

MARCH 1994

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MARCH 1994

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

Secretary of Labor, MSHA on behalf of Perry Poddey v. Tanglewood Energy, Inc., Docket No. WEVA 93-339-D. (Judge Amchan, January 25, 1994)

Secretary of Labor, MSHA on behalf of James Johnson and UMWA v. Jim Walter Resources, Inc., Docket No. SE 93-127-D. (Judge Fauver, January 25, 1994)

Secretary of Labor, MSHA v. Remp Sand and Gravel, Docket No. WEST 93-295-M. (Chief Judge Merlin, unpublished Default Decision, December 20, 1993)

Secretary of Labor, MSHA v. Oakwood Mining Company, Docket No. KENT 93-576. (Chief Judge Merlin, unpublished Default Decision, February 18, 1994)

Secretary of Labor, MSHA v. Beech Fork Processing, Inc., Docket No. KENT 93-406. (Chief Judge Merlin, unpublished Default Decision, February 18, 1994)

The following is a list of cases in which review was denied:

Secretary of Labor, MSHA v. MAYO Resources, Inc., Docket No. KENT 93-160. (Judge Fauver, January 25, 1994)

Secretary of Labor, MSHA v. Rhone-Poulenc of Wyoming Company, Docket No. WEST 92-519-M. (Judge Morris, Decision after Remand, February 4, 1994)

Secretary of Labor, MSHA v. Southmountain Coal, Inc., and William Ridley Elkins, Docket Nos. VA 93-165, etc. (Judge Melick, Interlocutory Review of January 25, 1994 Order)

Vincent Braithwaite v. Tri-Star Mining, Docket No. WEVA 91-2050-D. (Reconsideration of December 23, 1993 Commission Decision)

Secretary of Labor, MSHA v. Larry D. Irvin, Docket No. KENT 93-467. (Judge Amchan, February 16, 1994)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 14, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 93-295
 :
REMP SAND & GRAVEL :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners¹

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On December 20, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Remp Sand & Gravel ("Remp Sand"), for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty or the judge's August 20, 1993, Order to Show Cause. The judge ordered the payment of a civil penalty of \$390. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the Commission dated January 14, 1994, and received on January 21, 1994, Raymond H. Remp, owner of Remp Sand, asserts that he was not aware that the citations Remp Sand received during a one day inspection by the Department of Labor's Mine Safety & Health Administration ("MSHA") were in different dockets. He further asserts that he has tried to resolve the matter on several occasions with the Department of Labor's Office of the Solicitor in Denver.

The judge's jurisdiction over this case terminated when his decision was issued on December 20, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12158, 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Commission received Mr. Remp's letter 32 days after the issuance of the judge's decision. Because Mr. Remp has proceeded without benefit of counsel, we will treat his letter as a timely filed Petition for Discretionary Review.

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

Due to clerical inadvertence, the Commission did not act on the January 14 letter within the required statutory period for considering requests for discretionary review and the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Relief from a final Commission judgment or order on the basis of inadvertence, mistake, surprise or excusable neglect is available to a party under Fed. R. Civ. P. 60(b)(1). 29 C.F.R. § 2700.1(b)(Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Lloyd Logging, Inc., 13 FMSHRC 781, 782 (May 1991). In the interest of justice, we reopen this proceeding and deem the January 14 letter to be a Petition for Discretionary Review, which we grant.

It appears from the record that MSHA may have proposed penalties in more than one docket and that confusion may have arisen over the citations and docket numbers. On the basis of the present record, however, we are unable to evaluate the merits of Remp Sand's position. We remand the matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

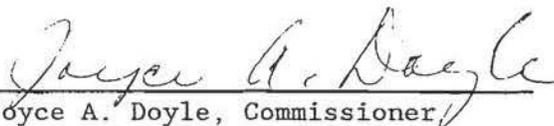
For the reasons set forth above, we reopen this matter, vacate the judge's default order, and remand this matter for further proceedings.



