

MARCH 1992

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MARCH 1992

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

Lonnie D. Ross and Charles E. Gilbert v. Shamrock Coal Company, Docket No. KENT 91-76-D and KENT 91-77-D. (Judge Fauver, February 28, 1992)

Secretary of Labor, MSHA v. Zeigler Coal Company, Docket No. LAKE 91-636. (Judge Koutras, February 12, 1992)

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Inc., Docket No. WEVA 91-1607. (Judge Maurer, February 12, 1992)

UMWA on behalf of Dan Nelson and others v. MSHA, John Weekly, et al., Docket No. SE 88-92-D, SE 88-23-D. (Judge Weisberger, February 14, 1992)

Larry E. Swift and others v. Consolidation Coal Co., Docket No. PENN 91-1038-D. (Judge Melick, February 19, 1992)

Secretary of Labor, MSHA v. Ford Construction Company, Docket No. WEST 90-346-M. (Judge Morris, February 16, 1992)

Review was denied in the following cases during the month of March:

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 91-93-M, etc. (Judge Koutras, January 23, 1992)

Secretary of Labor, MSHA v. Robert Shick employed by Muncie Sand and Gravel, Inc., Docket No. LAKE 91-64-M. (Judge Fauver, February 18, 1992)



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 24, 1991

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

v.

LANG BROTHERS, INC.

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Docket Nos. WEVA 90-48  
WEVA 90-58

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners

## DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), we are asked to decide whether certain gas well cleaning and plugging operations of Lang Brothers, Inc. ("Lang") were subject to the jurisdiction of the Mine Act and whether, in performing these operations, Lang was an independent contractor within the Act's definition of "operator." Commission Administrative Law Judge James A. Broderick concluded that, on the facts of this case, the gas well cleaning and plugging operations in question were subject to the Mine Act and that Lang was an independent contractor-operator under the Act. 12 FMSHRC 1690 (August 1990) (ALJ). For the reasons that follow, we affirm the judge's decision.

### I.

#### Factual and Procedural Background

The salient facts of this case are undisputed. Lang is a heavy construction company, approximately half of whose business involves drilling of new gas wells and the repairing of existing wells for gas companies. The remainder involves the cleaning and plugging of gas wells for coal mine operators.

The focus of this proceeding is on Lang's cleaning and plugging of two gas wells located in an area scheduled for development as part of the Blacksville No. 2 Mine, a large underground coal mine owned and operated by Consolidation Coal Company ("Consol"). Mining within 300 feet of an oil or gas well is prohibited by 30 C.F.R. § 75.1700.<sup>1</sup> However, the Department of

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<sup>1</sup> Section 75.1700, which repeats section 317(a) of the Mine Act, 30 U.S.C. § 877(a), provides:

Oil and gas wells.

Labor's Mine Safety and Health Administration ("MSHA"), in a Decision and Order dated July 18, 1980 ("Decision and Order"), granted Consol's petition for modification, filed pursuant to section 101(c) of the Mine Act, 30 U.S.C. § 811(c). That Decision and Order released Consol from the 300-foot requirement with respect to oil and gas wells in the Blacksville No. 2 Mine so long as the wells were cleaned and plugged. The modification allowed Consol to mine through the area of the wells on the condition that it clean the wellbores and plug the wells from below the coal bed to the surface, as well as meet various specific conditions for the plugging of the wells.

Consol contracted with Lang, an independent contractor, to clean and plug the gas wells in its mines. The contract was on an annual basis and renewable. Under the contract, Consol issued Lang a supplemental "purchase order" for each gas well to be cleaned and plugged. Pursuant to the contract, Lang obtained an operator's identification number from MSHA and was required to provide the necessary mine safety training to its employees in order to comply with the provisions of the Mine Act and applicable rules and regulations.

The purpose of cleaning and plugging the gas wells is to ensure that natural gas does not seep through the well into a mining area and create a safety hazard. If a gas well was left unplugged or was improperly plugged, gas could leak into an adjacent mine during the extraction of coal and result in an underground ignition or explosion. After a well is closed by plugging, it is no longer usable as a gas producer.

Typically, before Lang proceeds to do such work for Consol, Consol obtains a plugging permit from the state and makes appropriate arrangements with the affected surface landowner for access to the gas well. Lang builds roads to gain access to the site, if necessary, sets up the drilling rig at the surface site of the gas well, and moves the other necessary equipment, such as a "mud pump," water tanks, and a bulldozer to the site. Lang then

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[STATUTORY PROVISIONS]

Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

does the cleaning and plugging, performs reclamation activities at the site, and removes its equipment. A gas well is cleaned out by removing the well casing from the surface down to the gas production zone. Lang does not dig or drill through the earth or the coal. Rather, Lang sends its tools down through the existing well borehole and cleans out any debris. Lang takes out whatever has fallen into the borehole such as caved-in earth, or debris. Plugging involves filling the well borehole with expandable cement. Sec. Exh. 4.

In March 1989, Consol issued Lang a purchase order to reopen, clean out and plug Well B2-233, located in the Pennsylvania area of the Blacksville No. 2 Mine. Consol obtained a permit from the Commonwealth of Pennsylvania for this work and Lang brought its equipment to the site. The well extended more than 1,370 feet below the surface and passed through the mine's coal seam, situated approximately 675 feet below the surface.

On March 20, 1989, MSHA inspector George Phillips went to the Blacksville No. 2 Mine office and asked to see the contractors' register, which the operator is required to maintain pursuant to 30 C.F.R. § 45.4. Lang's name appeared on the register, and Inspector Phillips went to the area in which Lang was cleaning Well B2-233. Phillips issued Lang a citation charging a violation of 30 C.F.R. § 77.1710(i), because Lang's bulldozer did not have seat belts. Phillips also concluded that the violation was of a significant and substantial nature. There is no indication in the record as to how far Consol's coal mining operation was from Well B2-233 at the time the well was being cleaned and plugged.

In December 1989, pursuant to another purchase order, Consol directed Lang to clean out and plug another gas well located in the Pennsylvania area of the Blacksville No. 2 Mine, Well B2-278. Consol obtained a state permit for this work and Lang brought its equipment to the site and started work. Well B2-278 extended more than 3,000 feet below the surface and passed through the mine's coal seam, situated approximately 800 feet below the surface.

On December 4, 1989, while Lang was cleaning Well B2-278, Inspector Phillips issued Lang three citations, one alleging a violation of 30 C.F.R. § 77.404(a) because of a defective cylinder pressure gauge; one alleging a violation of 30 C.F.R. § 77.503 because of damaged insulation on a welder cable; and one alleging a violation of 30 C.F.R. § 77.1110 because of a defective fire extinguisher at the oil storage station. On December 12, 1989, Phillips again inspected Well B2-278 and issued two more citations, one alleging a violation of 30 C.F.R. § 77.404(a) because of two inoperative rear lights on a bulldozer, and one alleging a violation of 30 C.F.R. § 77.410 because of a defective automatic warning device on a bulldozer. Phillips also concluded that these violations were of a significant and substantial nature. At the time the citations were issued, Consol was mining about 300 feet from the well.

The Secretary subsequently proposed civil penalties for all of the alleged violations and the matter proceeded to an evidentiary hearing before Judge Broderick. Before the judge, Lang argued that its operation was not subject to the Mine Act. According to Lang, it was merely plugging wells

drilled for production of gas. Lang contended that it was not working at a mine and asserted that it was not in any way involved in extraction of minerals in nonliquid form but, rather, was engaged in a gas-related activity. It also argued that it had no contact with Consol's miners. Lang submitted that it was subject to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988) (the "OSHAct"). Lang further argued that even if its operation was subject to the Mine Act, it was not an "operator" within the meaning of the Act. Lang conceded, however, that if it were deemed an operator under the Mine Act, the cited violations occurred.

In his decision, Judge Broderick concluded that Lang was an independent contractor-operator under the Mine Act and was subject to the Mine Act's jurisdiction. The judge gave special emphasis to the Commission's decisions in Otis Elevator Company, 11 FMSHRC 1896 (October 1989) ("Otis I"), and Otis Elevator Company, 11 FMSHRC 1918 (October 1989) ("Otis II"), in which the Commission held that an independent contractor examining and maintaining elevator equipment at underground coal mines was an operator under the Mine Act. (The judge issued his decision before the Commission's Otis I and Otis II decisions were affirmed by the United States Court of Appeals for the District of Columbia Circuit. Otis Elevator Co. v. Secretary & FMSHRC, 921 F.2d 1285 (1990).) Applying the Commission's Otis test, the judge found:

The activities of Lang Brothers, in cleaning and plugging the gas wells for Consol, constituted an integral and important part of Consol's extraction process. Consol was obliged to clean and plug the wells in accordance with the modification petition in order to mine through the area where the wells penetrated the coal seam. If Consol did the work itself, there could be no doubt that it was part of the mining process.

12 FMSHRC at 1694. The judge also determined that Lang had a continuing presence in mine-related work, since approximately 50% of its work involved cleaning and plugging gas wells for coal mine operators. Id.

The judge also distinguished Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985). He emphasized the high percentage of Lang's work done for coal mines and noted:

Although Lang's employees were not in the mine itself, they operated heavy equipment which penetrated the mine atmosphere and directly and substantially affected the extraction process. Most importantly, their work was directly related to the safety of the miners, since improper plugging of a gas well could cause methane leaking into the mine as the extraction of the coal progressed and could result in an underground ignition or explosion.

12 FMSHRC at 1695. The judge concluded that Lang's contact with the mine was neither infrequent nor de minimis. Id.



The judge affirmed all of the citations and assessed civil penalties totaling \$234. 12 FMSHRC at 1695. The Commission granted Lang's subsequent petition for discretionary review, which challenges only the judge's jurisdictional rulings. On review, Lang asserts that the gas wells it cleans and plugs are not mines, that it is not a mine operator, and that jurisdiction over its activities is with the OSHAct, not the Mine Act.

## II.

### Disposition of Issues

#### A. Whether the well sites and Lang's operations were subject to the Mine Act

We begin with the question whether the well sites and Lang's operation at the sites were subject to the Mine Act as part of a "coal or other mine" or "coal mine" within the meaning of section 3(h) of the Act, 30 U.S.C. § 802(h).

Lang argues that the gas wells in question did not constitute a "coal or other mine" under the Mine Act. Citing the definition of "coal or other mine" in section 3(h)(1) of the Act, Lang argues that it was not involved in the extraction of nonliquid minerals and that, insofar as "liquid" minerals are concerned, the Act's definition applies only to "extract[ion] with workers underground," a condition not present here.<sup>2</sup> Lang argues that its work involved no contact with the coal bed other than passing through it via the borehole, while going down to the gas producing strata. Lang adds that its workers were not exposed to the hazards of mining and that they never came

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<sup>2</sup> Section 3(h)(1) states:

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

30 U.S.C. § 802(h)(1). A similar definition of "coal mine" is contained in section 3(h)(2) of the Mine Act. 30 U.S.C. § 802(h)(2).

into contact with any miners. In short, from Lang's perspective, its concern was "the proper cleaning and plugging of a natural gas well, not with coal mining." Lang Br. at 17.

As Lang acknowledges, the legislative history of the Mine Act makes clear that a broad reading is to be given to the definition of a mine. The Senate Committee stated:

The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 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). Judicial precedent also indicates that the Mine Act's definition of mining is to be broadly interpreted in favor of coverage. See, e.g., Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551-55 (D.C. Cir. 1984); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979) cert. denied, 444 U.S. 1015 (1980). While we recognize, as the D.C. Circuit Court of Appeals in Carolina Stalite observed, "[i]t is clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)" (734 F.2d at 1551), for the reasons that follow we hold that Lang's activities, in this instance, are subject to the Mine Act.

In reaching our decision, we focus on the relationship between Lang's operations at the well sites and the extraction process at Consol's mine, to determine whether there is a sufficient relationship between the activity in question and the extraction process for statutory coverage to apply. Precedent does not require that Lang itself be engaged in extraction. See Carolina Stalite Co., 6 FMSHRC 2518, 2519 (November 1984).

Lang casts its activities as being concerned only with the proper cleaning and plugging of gas wells. Lang's work at the well sites, however, was integrally related to Consol's extraction of coal. Cf. Carolina Stalite, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. If the wells were not plugged, Consol would not be permitted, because of section 75.1700 supra, to mine within 300 feet of the wells. Plugging them permitted Consol to extract more coal, since it could mine the affected coal instead of having to stay at least 300 feet away from the gas wells.

Consol filed its petition for modification for the purpose of allowing it to mine completely through the coal adjacent to oil and gas wells in the vicinity of the Blacksville No. 2 Mine. MSHA's Decision and Order granting

the petition sets forth detailed conditions for plugging (including cleaning) such wells. Consol contracted with Lang to do the work in compliance with the MSHA-prescribed procedures. MSHA's Decision and Order also sets forth procedures for Consol to follow when mining through a plugged oil or gas well area in order to ensure the safety of the miners.

Lang's cleaning and plugging work directly affected the safety of miners. Gas leaks into the mine could result in a fire or explosion. In fact, Lang acknowledges that cleaning and plugging gas wells is "clearly part of coal mine safety." PDR at 10; L. Br. at 13. Lang also acknowledged before the judge that plugging gas wells is "important to" and "directly concerned with mine safety." Tr. 12, 15. We agree with the judge that if Consol had done the plugging work itself, there would be no serious question that the work was part of the mining process.

Lang recognizes that "MSHA inspectors do and properly do come and satisfy themselves that the wells are plugged in accordance with MSHA regulations." Tr. 15, 122. Lang notifies MSHA when it is ready to plug wells. Tr. 59. MSHA oversees the cementing phase of plugging operations at such wells in accordance with the terms of its decisions granting petitions for modification. Tr. 54, 59, 75-76, 122. Indeed, Lang concedes MSHA's jurisdiction over its work of plugging gas wells. Tr. 122. In our view, there is no reasonable basis for Lang's assertion that, while MSHA may regulate well plugging, it may not regulate the other related steps involved in such work, including setting up its operation to carry out these various tasks.

We reject Lang's claim that its operation site is nothing more than "an area of land from which minerals are extracted in liquid form" and thus not a "mine" under section 3(h)(1) of the Act. This is not a case about the extraction of minerals in liquid form. Rather, it is about the extraction of coal and Lang's actions to facilitate its safe removal. Although section 3(h)(1) excludes from the statute's coverage some areas where "minerals are extracted in ...liquid form," Lang does not argue that the wells in question were producing gas at the time that it was working at the sites. Although the record is not entirely clear as to whether the wells had been formally abandoned prior to Lang's work, Consol's and Lang's intent certainly was to ensure that the wells would no longer produce gas. Thus, we conclude that Lang was not working in an area from which liquid minerals were being extracted within the meaning of the statute.

Accordingly, Lang's operations were, as the judge found, "an integral and important part of Consol's extraction process." 12 FMSHRC at 1694. Thus, we conclude that the gas well sites and Lang's operations at those sites, under the facts involved in this case, were subject to the coverage of the Mine Act.

B. Whether Lang is an operator under the Mine Act

Lang additionally argues that, in performing the services in question, it was not an independent contractor-operator within the meaning of the Mine Act because its contact with Consol's mine was de minimis and unrelated to

coal extraction.<sup>3</sup>

Section 3(d) of the Mine Act expanded the definition of "operator" under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977), to include "any independent contractor performing services or construction at such mine." In its Otis decisions, the Commission concluded that an independent contractor performing elevator maintenance and repair operations at underground coal mines constituted an operator within the meaning of the Act. Otis I, 11 FMSHRC at 1902; Otis II, 11 FMSHRC at 1923. The Commission indicated, however, that "not all independent contractors are operators under the Mine Act, and that 'there may be a point ... at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.'" Otis I, 11 FMSHRC at 1900-01, quoting Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3rd Cir. 1979). Citing Nat'l Indus. Sand Ass'n, supra, and Old Dominion, supra, as proper authority for determining when an independent contractor is an operator, Lang asserts that its contact with Consol's mine is so infrequent and de minimis that it does not amount to the performance of services. Further, in Lang's view, this activity does not amount to being engaged in the extraction process for the benefit of the owner or lessee of the property (in this case, Consol).

We conclude that the judge's determination that Lang was a statutory operator is amply supported by the record. In cleaning and plugging the gas wells, Lang performed services clearly related to the extraction process, at what amounted to a surface work area of Consol's Blacksville No. 2 underground coal mine. The overriding purpose of the plugging work was to ensure that gas did not seep into the mine after Consol mined through the area. Lang's work thus directly affected the safety of miners involved in the extraction of coal.

Notwithstanding the relatively limited period -- seven to ten days -- during which Lang provided services at the mine to clean and plug a well, we conclude that the contact was not de minimis. An independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the duration or frequency of its presence. The judge found that Lang's operation "constitute[d] an integral and important part of Consol's extraction process." 12 FMSHRC at 1694. Further, Lang had a "blanket contract" with Consol to clean and plug gas wells under specific purchase orders, and had plugged wells at different Consol mines since 1980 or 1981.

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<sup>3</sup> Section 3(d) of the Mine Act provides:

"operator" means an owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

30 U.S.C. § 802(d).

Our holding today is consistent with Nat'l Indus. Sand, Old Dominion, and the D.C. Circuit's Otis decision. Nat'l Indus. Sand involved the Secretary of Labor's promulgation of training regulations. As relevant here, the Third Circuit was addressing the Secretary's authority to "include fewer than all independent contractors as operators for purposes of the training regulations." 601 F.2d at 701. The Court noted that "[t]here may be a point, at least, at which an individual contractor's contact with a mine is so infrequent or de minimis, that it would be difficult to conclude that services were being performed." (Emphasis added). Id. The Third Circuit viewed de minimis contact as a level at which it would be difficult to conclude that services were being performed, and noted that Congress intended to include those engaged in the extraction process for the benefit of the owner or lessee. 601 F.2d at 701-03. Clearly, Lang is performing services for the benefit of Consol as part of the extraction process. Indeed, the services are so critical that without them Consol would be prohibited from extracting coal in these areas.

In Old Dominion, the Fourth Circuit adopted the Nat'l Indus. Sand analysis of the Third Circuit, and concluded that the appropriate analysis is whether the independent contractor substantially participates in mining activities. 772 F.2d at 97. Since the Fourth Circuit found that Old Dominion Power Company's "only contact with the mine is the inspection, maintenance, and monthly reading of a meter for the purpose of sending a bill to a mine company for the sale of electricity," there was not, in the Court's view, substantial participation in mining activities. 772 F.2d at 96.

In its opinion affirming the Commission's Otis decisions, the D.C. Circuit held that section 3(d) of the Act "does not extend only to certain 'independent contractor[s] performing services ... at [a] mine'; by its terms it extends to 'any independent contractor performing services ... at [a] mine.'" Otis, 921 F.2d at 1290 (emphasis in original). However, the court expressly noted that its decision did not address "whether there is any point at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed.'" 921 F.2d at 1290 n.3 (citation omitted).

For the reasons set forth above, we conclude that substantial evidence and applicable legal principles support the judge's determination that, in performing the services in question, Lang was an independent contractor-operator within the meaning of the Act.

C. Whether Lang's activity is subject only to the Occupational Safety and Health Act

Reasserting its earlier argument concerning the Mine Act's section 3(h) "liquid/nonliquid" distinction, Lang argues that oil and gas drilling are not subject to the Mine Act. Lang states that its operations here are no different, from a health and safety standpoint, than are other oil and gas drilling operations. Lang. Br. at 16-18. While Lang acknowledges that section 4(b)(1) of the OSHA Act precludes Occupational Safety and Health Administration ("OSHA") jurisdiction if another agency exercises statutory authority, it maintains that there is no Mine Act statutory authority in this

instance.

We reject Lang's argument that its activity is properly regulated under the OSHAct. Coverage under the OSHAct is exempted pursuant to section 4(b)(1) of the OSHAct, 29 U.S.C. § 653(b)(1), which states in pertinent part:

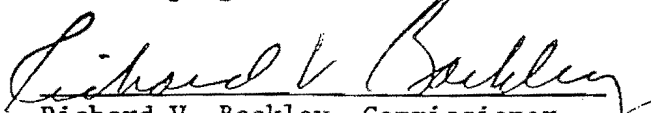
Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

As set forth earlier in this decision, we have determined that Lang's Consol-related operations fall within the section 3(h) definition of "coal or other mine" and that, with respect to these activities, Lang comes within the ambit of the term "operator" under section 3(d). Further, we also note that, in this instance, MSHA has exercised statutory authority to prescribe and enforce "standards or regulations" affecting the operation in question. MSHA's Decision and Order created, in effect, a new safety standard dealing with the cleaning and plugging of gas wells involving Consol's mine. Under 30 C.F.R. § 44.4(c), an operator must comply with the conditions in an order granting a petition for modification, and the violation of such conditions is equivalent to a violation of any other safety standard. See also Int. U., UMWA v. FMSHRC, 931 F.2d 908, 909 (D.C. Cir. 1991).

### III.

#### Conclusion

On the foregoing bases, we affirm the judge's decision.<sup>4</sup>

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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<sup>4</sup> Chairman Ford did not participate in the consideration or disposition of this matter.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 1992

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

v.

WASTE COAL MANAGEMENT, INC.

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Docket No. KENT 91-75

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

## ORDER

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on June 20, 1991, finding respondent Waste Coal Management, Inc ("Waste Coal") in default for failure to answer the civil penalty petition filed by the Secretary of Labor and the judge's Order to Show Cause. The judge assessed civil penalties of \$273 as proposed by the Secretary. For the reasons that follow, we vacate the Order of Default and remand this case for further proceedings.

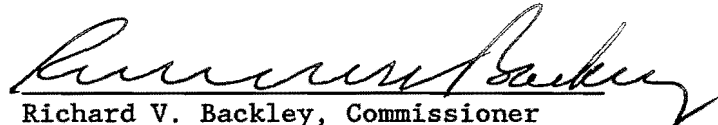
On March 9, 1992, the Commission received a letter dated February 29, 1992, addressed to Judge Merlin, in which the president of Waste Coal requests the judge to dismiss the Secretary of Labor's Motion for Default Judgment. Apparently, neither the Secretary nor Waste Coal is aware that Judge Merlin, had held Waste Coal in default and had ordered it to pay the Secretary's proposed penalties by order dated June 20, 1991. Counsel for the Secretary filed the Motion for Default Judgment on November 19, 1991, and advised the president of Waste Coal, by letter dated February 11, 1992, that the motion had not been ruled upon by the judge. The Commission's records indicate that the judge's Order of Default was sent to the parties by certified mail. The Postal Service never returned the return receipt cards to the Commission, however, suggesting that the orders may not have been received.

The judge's jurisdiction over this case terminated on June 20, 1991, when his Order of Default was issued. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Waste Coal did not file a timely petition for discretionary review within the 30-day period, nor did the Commission direct review on its own motion. 30 U.S.C. § 823(d)(2)(B). Thus, the judge's order became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

Under the circumstances of this case, we deem the February 29 letter to be a request for relief from a final Commission decision and to incorporate a late-filed petition for discretionary review. See J.R. Thompson, Inc., 12 FMSHRC 1194, 1195-96 (June 1990). Relief from a final judgment is available to a movant under Fed. R. Civ. P. 60(b)(1) on the basis of mistake, inadvertence, surprise or excusable neglect. See, e.g., Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). It appears from the record that Waste Coal filed a "Blue Card" request for a hearing in response to the Secretary's initial notification of proposed penalties and offered to settle this matter for \$125 at that time. It further appears that Waste Coal is proceeding without benefit of counsel. We are unable on the basis of the present record to evaluate whether Waste Coal has offered a cognizable explanation for its failure to respond to the judge's show cause order. Consequently, in the interest of justice, we will permit Waste Coal to present its position to the judge, who shall determine whether final relief from default is appropriate. See, e.g., Blue Circle Atlantic, Inc., 11 FMSHRC 2144, 2145 (November 1989).


Accordingly, we grant Waste Coal's petition for discretionary review, vacate the judge's default order, and remand this matter for proceedings consistent with this order.

