **IS DISMISSED** with prejudice.

Alternatively, there are no outstanding material issues of fact that warrant denial of summary decision in favor of the respondent on the jurisdictional question. Accordingly, summary decision **IS GRANTED** for the respondent and the discrimination complaint filed by Randall Patsy against the Big "B" Mining Company **IS DISMISSED** with prejudice for lack of jurisdiction under the Mine Act. Nothing herein shall be construed as a finding on the merits of Patsy's complaint or whether his complaint was timely filed.



Jerold Feldman
Administrative Law Judge

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[4] Section 3(h)(1) of the Act defines, in pertinent part, "coal or other mine" as "... an area of land from which minerals are extracted [including equipment]...used in, or to be used in, ... the work of extracting such minerals...."

Distribution:

Mr. Randall Patsy, R.D. #1, Box 290, E. Brady, PA 16028
(Certified and Regular Mail)

Mr. Daniel Hilliard, Ms. Susan Mackalica, Big "B" Mining Company,
R.D. 1, West Sunbury, PA 16061 (Certified and Regular Mail)

/rb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 27 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEVA 94-19<br>A.C. No. 46-01452-03957 |
| v. | : | Arkwright No. 1 |
| CONSOLIDATION COAL COMPANY, Respondent | : | |

## DECISION

Appearances: Robert Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Fauver

This is an action for civil penalties for three alleged violations of safety standards, under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 **et seq**.

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

## FINDINGS OF FACT

### Order No. 3118662

1. Inspector Richard McDorman issued § 104(d)(2) Order No. 3118662 on April 7, 1993, charging a violation of 30 C.F.R. § 75.340(a). The inspector found that water pump No. 68 was in a crosscut in an intake escapeway on the 2 South section and was not in a noncombustible enclosure or equipped with a fire suppression system, and the air ventilating the water pump was

not coursed into the return air entry but was used to ventilate the working section.

2. The pump was placed there to pump water out of an abandoned section of the mine adjacent to the 2 South section. The pump was 14 to 16 inches high, 18 to 20 inches wide, and 6 feet long. It weighed 300 to 350 pounds. The pump was energized and ready to be operated. It was located about 20 crosscuts from the working face and 1800 feet from the loading point. It was not moved as the working section advanced or retreated.

**Order No. 3118671**

3. Inspector McDorman issued § 104(d)(2) Order No. 3118671 on April 21, 1993, charging a violation of 30 C.F.R. § 75.400.

4. Accumulations of fine coal, coal dust and float dust were found on and around the 3 Right section belt line pony drive. A pony drive is an auxiliary drive that helps to drive a long belt line. As the conveyor belt comes to the pony drive, it dumps the coal onto a lower part of the belt, wraps around the pony drive, and comes back out where the coal is dumped back onto the upper belt. The belt goes to the mouth of the section where it dumps onto a main belt and then returns to the working section.

5. A scraper on the pony drive was installed to prevent coal from spilling off the belt. However, there was substantial spillage. The inspector found accumulations from 1/4 to 2 inches deep. They were packed under the belt, which was rubbing against the accumulations. He found other accumulations where coal had fallen off a pan under the belt. These accumulations were 6 to 12 inches deep. Other accumulations were near the end of the pan, measuring 8 inches deep.

6. To abate the cited condition, seven or eight men worked about two hours to remove the combustible accumulations from the area. About three tons of combustible materials were cleaned up to abate the condition.

**Order No. 3122509**

7. Section 104(d)(2) Order No. 3122509 was issued by Inspector Jerry Vance on April 20, 1993, for a violation of 30 C.F.R. § 75.370(a)(1).

8. Inspector Vance was traveling outby in the tailgate entry on the 3 Right longwall section, moving toward the mouth of the

section, when he observed that the operator had erected a stopping across the tailgate entry. When he went through the door in the stopping, he took a smoke tube reading and found there was no air movement. His methane detector sounded an alarm and showed over one percent methane. There was no air movement for about 600 feet in this entry.

## DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

### Order No. 3118662

This order was issued because a pump in an intake escapeway was not enclosed in a noncombustible enclosure and the air ventilating the pump was not coursed into a return entry. The inspector cited a violation of 30 C.F.R. § 75.340(a), which provides:

> Underground transformer stations, battery charging stations, substations, rectifiers, and water pumps shall be located in noncombustible structures or areas equipped with a fire suppression system meeting the requirements of § 75.1107-3 through § 75.1107-16. This equipment also shall be ----
>
> (1) ventilated by intake air that is coursed into a return air course or to the surface and that is not used to ventilate working places ***.