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

Distribution:

Tambra Leonard, Esq.
Office of the Solicitor
U.S. Department of Labor
1585 Federal Bldg.
1961 Stout Street
Denver, Colorado 80294

Raymond H. Remp
Remp Sand & Gravel
North 208 Colorado
Libby, MT 59923

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 1994

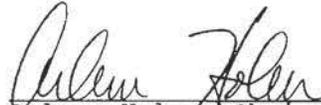
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket Nos. VA 93-165
	:	VA 93-166
SOUTHMOUNTAIN COAL, INC.	:	
	:	CONTEST PROCEEDING
and	:	
	:	Docket Nos. VA 93-108-R, et.al
WILLIAM RIDLEY ELKINS	:	
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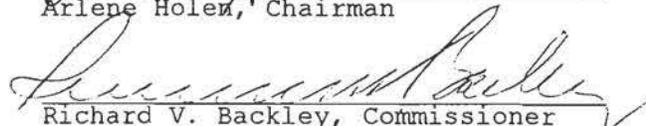
ORDER

Southmountain Coal, Inc. ("Southmountain") has filed with the Commission a petition for interlocutory review of Administrative Law Judge Gary Melick's January 25, 1994, Decision and Order Granting Limited Continuance of Stay. By order dated February 7, 1994, the judge denied Southmountain's Motion for Certification for Review of Interlocutory Ruling. See Commission Procedural Rule 76, 58 Fed Reg. 12158, 12172 (March 3, 1993), to be codified at 29 C.F.R. § 2700 (1993).

Subsequent to the Commission's receipt of Southmountain's petition for interlocutory review, the judge held a previously scheduled status conference with the parties on February 25 and, on March 7, issued his Decision and Order Granting Limited Continuance of Stay. In his Order, the judge decided to continue the stay "until a verdict is reached in the criminal trials or a mistrial is declared," as urged by the Secretary. The criminal trial involving Southmountain is presently scheduled to begin on May 2, 1994, although the investigation is continuing.

Upon consideration of Southmountain's petition and the Secretary's response,¹ we conclude that Southmountain has failed to establish a basis for granting interlocutory review of the judge's orders and, therefore, we deny the petition.²


Arlene Hoken, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner

¹We reject Southmountain's contention that the decision in Thunder Basin Coal Co. v. Reich, __ U.S. __, 127 L. Ed. 2d 29, 62 U.S.L.W. 4058 (January 19, 1994), bears on prosecution of a Mine Act criminal proceeding in district court prior to disposition of civil citations and penalties by the Commission.

²Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Distribution

Henry Chajet, Esq.
James G. Zissler, Esq.
Jackson & Kelly
2401 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Jack Kennedy, Esq.
P.O. Box 654
Norton, VA 24273

Jeffery A. Sturgill, Esq.
Sturgill, Mullins & Kennedy
944 Norton Road
P.O. Box 3458
Wise, VA 24293

Jessee Darrell Cooke
Miners' Representative
Southmountain Coal, Inc.
P.O. Box 950
Coburn, VA 24230

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 1994

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING
Petitioner	:	
	:	
	:	DOCKET NO. KENT 93-576
	:	
v.	:	
	:	
	:	
OAKWOOD MINING COMPANY	:	
Respondent	:	

ORDER

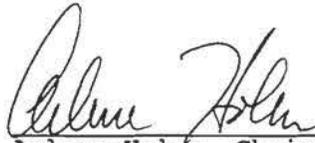
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On February 18, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Oakwood Mining Company ("Oakwood") for failing to answer the proposal for assessment of civil penalty filed by the Secretary of Labor and the judge's September 27, 1993, Order to Show Cause. The judge assessed the civil penalty of \$2,200 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand for further proceedings.

On March 7, 1994, the Commission received a Motion for Reconsideration, attached to a letter addressed to Judge Merlin, from Oakwood's counsel. Counsel stated that, when Oakwood received the order to show cause, it was proceeding without counsel and did not understand the necessity for filing an answer because it had previously requested a hearing by returning the "blue card."

The judge's jurisdiction over this case terminated when his decision was issued on February 18, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b) (1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of the decision's issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Oakwood's Motion for Reconsideration to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

On the basis of present record, we are unable to evaluate the merits of Oakwood's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.¹



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

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

Distribution

Billy R. Shelton, Esq.
Baird, Baird, Baird & Jones, P.S.C.
P.O. Box 351
Pikeville, KY 41502

Kermit France, Owner
Oakwood Mining Company
Box 190
Ashcamp, KY 41512

James B. Crawford, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

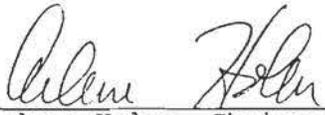
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 25, 1994

VINCENT BRAITHWAITE :
Petitioner :
 :
v. : Docket No. WEVA 91-2050-D
 :
 :
TRI-STAR MINING :
Respondent :