  
Ford B. Ford, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

Distribution:

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Joseph Luckett, Esq.  
Office of the Solicitor  
2002 Richard Jones Rd.  
Nashville, TN 37215

Chief ALJ Paul Merlin  
Federal Mine Safety & Health Rev. Comm.  
Washington, D.C. 20006



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

MAR 2 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-1796
Petitioner	:	A.C. No. 46-03300-03520
v.	:	
	:	VC #8 Central Shop
SHREWSBURY COAL COMPANY,	:	
Respondent	:	

## DECISION

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

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge Citation No. 3482538, issued by the Secretary of Labor under section 104(d)(1) of the Act for an alleged violation of the regulatory standard at 30 C.F.R. § 77.1607(bb).<sup>1</sup> The general issue before me is whether the

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<sup>1</sup>/ Section 104(d)(1) of the Act provides as follows:  
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mien safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator

section 104(d)(1) citation against Shrewsbury Coal Company (Shrewsbury) is valid and, if so, what is the appropriate civil penalty.

Citation No. 3482538 charges as follows:

A positive audible or visible warning system was not installed and operated to warn persons that the conveyor would be started at the mine when the No. 9 overland belt was started by a person located more than a mile away who could not see the entire length of this conveyor. It was reasonable to expect a person could be working on this belt and get injured when the belt started up without warning because the breaker could not be locked out and the belt gobbled off once during this shift and the guards were off. The foreman, John Hudnall, was in a building (door open) located approx. 50 feet from the tail of the belt and approx. 5-7 feet from the belt. When asked why alarms were not on the belt he said they were stolen when the belt was idle in the past. The belt was put back into active service about July, 1990 according to Hudnall.

The cited standard, 30 C.F.R. § 77.1607(dd), provides in part that "[w]hen the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started."

Shrewsbury does not deny the violation but maintains that the violation was neither "significant and substantial" nor the result of its "unwarrantable failure." According to experienced Coal Mine Inspector Sherman Slaughter, during the course of a regular inspection at the subject mine on January 15, 1991, he was inside foreman John Hudnall's office next to the No. 9 overland belt when the belt went down. He noted that no alarm sounded when the belt resumed operation. According to Slaughter, Hudnall explained that the belt alarm had been stolen sometime before July 1990, and had not since been replaced. During his inspection Slaughter noted that the No. 9 belt started and stopped more than 10 times. From his experience he opined that the belts would frequently shut down during the course of a shift. Slaughter also observed that two beltmen worked on each

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fn. 1 (continued)

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."

shift and were responsible for all 19 belts. Slaughter found the violation to be "significant and substantial" based on his knowledge of the frequency and seriousness of injuries and accidents that have occurred in the past by belts starting without warning. In reaching this conclusion he also considered that at the time of this citation some rollers were left unguarded, that there were no lights along the belt and that it was necessary to cleanup gob along the belt. He also noted that neither the No. 9 belt nor the door to the breaker box could be locked out at that time. Slaughter opined that as a result of the violation persons could become caught in the belt and lose limbs and bleed to death. He pointed out that an accident had previously occurred at this particular plant and a worker lost a limb as a result of contact with a conveyor belt. Slaughter also testified that he had seen the belts running at this operation without guards and on this same date had issued approximately 20 violations for missing guards.

In evaluating whether a violation is "significant and substantial" the Commission in Mathies Coal Co., 6 FMSHRC 1 (1984), explained as follows:

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf,

Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

The third element of the 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" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989).

Clearly the facts of this case warrant "significant and substantial" findings. The circumstances herein were particularly aggravated since at the time of the violation, miners were in the act of shovelling coal adjacent to unguarded rollers on the cited beltline, that the belt had not been locked out to prevent movement, and that there was no audible or visible system in place to warn these miners when the belt would commence movement. Under the circumstances, it is indeed reasonably likely that these miners could become entangled in the unprotected rollers upon a sudden belt start-up and suffer severe injuries including loss of limbs and/or death. From the significant number of guarding violations also issued that same day, and the fact that the alarm system had been absent for a significant period of time, it is apparent that, under normal continued mining operations, the hazard would have continued unabated.

It is also clear that the violation was the result of "unwarrantable failure." In reaching this conclusion I have not disregarded the testimony of John White, Corporate Manager of Maintenance and Environment for the Shrewsbury parent company, that a previously stolen alarm on the No. 9 belt had been replaced in May 1990. This testimony is, however, immaterial. Inspector Slaughter testified credibly that Hudnall told him at the time he issued the citation that the alarm had been stolen during the previous shutdown and that the belts had been subsequently restarted in July 1990. Furthermore Inspector Slaughter maintains that Hudnall told him that the alarm had not been working since July 1990. While Hudnall testified at hearing that he did not then have personal knowledge that the alarm had been absent for that period and learned this only from later talking to his electrician, I do not find this version to be credible. It is inconsistent with the inspector's credible testimony, it comes a year and a half after the citation was issued after a long opportunity for contemplation and it is patently not credible to believe that the belt foreman did not notice the absence of an audible alarm that should be expected to

be triggered on a belt that would have been repeatedly started during the 6-month period July 1990 to January 1991.

Under the circumstances it is clear that both Shrewsbury's electrician and its belt foreman knew that the start-up alarm was missing from the No. 9 belt for nearly 6-months before the citation was issued. Their failure to have replaced the stolen alarm system for that period of time constitutes an omission of an aggravated nature constituting "unwarrantable failure" and high negligence. See Emery Mining Corporation, 9 FMSHRC 1997 (1987), and the Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987). The section 104(d)(1) citation is accordingly affirmed. Considering the criteria under section 110(i) of the Act, I also find that the proposed penalty of \$400 for the alleged violation is appropriate.

ORDER

Shrewsbury Coal Company is hereby directed to pay a civil penalty of \$400 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor, U.S.  
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David J. Hardy, Esq., Jackson & Kelly, 1600 Laidley Tower, P.O.  
Box 553, Charleston, WV 25322 (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

**MAR 6 1992**

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 92-179-D
on behalf of	:	HOPE CD 91-16
PETER D. SPROUSE,	:	
Complainant	:	Mine No. 4
v.	:	
P-F MINING, INCORPORATED, et al,	:	
Respondents	:	

**ORDER OF DISMISSAL**

Before: Judge Weisberger

The Secretary's Motion to Withdraw is granted based on the Notice of Withdrawal of Complaint filed by Complainant.

It is Ordered that this case be DISMISSED.



Avram Weisberger  
Administrative Law Judge

**Distribution:**

Tina C. Mullins, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Cecil C. Varney, Esq., Varney Law Offices, L.C., P.O. Box 468, 141 East Second Avenue, Williamson, WV 25661 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
THE FEDERAL BUILDING  
ROOM 280, 1244 SPEER BOULEVARD  
DENVER, CO 80204

MAR 9 1992

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

v.

CHRISMAN READY-MIX INC.,  
Respondent

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

v.

OZARK MATERIAL CO., INC.,  
Respondent

: CIVIL PENALTY PROCEEDING

:

: Docket No. CENT 91-17-M

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: A.C. No. 03-01597-05503

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: Clarksville Quarry

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CIVIL PENALTY PROCEEDING

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Docket No. CENT 91-82-M

A.C. No. 03-01509-05502

Guthrey Island Pit & Plant

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas,  
for Petitioner;  
Robert Chrisman, President, Ozark Material Company,  
Inc., Ozark, Arkansas,  
for both Respondents.

Before: Judge Lasher

In these two proceedings the Secretary of Labor (MSHA) seeks assessment of penalties for a total of three alleged violations (described in three Citations) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977).

After the commencement of hearing in Fort Smith, Arkansas, on December 19, 1991, the parties concluded a settlement of the two violations involved in Docket No. CENT 91-82-M and Respondent agreed to pay in full MSHA's initially assessed penalties of \$39 each for both Citations, Nos. 3625803 and 3625804. That settlement was approved from the bench (T. 57-59) and such approval is here affirmed and will be reflected in the Order appearing at the end of this decision.

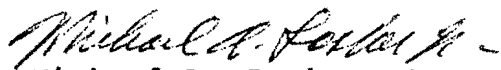
As a result of the settlement, only one Citation remained, No. 3281982 contained in Docket No. CENT 91-17-M.

Subsequent to the hearing on the issues involved in this matter, Respondent agreed to pay in full the penalty proposed by MSHA (\$20.00) and MSHA's motion to approve this resolution is here approved and such penalty is assessed.

ORDER

In Docket No. CENT 91-82-M, Citations numbered 3625803 and 3625804 are **AFFIRMED** and Respondent, within 30 days from the date of this decision, **SHALL PAY** to the Secretary of Labor penalties totaling \$78.00 (\$39.00 for each Citation).

In Docket No. CENT 91-17-M, Citation No. 3281982 is **AFFIRMED** and Respondent, if it has not previously done so, within 30 days from the date of this decision **SHALL PAY** to the Secretary of Labor a penalty therefor in the sum of \$20.00.

  
Michael A. Lasher, Jr.  
Administrative Law Judge

**Distribution:**

Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 501, 525 Griffin Street, Dallas, TX 75202 (Certified Mail)

Mr. Robert Chrisman, President, CHRISMAN READY-MIX INC., P.O. Box 505, Ozark, AR 72949 (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

MAR 10 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-58
Petitioner	:	A.C. No. 46-07081-03528
v.	:	
	:	Victoria No. 1 Mine
SHELL ENERGY COMPANY, INC.,	:	
Respondent	:	

## DECISION

Appearances: Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;  
Frank Staud, Shell Energy Company, Inc., Shinnston, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge Citation No. 3312037, issued to Shell Energy Company, Inc., (Shell Energy) by the Secretary of Labor pursuant to section 104(d)(1) of the Act. <sup>1/</sup> The citation

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<sup>1/</sup> Section 104(d)(1) reads as follows:

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

alleges a violation of the mandatory standard at 30 C.F.R. § 75.200 and charges as follows:

A 30 feet [sic] cut of coal was mined out of the 2nd split off of the No. 3 Pillar block on the 001 section, resulting in Don Henderson continuous miner operator being 10 feet beyond permanent roof-supports. The approved roof-control states, workman [sic] shall not advance inby roof-bolts except to install temporary supports. This condition should have been known by the mine foreman because he made a preshift examination of the working places before the start of the shift. Randy Moore, Mine foreman.

Respondent Shell Energy admits inter alia, that there was a violation of the cited standard, that the violation was "significant and substantial" and that it was the result of its "unwarrantable failure." Indeed it is quite clear that the admitted violation was extremely serious and the result of operator negligence. Shell Energy argues only that a \$600 penalty as proposed by the Secretary is too high.

More particularly, in its answer to the petition for assessment of civil penalty, Respondent claimed that (1) the "Victoria Mine is shut down and no longer in operation" and (2) "due to market conditions and other extenuating circumstances, the amount of the fine would affect our ability to operate in the future."

At hearing, however, Shell Energy representative Frank Staud acknowledged that the payment of the proposed \$600 penalty would not cause Shell Energy to go out of business. Indeed Staud testified that "if \$600 is going to shut me down, I shouldn't even be in business" and maintained only that he would "rather give that \$600 to a creditor, somebody that I owe money to and needs it . . . ." At hearing Staud also testified that his company has resumed its mining business.

Under section 110(i), in assessing the amount of a civil monetary penalty, the Commission must consider, among other things, "the effect [of the penalty] on the operator's ability to continue in business." Since the parties have stipulated and the evidence clearly demonstrates that payment of the proposed penalty would not affect Shell Energy's ability to continue in business, I find no basis for a reduction of the proposed

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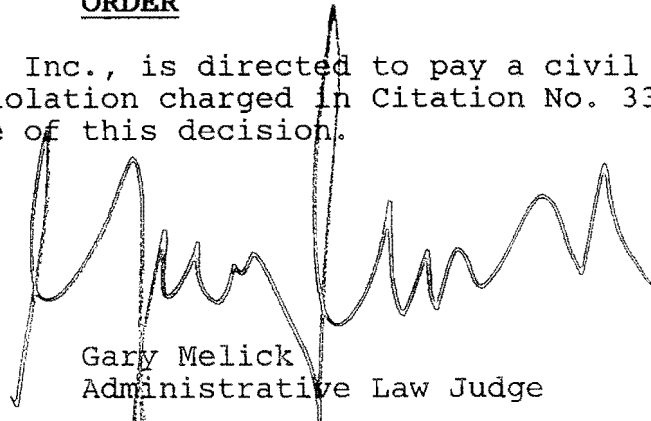
fn. 1 (continued)

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."

penalty. Considering the undisputed evidence, it is clear that the proposed penalty of \$600 is indeed appropriate, if not low, for the corresponding serious and negligent violation in this case.

ORDER

Shell Energy Company, Inc., is directed to pay a civil penalty of \$600 for the violation charged in Citation No. 3312037 within 30 days of the date of this decision.

A handwritten signature in dark ink, appearing to read 'Gary Melick', is written over the typed name and title.

Gary Melick  
Administrative Law Judge

Distribution:

Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203  
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Mr. Frank Staud, Shell Energy Company, Inc., 57 Rebecca Street, Shinnston, WV 26431 (Certified Mail)

/fb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 10 1992**

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 91-166-R
	:	Citation No. 3105295; 2/4/91
	:	
	:	Docket No. WEVA 91-167-R
	:	Citation No. 3105296; 2/4/91
	:	
	:	Robinson Run No. 95 Mine
	:	
	:	Mine ID 46-01318
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 92-177
	:	A.C. No. 46-01318-04022
	:	
	:	Robinson Run No. 95 Mine
	:	

**PARTIAL DECISION**  
**and**  
**STAY ORDER**

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Respondent/Petitioner.  
Walter J. Scheller, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for the  
Contestant/Respondent.

Before: Judge Koutras

**Statement of the Proceedings**

These consolidated proceedings concern Notices of Contest filed by the contestant Consolidation Coal Company (Consol), against the respondent (MSHA) pursuant to section 105(d) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. 815(d), challenging the legality of two section 104(a) non-"S&S" citations issued on February 4, 1991, charging Consol with alleged violations of the mandatory accident reporting requirements found in 30 C.F.R. § 50.10 and § 50.12. The civil

penalty case concerns MSHA's proposed civil penalty assessments of \$2,000 for the alleged violations, and a proposed civil penalty assessment of \$157, for one additional alleged violation of 30 C.F.R. § 75.400, as noted in a section 104(a) citation issued on August 22, 1991. A hearing was held in Morgantown, West Virginia, and the parties waived the filing of briefs. However, I have considered their oral arguments made in the course of the hearing in my adjudication of these matters.

#### Issues

The issues presented in these proceedings are as follows:

1. Whether Consol violated the cited mandatory regulatory standards, and if so, the appropriate civil penalties to be assessed for those violations based on the criteria found in section 110(i) of the Act.
2. Whether the incident or "event" of February 1, 1991, which gave rise to the issuance of the two contested alleged reporting violations was in fact an "ignition" (accident) which was required to be reported to MSHA pursuant to 30 C.F.R. § 50.10.
3. Whether Consol violated the provisions of 30 C.F.R. § 50.12, by continuing mining on February 1, 1991, after its investigation concluded that a reportable ignition had not occurred.
4. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 20 C.F.R. § 2700.1 et seq.
3. Mandatory reporting standards 30 C.F.R. §§ 50.10 and 50.12; and mandatory safety standard 30 C.F.R. § 75.400.

#### Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The presiding judge has jurisdiction to hear and decide these cases.
2. Inspector James Young was acting in his official capacity as an MSHA inspector when the contested citations were issued on February 4, 1991.

3. Inspector Ronald Tulanowski was acting in his official capacity as an MSHA inspector when he conducted the accident investigation on February 4, 1991 (Exhibit C-1).

4. The "event" which occurred on February 1, 1991, at the Robinson Run No. 95 Mine was not a planned event.

5. Consol never notified MSHA of the February 1, 1991, "event" prior to the issuance of the citations.

6. The imposition of any maximum penalties that may be assessed in these proceedings pursuant to the Act will not affect Consol's ability to continue in business.

7. The alleged violations were abated in good faith.

8. Consol may be considered a large mine operator for purposes of any civil penalty assessments.

9. The presiding judge may take judicial notice of the fact that February 1, 1991, the date on which the "event" in question occurred, was a Friday, and the investigation conducted by MSHA on February 4, 1991, was conducted on Monday.

#### Bench Ruling

The parties advised me that Citation No. 3103343, issued on August 22, 1991, for an alleged violation of 30 C.F.R. § 75.400, is a citation which includes an issue concerning MSHA's "excessive violation history" civil penalty assessment policy. Under the circumstances, the parties jointly moved for a stay of this citation, and the motion was granted from the bench (Tr. 5). Subsequently, on February 4, 1992, I issued an order reaffirming the bench ruling and staying the adjudication of the citation.

#### Discussion

The record in this case reflects that on Friday, February 1, 1991, at approximately 10:30 a.m., an "incident" or an "event" occurred on the 11 Left (087-0) working section of Consol's Robinson Run No. 95 Mine. It is MSHA's position that the "event" was in fact an unplanned frictional coal dust ignition which occurred 30 feet outby the face of the No. 1 Entry, and which should have immediately been reported. It is Consol's position that the alleged ignition did not occur, or if it did, it was something other than an "ignition" within the reporting requirements of 30 C.F.R. § 50.10.

The alleged ignition was reported to MSHA through an anonymous telephone call, and MSHA Inspectors Ronald T. Tulanowski and James A. Young were dispatched to the mine site on



Monday, February 4, 1991, to conduct an investigation. They conducted the investigation (MSHA Exhibit #3), and issued the two contested citations, which are as follows:

Section 104(a) non-"S&S" Citation No. 3105295, issued on February 4, 1991, cites an alleged violation of 30 C.F.R. § 50.10, and the condition or practice is described as follows:

Based on information obtained during an investigation to determine if a face ignition occurred, the company officials did not report or contact MSHA after their own investigation of this condition. A dust ignition set off by miner bits in sulfur at the face of the #1 entry on the 11 left 087 working section according to crew members did occur at 10:35 a.m. on 2-1-91. Six members of the crew and two foremen witnessed this ignition. The company did not contact MSHA to report this occurrence or to obtain information to see if they should report this occurrence.

Section 104(a) non-"S&S" Citation No. 3105296, issued on February 4, 1991, cites an alleged violation of 30 C.F.R. § 50.12, and the condition or practice states as follows:

No permission was granted to disturb or change an area where a face ignition occurred. MSHA was not contacted or notified that a face ignition occurred in the #1 face of the 11 left 087 working section. The ignition occurred at 10:35 a.m. on 2-1-91 and the section resumed production at 1:00 p.m. after conducting their investigation. The area was washed down with water, the miner was moved after advancing 80 feet past where the ignition occurred, and the miner has had extensive maintenance performed since 2-1-91. The area was inspected by MSHA on 2-4-91 and found to be cleaned and rock dusted.

#### MSHA's Testimony and Evidence

MSHA Inspector James A. Young testified that he has been so employed for six years, and he confirmed that he and Inspector Ron Tulanowski went to the mine on February 4, 1991, to investigate an ignition which had been reported to the MSHA office. Mr. Young stated that the section crew was initially questioned on the surface, and after they dressed and went underground, additional conversations were held with the same individuals underground, and he identified some of the individuals, including foremen, and several mine management people who were present during the conversations (Tr. 15-17).

Inspector Young explained and described the conversations with the crew members as follows at (Tr. 17-18).

A. In essence, what we tried to determine by the questions that Mr. Tulanowski was asking was did the individuals see sparks or did they see a flame of any duration and maybe the color of it.

Each individual categorically stated that they had witnessed a flame. They gave a dimension to it. They gave a color to it. They gave how long it lasted.

At the end of this, talking with each crew member one-on-one, there was a kind of a consensus question asked. This is what was said. Does anyone disagree or does everyone agree? At that time no one spoke up in disagreement with what we had heard in that room.

Q. You said that the crew mentioned the dimension of the flame. Do you recall what the dimensions were?

A. Almost man for man, everyone said it was approximately three foot by six foot. It was orange in color. It lasted for a very short period of time, and that time frame was arrived at by kind of taking a happy medium. One guy would say five to ten seconds, and one would say three to five. So we split the difference and made it a three-to-five-second duration.

Q. Do you recall how the employees told you they reacted to this flame?

A. They seemed to be very upset. A couple of them made it very clear that they were scared, that they heard a noise. One of them said that he actually felt the heat and that it was kind of an upsetting experience.

Mr. Young stated that after speaking with the employees, he inspected the area where the alleged ignition occurred and found that it had been cleaned and rock dusted, and the miner had been advanced approximately 80 feet from the entry where the event took place. He then returned to the surface and discussed the matter with management, and advised them that the citations would be issued. Mr. Young confirmed that he issued the two citations and he explained the findings that he made. He confirmed that he considered the violations to be non-"S&S", and the reporting citation was marked "high negligence" because he believed that management should have at least made an effort to contact MSHA for information or to report the incident. Abatement was achieved through a meeting with the crew and management to explain the importance of reporting such matters to MSHA (Tr. 20-25).

Mr. Young identified a copy of an accident report which he prepared and he confirmed that he agreed with the findings in the

report (MSHA Exhibit #3). He also confirmed that the conclusions in the report and the decision to issue the citations were based on the information he received from Consol's employees, and that the conclusion that the ignition was caused "when heat or sparks generated from the cutter bits ignited with the coal dust" was based on "kind of a consensus opinion of all of us involved" (Tr. 26-27).

On cross-examination, Mr. Young stated that mine management makes "a decent effort" to address any safety problems and has been cooperative with him during his prior inspections of the mine, and he considered mine superintendent David Tonkin to be a truthful person. Mr. Young stated that on February 4, 1991, he was made aware of the fact that management had conducted an investigation of the event in question, but he could not state whether he believed that Mr. Tonkin would have reported the incident if he thought that an ignition had occurred (Tr. 30). Mr. Young confirmed that Mr. Tonkin told him that he had conducted an investigation, and in "general terms said he did not find any soot on the roof". After the MSHA investigation was completed, Mr. Tonkin told him that he did not believe there was a reportable accident but that he nonetheless assumed the responsibility for the matter (Tr. 31).

Mr. Young stated that the investigative interviews with the crew on the surface were conducted as a group in the same room, and not individually. Inspector Tulanowski was asking the questions and Mr. Young was taking notes and jotting down some things that were said. The first person questioned was James Parker, and Mr. Young was not aware that he was chairman of the mine safety committee. Mr. Young stated that "their stories were not the same. They were not habitual. One guy did not copy what the other man said... he gave his testimony in different terminology. They did not sound alike". The "testimony" was not taken under oath, and the one room was used because that is where mine management summoned the crew and made the room available. During the subsequent meeting in the underground dinner hole, the crew came in groups of two or three, and "it ended up that there was about five in there plus a couple of management men" and several people were walking in and out (Tr. 34-35).

Mr. Young was of the opinion that an ignition "would have to have a flame", and that the duration would be "a pop, which is referred to in the mining industry. A pop is methane, based more on myself, in the mine. A pop would be similar to a firecracker" (Tr. 35). In response to a question as to whether or not the term "ignition" is defined in MSHA's regulations, Mr. Young responded as follows (Tr. 35-36):

Q. Are you aware of anywhere in the regulations where the term "ignition" is defined?

A. I haven't researched that, no.

Q. So you are not aware of whether or not it is defined?

A. There is a definition in there somewhere, I'm sure. It could be our manual or policy manual or something. I haven't looked it up. The part that I play in this is not talking about technical terms of an ignition or an explosion or whatever. The only thing that I'm basing -- and my name is on this citation -- for is the fact that Consolidation Coal Company is to report to us anything, regardless of what it was.

Mr. Young confirmed that no one said anything during the investigation that would lead him to believe that methane had ignited and he stated that "we were not speaking in terms of methane. We were talking of coal dust" (Tr. 38). He also stated that information was received that indicated that bit lugs were off the miner and that enough sulfur was present at the bottom of the coal seam to cause an ignition when coming in contact with the bits. He confirmed that he was told that the ventilation was good and that the methane checks which were made did not indicate the presence of any methane (Tr. 38).