Section 75.340(a) is a part of new ventilation regulations that took effect in November 1992. Its predecessor, § 75.1105, required that certain electrical equipment, including "permanent pumps," be housed in fireproof structures or areas, and that air ventilating them be coursed into the return air entry. The new regulations delete the reference to "permanent" pumps and apply to all pumps unless they come under an exemption in § 75.340(b).

Respondent contends that its pump was exempt from § 75.340(a) under either § 75.340(b)(4) or (6), which provide:

> This section does not apply to *** (4) pumps located on or near the section and that are moved as the working section advances or retreats; *** [or] (6) small portable pumps.

The preamble to § 75.340(b) states that "[s]mall portable pumps are easily relocated without the aid of mechanized equipment; capable of being moved frequently; and installed in such a manner to facilitate such movement."

I find that the pump, which weighed 300 to 350 pounds, was not a "small portable pump" within the meaning of § 75.340(b)(6).

I also find that the pump was not "moved as the working section advances or retreats" within the meaning of § 75.340(b)(6). The term "working section" is defined as "All areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. The pump was about 1800 feet outby the loading point and did not advance with the working section.

The pump was nonexempt and therefore in violation of § 75.340(a).

The inspector found that the pump was in good condition at the time the order was issued and was not likely to catch on fire. For those reasons, he cited the violation as not "significant and substantial" within the meaning of § 104(d) of the Act. However, this was still a serious violation. In the event of a fire reaching the pump's fuel tank, the resulting smoke would have contaminated the intake entry and escapeway with a reasonable likelihood of serious injuries.

The inspector found that the violation was due to high negligence and therefore was an "unwarrantable" violation within the meaning of § 104(d) of the Act. The Commission has defined an unwarrantable violation as one due to "aggravated conduct, constituting more than ordinary negligence" (Emery Mining Corp., 9 FMSHRC 1997 (1987)).

Respondent contends that the violation was not unwarrantable because Respondent held a good faith belief that the pump was in compliance with the regulations. To be a mitigating factor, the operator's belief must be reasonable. Wyoming Fuel, 16 FMSHRC 1618, 1628 (1994). I do not find that the exemptions claimed by Respondent were reasonable grounds for assuming, without first inquiring into MSHA's enforcement position, that the pump qualified for an exemption. The pump was too heavy to lift to be considered a "small portable pump," and since it was not moved as the working section advanced or retreated, it could not reasonably be considered exempt under § 75.340(b)(6).

Moreover, the operator's claims of exemption under § 75.340(b)(4) and (6) appear to be after-the-fact litigation positions, not the actual reason for the operator's contention that the pump was not covered by § 75.340(a). The actual reason appears to be the contention that the pump was not a "permanent" pump within the meaning of the old regulation. Thus, Respondent's safety compliance representative, Michael Jackson,

testified that at the time of the order he believed the pump "met the criterion of law of . . . not being a permanent pump." Tr. 84. This indicates that Respondent did not keep up with the change in the law.

Respondent is responsible for knowing the change in the safety standard after its publication in the Federal Register, which occurred about five months before the violation. The importance of safety standards places a high duty on an operator to keep abreast of the law and to be sure that it complies with all changes in safety standards that are duly published. "Ignorance of the law" does not lower the operator's negligence from high to ordinary in this case. The evidence sustains the inspector's allegation of an "unwarrantable" violation.

Order No. 3118671

This order was issued for a violation of 30 C.F.R. § 75.400. Respondent concedes that this was a "significant and substantial" violation, but challenges the inspector's findings of high negligence and an unwarrantable violation.

Section 75.400 provides that "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." Order No. 3118671 was issued because fine coal, coal dust and float dust had been allowed to accumulate on and around the 3 Right section belt line pony drive. A pony drive is an auxiliary drive that helps to drive a long belt line. As the belt comes to the pony drive, it dumps the coal onto a lower part of the belt, wraps around the drive, and comes back out where the coal is dumped back onto the upper belt. The belt goes to the mouth of the section where it dumps onto a main belt.

A scraper was installed on the pony drive to scrape coal off the bottom belt. However, there was substantial spillage. Some of the accumulations measured 1/4 to 2 inches deep. The accumulations were packed between the pan and the belt and the belt was rubbing against the accumulations. Other accumulations were on the mine floor, where combustible material had fallen off the pan. The accumulations under the pan were 6 to 12 inches deep. Other accumulations were found near the end of the pan, measuring 8 inches deep.