ORDER

The Commission issued its decision in this proceeding on December 23, 1993, in which it reversed the administrative law judge's decision and dismissed the discrimination complaint brought by complainant, Vincent Braithwaite under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3)(1988). In a letter dated March 5, 1994, the complainant raised with the Commission several issues relating to its decision. Upon due consideration of the letter, which we have treated as a timely filed motion for reconsideration¹ (see Commission Procedural Rule 78, 29 C.F.R. § 2700.78 (1993)), we deny the request for reconsideration of the Commission's decision.²



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

¹ Commission records reflect that Vincent Braithwaite was mailed a copy of the decision at the time of its issuance, December 23, 1993. However, by letter dated February 4, 1994, Mr. Braithwaite inquired as to the status of the case. The Commission sent a copy of the decision to Mr. Braithwaite on February 23, 1994.

²Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Distribution

Vincent E. Braithwaite
53 W. Harrison St.
Piedmont, WV 26750

Thomas G. Eddy, Esq.
Eddy & Osterman
820 Grant Building
Pittsburgh, PA 15219

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 93-406
 :
BEECH FORK PROCESSING, INC. :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners

ORDER

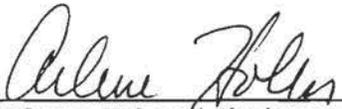
BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988). On February 18, 1994, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Beech Fork Processing, Inc. ("Beech Fork"), for its failure to answer the Secretary of Labor's proposal for assessment of civil penalty and the judge's September 20, 1993, Order to Show Cause. The judge ordered the payment of a civil penalty of \$4,547. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

In a letter to the Commission dated March 1, 1994, and received on March 7, 1994, Link Chapman, Safety Director of Beech Fork, requests that the order of default be vacated because a response to the order to show cause was filed. A copy of the September 24, 1993, response is attached to Mr. Chapman's letter.

The judge's jurisdiction over this case terminated when his decision was issued on February 18, 1994. Commission Procedural Rule 69(b), 29 C.F.R. § 2700.69(b)(1993). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Beech Fork's letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). On the basis of the present record, we are unable to evaluate the merits of Beech Fork's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co., 12 FMSHRC 1201, 1202 (June 1990).

For the reasons set forth above, we vacate the judge's default order and remand this matter for further proceedings.¹



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner

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

Distribution

Link Chapman, Safety Director
Beech Fork Processing, Inc.
P.O. Box 190
Lovely, KY 41231

Thomas A. Grooms, Esq.
Office of the Solicitor
U.S. Department of Labor
2002 Richard Jones Rd.
Suite B-201
Nashville, TN 37215

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
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 3 1994

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 92-669
Petitioner : A.C. No. 15-11855-03560
v. :
: No. 6 Mine
MULLINS AND SONS COAL :
COMPANY, INCORPORATED, :
Respondent :

DECISION ON REMAND

Appearances: Jerald Feingold, Esq., U.S. Department of Labor,
Office of the Solicitor, Nashville, Tennessee,
for Petitioner;
Dale Mullins, Vice President, Mullins and Sons
Coal Company, Inc., Kimper, Kentucky,
for Respondent

Before: Judge Feldman

Statement of the Case

This remand matter concerns two alleged violations.
104(d)(1) Citation No. 3809162, was issued to the respondent by
Mine Safety and Health Inspector Milburn, at 10:00 a.m., on
Monday, June 17, 1991, for an impermissible accumulation of
combustible coal dust in contravention of the mandatory health
and safety standard contained in Section 75.400, 30 C.F.R.
§ 75.400.¹ Shortly thereafter, Milburn issued 104(d)(1) Order
No. 3809164 for violation of the mandatory standard in Section
75.402, 30 C.F.R. § 75.402, which requires combustible coal dust

¹Section 75.400 provides as follows:

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

to be rock dusted within 40 feet of all working faces.² At trial, Dale Mullins, the corporate Vice President, appeared on behalf of the respondent. Mullins stipulated to the fact of occurrence of these violations and to their significant and substantial nature (Tr.12-13, 64-65). Therefore, the only issue for resolution was whether these violations occurred as a result of the respondent's unwarrantable failure.

On June 3, 1993, I issued a decision formalizing my bench decision that the violations in issue were not attributable to the respondent's unwarrantable failure. Mullins and Sons Coal Company, Inc., 15 FMSHRC 1061 (June 1993). On February 9, 1994, the Commission vacated my findings of no unwarrantable failure and remanded this proceeding for reconsideration of my initial decision consistent with its remand decision. Mullins and Sons Coal Company, Inc., 16 FMSHRC ___, Docket No. KENT 92-669 (February 1994).