Mr. Young confirmed that he does not have the technical background which would enable him to determine what it takes to ignite coal dust, but that "we have classes on that, but you don't retain much of it" (Tr. 38). He further confirmed that he and Mr. Tulanowski only prepared part of the report of investigation. They wrote the abstract which appears at Section E, at page one, and the description of the accident which appears on pgs. 2-3. The rest of the report "was put together and compiled by other people in MSHA up the ladder from us, which is a lot of it is just--if you will read the general information, that was put together by someone else. I did not do that." (Tr. 39).

Mr. Young stated that he was told that the flame was of short duration and self-extinguishing, and that "the flame appeared and it went out". He confirmed that he had not previously conducted investigations of ignitions, but that he has had his hair burned and eyebrows singed from methane ignitions, but there were no "telltale" signs of any soot (Tr. 40). According to the testimony of the people during his investigation, coal dust ignited. Something was also said about Mr. Parker's water supply, and that several miner head bits were reportedly missing, but he could not recall what was said about the water supply, and he did not believe that anyone knew when the bits had last been set (Tr. 42).

Mr. Young stated that the other individuals who contributed to the report of investigation were supervisors who had to clear

the reports for terminology, grammar, and punctuation, and he did not know who signed the reports for him and Mr. Tulanowski. It was his understanding that the striking out of the words "methane ignition" on page 3 of the report, and the insertion of "frictional dust" was to cure a typographical error or misprint (Tr. 43). Mr. Young confirmed that notes were taken during the investigation, and that they were turned in with his report. MSHA's counsel stated that the whereabouts of the notes is not known, and she confirmed my bench comment that "God knows what happened to them" (Tr. 44). Counsel also confirmed that tape recorders were not used to record the employee interviews (Tr. 44).

James W. Parker, Jr., testified that he has been employed with Consol for 19 years, and was working as a continuous miner operator on February 1, 1991. He described the work that he was performing that evening and he stated as follows at (Tr. 51-52):

I sheared it down that one time, and I scooted it over about probably eight to ten inches. Then I sumped it in another 12 inches at the top again. When I sheared it down the second time, that's when my bolter operator hollered and screamed. That's when I felt the flame coming from the left-hand side of the miner.

Q. When you said you felt the flame, what color was the flame?

A. Orange and yellow.

Q. Was it a big flame or was it just a little spark?

A. It started out at the head. It went up, and as it went up it widened out from probably -- it went probably 5 or 6 feet high, and it went probably in an area of 7-1/2 feet wide. As it went to the top, it started rolling back. As it hit the arch, it started rolling back toward us.

That's when I looked down. I couldn't turn my sprays on all the way. By this time my bolter operator had done grabbed the washdown hose and somebody on the other side had the other washdown hose.

I had looked down to see where my fire suppression was because that was the only thing I had left. As soon as I looked and seen my control handle, I looked back up and it was gone.

Q. At the time this flame rolled towards you, what did you do? What was your reaction?

A. It scared me real bad. That's the first time I've ever been in one of them. I knew if we didn't get it out that it could have just did (sic) the whole mines up.

Q. You said you had been mining for at least 19 years. You have seen a spark before, have you not?

A. Yes, Ma'am.

Q. Was this a spark?

A. No, ma'am. It was a flame. It went from the end of the cab clear over to the trim chain and off the rib. After it hit the arch it was rolling back toward me. It felt like somebody had a torch shooting at me.

Mr. Parker stated that he was seated on the right side of the machine, and that the ignition occurred on the left side of the machine head. After he shut down the machine, day shift foreman Gary Graham called for Mr. Tonkin and mine foreman Ray Oldaker to come to the scene. Mr. Parker stated that Mr. Graham stated that he saw the smoke from the flame, and that when Mr. Oldaker arrived he stated "Yes, I see a little bits of soot in the air" (Tr. 55).

Mr. Parker stated that he suggested that Mr. Tonkin and Mr. Oldaker summon "the safety committee and Federal and State, and get it over with", but that they took the position that they had to conduct an initial investigation before calling anyone. Mr. Tonkin and Mr. Oldaker gathered the crew together and questioned them, and Mr. Parker stated that "We all agreed that we had an ignition and it went up the left-side of the miner, out the rib, and rolled back toward the miner" (Tr. 56). The crew was then instructed to go eat, and a mechanic came to the area and said that two or three bits had broken off the miner. The water sprays were cleaned, some work was done on a loose monitor box, and the crew was then instructed to continue working. Most of the work performed on the miner can normally be done at the start of the shift, but broken bits and plugged sprays can be taken care of on-shift (Tr. 57).

Mr. Parker stated that after eating, and after the work was completed on the miner, he asked Mr. Tonkin and Mr. Oldaker if anyone was going to be called, and they told him that "We don't have to call them". Mr. Spencer then remarked "Okay, but I'm telling you I don't want any trouble in this later on" and he proceeded to continue slabbing the place "where I had finished from where I had the flash" (Tr. 59). He continued seeing sparks from "a real thick stream of sulfur" and "it was throwing sparks as I was hitting in sulfur" (Tr. 59).

Mr. Parker stated that after meeting with management on Friday, February 1, 1991, the crew was not contacted again until the MSHA inspectors came to the mine on Monday, February 4, 1991, to conduct their investigation. Management summoned the crew together at the safety office to meet with the inspectors (Tr. 61). The statement he gave to the inspectors was essentially the same as it was on Friday, and he explained that the inspectors questioned the crew as a group but asked questions of each individual, took notes of the answers given, and read the notes back and asked each individual if their statements were correct. Mr. Parker stated that he was not sworn, did not sign any statement, and he was not given a copy of what was said (Tr. 69-71).

On cross-examination, Mr. Parker testified that the ventilation was good on the evening in question, and he marked up a sketch showing where he was operating his miner, the ventilation air direction, where he was seated, the location where the ignition originated and its point of travel, and the location of a fan (Exhibits C-1 and C-2, Tr. 78-82). He confirmed that he checked the miner bits at the start of the shift, and he set 8 bits and replaced the ones that were bad. He also cleaned the water sprays, and the mechanic told him that two or three bits were knocked off where they struck the sulfur which is hard enough to sometimes break bits (Tr. 83). He confirmed that he cut the water sprays back because he did not want to create a mud hole and mire the miner (Tr. 84). After the incident in question, he continued to use full water pressure and that "it was just throwing sparks where it was hitting hard" (Tr. 85). He confirmed that the methane monitor was "picking nothing up but one-tenth" (Tr. 87).

Referring to notes that he made on February 1, 1991, after the ignition, Mr. Parker confirmed that the notes do not mention "flames rolling back", but that "it says a ball of fire on the left side that lasted three to five seconds" (Tr. 88). He stated that "the way it rolled back it looked like a ball of fire. The flames rolled back at me". He further conceded that his notes do not say anything about his feeling any heat, or that he felt like someone had pointed a torch at him, or that anyone said anything about seeing smoke (Tr. 88-89). He stated that he made the notes 5 to 10 minutes after the miner was shut down, and that the notes contain an accurate description of the way he remembered the incident five minutes after it happened (Tr. 89).

Mr. Parker stated that he was serving on the mine committee on February 1, 1991, and that he was fairly familiar with the union contract. He believed that he cannot refuse to work because of an unsafe condition, but that he could work under protest and request his foreman to summon a safety committeeman to be present. He confirmed that he did not invoke his individual safety rights or state that he did not wish to operate

the miner after the ignition occurred (Tr. 91). He was not aware of the fact that an individual miner could request a section 103(g) inspection, and believed that this could only be done by a safety committeeman (Tr. 93).

Mr. Parker did not believe that the area where he was working was too dusty, and he confirmed that the return was white after he placed two bags of rock dust into the fan before he started mining. The return looked the same after the incident (Tr. 95). He confirmed that when Mr. Tonkin was at the scene during his initial investigation "everybody" agreed that an ignition had occurred, but management decided not to report it (Tr. 96).

Gary L. Hayes, roof bolter operator, testified that he was working with miner operator Parker on Friday, February 1, 1991, and after checking the face for methane and finding one-tenth of one-percent, he advised Mr. Parker that it was safe to begin cutting coal. He explained that Mr. Parker proceeded to cut and trim the coal face. Mr. Hayes was standing to the front of Mr. Parker, approximately 12 feet from the miner head, when he saw a flame come over the head of the miner. The flame traveled straight to the roof top and widened out for a distance of four to five feet, and then rolled back from a corner of the roof. Mr. Hayes screamed and grabbed a wash-down hose and aimed it at the flame. However, the flame extinguished itself and only lasted for four to five seconds.

Mr. Hayes stated that foremen Carter and Wolfe were present and they notified mine management about the flame. Mr. Hayes confirmed that he was standing closer to the flame than anyone else, that he was scared, and that this was the first time he ever saw a flame come off a mining machine head in his 18 years in the mines, and he described what he observed as follows at (Tr. 104, 106, 110):

Q. When you first saw this flame, you said it rolled up. Would you say, sir, it was almost the arch?

A. Yes, I'd say that. It came up like the face where it sumped in and cut down. It come up that face. When it hit the mine roof where that miner sumped in it had kind of a roll to it, that made the flame go around because it had to come back out, see. That's what caused it to like roll back towards us.

It didn't really come back to us, but it just rolled back there as far as we was sumped in and rolled back. If it had come back any farther, I think it would have went down the return.

\* \* \* \* \*



Q. Everyone characterized it as a flame or fire?

A. Everyone said it was a flame. The flame came up and then it rolled up. Some of them got a ball or fire out of that because it rolled out. It was a flame that went up off of the head of the miner and went up to the top.

If you could cup your hand like that and take something -- see, it curved like this (indicating). It just went up there. Well, it would have went straight up, but when it hit that curve, it made it roll out.

\* \* \* \* \*

It pretty well consumed itself mainly right at the face and the head of the miner, right in that area. It didn't really come back out and go down a return or anything.

Mr. Hayes stated that after the flame extinguished, day shift foreman Gary Graham and dust sampler Sandy Eastman arrived at the area and they stated "they could smell the smoke where the flame came up" (Tr. 105). Mine superintendent David Tonkin and mine foreman Greg Oldaker then arrived and conducted an investigation. After checking the machine and checking for methane, they allowed work to continue. Mr. Hayes stated that the crew was questioned and that they explained to Mr. Tonkin "that we had a flame come up. It was orange yellow, bright orange and orange mixed flame that came up". Mr. Hayes stated that the crew also informed Mr. Tonkin that they were in agreement that "it was set off by dust and not methane. It was the dust from the miner. The sulfur and the sparks set the dust off or whatever. That's how the flame got started, that we felt it got started" (Tr. 108). Mr. Hayes further stated that Mr. Tonkin and Mr. Oldaker were not present to see what had occurred, but that "they agreed that, yes, there was a flame. That's what we seen" (Tr. 108).

Mr. Hayes stated that Mr. Tonkin and Mr. Oldaker informed the crew that in view of the fact that so many ignitions had previously occurred in the 12 Left section they had an agreement "with the Federal" that if management investigated such incidents and both management and the union were satisfied as to the cause of the ignition, work could resume (Tr. 109). The area was in "good shape" when work resumed (Tr. 110). Mr. Hayes confirmed that he has observed sparks at the face in the past, and he stated that "We've mined in sulfur, and there's a lot of times that there's sparks and stuff like that. But this was a flame of fire" (Tr. 111).

Mr. Hayes confirmed that the inspectors interviewed the crew on Monday, February 4, 1991, and that management was present. Each individual at the meeting stated what they had observed, and

their statements were read back to them, and they all agreed to what they had observed and made no changes in their statements (Tr. 112).

On cross-examination, Mr. Hayes stated that there was no appreciable methane present during the work shift, that there was "a good bit of air" ventilating the face and keeping the methane out, and that the dust was "no more" than what he had seen on prior occasions. He believed that Mr. Parker did not have the miner water sprays all the way on (Tr. 115). He further believed that none of the crew had ever previously observed an ignition, and he confirmed that when the inspectors spoke to the crew everyone was in the room together (Tr. 118).

David Allen Moore, testified that he has worked for Consol for 18 years, and was a roof bolter on February 1, 1991. The mining machine area was dusty and he stuck his head around the corner of the entry to get some fresh air, and when he next turned around he saw a flame travel up the rib from the bottom head of the miner. He was scared, and he screamed and grabbed the water hose, but the flame went out. He stated that the flame extended three to four feet from the miner head up to the roof arch for a distance of five or six feet and that "the heat from that thing just felt like it could singe the hair on your face, and it was real bright yellow and orange. It just scared me to death" (Tr. 122-123). Shift foreman Gary Graham and dust person Sandy Eastham heard the screams and came to the area and Mr. Graham stated he could smell the smoke, and Mr. Moore said that he showed Mr. Graham "a little bit of soot" where he said he could "smell where it burned" (Tr. 123-124).

Mr. Moore stated that Mr. Tonkin and Mr. Oldaker were called to the scene, and spoke to each person, and they each stated and agreed that they had seen a flame (Tr. 125). Mr. Moore stated that Jimmy Parker, Dave Moore, Gary Hayes, Roy Sailor, and Kevin Carter were present, but that Bob Wolfe was not. However, Mr. Wolfe had previously agreed that there was an ignition, but he was allowed to go home after dinner. Mr. Tonkin asked everyone whether there was an agreement as to what had happened and Mr. Moore stated that "we said yes" (Tr. 125).

Mr. Moore stated that management had on previous occasions called "the Federal out" when there were prior ignitions, but that someone stated that the only time they were to be called was in the event of a gas ignition. Mr. Moore stated that "we all agreed" that what occurred on February 1, 1991, was a dust ignition and "it ignited and caught the dust at the face on fire which caused the flame. It made us scream" (Tr. 127). He confirmed that after dinner, they continued mining (Tr. 128).

Mr. Moore stated that when he next returned to work on Monday, February 4, 1991, he and the crew met with the inspectors. Inspector Tulanowski asked the questions, and Inspector Young "wrote them down" (Tr. 128). The statements were read back, and "they all agreed that this is what happened" (Tr. 129). Mine management representatives, including Mr. Graham, Sandy Eastham, and foreman Kevin Carter were also present (Tr. 130). Mr. Moore was not sure what Mr. Carter may have said, and he could not recall that Mr. Wolfe was present (Tr. 131).

On cross-examination. Mr. Moore described where he was standing when he observed the flame, and he confirmed that it was the first time he had seen anything like it (Tr. 132-134). He also testified as to the use of the water sprays by Mr. Parker, and he confirmed that while Mr. Parker was cutting at the face after the incident with the water sprays fully on "it made sparks all the time" (Tr. 137).

#### Respondent's Testimony and Evidence

Kevin B. Carter, Longwall Foreman, stated that he has worked as a foreman for 12 years and that he holds a B.S. degree in technical mine engineering from Fairmont State and that he was the day shift section boss on the 11 Left section on February 1, 1990. He fire-bossed the section that day and found no more than two-tenths of one percent methane.

Mr. Carter stated that soon after mining began he heard everyone yelling and foreman Bob Wolfe was running to the water hose. Mr. Carter stated that in response to the yelling he was turning "a lot of different ways and looking everywhere at once because I wasn't sure what was going on", and that "whatever I saw, I saw very briefly because I was turned the other way from the people, just a glow near the bits". He explained that he saw "a glow near the bits on the left side, above the bits. It was just gone almost immediately as I looked." (Tr. 143). He stated that he saw no flame or smoke.

Mr. Carter could not remember Mr. Parker telling him that he saw anything, and he stated that Dave Moore and Gary Hayes told him that they "saw something on the left side of the miner" but he did not remember that they said they saw flames rolling back toward them. Mr. Carter stated that Mr. Moore and Mr. Hayes told him that they saw "like a ring of fire near the bits, a glow near the bits, up above between the bits and roof" (Tr. 143-144).

Mr. Carter explained his understanding of "a ring of fire" as follows at (Tr. 145):

A. In my experience, when someone refers to it, they refer to it when they're in sulfur. When you're cutting a lot of it, you'll see a lot of sparks off the head. The head moves pretty quickly, and you'll see a lot of -- it's called a ring of fire.

Q. Does it create an illusion of a ring of fire? Does everything look orange?

A. It's almost like holding metal against a grinder. It's the same thing.

Mr. Carter confirmed that management conducted an investigation of the incident and that Mr. Tonkin spoke to everyone and stated "are we in agreement that we hit sulfur with the bits and you saw a ring of fire around the bits? We know what it was, and we know what caused it". Mr. Carter stated that everyone responded "yes" and no one stated that they had seen flames (Tr. 146).

Mr. Carter stated that "it was not real dusty" on February 1, and that the air flow was good and the fan was running. He also stated that he was looking back toward the boom of the miner and was also watching the cables. He confirmed that he was present during the MSHA investigation of February 4, and that the statements made to the inspectors "seemed to have escalated a little bit" from the statements previously given to Mr. Tonkin. The employees told the inspectors that they saw fire above the miner bits and when asked if he recalled that they said they saw flames he responded "I think they did" (Tr. 148).

On cross-examination, Mr. Carter stated that he never made any statement that he saw flames. (In response to a question from the bench, Inspector Young stated that during the investigation interviews he recalled that Mr. Carter "used the terminology "fire" and not flame (Tr. 153)).

Mr. Carter confirmed that he did not actually observe the event when it happened and that he was "at the rear of the miner, facing the rear of the mine, facing away from the face" (Tr. 155). However, as he turned around he briefly saw a glow on the left side of the miner, and that "I caught the tail end of whatever it was, enough for me to have noticed there was something there" (Tr. 156). He stated that at the time of the event he asked Mr. Moore and Mr. Hayes what they saw and that they told him they saw fire on the left side of the miner at the bits and they did not characterize what they saw as a "ring of fire" (Tr. 159).

Mr. Carter confirmed that most of the crew members had long years of experience in the mines and that "they saw something more than they had seen before or they wouldn't have been

panicked. We do hit a lot of sulfur. You see a lot of sparks, a lot of glow around the bits" (Tr. 160-161).

Robert Wolfe, section foreman, stated that he holds a BS degree in mining engineering and an AS degree in mechanical engineering from Fairmont State. He has served as an hourly loading machine and miner operator, roof bolter, shear operator, and shieldman, and on February 1, 1991, he stayed over from his night shift to work the day shift and help slab the No. 1 entry (Tr. 165). He explained the work he performed, and he confirmed that he checked for methane and found two-tenths of one percent "which is common on that area" (Tr. 167).

Mr. Wolfe stated that Mr. Parker cut the miner water sprays back 80 percent when he sheared the bottom of the face, and that "there was a ball where the bits were coming into contact with the iron pyrite. It's sparks, we had a lot of sulfur gas sparks" (Tr. 168). Mr. Wolfe stated that he grabbed a washdown hose used to wash dust off the miner to put additional water on the sparks and that he did not see any flames. He did not remember making any statements to anyone that he saw flames (Tr. 168). He did not see or smell any smoke. In his opinion, the crew became excited because "they seen more sparks off the iron pyrite than they was used to seeing because the water was cut back on the miner", and that "there wasn't that much dust" (Tr. 169).

Mr. Wolfe confirmed that he was present during the investigation conducted by Mr. Tonkin and Mr. Oldaker, and he explained as follows at (Tr. 170-171):

Q. Do you recall Mr. Tonkin asking the crew members if they had seen flames or had an ignition?

A. Yes. Everyone there was present.

Q. Do you recall what the answers were?

A. The best I can remember, everyone determined that hadn't been that. That hadn't happened.

JUDGE KOUTRAS: Do you remember him asking everybody individually whether they saw a flame?

THE WITNESS: He asked them as a group.

JUDGE KOUTRAS: What did he say? Did anybody see flames?

THE WITNESS: I don't recall what he said exactly, but it was in that line. He said, "Did anyone see flames? Everyone was standing in a semi-circle around him as he was speaking."

JUDGE KOUTRAS: He specifically asked the group whether they saw a flame?

THE WITNESS: Yes.

BY MR. SCHELLER:

Q. Their answers at that point were that they had not?

A. Yes, the best I can remember. I by this time had been in there a lot of hours.

On cross-examination, Mr. Wolfe stated that the crew screamed when they saw sparks and that he already had the water hose on and pointed in the direction of the miner head because it was a common occurrence. He was following his normal procedure and would have the water on regardless of any sparks in order to cut down the dust (Tr. 172-174).

David C. Tonkin, Assistant Mine Superintendent, stated that he was serving as the acting superintendent on February 1, 1991, and has 23 years of mining experience (Tr. 185). He confirmed that he has investigated ignitions on several occasions and that he looks for physical evidence such as soot, cinders, and ash and that he has visited areas after an ignition and could still smell smoke. He confirmed that he was summoned to the section by Gary Graham who informed him "they might have had an ignition at the No. 1 heading". Mr. Graham further informed him that "they had stopped mining and I left everything be" (Tr. 186).

Mr. Tonkin confirmed that he investigated the area where the event took place and found no physical evidence of soot or ash and smelled no smoke. He found nothing that would have led him to believe that an ignition had occurred (Tr. 187). He then called the crew together to question the individuals about what they had seen and he explained as follow at (Tr. 187-189):

A. I don't remember exactly the order I talked to them. Mr. Hayes said he was standing on the right side of the miner. He had been checking for methane in the face area. He said he saw a small fireball at the bits of the miner. He turned to get the hose, to get the hose there, turned the water on and it was gone.

I talked to Mr. Moore. He said he was standing near the corner. He was not looking at the miner. He said he heard somebody holler, and he looked around. He said he saw a fireball at the bits of the miner. He saw people grab the water hose and it was gone.

I talked to Jimmy Parker. I asked him what he was doing. He described the motions he went through as far as making

one sump, making the second sump. He said he was making the second sump and as the miner head was being dropped, which is a common practice for miner operators, they usually reach down and turn the water nearly off or down. He said he was reaching down to turn the water down, and he heard somebody holler. He said he reached back up and looked. He saw a ball and it was gone.

\* \* \* \* I told them we were going to make the investigation. I questioned them. I went back over it. I said that from you all are telling me, we saw a fireball at the bits of the miner. I questioned them about a blue flame. There's no blue flame. It's a fireball at the bit of the miner. It was contained around the bits of the miner. I said, "Do you all agree with that?" They said yes.

Q. Did anyone tell you they saw any flames?

A. No, there was no mention of flames.

Mr. Tonkin stated that if anyone had told him they saw flames or that the flames went to the roof it would have been a reportable event and he would have reported it as he has done in the past. However, after speaking to all of the employees he concluded that while dropping the miner, Mr. Parker hit a sulfur ball as the water was turned off or nearly turned off and that "this would bring a larger than normal amount of light to the area . . . he was cutting through this sulfur ball with his water off and greatly amplified the light. The people were not used to it, and they were afraid" (Tr. 189).

Mr. Tonkin stated that he made the decision that the event was not reportable and that "I asked everybody if they agreed with me with what we saw, and they all agreed what we saw. That was a fireball near the bits on the side of the miner". He explained that the "fireball" he was referring to was the "Ring of Sparks" which is "low on the pyrites" (Tr. 190).

Mr. Tonkin confirmed that he was present during the MSHA investigation of February 4, 1991, and that the events as relayed by the crew to the inspectors were not the same as they were relayed to him on February 1, immediately after the occurrence. He believed the sparks were enhanced by the lack of water on the miner and that it cut through the pyrite with the water turned off or nearly turned off. There was no doubt in his mind that an ignition did not occur (Tr. 191).

On cross-examination, Mr. Tonkin stated that the employees told him they saw a fireball on the left side of the miner near the bit area, and that it was contained around the bits. They did not state that it rolled up the arch (Tr. 192). He confirmed

that the employees told the inspectors that there were flames, but he did not know that they stated that it was an ignition.

Mr. Tonkin stated that he was not told anything about any flames by the crew when he spoke to them on Friday, February 1, and that "the story today was even more so than the story that we had that day" (Tr. 192). Mr. Tonkin stated that he reported what he believed happened to his superiors, and that his decision with respect to the lack of a reportable incident was based on physical evidence and what the men had reported to him. The presence of flames and an ignition was not reported to him as such, and he believed the men saw "a ball of fire", which he defined as the "result of the bits hitting the sulfur, and it was amplified by the lack of water" (Tr. 194).