To abate the violation, it took seven or eight men up to two hours to remove the combustible accumulations from the area. Inspector McDorman testified that he and the company

representative, Clifford Cutlib, agreed that about three tons of coal were cleaned up to abate the violation. This figure is reflected in Inspector McDorman's notes. Company witnesses disputed this figure. However, in addition to Inspector McDorman's notes, it is reflected in the order itself, and Mr. Cutlib said nothing about that to Inspector McDorman when the order was issued. On balance, I credit the Inspector's testimony and his notes as the locations and quantities of the accumulations.

After some abatement efforts were made, the mine superintendent asked the inspector to terminate the order. The inspector refused to terminate the order until all the accumulations had been removed. The mine superintendent stated that the order had shut down a million dollar piece of equipment which the company needed to get running. This is consistent with the inspector's opinion that the company practice was to clean up accumulations only partially, just so that the belt would not rub against combustible accumulations.

The company's preshift and onshift reports for March 21 to April 21, 1993, show 43 reports of coal spillage at the location where Order No. 3118671 was issued. Also, the mine history shows seven citations for violative accumulations along belt lines from April 1992 through April 1993. Two of those citations were issued for accumulations at the pony drive on the 2 Right section.

Section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated" (Old Ben Coal Company, 1 FMSHRC 1954 (1979)). The primary Congressional intent in passing the Mine Act was to prevent mine explosions and fires and § 75.400 is central to that purpose. Black Diamond Coal Company, 7 FMSHRC 1117 (1985).

The inspector's findings of high negligence and an unwarrantable violation are amply supported by the evidence. Respondent knew that it had major spillage problems but did not correct them. The preshift and onshift reports showed repeated entries of spillage at the cited location. Also, Respondent had a number of prior citations for violative accumulations, including two at the cited pony drive. Despite this notice that there was a persistent problem of combustible accumulations, Respondent did not assign anyone to this area to prevent violative accumulations. The operator's primary concern appears to have been production rather than preventing combustible accumulations. The evidence shows aggravated conduct beyond ordinary negligence.

**Order No. 3122509**

This order was issued for a violation of 30 C.F.R. § 75.370(a)(1), which requires the operator to develop and comply with a ventilation plan approved by the Secretary. Once the operator's ventilation plan is approved, its provisions and revisions are enforceable as mandatory standards. See, UMWA v. Dole, 870 F.2d 662, 671 (D.C. Cir. 1989); and Jim Walter Resources, 9 FMSHRC 903, 907 (1987).

Respondent's ventilation plan provides that the "mine is constantly patrolled by fire bosses to insure that no dead areas or areas of no air movement occur." Exhibit G-16, p.2. Order No. 3122509 was issued because there was no air movement for about 600 feet in the tailgate entry of a longwall section.

Inspector Vance was traveling the tailgate entry on the 3 Right longwall section from the face toward the mouth of the section when he encountered the violation. He was traveling with a company representative, Bobby Gross, and a miner's representative, Alex Petrosky. The operator had erected a stopping across the tailgate entry. Outby that point, there was no air movement for about 600 feet. When the inspector went through the door in the stopping, he took a smoke tube reading. There was no air movement. His methane alarm went off, indicating over one percent methane. He took smoke tube readings at various locations in the entry. All readings showed no air movement.

The dead air space was caused by the stopping across the tailgate entry. With the stopping there, the air in the tailgate entry had nowhere to go.

Respondent contends that the dead air space was caused by "certain changes that occur in mine conditions and that they occurred between the time of the last examination and the time that the Inspector wrote the Order." Tr. 234. However, there is no evidence of any specific changes that would have accounted for the dead air after the stopping had been erected. The reliable evidence indicates that the dead air space was caused by the stopping across the tailgate entry, which had been erected about four weeks before the order was issued.

Since this entry is required to be walked by a fireboss weekly, this condition should have been detected and corrected by the operator prior to Inspector Vance's inspection. Also, when the stopping was installed, the operator should have made sure that there was positive air movement in the entry. It was

obvious to Inspector Vance when he reviewed the mine map that the stopping presented a problem. It should have been just as obvious to the operator.

Finally, the violation was the direct result of actions taken by management. The stopping across the tailgate entry was installed at the direction of management, which has a duty to evaluate the consequences of its actions. The company's failure to prevent, detect, and correct the violation of its ventilation plan constitutes more than ordinary negligence. I find that the evidence supports the inspector's findings of high negligence and an unwarrantable violation.

Although the violation was not designated "significant and substantial," it was a serious violation. As a direct result of the violation, there was a build up of more than one percent methane in the tailgate entry.

## Civil Penalties

Section 110(i) of the Act provides six criteria for assessing civil penalties:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

Respondent is a large operator. After notification of the violations involved, Respondent made a good faith effort to achieve rapid compliance. The factors of gravity and negligence have been discussed as to each violation.