He further explained as follows at (Tr. 194):

Q. You have heard these men testify today how that flame or that ball of fire rolled toward them. Then you said that was never reported.

A. Yes. They told me that it was a flame and came towards them, yes. The day that you're talking about in the safety office, there was no mention of a large ball of fire going up against the arch and rolling back to them. That was not even mentioned that day, but they did say that day there were flames.

Q. Just based on your own opinion, you would not call a ball of fire an ignition?

A. My terminology of ball of fire has to do with hitting sulfur and a ball of fire, large sparking around the bits, my terminology of a ball of fire.

Q. But you always have sparking around bits in large streaks and things like that, correct?

A. Yes.

Q. It does not result in a ball of fire. It's just streaks.

A. If the water is turned on, I'd say, no, it wouldn't.

Mr. Tonkin stated that at the time of the MSHA investigation he told Inspector Young that the story relayed to him by the crew was not the same as what he heard underground on February 1, (Tr. 196). Mr. Tonkin stated that he told Mr. Parker that in the event management concluded that there was no ignition it would not be reported to MSHA and that mining would continue.



Mr. Tonkin believed that his relations with the miners and the inspector were good (Tr. 197).

Mr. Tonkin stated that since he did not believe there was an ignition, mining was allowed to continue. If an ignition that he thought was reportable had occurred, the evidence would not have been destroyed and "we would have let it be" (Tr. 198). He believed that management did the right thing and that foreman Graham told the crew not to disturb anything until he (Tonkin) reached the area. Mr. Tonkin conceded that Mr. Parker may have seen a flame, and he stated that "he did not tell me he saw a flame. That's what I had to go on. I'm not denying he saw flames, I'm just telling you what they reported to me" (Tr. 199). Mr. Tonkin was of the opinion that if dust had engaged an ignition and rolled to the roof, there would surely be soot on the roof. He speculated that the miners may have embellished their story because management and the safety committee were not on good terms and the union may have pressured them (Tr. 199-200).

Mr. Tonkin stated that he prepared no notes or report of his investigation and saw no harm in notifying MSHA of the event (Tr. 200-201). He explained that he has in the past participated in ignition investigations with MSHA, but that in this case he did not feel the need to call MSHA if he believed there was no ignition (Tr. 201). He stated that after questioning everyone they agreed that there was a ball of fire in and around the bits and that no one spoke up and said that they saw more than a ball of fire and saw flames rolling up over the roof (Tr. 202-203).

Greg Oldaker stated that he has 20 years of mining experience and that he was the underground mine foreman on February 1, 1991. He confirmed that he was summoned to the section by phone and that "they said they had a possible ignition" (Tr. 204). He confirmed that he checked the miner and found no evidence of soot, ash, or soot streamers, and did not smell smoke. He saw nothing that would indicate that an ignition had occurred. He found 30,000 cubic feet of air going across the miner, and one-tenth of one-percent methane (Tr. 205).

Mr. Oldaker confirmed that he was present "the majority of the time" during the management investigation and that "as a whole, to me, everybody was more or less agreeing that had a ball or fire" (Tr. 206). He described a "ball of fire" as "like when you're in sulfur and you've got a lot of sparks from the sulfur coming around the head of the miner they'll refer to it as a ball of fire. That's more or less what it is" (Tr. 206). He stated that he never heard anyone say anything about flames, and that the crew basically agreed that what they had seen was a ball of fire around the bits. He "was more or less in agreement with them because I didn't see evidence of an ignition myself when I looked at it" (Tr. 207). He confirmed that he may have been in

or out of the room during MSHA's interviews with the employees but he did not sit in on any of the testimony (Tr. 207).

In response to further questions, Mr. Oldaker stated that he has observed balls of fire from cutting sulfur, and the size of the ball would depend on the amount of sulfur present. Although there may be a big glow "like a shower of sparks", he did not believe it would roll up the face and he has never observed this happen. Although he believed that such sparking could probably ignite methane, he did not know if it would ignite coal dust (Tr. 209).

Inspector Young was recalled by the Court and he explained that any statements made during the investigation with respect to "a ball of fire rolling up the coal and all that" would not appear in his report of investigation. He further explained that it "would not be the terminology that you put in there. I've never seen one of these come close to that kind of description" (Tr. 210). When asked if he would include in his report any statements by Mr. Wolfe and Mr. Carter (if in fact made to him) that they saw a ball of fire, Mr. Young responded "a ball of five, maybe, but you were saying rolling up the coal and all. We would not have put that in there, no" (Tr. 210).

When asked if he would have included in his report any statements (if in fact made) that flames were rolling back toward the mine operator, Mr. Young stated that he would have put that in his notes "but I would not have worded it that way in this accident report, no. I've never seen one with terminology like that" (Tr. 220).

Mr. Young confirmed that during his investigation on February 4, Mr. Tonkin stated "if I had heard what you just heard the other day on the section, I would have reported it" (Tr. 211). Mr. Tonkin told him that the statements made by the miners during the interviews were not the same statements made to him (Tonkin) during his investigation (Tr. 219).

Mr. Young confirmed that he based his citation for the failure by the respondent to preserve the evidence on the testimony of the employees which led him to conclude that there was an ignition, and that if there was an ignition, MSHA should have been afforded the opportunity to investigate it. However, since the area was cleaned up and repairs made to the miner, any investigation would have been fruitless (Tr. 212). Conceding that the respondent had the right to investigate in order to decide whether a reportable accident had occurred, and that there would be nothing to preserve if it was concluded that the incident was not reportable, Mr. Young nonetheless stated that "the testimony was so overwhelming that we had no choice. We

didn't hear anything contrary to an ignition. Nobody told us a maybe, an if, or what for. It was all dead straight forward".

When asked if the testimony he heard during the hearing in this case was like the testimony he heard during his investigation, Mr. Young responded "I don't know if any words agreed" (Tr. 212). Mr. Young stated that Mr. Parker's testimony that "it went all the way to the ceiling and rolled back on him" was the same as what he stated during the investigation, and that the hearing testimony of the other miners was also consistent with their prior statements (Tr. 213).

When asked if he disagreed with the testimony about the appearance of a "ball of fire" or "a ring of fire", Mr. Young stated that there were 8 or 9 people in the room during his interviews and that "it seemed that we had one faction over here that wanted to agree on this is what it is and one faction over here that wanted to agree on something else" (Tr. 216). Mr. Young stated that he has seen "a ring of flames" around a miner bit when dust and methane are ignited, and that he has also observed "sparks go round and round bit lugs" and that there is a distinct difference in the two. The response he received was "that it was a fire and it had a flame. It was this color and it did this" (Tr. 217).

Mr. Young stated that Mr. Tonkin and Mr. Oldaker were not asked any questions during his interviews with the other miners. Mr. Young also confirmed that Gary Graham was present "out in the hall", but that he was not questioned. The questioning was limited to "the people that was right around the continuous miner that saw what went on" (Tr. 217). Mr. Young stated that he distinctly remembered that Mr. Wolfe stated he saw fire, but that Mr. Carter "was hesitant" and that "he always looked down. He didn't look up. He didn't want to give me a direct answer" (Tr. 218). Mr. Young stated further at (Tr. 219):

THE WITNESS: My position was in the middle somewhere. I had more than one person categorically tell me, "We had a fire and ignition or ball." Then I had another guy saying, "James, I didn't see it." I wasn't told the same thing you were.

JUDGE KOUTRAS: Was there any inquiry made of these miners as to what they may have told Mr. Tonkin.

THE WITNESS: There was remarks made in the room by other people about "Wait a minute. I didn't hear that the other day." They would make an explanation to them but not directed at me.

Mr. Young agreed that the testimony of the miners during the hearing in this case was more than what he heard

during his investigation and he attributed this to the kinds of direct questions asked by counsel which were not the same questions asked during the investigation interviews (Tr. 220). He stated that the responses to the questions asked during the investigation were straight-forward and that no one was "wishy-washy" about what was said (Tr. 221). He stated that "the testimony given to me did not say anything about a small ball. Just categorically, we had a flame and a fire, and that's what we based it on".

Mr. Young stated that in view of some statements by some of the respondent's representatives who were present during his interviews with respect to the term "ball of fire", he specifically asked for clarification as to whether there was "a flame of fire of orange color" or "a ring of sparks". The statements by the crew that "flames were rolling back on the roof" led him to conclude that there was an ignition (Tr. 223).

David Allen Moore was recalled by the Court, and he stated that when Mr. Tonkin spoke with the crew during his investigation he told Mr. Tonkin that "I seen the flame shoot up there. It was hot. It scared me" (Tr. 226). When asked if he specifically used the word "flame", Mr. Moore responded "Yes, fire. Flame, fire. I'd say flame. I can't remember exactly, but it was either fire or flame. I think fire and flame is the same thing, isn't it? I'd say flame because he asked me how big it was and the color of it" (Tr. 226). Mr. Moore further stated that he told Mr. Tonkin that it was "three foot high and five to six foot wide, and it was kind of yellow and orange and real bright. It was hot" (Tr. 227).

Mr. Moore stated that he heard "ball of fire" discussed and that "it just rolled like a ball of fire there, but it was three foot high at the miner head where it was cutting". He stated that everyone agreed that they saw "a flame shooting up the rib, three foot high and five foot long" (Tr. 220).

Gary Lee Hayes was recalled by the Court, and he stated that when Mr. Tonkin spoke with the crew during his investigation Mr. Tonkin was told that "we had an ignition, that we had flame, we explained to him how it came off the miner and how it rolled back. I think that's how he got to the point of a ball of fire and everything. We didn't really know. This was the first time we ever experienced anything like this" (Tr. 229). In response to a question as to how he concluded that an ignition occurred, Mr. Hayes responded as follows (Tr. 229-230):

JUDGE KOUTRAS: Let me ask you this. How did you come to the conclusion that this was an ignition?

THE WITNESS: This is what we've been told, that any time that you've got fire like that in the face area, it's

called an ignition. That's the reason we come out with this point was the flame that happened in the face that was set off. We believe it was set off by the dust. This was we called it, an ignition.

If it wasn't an ignition, the only thing I can say is it was a flame of fire that came off the head of the miner to the top. This is the way we reported it. I said ignition, but that's my own opinion of what an ignition is, a fire at the face of a working section. That's why I've come to the point of an ignition.

JUDGE KOUTRAS: What does ring of fire mean to you?

THE WITNESS: A ring of fire is like miner bits hitting sulfur and being going around the head of the miner. I've seen this happen. I didn't feel that was a reportable thing. I've seen it many a time in my years of coal mining experience. I've seen the bits keep hitting it. It followed the miner hitting around. It's them bits set on an order where they just keep hitting it, and it makes it look like a ring of fire. But we had flame. It was a flame.

JUDGE KOUTRAS: That ring of fire that you have described, would that be an ignition?

THE WITNESS: No, I didn't say that an ignition, no.

JUDGE KOUTRAS: Did you remember specifically telling Mr. Tonkin that what you saw was flame?

THE WITNESS: Yes, sir.

James W. Parker, Jr. was recalled by the Court, and he stated that when Mr. Tonkin came to the scene on February 1, he told Mr. Tonkin that "it was a flame going up the left-hand side of the miner, up to the top, and rolled back from the arch over the top toward us" (Tr. 232). Mr. Parker stated that he never referred to the flame as a "ring of fire". He confirmed that during the MSHA investigation of February 4, the statements made to the inspectors were "pretty much" the same statements made to Mr. Tonkin and he did not recall anyone refer to the flame as a "ring of fire" (Tr. 233).

#### Consol's Expert Witness

Dr. Pramod C. Thakur, testified that he is employed by Consol and is responsible for degasification of all of its mines, control of respirable dust, and the prevention of methane and dust ignitions. He received his early mining education in India and holds BS, MS, and PHD degrees in mining engineering from Penn State University and has an MS degree in applied Mathematics. He

is a certified mine manager, has conducted research in methane and dust ignitions and mine ventilation, and has been involved in investigations of ignitions (Tr. 234-237).

Dr. Thakur agreed with Inspector Young's statement that "when you have a visible flame, it's an ignition, ignition of something" (Tr. 237). He stated that methane and air mixtures will ignite, and that coal dust and air mixtures will ignite. In order for these mixtures to ignite there are three ingredients that must be present, namely, (a) the right concentration, (b) the right temperature for all ignition temperatures, and (c) the right energy input (Tr. 238).

Dr. Thakur confirmed that based on the testimony of all of the witnesses, which he heard in the course of the hearing, he agreed with MSHA that no methane ignition took place on February 1, 1991 (Tr. 239). He was also of the opinion that it was impossible to ignite coal dust under the circumstances described by the witnesses. He explained that based on the published literature by the U.S. Bureau of Mines one would have to have a thousand times more dust at the face than what was present at the time of the event in question, and that the dust would have to be ignited by an explosive charge. No mechanical friction of any sort can ever ignite coal dust, and that based on all of the literature on the subject "it is impossible to ignite coal dust and air mixtures with mechanical friction" (Tr. 241).

Dr. Thakur stated that sparking caused by friction will ignite a mixture of methane and air, with a resulting flame which is bluish in color. Depending on the volume, "you will hear a pop", and the flame "will rise, go to the roof". He further stated that "there's no way you can have a sustaining visible flame to qualify as an ignition and go away in three seconds" (Tr. 241).

In addition to the lack of sufficient coal dust, and the impossibility of igniting coal with a frictional emission, Dr. Thakur stated that a "great powerful source" of energy, which is 10 to 100 times more than what is necessary to ignite a mixture of methane and air, must be present to ignite coal dust. He also indicated that a coal dust explosion may be ignited if there was an initial methane explosion which has sufficient momentum to "kick up" the dust from the mine floor, ribs, and roof at 700 degrees centigrade or higher (Tr. 242).

Dr. Thakur stated that based on the testimony he heard in this case from all of the witnesses he was of the opinion that what occurred was the creation of light by the bits of the mining machine striking quartzite or pyrite. Quartzite will oxidize very rapidly, creating a light, and pyrite creates more light because it oxidizes very rapidly and dissipates faster and gives off a "more orange light". The resulting sparks, or "ring of

fire", is pyrite oxidizing very rapidly, and there will be more sparking when the water is cut down. There is no ignition, no fire, or any flame, and to anyone standing 10 to 30 feet away it would appear to be a "ball of fire" (Tr. 245). Once the machine is stopped, the sparks will end, and if the machine is started again, it will happen again. He believed it was impossible to have a coal dust ignition given the amount of methane present (Tr. 245).

On cross-examination, Dr. Thakur stated that based on scientific opinion and research, it was his opinion that it is impossible to ignite coal dust by mechanical friction, and he explained what is necessary to ignite an airborne mass of coal dust (Tr. 246-248). He further stated as follows at (Tr. 249):

Q. You mean to tell me then that it is your position, when you heard these employees testify, that it was just some kind of sparks.

A. There was all this sparking and because of a lack of water it became a very -- what should I say -- large number of particles were created. They were all oxidizing very rapidly and they glowed. They created a source of light. As I said, this was the mechanism they used in army days to light the mines. The people used to work in the light of the sparking wheels.

Q. I know what you are saying about sparks and so forth. These people said they saw a flame.

A. You also realize -- I don't want to put them down -- they had never seen a real ignition before.

Q. But they have seen a flame before, have they not? I have seen a flame.

A. Yes. But what they thought was a flame, in my opinion, was not a flame.

Dr. Thakur acknowledged that sparking is a potential source of ignition, and he cited a fatal incident in Nova Scotia caused by frictional ignition. However, he believed that the real ignition source in that event was the presence of a lot of methane and using mechanical means to cut the coal (Tr. 251). He believed that if there is no methane there will be no coal dust explosions, and he stated that "the only way they ever have coal dust explosion is if they were shooting coal or there was a freak of several methane explosions" (Tr. 253). Dr. Thakur concluded his testimony as follows at (Tr. 258-259):

THE WITNESS: The only thing I would submit, Your Honor, to you is that if a mechanism is creating so-called

sparks, as soon as you stop that mechanism the sparks stop. That's not an ignition.

For an ignition to be called an ignition, something has to be ignited, something which would sustain a visible flame for some duration of time, even it is five or ten seconds.

I respectfully submit to you that what they saw was a big mechanical wheel cutting into pyrite, creating fine particles, and creating a lot of heat which oxidized those particles. They glowed, and they glowed like a ball of fire.

The moment you stopped that machine the phenomenon ended. There was nothing ignited, and, therefore, there was no ignition. I would have taken the same action as Mr. Dave Tonkin did if I were the mine superintendent. It was not a reportable accident.

### Findings and Conclusions

#### Fact of Violation. Citation No. 3105295, 30 C.F.R. § 50.10

Consol is charged with a violation of 30 C.F.R. § 50.10, for failing to report the alleged ignition which the inspector believed occurred on February 1, 1991. Section 50.10 provides as follows:

#### § 50.19 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 (202) 783-5582.

I take note of the fact that the citation issued by Inspector Young contains language which suggests that Consol was required to report the results of its investigation of the incident of February 1, 1991, to MSHA, and that it also failed to contact MSHA to obtain information to determine whether "the occurrence" needed to be reported. During the course of the hearing, Mr. Young testified that Consol was obliged to report "anything, regardless of what it was" (Tr. 36). However, contrary to the inspector's belief, Consol's only legal obligation pursuant to section 50.10, was to immediately report an "accident". The definition of an "accident" found at section 50.2(h)(5), includes an unplanned ignition or explosion of gas or dust. The citation alleges that a dust ignition occurred on the 11 left working section on February 1, 1991, and the issue presented is whether a coal dust ignition in fact occurred, or



whether the occurrence in question was something other than a reportable ignition.

Neither the Act nor the regulations further define ignition. However, the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968 Edition, provides the following relevant definitions:

Ignition . . . . . The act of igniting, or the state of being ignited; An outburst or fire or an explosion. (Pg. 569).

Coal mine ignition . . . . . The burning of gas and/or dust without evidence of violence from expansion of gases. (Pg. 225).

Webster's Third New International Dictionary (Unabridged), provides the following relevant definitions:

Ignite . . . . . To subject to fire or intense heat; to heat up; to catch fire; to begin to glow; become luminescent. (Pg. 1125).

Ignition . . . . . The act or action of igniting; subjection to the action of fire or intense heat; setting fire. (Pg. 1125).

Luminescence. . . . . An emission of light that is not ascribable directly to incandescence and therefore occurs at low temperatures, that is produced by . . . friction, . . . by certain bodies while crystallizing. (Pg. 1345). (Similarly defined by the Mining Dictionary, at pgs. 662-663).

Luminous . . . . . full of light; emitting or seeming to emit a steady suffused light that is reflected or produced from within. (Pg. 1345). Radiating or emitting light; bright; clear. (Mining Dictionary, at pg. 663).

In support of its conclusion that an ignition in fact occurred on February 1, 1991, MSHA relies on the testimony of Inspector Young, including his report of investigation, and the testimony of the miners who witnessed the February 1, 1991, event and who were subpoenaed to testify at the hearing in this case. With regard to the investigation conducted by Mr. Young and Mr. Tulanowski, and the report which they prepared are concerned, as I noted in the course of the hearing, the investigation and the report leave much to be desired and are of little credible or evidentiary value (Tr. 43-47; 76-78; 150-153; 175-180).

The record reflects that the "statements" purportedly given to the inspectors during their investigation were in fact verbal summaries of the questions asked by Inspector Tulanowski and the responses recorded by Inspector Young as part of his investigative notes. However, the notes were not produced at the hearing and they are apparently lost and not available. Further, it would appear that none of the miner "statements" were reduced to writing or signed by the miners who purportedly gave them, they were not sworn, and I take note of the fact that the miners were interviewed in groups rather than individually and in private. One potentially critical witness (Foreman Gary Graham), who reportedly commented on February 1, 1991, that he smelled smoke when he arrived at the scene was not called to testify at the hearing, and although Mr. Graham was present during the interviews of February 4, 1991, Inspector Young confirmed that he was asked no questions (Tr. 217).

Mr. Young confirmed that he and Inspector Tulanowski only prepared part of the report of investigation, and that the rest of the report was prepared by other unidentified MSHA officials. Mr. Young acknowledged that he and Mr. Tulanowski did not sign the report, and he could not state who initialed and signed the report over their typewritten names. Although the name "David N. Wolfe" appears over Mr. Young's typed name, Mr. Young confirmed that he did not know Mr. Wolfe (Tr. 43). Mr. Young also did not know who changed pg. 3 of the report by scratching through the word "methane" and inserting "frictional dust", and he believed the change was made to correct a typographical error.

Three eyewitnesses to the incident of February 1, 1991, gave rather graphic and detailed sworn testimony as to what they observed. Continuous miner operator Parker, who has worked for Consol for 19 years, and roof bolter Hayes, with 18 years of experience in the mines, testified that they observed a flame from the miner machine head travel up to the roof and roll back over the machine before it extinguished itself. Mr. Parker was operating the machine and Mr. Hayes was standing to the front of Mr. Parker, approximately 12 feet from the miner head. Mr. Parker recorded his observation in his personal notes made 5 or 10 minutes after the event, and while the notes do not mention any "flames rolling back" they do mention an "orange and yellow ball of fire" lasting 3 to 5 seconds, and Mr. Parker explained that the flames he saw resembled a "ball of fire" as they rolled back and that is why he characterized it as such in his notes. Further, Mr. Parker and Mr. Hayes, both of whom had previously observed sparks and sparking in their mining experience, denied that what they actually saw were sparks, and they were rather emphatic that they observed a flame, and their testimony in this regard remained consistent when later recalled by the court in the course of the hearing.

Roof bolter David Moore, with 18 years of mining experience, testified consistently on direct and on recall by the court that after sticking his head around the corner of the entry to get some fresh air he turned around and saw a flame travel up the coal rib from the head of the miner machine, and he described the flame as bright orange and yellow. He also stated that he could feel the heat. Mr. Moore, Mr. Parker, and Mr. Hayes all insisted that during management's inquiry on February 1, 1991, they told Mr. Tonkin that they had seen a flame. Mr. Tonkin confirmed that he made no notes of the discussions with the crew and he apparently did not prepare any report of his inquiry. He testified that the three miners told him they saw "a fireball" near the bits of the miner machine, and he confirmed that the three miners told the MSHA inspectors on February 4, 1991, that they had seen flames (Tr. 194).

In support of its conclusion that what the miners actually saw on February 1, 1991, was not a flame or an ignition, but sparking which often occurs when the bits of the miner machine strike sulfur or pyrite while mining with insufficient water in the machine, Consol relies on the eyewitness testimony of longwall foreman Kevin Carter, section foreman Robert Wolfe, and its expert witness and employee Dr. Thakur. Consol also relies on the testimony of Mr. Tonkin and Mr. Oldaker, the management officials who conducted the inquiry of February 1, 1991.

Mr. Carter testified that he saw "just a glow near the bits" of the miner machine, but he acknowledged that "whatever" he saw was brief, that he was looking in several different directions in response to the yelling by crew members, and that he was positioned at the rear of the miner looking away from the face, and that he did not actually see what had happened. Mr. Carter also confirmed that at the time of the incident, Mr. Hayes and Mr. Moore told him that they saw fire on the left side of the miner at the bits, and he believed that the miners told the MSHA inspectors that they saw flames. Mr. Carter acknowledged that given their long years of experience in the mines, and the fact that sparking and glowing is not particularly unusual, the miners saw "something more than they had seen before or they would not have panicked" (Tr. 159).

Mr. Wolfe testified that he saw no flames, and it was his opinion that what the crew actually saw was an unusual sparking event caused by the miner bits striking pyrite. He believed that the lack of water in the machine caused unusual sparking which he characterized as "a ball of sulphur gas sparks" (Tr. 168). Mr. Wolfe further testified that at the time Mr. Tonkin spoke with the crew on February 1, 1991, no one said anything about seeing any flame. Mr. Wolfe denied that he ever made any statements to anyone that he saw flames. However, in response to a question from the court concerning the information at page 3 of the MSHA report of investigation which states that he "observed

an orange flame measuring approximately 3 feet tall and 6 feet wide, at the miner ripper head", Mr. Wolfe stated that based on his own mining terminology, an orange flame is the same as a spark (Tr. 176).

Mr. Tonkin did not witness the event of February 1, 1991. Mr. Tonkin was summoned to the area by Mr. Graham who told him that "they might have had an ignition". Upon arriving at the scene, Mr. Tonkin found no physical evidence such as soot, cinders, or ash. Based on his discussions with the crew, including statements by Mr. Hayes and Mr. Moore that they saw "a fireball at the bits of the miner", Mr. Tonkin concluded that an ignition had not occurred, and that the crew had only observed "a ball of fire". Mr. Tonkin conceded that Mr. Parker may have seen a flame, but he insisted that none of the miners told him that they saw any flames. Mr. Tonkin stated that he would consider a flame to be an ignition, but that based on the terminology that he is used to, a ball of fire that is caused by sulfur is not classified as an ignition (Tr. 195).

Mr. Oldaker did not witness the event, and he was summoned to the area by a telephone caller who informed him of "a possible ignition". Mr. Oldaker saw no evidence of any ignition, and while he was present during the MSHA interviews with the crew, he confirmed that he did not sit in on any of the "testimony " and may have been in and out of the room. He denied hearing anyone say anything about the presence of flames, and his conclusion that everyone saw "a ball of fire" was based "more or less" on what he believed was a consensus view of the crew.

Dr. Thakur agreed that a visible flame would indicate that an ignition has occurred, and he confirmed that given the right concentration, temperature, and energy input, a mixture of coal dust and air will ignite. However, based on the testimony of the witnesses, he did not believe that an ignition occurred. He concluded that the employees saw sparks or a ball of fire created by the miner bits cutting into pyrite. This produced a lot of heat which oxidized the fine pyrite particles, and which resulted in a glow and the creation of a source of light. Dr. Thakur further concluded that it was impossible to ignite coal dust and air mixtures with mechanical friction.

Although it may be true that the subpoenaed miners who testified under oath during the hearing disclosed more than what they may have previously stated to Mr. Tonkin, I find no reason for disbelieving their testimony. Mr. Tonkin confirmed that he got along well with the miners, and although he suggested that the union safety committee may have put pressure on them to embellish their stories because the committee did not get along with management, I find no credible evidence to support any such conclusion.

Although Mr. Tonkin impressed me as a candid and credible individual, and Inspector Young believed him to be a truthful person, it would appear to me that the "investigation" conducted by Mr. Tonkin on February 1, 1991, was more of a group discussion and rather cursory, and he took no notes and prepared no written report of what may have been said. Under the circumstances, I do not find it unusual that critical facts remain unresolved and undocumented, and that individual perceptions and recollections as what may have been said has changed over time. Nor do I find it unusual that miners subjected to a management inquiry, and in the presence of foreman and other management officials, sometimes have a tendency to remain noncommittal, particularly when they are not placed under oath and are not called upon to testify in a formal hearing away from their working mine environment.

After careful review and consideration of all of the testimony in this case, and having viewed all of the witnesses during the course of the hearing, I conclude and find that Mr. Parker, Mr. Hayes, and Mr. Moore are credible witnesses and I believe their testimony that they observed a flame of rather short duration coming from the miner machine bits at the head of the machine and rolling up and over the machine. Their description of the flame is consistent with the aforementioned dictionary definitions of the terms "ignite" and "ignition", and I do not find their testimony to be in conflict with the testimony of Mr. Tonkin, who confirmed that the presence of a flame is in fact an ignition, and the testimony of Dr. Thakur, who testified that a visible flame would indicate that an ignition has occurred.

Although I find Dr. Thakur to be a knowledgeable and credible individual, his opinion that an ignition did not occur was based on his belief that what the miner eyewitnesses saw was "some kind of sparks" which they thought was a flame, rather than on his personal observation of the same event. Dr. Thakur acknowledged that a spark was a potential source of ignition, and his testimony that sparking caused by rapid oxidizing and a lack of water would create a "source of light", or heat, and a glow which would appear "like a ball of fire" are characteristics similar in some respects to those found in the dictionary definitions of an ignition.

Although Dr. Thakur initially stated that it was impossible to ignite coal dust by mechanical friction, he later confirmed that he was familiar with accidents and explosions that have occurred because of frictional dust ignitions (Tr. 251). Further, although Dr. Thakur stated that "there's no way you can have a sustaining visible flame to qualify as an ignition and go away in three seconds" (Tr. 241), he later testified that "for an ignition to be called an ignition, something has to be ignited, something which would sustain a visible flame for some duration of time, even if it is five or ten seconds" (Tr. 259). Under all

of these circumstances, I remain unconvinced that frictional coal dust ignitions are impossible under any and all circumstances. In any event, the issue here is whether or not the testimony of the eyewitness miners is credible and supports any reasonable conclusion that what they saw of February 1, 1991, was a flame, and whether or not that flame was a coal dust ignition which was required to be immediately reported to MSHA pursuant to 30 C.F.R. § 50.10. I have concluded and found that what the miners observed was a flame. I further conclude and find that the flame which they observed constituted an unplanned coal dust ignition which was required to be immediately reported. Accordingly, since it was not reported to MSHA, a violation has been established and the citation IS AFFIRMED.

Fact of Violation.    Citation No. 3105296, 30 C.F.R. § 50.12.

Consol is charged here with a violation of section 50.12, because it permitted mining to continue after the occurrence of the ignition on February 1, 1991, and failed to obtain MSHA's permission before disturbing or changing the area where the ignition occurred. Section 50.12, provides as follows:

§ 50.12 Preservation of evidence.

Unless granted permission by a 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.

Consol does not dispute the fact that after the conclusion of Mr. Tonkin's inquiry on February 1, 1991, mining was allowed to continue and the miner machine was advanced past the area where the ignition had occurred and the area was cleaned up and rock dusted. The record reflects that when foreman Graham initially arrived at the scene, he ordered all mining to cease and that nothing be disturbed until Mr. Tonkin arrived. Mr. Tonkin subsequently permitted mining to continue after he concluded from his discussions with the crew that an ignition did not occur. Mr. Tonkin maintained that no one initially mentioned that they had seen any flame, and coupled with the lack of any physical evidence of any ignition, he made the decision that a reportable accident (unplanned coal dust ignition) did not occur and that the incident was not required to be reported. Under these circumstances, he allowed mining to continue.

In view of my finding that a reportable accident (unplanned coal dust ignition) occurred and was not immediately reported to MSHA, I further conclude that Consol's continuation of mining, which resulted in the alteration of the scene of the ignition

without MSHA's permission, constitutes a violation of section 50.12. Although it is true that foreman Graham acted promptly by discontinuing any further mining and preserving the scene until Mr. Tonkin's arrival, and Mr. Tonkin may have in good faith believed that an ignition had not occurred, I conclude that these factors may be considered in mitigation of the violation, but may not serve as an absolute defense to the violation. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

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

I adopt as my findings the stipulations by the parties that Consol is a large mine operator and that the payment of civil penalty assessments for the violations in question will not adversely affect its ability to continue in business.

#### History of Prior Violations

An MSHA computer print-out listing Consol's history of prior violations for the period August 23, 1989, through August 22, 1991, reflects civil penalty payments in the amount of \$221,247, for 797 violations. One prior single penalty assessment of \$20 for a violation of 30 C.F.R. § 50.10, issued on September 19, 1989, is included in this history. MSHA's pleadings reflect that Consol's overall annual coal production for civil penalty assessment purposes was 49,368,060 tons, and that the Robinson Run No. 95 Mine had an annual production of 1,856,689 tons. Although I cannot conclude that Consol's history of prior violations is particularly good, for an operation of its size, I cannot conclude that additional increases in the civil penalty assessments that I have made for the two violations which have been affirmed, are warranted. However, I have considered the history, as well as the other penalty criteria, in assessing the penalties for the violations.

#### Good Faith Compliance

The parties stipulated that Consol abated the violations in good faith. The record reflects that corrective action was immediately taken and that the inspector terminated the citations within an hour after they were issued. Under the circumstances, I conclude and find that Consol exercised rapid good faith compliance in correcting the cited conditions and I have taken this into consideration.

#### Gravity

The inspector found that both violations were not significant and substantial. The evidence establishes that no significant amounts of methane were present and that the area

where mining was taking place was in good condition. Further, the flame in question only lasted for approximately three seconds and there were no injuries. Although these factors concerning the prevailing mining conditions mitigate the gravity of the violations, I nonetheless conclude that the failure to report an ignition and to allow mining to continue without notice to MSHA and without its approval are serious violations.

#### Negligence

The inspector found that the violations resulted from a "high" degree of negligence, and he based these findings on his belief that mine management made no effort to contact MSHA for the purpose of reporting the incident or seeking information as to how to proceed further (Tr. 22-23).

Taking into account Mr. Tonkin's denials that the miners specifically told him that they had seen flames when he initially spoke to them on February 1, 1991, I nonetheless find that all of the indicia of a reportable ignition were present when Mr. Tonkin came to the opposite conclusion. Mr. Tonkin conceded that the miners told him that they had seen a ball of fire. Foreman Carter confirmed that at the time of the incident he was told by miners Hayes and Moore that they saw fire at the left side of the miner machine bits, and Mr. Carter himself testified that he had briefly observed a glow. Foreman Wolfe, who claimed that what the crew saw was sparks, was of the view that a spark was the same thing as a flame, and he did not deny the statement attributed to him in MSHA's accident report which indicates that he saw an "orange flame". Mr. Tonkin agreed that if a flame were indeed present, an ignition occurred. Under all of these circumstances, I conclude that Mr. Tonkin acted less than reasonable when he based his conclusion that an ignition had not occurred solely on the fact that the miners may not have specifically informed him that they had observed a flame. I further conclude and find that the failure by mine management to immediately report the matter to MSHA and to preserve the scene until MSHA could look into the situation supports the inspector's high negligence findings and they ARE AFFIRMED.

#### Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3105295	2/4/91	50.10	\$500
3105296	2/4/91	50.12	\$350



ORDER

Docket Nos. WEVA 91-166-R and WEVA 91-167-R

Consol's contests are DENIED and DISMISSED.

Docket No. WEVA 92-177

Consol IS ORDERED to pay civil penalty assessments in the amounts shown above for the two citations which have been affirmed. Payment is to made to MSHA within thirty (30) days of the date of this decision and order.

My previous Stay Order of February 4, 1992, staying excessive history section 104(a) Citation No. 3102243, August 22, 1991, 30 C.F.R. § 75.400, remains in effect and the citation IS STAYED pending the Commission's decisions in Drummond Coal Co., Inc., 13 FMSHRC 339, and 13 FMSHRC 356 (March 1991), and Zeigler Coal Company, 13 FMSHRC 367 (March 1991).

  
George A. Koutras  
Administrative Law Judge

Distribution:

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/ml

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 10 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-1801
Petitioner	:	A.C. No. 46-05480-03815 A
v.	:	
	:	Dobbin Mine
CHARLES E. CARPENTER,	:	
Employed by	:	
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

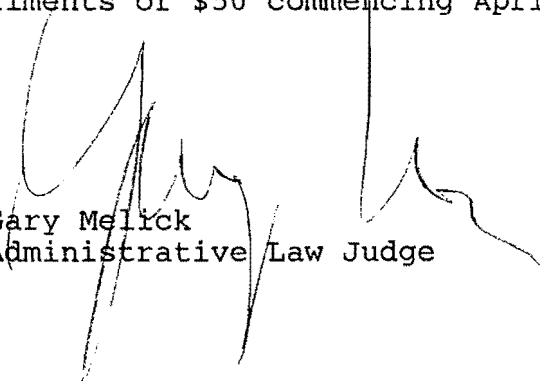
**DECISION APPROVING SETTLEMENT**

Appearances: Edward H. Fitch, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Paul J. Harris, Esq., Wallace, Ross & Harris,  
Elkins, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The petition had previously been modified by the Secretary's withdrawal of charges against Mr. Carpenter under Order No. 3111274. At hearings on the remaining charges under Order No. 3111276, the Secretary filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$1,200 to \$350 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the relevant 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 \$350. Payment shall be made in monthly installments of \$50 commencing April 1, 1992.

  
Gary Melick  
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
THE FEDERAL BUILDING  
ROOM 280, 1244 SPEER BOULEVARD  
DENVER, CO 80204

MAR 11 1992

SECRETARY OF LABOR, MSHA,	:	DISCRIMINATION PROCEEDING
on behalf of	:	
ROBERT W. BUELKE,	:	Docket No. WEST 92-243-DM
Applicant	:	WE MD 91-15
	:	
v.	:	Rabbit Creek Mine
	:	
SANTA FE PACIFIC GOLD	:	
CORPORATION,	:	
Respondent	:	

DECISION  
AND  
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Applicant;  
Charles W. Newcomb, Esq., Denver, Colorado,  
for Respondent.

Before: Judge Cetti

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). Section 105(c) of the Mine Act, 30 U.S.C. § 815(c) (1988), prohibits operators of mines from discharging or otherwise discriminating against a miner who has filed a complaint alleging safety or health violations at a mine. If a miner believes that he has been discharged in violation of this section, he may file a complaint with the Secretary of Labor ("Secretary"), who is required to initiate a prompt investigation of the alleged violation. If the Secretary finds that the miner's complaint was "not frivolously brought," she must apply to the Federal Mine Safety and Health Review Commission ("Commission") for an order temporarily reinstating the miner to his job, pending a final order on the complaint. The Commission is required to grant such an order if it finds that the statutory standard has been met.

Although the Act does not require a hearing on the Secretary's application for temporary reinstatement, the Commission's regulations provide an opportunity for a hearing upon request of a mine operator, prior to the entry of a reinstatement order. See 29 C.F.R. § 2700.44(b) (1990). The scope of such a hearing

is limited to a determination by the Administrative Law Judge "as to whether the miner's complaint is frivolously brought," with the Secretary bearing the burden of proof on this standard.

#### Factual and Procedural Background

On February 7, 1992, the Secretary pursuant to Section 105(c)(2) of the Mine Act and Commission Rule 29 C.F.R. § 2700.44(a), filed an application for an order requiring Respondent, Santa Fe Pacific Gold Corporation ("Pacific Gold"), to temporarily reinstate Robert W. Buelke to his job as an electrician at Pacific Gold, Rabbit Creek Mine from which he was discharged July 1, 1991.

On August 6, 1991, Mr. Buelke filed his discrimination complaint with MSHA at the Reno field office. His complaint in part reads as follows:

- I. Have worked as a mine electrician approximately 15 years. Resume Attached.
- II. Have had numerous encounters with supervisors in trying to get electrical installations done correctly, or repaired correctly; have tried to get them taken care of "in house", written a couple of letters/reports of concern, and have been put down and fired mainly because of these -- see attached letter.

If you need any additional information, please feel free to contact me.

Thank you for your concern, time and consideration.

Sincerely,

/s/  
Robert W. Buelke

cc: Perry Tenbrink  
Ray Nicholson

The application for temporary reinstatement states that the Secretary has determined that the Respondent's discharge of Robert W. Buelke was motivated by his protected safety activity and that this constitutes an act of illegal discrimination which

provided the basis for a non-frivolous cause of action under Section 105(c)(2) of the Act. Attached to the application is an affidavit setting forth the factual basis for the Secretary's determination.

The affidavit reads as follows:

AFFIDAVIT

James E. Belcher, being duly sworn, deposes and states:

1. I am the Chief, Office of Technical Compliance and Investigation Division, Metal and Nonmetal Safety and Health.

2. I am responsible for reviewing discrimination complaints filed pursuant to the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). I have reviewed the special investigation file in the above-captioned case.

3. My review of the investigative file disclosed the following facts:

a. At all relevant times, Respondent, Santa Fe Pacific Gold Corporation, engaged in the production of gold and is therefore an operator within the meaning of Section 3(d) of the Mine Act;

b. At all relevant times, Applicant, Robert W. Buelke, was employed by Respondent as an electrician and was a miner as defined by Section 3(g) of the Mine Act;

c. Rabbit Creek Mine, located near Winnemucca, Humboldt County, Nevada, is a mine as defined by Section 3(h) of the Mine Act, the products of which affect interstate commerce;

d. The alleged act of discrimination occurred on July 1, 1991, when Applicant Robert W. Buelke was discharged by Perry Tenbrink, Maintenance Supervisor;

e. Applicant Buelke engaged in protected activity by making numerous safety com-

plaints to management concerning electrical equipment and by submitting letters to Mine Manager Michael Surratt on January 23, and May 13, 1991. The letters detailed safety complaints by Buelke concerning electrical equipment;

f. The letters concerning safety complaints were received with hostility. Buelke was told that he had no business writing letters to mine management. Buelke's supervisors became hostile in tone and work assignments after the letters were submitted;

g. On May 29, 1991, Buelke was given a step one disciplinary notice allegedly for failing to correct an electrical grounding problem in a timely manner.

h. The Respondent's articulated basis for the May 29, 1991, disciplinary action was pretextual.

i. On July 1, 1991, having been absent for one week due to legitimate illness, Buelke received three disciplinary notices for violation of the one hour rule which requires employees to call in sick at least one hour prior to the start of the shift.

j. Buelke suffered disparate treatment, as other employees violated the one hour rule and received no disciplinary action or less severe action.

4. In view of the foregoing facts, I have determined that the Applicant Robert W. Buelke was discharged for engaging in protected safety activity and the complaint filed by him is not frivolous.

/s/  
James E. Belcher

Taken, subscribed and sworn before me this  
3rd day of February, 1992.

Catherine L. Falarko  
Notary Public

### Stipulations

1. Jurisdiction of this action is conferred upon the Federal Mine Safety and Health Review Commission pursuant to Section 113 of the Act, 30 U.S.C. 823.

2. This action is brought by the Secretary of Labor (Secretary) pursuant to authority granted by Section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2).

3. The Administrative Law Judge has jurisdiction to hear and decide this matter.

4. At all relevant times hereinafter mentioned, Respondent Santa Fe Pacific Gold Corporation, a New Jersey corporation, authorized to do business in Nevada operated the Rabbit Creek Mine in the production of gold and is therefore an "operator" as defined by Section 3(d) of the Act, 30 U.S.C. 802(d).

5. Respondent's Rabbit Creek Mine, located in or near Winnemucca, Humboldt County, Nevada, is a surface metal mine, the products of which enter commerce within the meaning of Sections 3(b), 3(h), and 4 of the Act, 30 U.S.C. 802(b), 802(h), and 803.

6. At all relevant times, Complainant Robert W. Buelke, was employed by Respondent as an electrician and was a miner as defined by Section 3(g) of the Act, 30 U.S.C. 802(g).

7. Buelke was employed as an electrician at the Rabbit Creek Mine from June 6, 1990, until his discharge on July 1, 1991.

8. At all relevant times hereinafter mentioned, Perry Tenbrink was maintenance supervisor for the Respondent at the Rabbit Creek Mine and as such supervised miners employed at the mine. Mr. Buelke was discharged by maintenance supervisor Perry Tenbrink on July 1, 1991.

### Applicant's Evidence

Mr. Buelke testified that he was concerned about employee safety; that he made numerous safety complaints to management concerning electrical equipment. He wrote two letters detailing safety complaints, to the mine manager, Mr. Surratt. The first letter dated January 23, 1991, a memorandum with the heading Internal Correspondence, reads as follows:

Whereas I'm the only MSHA Electrician on the Rabbit Creek Mine Site, and not in a position to advise, design, or change many of the electrical installations here, I would appreciate your naming someone who is responsible and liable for all electrical installations, and operations. Under MSHA regulations, and being a card-ed MSHA electrician, I automatically become totally liable for all electrical installations, and operations should there be any violations of the codes or accidents, unless I have a written notice from you relieving me of this responsibility and specifically naming someone else.

Since this mine has been in operation for 6 months and turned over from the constractor to Rabbit Creek and we are now coming under full MSHA jurisdiction, I'm obligated as a MSHA electrician to shut down and tag out (until corrected) any electrical equipment that is in violation of the code and/or a safety hazard.

I would appreciate a reply before February 1, 1991 thereafter I will be obligated to carry out my duties.

Mr. Buelke's second letter, addressed to David Wolfe, the Head of the Safety Department, dated May 13, 1991 reads as follows:

Whereas it has been a very busy time since our last meeting, around the first of March, with off site schools, new used trucks, a new P&H shovel, and general maintenance on the rest of our fleet, I regret that I have not been able to get a list of electricial (sic) problem areas, to your attention, before this time. I have decided, due to my limited time available to research and verify each problem, that I will try to get a list of three problems to you each month, for you to get corrected or verified.

The following three items are submitted for your verification and corrective action this month:



1. The need for a static ground line on the 34,500 volt pit-shovel supply line for the following reasons:

- a. Common safety practice. (sic)
- b. Required by MSHA in all mines (metal or non-metal) and strictly enforced in the Midwest - even the iron mines.
- c. Falls under the N.E.C. Section 250 on grounding as high-lited on attached copies.

2. The need to correct the Main 375Kw/480v Pit Generator feed for the following reasons:

- a. The generator output leads have been changed and no longer meet code Section 445; high-lited.
- b. A second branch circuit is required to protect the 2/0 pump cable Section 240, high-lited.
- c. Pump must be additionally (separtly) (sic) grounded or cable must be provided with ground check monitor, Section 250.

3. The need to correct the new 4160/480 volt pit-pump transformer/distribution panel (located on the lower hopper level) for the following reasons:

- a. All service panels over 1000 amp must be protected with Ground Fault Interrupter breaker, Section 230 and 240, high-lited.
- b. A main disconnect means shall be provided on all service panels over 6 circuits (present 7 - and has additional spaces available), Section 230.

If you need any additional information, please feel free to contact me.

Thank you for your concern, time, and consideration.

Mr. Buelke also testified that his concern for employee safety from electrical hazards due to improper grounding of the substation, led him to tag out the substation on May 14, 1991, and again on May 20, 1991. He stated that the improper grounding could result in serious injury or death.

It is Applicant's position that Pacific Gold took adverse action against Mr. Buelke in the form of disciplinary notices and the July 1, 1991, discharge. On May 29, 1991, Mr. Buelke received a step-one disciplinary notice allegedly for failure to correct a grounding problem on the substation in a timely manner while time permitted. The electrical log book entries, and the testimony of Mr. Buelke and Mr. Brabank indicated that Mr. Buelke's actions were consistent with good practice and that Mr. Buelke acted diligently and responsibly with regard to the substation. The Applicant contends that the May 29, 1991, disciplinary notice was pretextual, and that Mr. Buelke was in fact punished for engaging in protected safety activity, including his previous safety complaints and tagging out the substation to ensure proper grounding on May 20, 1991.

Testimony was presented at the hearing that tended to show that Mr. Buelke has a good work record and has never been disciplined in any way prior to May 29, 1991, concerning performance of his duties. Mr. Buelke has on occasion been called out to perform electrical work that more senior electricians could not perform.

Mr. Buelke received three consecutive disciplinary notices on July 1, 1991, for failure to report off sick prior to one hour before the start of the shift, which allegedly formed the basis for his discharge. Mr. Buelke testified as to matters that appear to be mitigating circumstances. Evidence and arguments were presented to show that other employees violated the one hour rule and received no or less severe disciplinary action. The evidence shows that Mr. Buelke received the three disciplinary notices on the same day without any verbal warning or discussion, after returning from a legitimate illness of which the company was aware. The evidence indicated that Mr. Buelke had no history of lateness or absenteeism and had never been disciplined in any way for attendance problems prior to July 1, 1991, the date of his discharge.

Special Investigator David Brabank, Western District, MSHA, testified concerning the conduct of the 105(c) investigation, including the purpose and scope of the investigation. Mr. Brabank testified as to information he obtained with respect to disparate treatment in the enforcement of the one hour reporting

rule. Mr. Brabank testified as to why in his opinion, based on the special investigation, the complaint is non-frivolous.