Considering all of the criteria in § 110(i), I find that the following civil penalties are appropriate:

| Order | Civil Penalty |
|---|---|
| No. 3118662 | $ 2,400 |
| No. 3122509 | $ 2,400 |
| No. 3118671 | $ 4,800 |
| | $ 9,600 |

## CONCLUSIONS OF LAW

1. The judge had jurisdiction.

2. Respondent violated the safety standards as alleged in Orders Nos. 3118662, 3122509 and 3118671.

## ORDER

WHEREFORE IT IS ORDERED that:

1. Order Nos. 3118662, 3122509 and 3118671 are AFFIRMED.

2. Respondent shall pay civil penalties of $9,600 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

FEB 28 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 94-1206 |
| Petitioner | : | A.C. No. 15-16910-03533 M |
| v. | : | |
| | : | Mine: Polly #3 |
| EARL CAUDILL, | : | Perry County, KY |
| Respondent | : | |

**DECISION APPROVING SETTLEMENT**

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Appearance waived by Earl Caudill.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing on January 24, 1995, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $1,250 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable 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 $1,250 within 30 days of this order.

Gary Melick
Administrative Law Judge

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/jf

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 2 8 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 94-408 |
| Petitioner | : | A. C. No. 15-07201-03631 |
| v. | : | |
| | : | C-2 Mine |
| HARLAN CUMBERLAND COAL COMPANY, | : | |
| Respondent | : | |

## DECISION APPROVING SETTLEMENT

Before: Judge Maurer

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The parties have filed a joint motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $534 to $426 is proposed. The citations, initial assessments, and the proposed settlement amounts are as follows:

| CITATION NO. | INITIAL ASSESSMENT | PROPOSED SETTLEMENT |
|---|---|---|
| 4040311 | $ 267 | $ 213 |
| 4040312 | 267 | 213 |
| TOTAL | $ 534 | $ 426 |

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 $426 within 30 days of this order.

Roy J. Maurer
Administrative Law Judge

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H. Kent Hendrickson, Esq., Rice & Hendrickson, P. O. Box 980, Harlan, KY 40831

dcp

# ADMINISTRATIVE LAW JUDGE ORDERS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 1995

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 94-957<br>A. C. No. 15-07986-03665 |
| v. | : | Darby Mine |
| **JERICOL MINING INCORPORATED,** Respondent | : | |

## DECISION DISAPPROVING SETTLEMENT ORDER TO SUBMIT INFORMATION

**Before: Judge Merlin**

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements for the two violations in this case. A reduction in the penalties from $5,700 to $2,298 is proposed.

Citation No. 4249131 was issued as a 104(d)(1) citation for a violation of 30 C.F.R. § 75.342(a)(4) because the methane monitor on a continuous mining machine was not maintained. The methane monitor would not deenergize the control circuit on the continuous miner because the monitor module was disconnected from the control circuit. The continuous miner had been operating for four hours. The inspector had also detected methane at seals deeper in the mine from where the miner was cutting coal. According to the joint motion filed by the parties, the operator's witnesses would challenge the inspector's assessment of the presence of methane. The operator would present testimony that a repairman was working on the monitor at the time the citation was issued and that parts for the repair were delivered while the inspector was on the section. In addition, the foreman was taking regular methane readings with a hand-held methane detector during the time the monitor was being repaired. Based on the operator's representations, the parties agree to reduce the penalty from $4,200 to $1,298 but the citation would remain as written.

Order No. 4249190 was issued as a 104(d)(2) order for a violation of 30 C.F.R. § 75.202(a) because there were loose ribs along the haulage roadway. According to the parties, the operator would present evidence that the ribs were more stable because they could not be pulled down single-handedly but required the use of a four foot bar used to pry down slate. Based on the operator's representations, the parties agree to reduce the penalty from $1,500 to $1,000 but the citation would remain as written.

The motion as presented cannot be approved. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The parties in the instant motion have merely stated their positions with respect to the violations. The motion sets forth unresolved conflicts between the parties on the evidence. Under the provisions of the Act, as set forth above, I cannot approve a settlement based upon the representation of such conflicts. I may only approve a settlement justifiable under the six criteria of section 110(i), supra. Accordingly, the parties must explain why the proposed penalties should be reduced in light of the six criteria. For instance, if the facts indicate a lesser degree of gravity or negligence than first thought, the parties, and most especially, the Solicitor must say so. This is especially true where as here the penalty reductions are large but the special findings remain unchanged.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the parties submit appropriate information to support their motion for settlement. Otherwise, this case will be set for further proceedings.

Paul Merlin
Chief Administrative Law Judge

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