#### Respondent's Position

Respondent's position broadly stated is that Mr. Buelke did not engage in protected activity and adverse actions taken against him were not motivated by that activity and in any event Mr. Buelke's job-related misconduct warranted the termination of his employment under company policies.

Respondent asserts that Mr. Buelke was properly discharged for receiving two or more disciplinary notices within 12 months in accordance with company policy.

#### Conclusion

At the conclusion of the hearing in this matter on February 27, 1992, after reviewing all the evidence and arguments presented, I ruled from the bench that the Secretary had made a sufficient showing and I granted the application for an Order of Temporary Reinstatement. I hereby affirm in writing the oral ruling made from the bench. The bench order orally issued February 27, 1992, was substantially as follows:

#### ORDER

My ruling in this matter is limited to the single issue of whether Mr. Buelke's application for temporary reinstatement is frivolously brought. I heard the testimony of only two witnesses, both presented by the Solicitor. I see no reason to doubt their credibility. Evaluated against the "not frivolously brought" standard, I conclude that the Secretary has made a sufficient showing of the elements of a complaint under Section 105(c) of the Act. Therefore, the application for an Order of Temporary Reinstatement of Robert W. Buelke is **GRANTED**.

Respondent is **ORDERED** to immediately reinstate Mr. Buelke to his position as electrician from which position he was discharged, at the same rate of pay, and with the same or equivalent duties assigned to him immediately prior to his discharge.

As previously stated the scope of this temporary reinstatement hearing is limited to my determination as to whether Mr. Buelke's discrimination complaint is frivolously brought. The Respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits

of the discrimination complaint filed. The parties will be notified as to the time and place of any hearing requested on the discrimination complaint.

-   
August F. Cetti  
Administrative Law Judge

Distribution:

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sh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 11 1992**

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

v.

CONSOLIDATION COAL COMPANY,  
Respondent

: CIVIL PENALTY PROCEEDINGS  
:  
:  
: Docket No. WEVA 91-303  
: A. C. No. 46-01453-03949  
:  
:  
: Docket No. WEVA 91-353  
: A. C. No. 46-01453-03950  
:  
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: Docket No. WEVA 91-1028  
: A. C. No. 46-01453-03953  
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:  
: Humphrey No. 7 Mine  
:  
:  
: Docket No. WEVA 91-305  
: A. C. No. 46-01436-03840  
:  
:  
: Shoemaker Mine  
:  
:  
: Docket No. WEVA 91-1033  
: A. C. No. 46-01867-03886  
:  
:  
: Blacksville No. 1 Mine

**DECISION**

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for the Petitioner;  
Walter J. Scheller, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for the  
Respondent.

Before: Judge Maurer

At the hearing of these cases, which was held on November 13 and 14, 1991, in Morgantown, West Virginia, the parties jointly moved for approval of their settlement of certain portions of the captioned matters. And subsequently, the Secretary on January 16, 1992, filed a Motion to Approve Settlement in Docket No. WEVA 91-1033 in its entirety.

Docket No. WEVA 91-303 involves a single section 104(d)(2) order, Order No. 3314158. An oral motion was presented on the record requesting approval of a reduction in the proposed civil

penalty from \$1000 to \$900, and a request to modify the order to a section 104(a) citation as well as reducing the negligence factor to "moderate." I granted the motion on the record.

Docket No. WEVA 91-305 involves a single section 104(a) citation, Citation No. 3327217. Respondent agreed to pay the full amount of the proposed civil penalty, i.e., \$311. I granted the motion to approve settlement on the record.

Docket No. WEVA 91-1028 involves two section 104(a) citations, Citation Nos. 3308260 and 3307302. An oral motion was presented on the record requesting approval of a reduction in the civil penalty proposed for each citation from \$259 to \$155 as well as modification of each of the citations to nonsignificant and substantial violations. I granted the motion on the record.

Docket No. WEVA 91-353 involves six section 104(a) citations, Nos. 3308250, 3327724, 3308251, 3307317, 3307306, and 3327732. At the hearing, settlement motions were presented with regard to five of these six. In regard to Citation No. 3308250, a motion was made requesting approval of a reduction in the civil penalty from \$259 to \$155 and modification to a nonsignificant and substantial violation. With regard to Citation No. 3327724, respondent agreed to pay the full amount of the proposed civil penalty, \$192. A motion was made concerning Citation Nos. 3308251 and 3307317, requesting approval of a reduction in the civil penalty proposed for each citation from \$259 to \$155 as well as modification of each of the citations to nonsignificant and substantial violations. In regard to Citation No. 3307306, a motion was made requesting approval of the respondent's agreement to pay \$192 of the proposed penalty of \$259 as well as requesting an order modifying the citation to reflect a "low" degree of negligence on the part of respondent. I granted the motions concerning these five citations on the record. Citation No. 3327732 remained for trial, and in that regard, the operator stipulated to the fact of violation, but disputes the "S&S" finding and of course, the assessed penalty.

At hearing, there were two citations and an order still in dispute. As noted previously, in Docket No. WEVA 91-353, section 104(a) Citation No. 3327732 remained in dispute and in Docket No. WEVA 91-1033, section 104(d)(2) Order No. 3314086 and section 104(a) Citation No. 3314087 remained in dispute. Testimony was heard in regard to each of these on November 13 and 14, 1991. Following the conclusion of the testimony on November 14, respondent had not yet fully presented its defense for the two violations at issue in Docket No. WEVA 91-1033. Accordingly, it was agreed that the parties would reconvene in Morgantown, West Virginia, on December 17, 1991, for the conclusion of the evidence in Docket No. WEVA 91-1033. However, prior to that date, the parties reached an agreement in regard to each of the violations at issue in Docket No. WEVA 91-1033. A written Motion

to Approve Settlement was filed with the undersigned administrative law judge. In regard to Order No. 3314086, the motion requested approval of respondent's agreement to pay \$276 of the proposed penalty of \$1100 as well as requesting modification of the order to a section 104(a) citation as well as indicating that the violation was the result of a "moderate" degree of negligence on the part of the respondent. With regard to Citation No. 3314087, the motion requested the entry of an order vacating the citation. Based on the Secretary's representations, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act. The terms of this settlement agreement as well as those entered onto the record at the hearing will be incorporated into my order at the end of this decision.

Both parties have filed post-hearing proposed findings and conclusions and/or briefs, which I have considered along with the entire record in making the following decision.

#### FINDINGS OF FACT

1. Citation No. 3327732 alleges a violation of the regulatory standard found at 30 C.F.R. § 75.605 and charges as follows:

A strain clamp was not provided to prevent strain on the No. 6 A.W.G. trailing cables for the 5 southwest section (043) battery charger.

2. MSHA Coal Mine Inspector, (Electrical) Roy Jones issued Citation No. 3327732 to the respondent on November 20, 1990, while conducting a regular electrical inspection of respondent's Humphrey No. 7 Mine. On that date, he had observed that there was no strain clamp on a trailing cable for a battery charger.

3. Respondent does not contest the fact that the violation of the cited mandatory standard as described in Citation No. 3327732 existed at that time. The cable admittedly was not properly clamped, but respondent submits that the violation was nonetheless improperly designated "S&S."

4. The trailing cable in question was suspended from the mine roof on insulated "J" hooks, and extended from the battery charger to the power center, a distance of approximately 100 to 150 feet. It was arguably subject to being pulled down by a scoop car that would of necessity travel under it on a regular basis, i.e., once or twice every shift. However, only 15 feet of the cable, the width of a heading, would ever be exposed to the scoop, if it could be reached.

5. The height of the entry was approximately 7 to 7 1/2 feet and the scoop was approximately 4 1/2 feet high. Mr. Radabough, a maintenance foreman, credibly testified that in his opinion it would be unlikely for the scoop to catch that cable, although he acknowledges the possibility. Inspector Jones, on the other hand, testified that he was not aware of the clearance existing for the scoop from the roof in the area where it could potentially pull the cable (Tr. 58-59). This is a significant omission in the chain of analysis regarding the reasonable likelihood of the cable being pulled down in the first instance.

6. A strain clamp is most important on equipment that is actually in motion, that is mobile equipment which is in frequent motion and which drags its trailing cable behind it. This is so because the purpose of the strain clamp is to protect the cable and electrical connections from damage should the cable be jerked or suddenly pulled.

7. A battery charger is mounted on skids and not moved on a daily or even weekly basis. Rather the charger is moved only once or twice per month. Furthermore, the cable is not pulled or dragged behind the battery charger.

8. There was a box connector installed where the cable entered the metal frame of the battery charger which provided protection for the jacketing of the cable where it enters the frame and also provided some strain relief on the cable.

#### DISCUSSION AND FURTHER FINDINGS

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 reasonable serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety contributed to by the



violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

The Secretary's position is that if the cable should be pulled down by the scoop, the absence of a strain clamp on the cable at the battery charger could result in insulated wires becoming exposed. Inspector Jones explained that power conductors are normally inside the housing of the battery charger and therefore are not subject to contact with any surface which may conduct an electric current. However, in the absence of a strain clamp, the cable can be pulled outside the housing, and the power conductors could become exposed. This sequence of events could possibly shock a miner who might inadvertently touch the exposed power conductors or the metal guard surrounding the battery charger. If an exposed wire should come into contact with the metal housing in such a fashion, an electric current, i.e., amperage, would be conducted onto the frame of the battery charger. An individual would be potentially exposed to as much as 15 amps of electric current were he to come into contact with the exposed conductors or the energized frame of the battery charger. This in turn could produce a serious electric shock injury or even an electrocution.

The weakness in the Secretary's analysis is, however, that the likelihood of the scoop pulling down a cable 2 1/2 feet above it and to which it is exposed for only a distance of 15 feet once or twice per shift is not a reasonably likely event. Yet it is a precondition to all that follows in the Secretary's above scenario which culminates in the miner's injury or death due to electric shock.

Additionally, even the inspector concedes that the box connector which was installed would supply some strain relief to the battery charger cable in the absence of the required strain clamp.

Accordingly, on the basis of the foregoing findings and conclusions, I find the violation alleged in Citation No. 3327732 to be nonsignificant and substantial. Citation No. 3327732, as so modified, will be affirmed herein.

I also find that the violation occurred as a result of the "moderate" negligence of the respondent because there was no recordation of this condition in the weekly electrical examination records and it is most likely that there was never a strain clamp installed for this cable on this particular battery charger.

Considering the statutory criteria contained in section 110(i) of the Mine Act, I find and conclude that a civil penalty of \$50 for the admitted violation is appropriate and will be ordered herein.

#### ORDER

It is hereby **ORDERED** that:

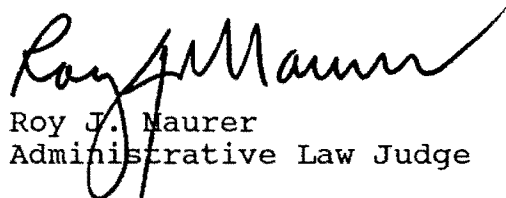
1. Citation Nos. 3327724, 3307306 (modified to reflect "low" negligence), and 3327217 **ARE AFFIRMED**.

2. Citation No. 3314087 **IS VACATED**.

3. Citation Nos. 3308250, 3308251, 3307317, 3327732, 3308260, and 3307302 **ARE MODIFIED** to delete the "significant and substantial" (S&S) finding, and as so modified, **ARE AFFIRMED**.

4. Order Nos. 3314158 and 3314086 **ARE MODIFIED** to citations issued pursuant to section 104(a) of the Mine Act with negligence factors reduced to "moderate" in each, and as so modified, **ARE AFFIRMED**.

5. Respondent, Consolidation Coal Company, **IS ORDERED TO PAY** civil penalties in the amount of \$2,696 within 30 days of the date of this decision, for the violations found herein.

  
Roy J. Maurer  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 18 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 91-1231
Petitioner	:	A.C. No. 15-14074-03587
v.	:	
	:	Martwick Underground Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act," to challenge four citations issued by the Secretary of Labor against the Peabody Coal Company (Peabody) for alleged violations of regulatory standards. The general issue before me is whether Peabody violated the cited regulatory standards as alleged, and, if so, what is the appropriate civil penalty. Three of these four citations were the subject of a posthearing settlement motion in which a reduction in penalties from \$472 to \$394 was proposed. Considering the representations and documentation submitted, I find that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act and an order directing payment will be incorporated in this decision.

The one citation remaining at issue, Citation No. 3419837, as amended at hearing, alleges a violation of the mandatory standard at 30 C.F.R. § 75.301 and charges that "[o]nly 6,750 cubic feet a minute of air was reaching the last open crosscut between Nos. 1 and 2 Rooms (intake to return) in rooms left off northeast entries off four east panel off southwestern submain entries (ID 004)." The cited standard provides in relevant part that "[t]he minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute . . . ."

The essential facts are not in dispute. Federal Mine Safety and Health Administration (MSHA) ventilation specialist Lewis Stanley obtained an air reading during the course of an inspection of the subject mine in the area he determined to be the last open crosscut between the No. 1 and the No. 2 rooms. It is undisputed that the quantity of air at that location was then only 6,750 cubic feet per minute (CFM). It is further undisputed that if Inspector Stanley measured the air at the correct location then Respondent failed to provide the prescribed minimum of 9,000 CFM and there was a violation of 30 C.F.R. § 75.301 as charged. Respondent maintains however, that Inspector Stanley did not measure the air at the correct location in that he did not take his reading at the "last open crosscut."

In Secretary of Labor v. Peabody Coal Company, 11 FMSHRC 4, (1989), the Commission stated in regard to the term "last open crosscut" that:

Although "last open crosscut" is not defined in the Mine Act or the Secretary's regulations, the Act and regulations contain repeated references to the term. [Footnote reference omitted.] As noted, a "crosscut" is a passageway or opening driven across entries for ventilation and haulage purposes. In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine. [Footnote reference omitted.] The last open crosscut "is an area rather than a point or line . . . ." Henry Clay Mining Co., 3 IBMA 360, 361 (1974).

At hearing, Inspector Stanley provided expert testimony that the crosscut labeled "location of bolter" on Joint Exhibit No. 1 (Appendix A) was the "last open crosscut." Peabody argues however, that since this crosscut was then being roof-bolted and the roof-bolting machine was situated in and partially obstructing that crosscut it was not "open" and therefore could not have been the "last open crosscut." Clearly, however, within the scope of the above definition the concept of "open" in the phrase "open crosscut" refers to the point at which the crosscut is cut through in its total width to complete a passageway between entries. In this regard, I accept the definition provided by the MSHA expert testimony. A definition such as proffered by Peabody depending upon whether mining equipment such as a roof bolter may be within the crosscut at a particular moment would completely void the purpose of the ventilation requirements here cited and indeed is without any legal or rational foundation. Peabody's contention is accordingly rejected.

I also reject Peabody's contention that the violation was not proven because the inspector failed to take his air reading

within the area he defined as the "last open crosscut." It is not disputed that the specific point at which the inspector obtained his reading provided the same reading as if it was actually taken within the last open crosscut. He was apparently unable to take a reading within the crosscut because of the position of the roof bolter. The evidence is clearly sufficient therefore from which it may reasonably be inferred that the quantity of air in the last open crosscut was deficient as charged.

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 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of 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'd 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria)). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1986))."

Inspector Stanley testified without contradiction that the subject mine liberates methane and that adequate ventilation is accordingly necessary to remove and/or dilute such methane. He cited a number of ignition sources in the cited set of rooms including the roof bolter within the last open crosscut. It was his expert opinion that a resulting explosion or ignition could result in burn injuries or fatalities. It may reasonably be inferred from this evidence that the violation was "significant and substantial" and serious. I further find the operator chargeable with but little negligence in light of the dearth of

evidence in this regard. Under the circumstances and considering the criteria under section 110(i) I find that a civil penalty of \$200 is appropriate.

ORDER

Peabody Coal Company is hereby directed to pay civil penalties of \$594 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge

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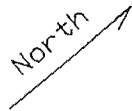
W. F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

David R. Joest, Esq., Midwest Division Counsel, Peabody Coal Company, 1951 Barrett Court, P.O. Box 1990, Henderson, KY 42420-1990 (Certified Mail)

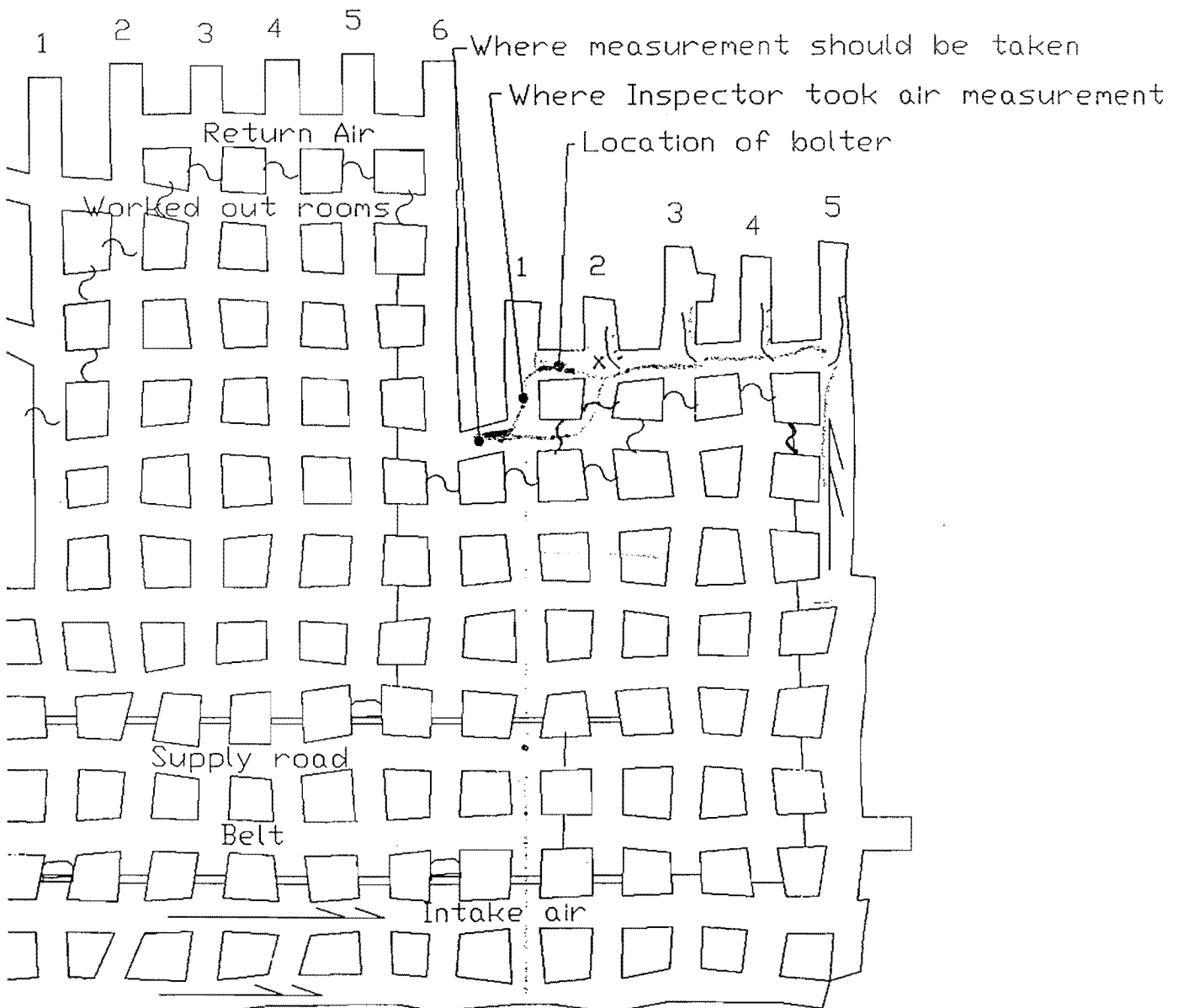
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APPENDIX A

MARTWICK  
UNIT 4  
4/29/91



Citation No. 3419837  
L. Stanley  
104-a S&S



Joint Exhibit  
No. 1

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 19 1992**

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

CONSOLIDATION COAL COMPANY,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 91-1600  
A.C. No. 46-01453-03960

Humphrey No. 7 Mine

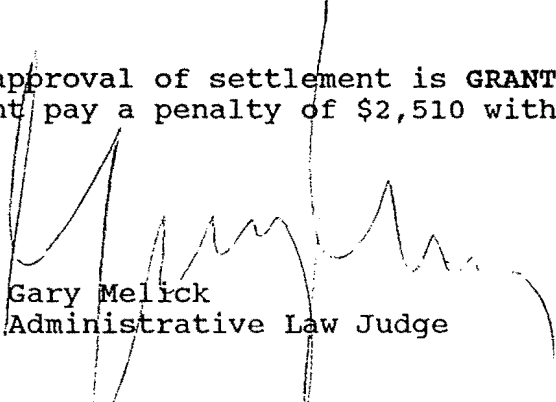
**DECISION APPROVING SETTLEMENT**

Appearances: Caryl L. Casden, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, Virginia,  
for Petitioner;  
Walter J. Scheller III, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania for  
Respondent.

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 Petitioner sought to vacate Citation No. 3316065 for insufficient evidence and filed a motion to approve a settlement agreement as to the remaining citations. A reduction in penalty from \$2,638 to \$2,510 has been proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$2,510 within 30 days of this order.

  
Gary Melick  
Administrative Law Judge

Distribution:

Caryl L. Casden, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241-1421 (Certified Mail)



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 19 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-1601
Petitioner	:	A.C. No. 46-01453-03961
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

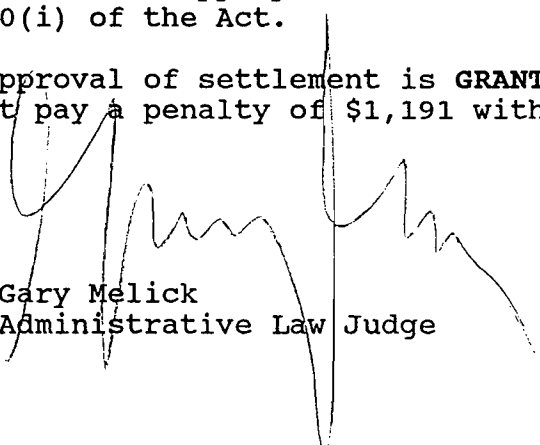
**DECISION APPROVING SETTLEMENT**

Appearances: Caryl L. Casden, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, Virginia,  
for Petitioner;  
Walter J. Scheller III, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania for  
Respondent.

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 hearings and following hearings Petitioner filed motions to approve settlement agreements and to dismiss the case. A reduction in penalty from \$1,295 to \$1,191 has been proposed. I have considered the evidence, representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

**WHEREFORE**, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$1,191 within 30 days of this order.

  
Gary Melick  
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 20 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 91-1045
Petitioner	:	A.C. No. 36-04281-03732
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Caryl Casden, Esq., and H. P. Baker, Esq., (on the Brief), Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;  
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act," charging the Consolidation Coal Company (Consol) with one alleged violation of the mandatory standard at 30 C.F.R. § 75.1103-4. Five other citations in this case were the subject of a partial settlement decision issued November 27, 1991. The general issue before me is whether Consol violated the cited regulatory standard as alleged, and, if so, what is the appropriate civil penalty to be assessed.

The citation at bar, No. 3468340, charges as follows:

The petition for modification Docket No. M-86-49-C dated December 5, 1986, for the carbon monoxide system at the mine was not being used as described. In that under Item No. 5 of the petition the audible and visual alarm was not sent to a surface location where a responsible person was on duty at all times. The hard line phone system used between the master command center in Moundsville, West Virginia, and Dilworth Mine was inoperable. There was no alarm system that is continuously manned on the surface of Dilworth Mine.

It is undisputed that on the date of the alleged violation, January 30, 1991, Respondent then had in place a point-type fire detection system meeting the requirements of the cited mandatory standard. It is the Secretary's position however, that in light of her approval of a petition for modification of the cited mandatory safety standard pursuant to section 101(c) of the Act (permitting the use under certain circumstances of a carbon monoxide fire detection system with audio and visual alarms connected to a monitored surface location) Consol was required to comply not with the cited standard but with the terms of the approved petition for modification.<sup>1/</sup>

Consol maintains on the other hand that by its own specific terms the approved petition for modification is inapplicable to the case at bar. For the reasons that follow, I find that the approved petition is indeed inapplicable hereto and that since Consol was in compliance with the cited standard there was in fact no violation.

The approved petition for modification at issue provides that "a low-level carbon monoxide [early warning fire detection] system shall be installed in all belt entries utilized as intake

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<sup>1/</sup> Section 101(c) of the Act provides as follows:

"Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of Title 5 of the United States Code."

air-courses" (Government Exhibit No. 4). From this unambiguous language it is clear that only those belt entries utilized as intake air courses are to be governed by the approved petition. Since it is undisputed that none of the belt entries were being utilized as intake air courses, the approved petition for modification is clearly inapplicable. Since it is further undisputed that Consol continued to utilize the point-type sensor fire detection system required by 30 C.F.R. § 75.1103-4, and that the system was fully operational on the date of the citation, there was no violation.

Under the circumstances it is not necessary to reach the question of whether the approved petition for modification superseded the cited mandatory standard.

ORDER

Citation No. 3468340 is hereby vacated.



Gary Melick  
Administrative Law Judge

Distribution:

Caryl Casden, Esq., and H. P. Baker, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

/fb

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 24, 1992

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 91-228-R
v.	:	Citation No. 3315561; 2/20/91
	:	
	:	Arkwright No. 1 Mine
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 46-01452
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-1832
Petitioner	:	A. C. No. 46-01453-03788
	:	
v.	:	Arkwright No. 1 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

## DECISION

**Appearances:** Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant-Respondent;  
Charles M. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent-Petitioner.

**Before:** Judge Merlin

This case is a petition for the assessment of five civil penalties and a notice of contest corresponding to one of the penalties. The contest case was filed by the operator under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The penalty petition was filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Act, 30 U.S.C. § 820. The case came on for hearing on March 10, 1992.

### Citation No. 3315928 and Citation No. 3315561

Citation No. 3315928 was issued for a violation of 30 C.F.R. § 75.316 because the man door in the stopping was bound and the bottom frame was bent, resulting in the door standing open a couple of inches and air was passing from the track into the fresh air escapeway. The alleged violation was designated by the inspector as significant and substantial.

Citation No. 3315561 was also issued for a violation of 30 C.F.R. § 75.316 because the stopping between the track entry and fresh air escapeway on the 11 left section had a  $\frac{1}{2}$  block hole and air was passing from the track entry into the fresh air escapeway. This citation is the subject of a notice of contest case Docket No. WEVA 91-228-R.

The inspector testified first with respect to Citation No. 3315928. He set forth his position regarding the existence of a violation and why it was significant and substantial. The inspector exhibited great confusion over the meaning of significant and substantial. At the conclusion of the inspector's direct testimony the parties advised that they wished to settle this citation on the basis that the significant and substantial designation be deleted and that the penalty be assessed at \$128. The settlement was approved on the record.

At the same time the parties also moved to settle Citation No. 3315561 on the same basis that the significant and substantial designation be deleted. The proposed settlement in this matter was \$94 and it, too, was approved from the bench.

#### Citation No. 3315933

This citation was issued for an alleged violation of 30 C.F.R. § 75.904 because the circuit breaker which provided protection for the main South No. 2 belt drive was not marked for identification. The inspector testified with respect to the existence of a violation and why it was significant and substantial. Once again, the inspector was confused and unclear with respect to significant and substantial. At one point he stated there was no reasonable likelihood of injury. After direct and cross examination, the parties agreed to settle the case on the basis that the significant and substantial designation be deleted and that I set an appropriate penalty amount. The proposed settlement was accepted on the record and I assessed a penalty in accordance with the criteria in Section 110(i) of the Act, in the amount of \$94.

#### Citation Nos. 3315935 and 3315510

Citation No. 3315935 was issued for a violation of 30 C.F.R. § 75.807. The 4160 high voltage transmission cable, which provides power to the main South No. 1 belt drive transformer, was laying on the mine floor and there was considerable head coal and rib sloughage on the cable. Citation No. 3315510 was issued for a violation of 30 C.F.R. § 75.1100-2(b) because a distance of 540 feet existed between consecutive fire hose outlets between No. 62 and No. 68 block along the main Butts No. 2 conveyor belts.

Prior to going on the record, the parties agreed to settle these citations on the basis that the significant and substantial designations be deleted for both citations, that a penalty of \$128 be assessed for Citation No. 3315935 and that a penalty of

\$94 be assessed for Citation No. 3315510. The proposed settlements were approved from the bench.

**ORDERS**

In light of the foregoing, the recommended settlements are **APPROVED** and the operator is **ORDERED TO PAY** the following amounts within 30 days from the date of this decision.

<u>Citation No.</u>	<u>Amount</u>
3315928	\$128.00
3315561	\$ 94.00
3315933	\$ 94.00
3315935	\$128.00
3315510	\$ 94.00
<b>Total</b>	<b>\$538.00</b>



Paul Merlin  
Chief Administrative Law Judge

**Distribution:**

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Mr. William White, UMWA, Rt. 1 Box 154B5, Bruceton Mills, WV 26525 (Certified Mail)

Richard G. High, Jr., Director, Office of Assessments, MSHA, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

/gl

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 24, 1992

<b>CONSOLIDATION COAL COMPANY,</b>	:	<b>CONTEST PROCEEDING</b>
Contestant	:	
	:	Docket No. WEVA 91-247-R
v.	:	Citation No. 3315776; 2/26/91
	:	
	:	Blacksville No. 1 Mine
	:	
<b>SECRETARY OF LABOR,</b>	:	
MINE SAFETY AND HEALTH	:	Mine ID 46-01867
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
<b>SECRETARY OF LABOR,</b>	:	<b>CIVIL PENALTY PROCEEDINGS</b>
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-1553
Petitioner	:	A. C. No. 46-01453-03788
	:	
v.	:	Humphrey No. 7 Mine
	:	
<b>CONSOLIDATION COAL COMPANY,</b>	:	
Respondent	:	Docket No. WEVA 91-2022
	:	A. C. No. 46-01867-03909
	:	
	:	Docket No. WEVA 92-146
	:	A. C. No. 46-01867-03912
	:	
	:	Blacksville No. 1 Mine

**DECISION**

**Appearances:** Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant-Respondent;  
Charles M. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Respondent-Petitioner.

**Before:** Judge Merlin

When the above-captioned cases came on for hearing on March 9, 1992, counsel for both parties advised that settlements had been reached. With permission of the bench these settlements were placed upon the record. Other cases scheduled for hearing at the same time were heard on the merits.

**WEVA 91-1553**

This case involved two violations which were originally assessed at \$518 and the proposed settlement was for \$414.



Citation No. 3307921 was issued for a violation of 30 C.F.R. § 75.220 because the main haulage entry was in excess of 20 feet wide and was not supported as required by the approved roof control plan. The proposed settlement modified the citation to reflect that the violation was not significant and substantial. The originally assessed penalty was \$259 and the proposed settlement was \$155. The Solicitor represented that the reduction and modification were warranted because gravity was less than originally thought. According to the Solicitor, the roof in the area cited was not in poor condition. The foregoing representations were accepted from the bench and the proposed settlement was approved.

Citation No. 3328103 was issued for a violation of 30 C.F.R. § 75.518 because the water pump did not have adequate overload protection. The operator has agreed to pay the originally assessed penalty for this violation. The circumstances of this violation were explained and I accepted the proffered amount from the bench.

#### **WEVA 91-2022**

Citation No. 3307720 was issued for a violation of 30 C.F.R. § 50.10 because the operator failed to immediately report a fire that occurred in the surface slack silo during silo cleaning operations by an independent contractor. The originally assessed penalty was \$500 and the proposed settlement was \$200. The Solicitor represented that the penalty reduction was warranted because negligence was less than originally thought. The Solicitor advised that there was some confusion by the independent contractor and the operator as to whether the incident was a mine fire reportable under the regulations. Therefore, the Solicitor stated that the negligence should be modified from high to moderate. The foregoing representations were accepted from the bench and the proposed settlement was approved.

#### **WEVA 92-146 and WEVA 91-247-R**

These cases are a petition for the assessment of a civil penalty and a corresponding notice of contest. Citation No. 3315776 was issued for a violation of 30 C.F.R. § 75.303. An inadequate pre-shift examination allegedly was conducted on the P-8 longwall supply track because an obvious hazardous condition existed and was not reported. The Solicitor moved to vacate the citation on the ground he would be unable to establish that the hazardous condition existed at the time of the pre-shift. The foregoing representations were accepted from the bench and the motion to vacate was approved and the cases dismissed.

## ORDERS

In light of the foregoing the recommended settlements are **APPROVED**.

It is **ORDERED** that Citation No. 3307921 be **MODIFIED** to delete the significant and substantial designation and the operator **PAY** \$414 within 30 days of the date of this decision.

It is further **ORDERED** that Citation No. 3307720 be **MODIFIED** to reflect the operator's negligence as moderate and the operator **PAY** \$200 within 30 days of the date of this decision.

It is further **ORDERED** that Citation No. 3315776 be **VACATED** and that Docket Nos. WEVA 91-247-R and WEVA 92-146 be **DISMISSED**.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin  
Chief 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

**MAR 26 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-119-M
Petitioner	:	A.C. No. 20-02849-05501
v.	:	
	:	Aggregate Pit
YERINGTON LEASING COMPANY,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**

Appearances: Susan J. Bissegger, Esq., Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois, for  
the Petitioner;  
Mr. John S. Yerington III, President, Yerington  
Leasing Company, St. Joseph, Michigan, for the  
Respondent.

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). Following hearings, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Petitioner now moves to vacate Citation Nos. 3618778, 3618779 and 3618780 for insufficient evidence and Respondent agrees to pay the proposed penalty for the remaining citations of \$80 in full. 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 \$80 within 30 days of this order.

  
Gary Melick  
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 26 1992

EAGLE NEST, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 92-729-R
	:	Citation No. 3754287; 3/2/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	East Nest Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	

## DECISION

Appearances: David J. Hardy, Esq., Jackson and Kelly,  
Charleston, West Virginia, for Contestant;  
Pamela Silverman, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, Virginia,  
for Respondent.

Before: Judge Weisberger

This case is before me upon based upon a Notice of Contest filed by the Operator on March 5, 1992, challenging the issuance of Citation No. 3754287 which alleges a violation of 30 C.F.R. § 75.1002.<sup>1</sup> On the same date, the Operator filed a Motion for Expedited Proceedings. In telephone conference calls on March 5 and 6, 1992, counsel for the Operator presented argument in favor of the Motion, and counsel for the Secretary presented argument in opposition to the Motion. The Motion was granted, and the case was scheduled for hearing on March 12, 1992 in Charleston, West Virginia and was heard on that date. At the hearing, Ronald Lorrison, Thomas Hager, and Steve Alexander testified for the Operator. Ernest H. Thompson and Ernest Sheppard testified for the Secretary. The parties waived their right to submit written post hearing briefs, and in lieu thereof presented oral argument. The Secretary, in addition, filed a written argument on March 17, 1992, and the Operator filed a response to this argument on March 18, 1992.

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<sup>1</sup>The Secretary filed an Answer on March 12, 1992.

## FINDING OF FACT AND DISCUSSION

### I. Violation of 30 C.F.R. § 75.1002

On February 19, 1992, longwall mining had commenced in the E-Panel at the Operator's Eagle Nest Mine. In general, as longwall mining proceeds, a gob area is built up behind (inby) the longwall face. In the E-Panel immediately inby the gob (mined-out areas), the Operator located a set up entry wherein various equipment to develop a future longwall panel was stored. Immediately inby this entry, a bleeder entry vented gases from the gob to the return entries, and then out of the mine. An intake entry, containing trolley wires and tracks, was located immediately inby the bleeder entry, and was separated from the bleeder entry by a double row of cement blocks, each row consisting of blocks 8 inches x 8 inches x 16 inches. On February 24, 1992, as part of the normal longwall mining process, the first roof fall in the gob area occurred.

On February 27, 1992, the entry containing the trolley tracks and wires was inspected by MSHA Inspector Ernest Thompson. The trolley wires were 108 feet from the inby end of the set-up entry, but were approximately 350 feet from longwall face.

Thompson issued a Citation alleging a violation of 30 C.F.R. § 75.1002 which, as pertinent, provides that trolley wires "...shall be kept 150 feet from pilar workings". (emphasis added). The initial issue for resolution is whether the term "pilar workings", encompasses the gob or mined out area or, whether it means the longwall face.

The term "pilar workings", as set forth in Section 75.1002, *supra*, is not defined in Volume 30 of the Code of Federal Regulations. Section 75.1002, *supra*, sets forth the statutory provision found at Section 310(c) of the Federal Mine Safety and Health Act of 1977 (P.L. 95-164, "the 1977 Act", and, its predecessor, Section 310(c) of the Federal Coal Mine Health and Safety Act of 1969, (P.L. 91-173, "the 1969 Act"). Neither the 1969 Act, nor the 1977 Act contains any definition of the term "pilar workings". Neither is that term defined in A Dictionary of Mining, Mineral, and Related Terms (U.S. Department of the Interior, 1968). Hence, in analyzing the scope to be accorded the term "pilar workings", emphasis is placed on the Congressional intent behind the enactment of Section 310(c), *supra*.

The only indication of any Congressional intent with regard to Section 310(c) *supra*, consists of the following language contained in the Section-by-Section analysis of the Senate

version of the 1969 Act "This Section<sup>2</sup> requires that ...trolley wires...be kept at least 150 feet from pillar workings...because the ventilating current may contain explosive mixtures of gas. Also, pillar falls may damage and cause short circuits in the cables and transformers." (S. Rep. No. 91-411, 91st, Cong., 1st Sess. 77, reprinted in Legislative History Federal Coal Mine Health and Safety Act, at 77) Since the gob area of a longwall panel can liberate gas, and can cause a "sudden outrush of air" (Tr. 147) when the gob roof falls, even after the first fall, it would appear that Congress, in enacting Section 75.1002 supra, intended to minimize the hazard of gob gases being forced over trolley wires, a source of ignition (See, Consolidation Coal Company, 4 FMSHRC 2153, 2161 (1982), petition for discretionary review denied (January 14, 1983), wherein Judge Broderick, in analyzing whether the measurement of the distance to certain non-permissible equipment should be taken from the outby corner of the pillar being mined, or from the actual place of the cut, set forth as follows with regard to Section 75.1102 supra: "The hazard which the standard is designed to prevent is an ignition or explosion which could result from methane being forced back over electrical equipment which may arc."

Thomas Hager, the Operator's mine foreman, and Steve Alexander, underground superintendent at Eagle Nest, both of whom have more than 20 years experience each in the mining industry, testified, in essence, that the term "pillar workings" means the area where coal is being extracted i.e., the longwall face. Also, in support of its position herein, the Operator relies on the Secretary's Program Policy Manual, Volume V, Part 75, wherein, under the heading 75.1002-1, location of other electric equipment; requirements for permissibility, the following language is set forth: "In longwall mining, the 150-foot distance shall be measured in a straight line from the wire, cable or electric equipment in question to the outby edge of the longwall roof-support system." It was not controverted that this language contemplates that the measurement be taken from the longwall face.

The Program Policy Manual, supra, does not explicitly defined the term "pillar workings". Further, to the extent that the Program Policy Manual supra, is inconsistent with the expressed Congressional intent behind the enactment of Section 310(c), supra, I accord more weight to the latter with regard to the scope to be accorded the term "pillar workings". Also, I have considered the definitions of the term "pillar workings", as provided by Hager and Alexander. Although they each have extensive mining experience, they did not explicitly testify as to the common usage of that term in the industry. Instead, it

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<sup>2</sup>In the Senate version of the 1969 Act, the statutory provision at issue was set forth as Section 211(c).

appears that their definitions of "pillar workings" were based on what the term meant to them. In contrast, I place more weight on the testimony of Ernest Sheppard an MSHA Ventilation Specialist who indicated that, in his experience mining prior to MSHA, and during the time he has worked for MSHA, he has not known the term "pillar workings" to exclude the gob area. (Tr.270)

Hence, for all the above reasons I conclude that the Operator violated Section 75.1002 supra, inasmuch as the trolley wires were located less than 150 from the set-up entry which is immediately inby the gob area which is part of the "pillar workings."

## II. Significant and Substantial

The Citation herein alleges that the violation is significant and substantial. In Southern Ohio Coal Company, 13 FMSHRC 912, (1991), the Commission reiterated the elements required to establish a significant and substantial violation as follows:

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. 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 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of 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 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which

there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917).

With regard with the first element, I find that a violation Section 75.1002 supra has been established. Also, as discussed above, infra, the presence of trolley wires 108 feet from the gob contributed to the hazard of an explosion, inasmuch as the trolley wires, an ignition source, could have come in contact with gob gas. However, the record fails to establish the third element set forth in Mathies, supra, i.e. a reasonable likelihood that the hazard contributed to would result in an injury, as it has not been established that there was a "reasonable likelihood" that the hazard contributed to would result in an event in which there is injury", U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

Hager, on cross examination, agreed with Thompson that the trolley wires are an ignition source. Readings taken by Thompson with an MX270 Methane Tester on February 27, 1992, did not reveal the presence of methane. Samples taken at two evaluation points on February 27, indicated the presence of 1/100th of one percent and 1/10th of one percent of methane, and, at the latter location, 8,706 cubic feet of methane in 24 hours. The amount of methane produced was not within the explosive range, and was considered by Thompson to be "not high", (Tr. 173), but the positive readings indicated to him that the gob area was liberating methane. However, the area that the evaluation points were located in was approximately three crosscuts removed from the track entry in question, and separated by stoppings from that entry. Also, any methane present at the evaluation points would go directly into the return and be vented out of the mine.

Of more significance is the fact that any hazard of a gas explosion occasioned by the location of the trolley wires, is minimized by the presence of a double row of cement block stoppings, 8 inches x 8 inches x 16 inches, between the bleeder entry and the trolley track entry. Although Thompson performed a smoke test which showed air going from the bleeder to the track through four stoppings on March 3 and 4, and observed a hole 6 inches by 6 inches between the rib and one of the stoppings, there is insufficient evidence to base a conclusion that these conditions had existed on February 27, the date of the original citation. Indeed, Thompson indicated that he did not check the stoppings on that date. Also, according to Hager, smoke readings that he took at one of these stoppings on February 20, 26, 27, 29, and 3 dates subsequent to March 4, indicated the air to be travelling into the bleeder entry. Moreover, although the



planned longwall roof fall that had occurred on February 24, 1992, did blow out some stoppings, there is no evidence that the roof fall affected any of the stoppings between the bleeder and track entries.

Thompson indicated that had observed an area of bad roof and indicated that if it should fall, it could crush ventilation controls. However, an examination of the mine map, Joint Exhibit No. 1, indicates, as explained by Alexander, that should the roof fall in the area indicated by Thompson and ruin stoppings, then air would flow to the return entries, and not to the track entry.

Although Thompson indicated that even with various precautions something can happen to release gas at the gas well that is present in the solid pillar to be mined, the specific safety precautions to be taken, Operator's Exhibit No. 3, appear to mitigate against the degree of this hazard.


Further, the presence of a low level of incombustible elements, the energized power center, and the presence of coal dust and saturated oil on the mine floor do not increase the likelihood of an explosion, in the absence of a reasonable likelihood of gas from the gob reaching the area in which the trolley track was located.

Thompson observed that 11 rail bonds, used to prevent the trolley tracks from arcing, were missing, and that the balance were struck on rather than welded. This condition extended over five crosscuts. However, it is significant to note, as indicated by Hager, that this area was 200 to 800 feet from the area in question.

Accordingly, for all the above reasons, I conclude that the violation herein was not significant and substantial.

ORDER

It is ORDERED that Citation No. 3754287 be amended to indicate that the violation alleged therein is not significant and substantial. It is further ordered that the Notice of Contest be DISMISSED.<sup>3</sup>

  
Avram Weisberger  
Administrative Law Judge

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nb

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<sup>3</sup>Counsel have each presented argument as to the level, if any, of the Operator's negligence. I decline to reach any decision on this issue. I find that a finding on the issue of negligence is only necessary in deciding the amount of a civil penalty pursuant to Section 110(i) of the act. Hence, a decision on the issue of negligence at this stage of the proceedings would not be in harmony with the statutory scheme for enforcement of violations set forth in the Act, which provides for the Secretary to initially propose a penalty (See, Section 105(c) and 110 of the Act).

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 30 1992

ROCHESTER & PITTSBURGH COAL	:	CONTEST PROCEEDINGS
Contestant	:	
	:	
	:	Docket No. PENN 88-309-R
v.	:	Citation No. 2889075; 8/24/88
	:	
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 88-310-R
MINE SAFETY AND HEALTH	:	Citation No. 2889167; 9/6/88
ADMINISTRATION (MSHA),	:	
Respondent	:	Greenwich Collieries No. 2
	:	Mine
	:	
	:	
	:	Mine ID 36-02404

## DECISION ON REMAND

Before: Judge Weisberger

The Commission remanded this case to me for further Proceedings consistent with its decision, Rochester and Pittsburgh Coal Company, 14 FMSHRC 37 (1992)). On February 5, 1992, in a telephone conference call with counsel for both parties, counsel indicated, that in the event the issues raised by the Commission's Decision cannot be settled, briefs will be filed by April 6, 1992. On March 9, 1992, in a follow-up telephone conference call with counsel with both parties, counsel indicated their intention to rely on their previously filed post hearing briefs and that supplemental briefs, if any, will be filed by March 20, 1992. The Operator filed a brief on March 19, 1992.

The factual background of these cases is set forth in the Commission's decision, Rochester and Pittsburgh, supra, at 38-40, and need not be repeated here. In its Decision, the Commission, Rochester and Pittsburgh, supra, at 41, directed as follows:

The judge should set forth findings and conclusions as to whether the Secretary proved that the disputed safeguard was based on the judgment of the inspector as to the specific conditions at Mine No. 2 and on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard. Taking into consideration the principles announced in SOCCO I, the judge should determine whether the safeguard notice "identif[ied] with specificity the nature of the hazard

at which it [was] directed and the conduct required of the operator to remedy such hazard." 7 FMSHRC at 512. If the judge finds the safeguard to have been validly issued, he should resolve the question of whether R&P violated the safeguard. If the judge determines there were violations, he should then consider whether the violations were of a significant and substantial nature and should assess appropriate civil penalties.

I.

Whether the safeguard was based on the judgment of the inspector as to the specific conditions at Mine No. 2.

The evidence is not controverted that the safeguard in issue was issued by Neven Davis, an MSHA inspector, on May 18, 1988, as a result of having observed 2 miners unloading from an elevator, 4 or 5 metal pipes about 2 inches in diameter, and between 2 to 4 feet in length. He also had observed two cylindrical objects about an half foot high on the floor of the elevator. Hence, I conclude that the issued safeguard, which refers to these objects, and requires that no person shall be transported on cages or elevators with equipment, supplies, or other materials, was therefore based on the judgment of the inspector as to the specific conditions at Mine No. 2.

II.

Whether the safeguard at issue was based on a determination by the inspector that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard.

Davis testified, with regard to the hazard that necessitated the issuance of the safeguard, as follows: "we have metal objects there and these elevators have been known to speed up or slow down at times, thereby creating more or less the hazard of these pipes moving or flying and then striking anybody riding the elevator with this equipment on at this time." [sic] (Tr. 23) Based on this testimony that has not been either rebutted, impeached, or contradicted, I conclude that the safeguard was issued based on the determination by Davis that a transportation hazard existed that was to be remedied by the action prescribed by the safeguard i.e. prohibiting persons from being transported on an elevator with equipment supplies or other materials, aside from the carrying of small hand tools, surveying instruments, or technical devices.

III.

Whether the safeguard notice identified with specificity the nature of the hazard at which it was directed and the conduct required of the operator to remedy such hazard, and whether the

operator violated the safeguard.

In Southern Ohio Coal Company ("SOCCO I"), 7 FMSHRC 509 (April 1985), a case involving the issue of whether a notice to provide a safeguard was violated, the Commission, at 512, held as follows: "... we hold that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required." The Commission, in SOCCO I, supra, did not analyze the wording of the safeguard at issue, but rather focused on whether the specific conditions referred to in the safeguard should have put the operator on notice that the specific conditions cited in citation at issue fell within the safeguard's prohibitions. In this connection, the Commission concluded that the citation subsequently issued for an accumulation of water in a travelway, did not fall within the safeguard's prohibition which referred to fallen rocks and cement blocks, and required 24 inches of clearance on both sides of a conveyor belt.

In Green River Coal Co Inc., 14 FMSHRC 43 (January 1992) a safeguard had been issued by an MSHA inspector requiring 24 inches clearance on each side of the belt, as a result of having observed roof support timbers that had been installed too close to the belt. Subsequently, on the basis of this safeguard, the inspector issued a citation alleging that 24 inches of clearance had not been provided due to an obstruction caused by a roof fall.

The Commission, in Green River, supra in referred to its decision in SOCCO I, supra, where the safeguard had been issued to address an obstruction caused by cement blocks and rocks, and took cognizance of its statement in SOCCO I, supra, "...that further instances of physical obstructions, whether rocks, cement blocks, construction materials, mine equipment, or debris, would fall within the scope of the safeguard" (7 FMSHRC at 513). In this connection, the Commission explicitly stated that its disagreement with the following argument of the Secretary: "...because the safeguard notice and citation in this case cover 'physical obstructions', roof support timbers and fallen rock, the citation was validly issued... ." (Green River, supra at 46). Instead, the Commission reiterated its explanation in SOCCO I, supra, that "...strict construction of safeguards is premised upon the unique process by which safeguards are issued." (Green River, supra, at 46).

In the same fashion, the Commission, in Green River, supra, at 47, took cognizance of the inspector's belief "...that whenever a clear travelway was not provided for whatever reason, he should issue a citation, even though an obstruction caused by fallen rock was not specifically addressed in the safeguard

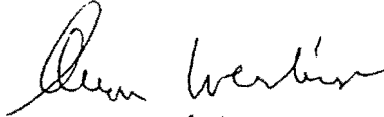
notice." However, the Commission concluded, as it did in SOCCO I, supra, that a safeguard "...must identify with specificity the nature of the hazard against which it is directed and the conduct required of the operator to remedy the hazard." (Green River, supra, at 47).

In addressing the directives of the Commission on remand, and following the analysis of the Commission in SOCCO I, supra, and Green River, supra, I conclude that the Safeguard herein did not identify with specificity the nature of the hazard against which it was directed. The safeguard does not explicitly set forth any hazard.<sup>1</sup> Further, even if it be assumed that the hazards described are the pipes and cylindrical objects themselves, the safeguard, rather than prohibiting these specific hazards, instead proscribes a broad category of equipment, supplies, or other materials. I agree with the position of the Contestant, that if the Secretary believes that men should not be transported with equipment supplies and other materials, the proper procedure is to promulgate a mandatory standard under section 101 of the Federal Mine Safety and Health Act of 1977. I also do not find that the exclusion of the carrying of small hand tools, surveying instruments, or technical devices from the provisions of the safeguard, renders the prohibition of equipment, supplies, or other materials sufficiently specific to validate the safeguard. In addition, given the strict construction to be accorded the safeguard, I also conclude that a dolly approximately two feet high, tapered toward its rectangular base that was approximately one foot by two feet, is not within the scope of the prohibition of the safeguard which referred to metal pipes and "large" cylindrical objects.

---

<sup>1</sup>The objects mentioned in the safeguard i.e. metal pipes and cylindrical objects, are not hazards per se, as Davis, in describing the hazard involved in transporting this equipment in elevator with persons, described the creation of a hazard of the pipes moving and hitting the person in the elevator as a consequence of the elevator speeding up or slowing down. He did not describe any hazard of the pipes or cylindrical objects per se. Also, I note that in SOCCO I, supra the Commission did not indicate that the objects referred to in the safeguard i.e. the presence of cement blocks and rocks, constituted a hazard per se. To the contrary, the Commission recognized that the objects themselves did not constitute the hazard, but the hazard was that of stumbling. In this connection the Commission stated as follows: "The presence of these solid objects in the walkway would present an obvious stumbling hazard and depending on the amount of material or debris, could prevent passage altogether." SOCCO I, supra at 513.

For all the above reasons I conclude that although the safeguard was validly issued, Contestant herein did not violate the safeguard. Accordingly I find that the notices of contest herein shall be sustained, and that Citation Nos. 2899095, and 2889167 be DISMISSED.



Avram Weisberger  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 31 1992**

CLIFFORD MEEK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. LAKE 90-132-DM
	:	MSHA Case No. UC MD-90-06
	:	
ESSROC CORPORATION,	:	
Respondent	:	

**FINAL ORDER**

Before: Judge Fauver

This is a discrimination proceeding under § 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

A decision on liability was entered December 14, 1991, finding that Respondent discriminated against Complainant by refusing to employ him because of protected activities. A supplemental decision was entered on January 31, 1992, denying a motion to dismiss. The matter has been pending a final order on monetary relief.

After extensive exchanges between the parties, and submissions to the judge, of factual positions, documents, legal arguments, and proposals for monetary relief, Complainant filed a revised proposed order for back pay interest, and an attorney fee through March 2, 1992.

After considering this proposal and Respondent's reply, an Order was entered on March 10, 1992, directing the parties to exchange and file by March 30, 1992, certain information needed for a final order for monetary relief. Complainant has filed the additional information, and states that Respondent has not furnished the items specified in the Order, i.e., W-2 statements and quarterly gross wages for its hourly employees at the Middlebranch Plant for the period from February 27, 1990, to March 1, 1992.

The premises considered, Complainant's request on March 30, 1992, for an order granting monetary relief is GRANTED, and it is therefore ORDERED that:

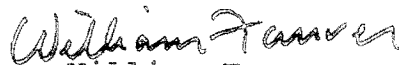
1. Respondent shall pay to Complainant, within 30 days from the date of this Order, the following damages due from February 27, 1990, through March 2, 1992:



Back Pay and Interest	- - - -	\$24,000.00
Attorney Fee and		
Litigation costs	- - - -	<u>\$17,065.80</u>
		\$41,065.80

2. Respondent's liability for back pay, interest and an attorney fee and litigation costs after March 2, 1992, shall continue to accrue until this case including any appeals is concluded.

3. The prior Decisions herein and this Final Order constitute the judge's final disposition of this proceeding.



William Fauver  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

MAR 31 1992

HARMAN MINING COMPANY	)	CONTEST PROCEEDING(S)
Contestant	)	
v.	)	Master Docket No. 91-1
	)	DOCKET NOS. VA 91-270-R
	)	through VA 91-287-R
SECRETARY OF LABOR,	)	Citation Nos. 9861336
MINE SAFETY AND HEALTH	)	through No. 9861344
ADMINISTRATION	)	Mine: Greenbrier No. 1
Respondent	)	
	)	
SECRETARY OF LABOR,	)	PENALTY PROCEEDING(S)
MINE SAFETY AND HEALTH	)	
ADMINISTRATION	)	Master Docket No. 91-1
Petitioner	)	DOCKET NO. VA 91-536
v.	)	A.C. No. 44-06259-03556D
	)	
	)	
HARMAN MINING CORPORATION	)	Mine: Greenbrier No. 1
Respondent	)	

DECISION APPROVING SETTLEMENT  
ORDER OF DISMISSAL

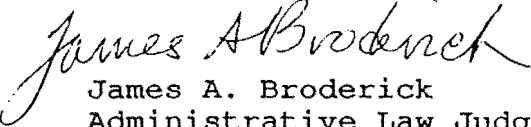
Before: Judge Broderick

On March 26, 1992, the Secretary filed a motion to approve a settlement between the parties in the above cases. The cases involve nine alleged violations of 30 C.F.R. § 70.209(b), each of which was originally assessed at \$1,300. The Secretary continued to assert that the violations resulted from a deliberate act, which is denied by the mine operator. The degree of negligence is disputed, and the parties agree to the reduction in the total penalties from \$11,700 to \$9,360.

I have considered the motion in light of the criteria in § 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement motion is APPROVED. The operator is ordered to pay within 30 days of the date of this order the sum of \$9,360 for the violation(s) charged in these proceedings.

IT IS FURTHER ORDERED that the contest proceedings are  
DISMISSED.

  
James A. Broderick  
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**MAR 5 - 1992**

In Re:        CONTESTS OF RESPIRABLE                                )  
               DUST SAMPLE ALTERATION                              )        Master Docket No. 91-1  
               CITATIONS    )

**ORDER DENYING MOTION TO EXCLUDE EXPERT  
WITNESS AND TO IMPOSE THE SANCTIONS  
SOUGHT BY THE SECRETARY**

**ORDER TO U.S. STEEL TO SERVE AMENDED  
EXPERT WITNESS REPORT**

On February 20, 1992, the Secretary of Labor (Secretary) filed a motion to exclude Andrew McFarland as an expert witness, and to bar U.S. Steel Mining Co., Inc. (U.S. Steel) from participating in expert witness discovery. U.S. Steel filed an opposition to the motion on March 2, 1992.

**I**

Following a Prehearing Conference on June 19, 1991, I issued a Prehearing Order Adopting Plan and Schedule of Discovery (Discovery Plan) which had been submitted by the Secretary after negotiations with counsel for some of the mine operators. Section II.C. of the Discovery Plan required the Secretary and the other parties to exchange lists of expert witnesses they anticipate using at trial. It also required that the expert witnesses "prepare a written report stating their credentials, all opinions or conclusions to which the expert expects to testify ..., and a summary of any test, study, results, or evaluations which form the bases for such conclusions or opinions." The Discovery Plan has been amended, most recently on December 3, 1991, (the Fourth Amended Discovery Plan), and the time for exchanging expert witness lists and reports of expert witnesses has been extended, but the language from Section II. C. quoted above has not been changed.

At the Prehearing Conference, counsel for U.S. Steel stated that the Discovery Plan requirement that expert witnesses provide a summary of any tests, studies, results, or evaluations was "a bit burdensome" and was more than required by Rule 26 of the Federal Rules of Civil Procedure. He suggested an amendment to the Discovery Plan to delete the requirement for providing a summary of any tests, etc. After discussion with counsel for the Secretary and U.S. Steel, the requirement was retained. (Prehearing Conf. Tr. 54-57).

## II

The Secretary argues that the report of Dr. McFarland submitted by U.S. Steel does not comply with the Discovery Plan in that it fails to state the substance of his opinions and conclusions, and fails to describe "in any detail" the tests he performed, the results of the tests, or his evaluation of those results. Dr. McFarland does not describe the experiments to which he refers in his report, any data related to the experiments, or the results of the experiments. The Secretary argues that U.S. Steel's failure to comply with the Discovery Plan prejudices her case because she is not able to prepare for a deposition of the expert. She contends that U.S. Steel's failure to comply with the order is flagrant and indicative of bad faith. Because of this, she asks for sanctions against U.S. Steel: to exclude Dr. McFarland as an expert witness, to prohibit U.S. Steel from exchanging Dr. McFarland's work with any other party in the case, and to prohibit U.S. Steel from deposing the Secretary's experts.

U.S. Steel contends in its opposition that the four page report submitted by Dr. McFarland contains the opinions and conclusions to which he will testify, and a summary of the experiments conducted under his direction concerning the handling of dust filter cassettes. It asserts that the report complies with the requirements of the Discovery Plan. The opposition also discusses the reports of experts served upon U.S. Steel by the Secretary, although no action is pending before me concerning such reports, only some of which have been filed with me (there is no requirement they be filed).

## III

The Discovery Plan mandates an exchange of expert witness lists by the parties so that these witnesses may be deposed during the joint discovery phase of these proceedings. It requires an exchange of the reports of such witnesses to facilitate and expedite the depositions. Although the Plan does not require the reports to include the detail exhibited by some which have been filed with me, it does direct that a summary of any tests, studies, results, or evaluations be furnished. Dr. McFarland's report does not meet this requirement: it does not, in summary or otherwise, state what tests or experiments were performed and what the results of the experiments were. The report is not adequate to facilitate and expedite Dr. McFarland's deposition by the Secretary's counsel. I conclude that it does not comply with Section II. C. of the Discovery Plan.

## IV

The fact that U.S. Steel has not fully complied with the Discovery Plan does not in itself show bad faith, and I am not disposed to infer bad faith. The failure to comply is not in my

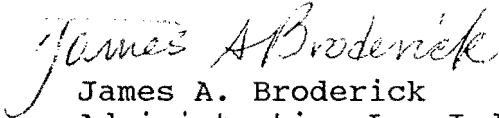


judgment "flagrant," but it should be remedied. To exclude U.S. Steel's expert from testifying in these proceedings is too drastic a remedy. Although such a sanction would be related to the failure to comply, and would certainly penalize U.S. Steel, it would also penalize the Commission since Dr. McFarland's testimony could be important in resolving the disputed issues. Cases before the Commission are not duels, but attempts to ascertain the truth lying behind factual disputes so that the Commission can apply the provisions of the Mine Act to the facts. To bar U.S. Steel from participating in further expert discovery bears no relation to its failure to comply. I therefore reject the sanctions proposed by the Secretary. U.S. Steel, however, is required to comply with the terms of the Discovery Plan, and I will order it to file with me and serve upon the Secretary, a report from its expert witness, Dr. McFarland, which describes, at least in summary fashion, the tests and experiments which he conducted or directed, the results of such tests and experiments, and his conclusions based upon these tests and experiments.

#### ORDER

Based upon the above discussion IT IS ORDERED

1. The Secretary's motion to exclude Dr. McFarland as an expert witness is DENIED;
2. The Secretary's motion to bar U.S. Steel from participating in further expert discovery is DENIED;
3. U.S. Steel shall, within 10 days of the date of this order, file with me and serve upon the Secretary a report from its expert witness, which describes the tests and experiments he conducted or directed, the results of such tests and experiments, and his conclusions based thereon.

  
James A. Broderick  
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

**MAR 11 1992**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 91-1456
Petitioner	:	A. C. No. 36-00929-03720
	:	
v.	:	Marion Mine
	:	
TUNNELTON MINING COMPANY,	:	
Respondent	:	

**DECISION DENYING SETTLEMENT MOTION**

Before: Judge Fauver

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

The parties have moved for approval of a settlement.

**The Meaning of a "Significant and Substantial" Violation**

Since the settlement motion proposes to reduce the alleged violation from a "significant and substantial" violation to a "non-significant and substantial" violation, it will be helpful to review the meaning of this statutory term.

The Commission has held that a violation is "significant and substantial" if there is a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (1984). The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of

resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice.... which could reasonably be expected to cause death or serious physical harm before [it] can be abated,"<sup>1</sup> and expressly places S&S violations below an imminent danger.<sup>2</sup> It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

### The Proposed Settlement

The inspector issued Citation No. 3484197, alleging a violation of 30 C.F.R. § 75.604(b) on the ground that the trailing cable to a roof bolter was not "effectively insulated, and [did] not effectively exclude moisture" because there was "an opening measuring 1/2 inch by 1 1/2 inches through the outer insulated jacket, and the inner insulated conductors [were] exposed."

The settlement motion states that the exposed inner insulation of the cable was intact and, therefore, injury was "unlikely to occur." However, it does state or indicate that the opening in the cable did not present a substantial possibility of injury, e.g., the exposure of the inner insulation rendering it vulnerable to cutting or breaking, with moisture reaching live conductors, by forces that would not penetrate the inner insulation if the outer jacket were intact, or the possibility of moisture entering the outer jacket reaching an existing-but unseen nick in the inner insulation.

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<sup>1</sup> Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

<sup>2</sup> Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger...."

Accordingly, the settlement motion is DENIED. The proposal to reduce the penalty from \$136 to \$86 will be approved if the motion is amended to delete the change to non-S&S, or if the parties show sufficient facts to warrant such a change.

  
William Fauver  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 19 1992

IN RE: CONTESTS OF RESPIRABLE )  
DUST SAMPLE ALTERATION ) Master Docket No. 91-1  
CITATIONS )

## ORDER GRANTING IN PART MOTION TO COMPEL FURTHER EXPERT DISCOVERY

On March 12, 1992, the Secretary of Labor (Secretary) filed a Motion to Compel Further Expert Discovery. In particular, the Secretary seeks an order compelling the production of documents utilized by expert witnesses identified by the law firms Buchanan Ingersoll, Crowell & Moring, Jackson & Kelly and Smith, Heenan & Althen (the four law firms) in preparing their reports, and those documents which reflect the results of tests performed by the experts. In addition the Secretary seeks access to the experimental filters created by those experts, for the purposes of inspection, photographing and videotaping.

A response to the motion was filed on behalf of the four law firms on March 16, 1992. On March 18, 1992, at the request of the parties, I heard further argument on the motion in a telephone conference call with Laura Beverage, Esq., representing the four law firms, and Richard Gilman, Esq., representing the Secretary. At the conclusion of the call, I announced my decision on the motion, and am reducing it to writing by this order.

### I

The Secretary seeks the production of documents and access to the experimental filters in order to more effectively examine Contestants' experts in their scheduled depositions. Section II.C. of the Discovery Plan requires the parties to exchange expert witness lists by January 24, 1992. Each expert must prepare a report with his credentials and all opinions and conclusions to which he expects to testify and a summary of tests, studies, etc., forming the basis for his conclusions or opinions. Section II.C.3. provides that all costs associated with expert depositions shall be governed by Rule 26(b)(4) of the Federal Rules of Civil Procedure.

Because this motion relates to expert witness discovery, even though it deals with documents and tangible things, it is governed by Rule 26(b)(4) rather than 26(b)(3). The documents and tangible things are sought to assist in and facilitate the deposition of expert witnesses.

## II

The nature of these cases and the evidence of which I am aware make it clear that expert opinion evidence will be important, perhaps critical, in arriving at a decision. For this reason, the depositions of expert witnesses are highly important to the parties and to the Commission, in order that the witnesses' opinions can be tested by informed cross-examination. The experts' reports are voluminous and involve complex tests, and physical and mathematical formulae. To conduct adequate and meaningful examination of the experts, counsel must understand the background and bases for their reports. Accordingly, I will grant the Secretary's motion to produce the documents and things referred to in the motion.

## III

The "back-up data" referred to in the Secretary's motion consists of documents utilized by the experts in preparing their reports, and documents reflecting the results of tests performed by the experts. These documents are detailed in paragraphs numbered 3 through 8 in the letter of March 6, 1992 from Mr. Gilman to Ms. Beverage, appended as attachment A to the Secretary's motion. Because these are existing documents, copies should be made available to the Secretary without cost. Further, the identity of persons who assisted in the preparation of the reports and samples of the coal dust used in the experimental samples (numbers 9 and 10 of attachment A) should be made available to the Secretary without cost.

## IV

Some or all of contestants' experts created and tested experimental dust filters as part of their studies. A large number of such filters were created and tested by two of the experts and they form an important part of their conclusions and reports. It is important that the Secretary be permitted to inspect these filters in preparation for her deposing the expert witnesses. However, examining, testing, photographing and videotaping these filters may take considerable time and involve some expense. I conclude that the Secretary, as the party seeking discovery, should be required to pay the reasonable expenses associated with making the filters available. (The parties agree that under Rule 26(b)(4)(c), the party seeking discovery will pay the expert a reasonable fee for the time spent in his deposition). I do not believe that manifest injustice will result from requiring the Secretary to pay these expenses. I have considered and reject the Secretary's contention that because she made the cited filters and other filters available in the fact discovery phase without cost to the operators, it is manifestly unjust to require her to bear the expenses incidental to making the experts' filters available in order that she may prepare for their depositions.

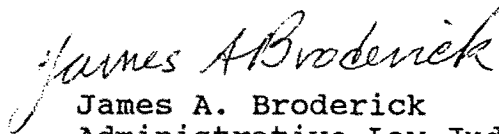
The reasonable expenses associated with making the filters available will include the cost of providing technician(s) to assemble the filters and oversee the Secretary's inspection of them. The parties will attempt to agree on what the reasonable expenses are and, if they are unable to agree, will return to me for a further ruling.

V

The Secretary's motion states that Dr. Malloy and Dr. Yao (listed as expert witnesses by Smith, Heenan and Althen) are employees of a party and therefore Rule 26(b)(4)(C) does not apply to them. After discussion during the conference call, it was agreed that further consultation between counsel with respect to the status of these witnesses is necessary, and I am not now ruling on the applicability of Rule 26(b)(4)(C) to them.

ORDER

In accordance with the preceding discussion, the Secretary's Motion to Compel Further Expert Discovery is GRANTED, with the condition that the Secretary shall pay the reasonable expenses associated with making the expert witnesses' experimental filters available for inspection, photographing or videotaping.

  
James A. Broderick  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 26 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 91-1375
Petitioner	:	A. C. No. 36-04281-03736
	:	
V.	:	Dilworth Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

## DECISION DENYING SETTLEMENT MOTION

Before: Judge Fauver

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

The parties have moved for approval of a settlement.

### The Meaning of a "Significant and Substantial" Violation

Since the settlement motion proposes <sup>1</sup> to reduce some of the alleged violations from "significant and substantial" to "non-significant and substantial" violations, it will be helpful to review the meaning of this statutory term.

The Commission has held that a violation is "significant and substantial" if there is a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether any particular violation is significant and substantial

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<sup>1</sup> The motion states that after discussion the "significant and substantial" designation was "deleted." However, the Secretary has no authority to change an allegation of violation after filing a civil penalty proceeding, without approval of the judge. Accordingly, the "deletions" will be considered as a settlement proposal to amend the citations.



must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice ... which could reasonably be expected to cause death or serious physical harm before [it] can be abated,"<sup>2</sup> and expressly places S&S violations below an imminent danger.<sup>3</sup> It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

#### Proposed Settlement

Citation No. 3702181 was issued for a violation of 30 C.F.R. § 77.205 when the inspector observed that the travelway to the electrical switch box was obstructed by a wooden pallet and old desks, creating a tripping hazard.

The motion states that, "while the pallet lay horizontal under the switch box, thus creating a possible tripping hazard, the desks were not directly in front of the box, and less likely to create a tripping hazard. Thus, the likelihood of being injured is less than originally assessed."

The motion does not state or indicate that the pallet and desks did not present a substantial possibility of causing a tripping accident. Accordingly, the proposal to reduce the charge to a non-S&S violation will be denied.

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<sup>2</sup> Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

<sup>3</sup> Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger ...."

Citation Nos. 3702182 and 3702187 were issued for violations of 30 C.F.R. § 77.513 when the inspector observed that electrical control switch boxes were not provided with insulating mats nearby.

The motion states that, while "the mats were placed on the outside wall to the electrical control switch boxes and within 10 feet of the switch box, this placement does not meet the condition that the mat be kept in place. Moreover, while the electrical control switch boxes were Delta grounded system, externally grounded, a shock hazard was still possible depending on the method of installation and on the conditions existing at the switch boxes, such as whether it was wet. The shock hazard would be eliminated by the use of the insulating mats, which, though not in place, were nearby. Therefore, the likelihood of being injured is less than originally assessed."

The motion does not state or indicate that the failure to keep the insulated mats in place did not present a substantial possibility of resulting in an electrical injury. Accordingly, the proposal to reduce the charges to non-S&S violations will be denied.

The settlement proposals as to Citations 3702191 and 3702193 are appropriate and if resubmitted in a revised motion will be approved.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. The settlement motion as a whole is DENIED.
2. The parties may submit a revised motion as to all or any of the citations involved.
3. The citations not approved for settlement will proceed to hearing at a date to be set.

  
William Fauver  
Administrative Law Judge