Background

The pertinent facts are not in dispute. On the morning of Monday, June 17, 1991, Milburn inspected the respondent's No. 6 Mine and reviewed the preshift examination book. Coal dust accumulations in the Nos. 1 through 6 entries in the No. 2 section were noted in the preshift exam book at approximately 6:00 a.m. that morning. (Tr. 11). Production commenced shortly thereafter at approximately 7:00 a.m.³ (Tr. 69, 133-34). The noted accumulations occurred during the previous production day shift on Friday, June 14, 1991. (Tr. 24-25, 69-72). There was no continuous mining operation during the intervening Saturday and Sunday. (Tr. 30-31, 72, 194-95). Milburn's testimony as well as his contemporaneous inspection notes reflect that the subject entries are approximately 180 feet long, twenty feet wide and 36 inches in height. (Tr. 20, 80-81; Gov. ex. 1, pp. 6-8). Milburn was informed prior to his inspection that the scoop was out of service. Milburn proceeded to inspect the six entries and observed accumulations three to six inches in depth that he estimated to extend in by the No. 2 belt feeder approximately 180 feet in each entry. (Joint ex. 1). Milburn also observed that the accumulations were not rock dusted. At the time of the inspection, the battery operated scoop usually used for removing accumulations and for rock dusting was being charged. (Tr. 61).

²Section 75.403, 30 C.F.R. § 75.403, contains the standard for application of rock dust.

³ The pertinent entry in the preshift examination book occurred shortly before commencement of production at 7:00 a.m. on Monday, June 17, 1991. For simplicity, the preshift notation and the start of production will be treated as having occurred simultaneously at 7:00 a.m.

This scoop was a "low profile" Elkhorn scoop that was fitted with a low frame and small tires to enable it to operate in low coal seam entries. (Tr. 80-81). Milburn testified that there was no other scoop available that could be used as an alternative means of removing the accumulations. (Tr. 93-94).

The June 3, 1993, Initial Decision

At the culmination of the hearing in this proceeding conducted on April 14, 1993, I issued a bench decision. My decision was based on three essential findings of fact. Namely, the following:

- 1) Shoveling was not a feasible alternative to use of the scoop given the dimensions of the entries (15 FMSHRC at 1063 n.3);
- 2) Milburn based his unwarrantable failure findings exclusively on the fact that the accumulations had been noted in the preshift examination book (15 FMSHRC at 1063); and
- 3) Milburn considered the accumulations to be of three hours duration (15 FMSHRC at 1063).

I issued a bench decision and a brief written decision on June 3, 1993, formalizing my bench ruling because I viewed the facts of this case as unambiguous and noncontroversial. I now realize my June 3, 1993, decision did not adequately set forth the basis for my conclusion that the Secretary had not prevailed on the unwarrantable failure issues.

My decision with respect to the alternative of shoveling was predicated on the fact the six entries in issue were low seam coal entries 36 inches in height by 20 feet in width by 180 feet in length. Accepting Inspector Milburn's approximation of coal dust three to six inches in depth the full length of each entry, the accumulations amounted to between 5,400 and 10,800 cubic feet of dust. Inspector Milburn testified the Elkhorn scoop was out of service and no alternative scoops were available. My conclusion that manual shoveling was not a feasible alternative to using the specially equipped low profile scoop was based on

Inspector Milburn's estimated size of the coal dust accumulations and the inherent difficulty of manual shoveling in a low seam environment.⁴ In apparent recognition of the magnitude of the cleaning task, Inspector Milburn established 1:00 p.m. on Tuesday, June 18, 1991 (27 hours after his inspection) as the termination deadline for the coal dust removal. Although not addressed in the record, it is not inconceivable that the scoop could have returned to service long before shoveling could be completed.

Regarding the issues of the duration of the subject accumulations and Inspector Milburn's reliance on the preshift notation as dispositive of the unwarrantable failure question, Milburn testified "...if there was no notation in the preshift examiner's book, that this condition existed, prior to them operating on this Monday, then, it wouldn't be unwarrantable (emphasis added)." (Tr. 105, See also tr.22-24, 40). Thus, Milburn cited the respondent for unwarrantable failure at 10:00 a.m. solely because it did not remove the subject accumulations after they were noted by the preshift examiner at 7:00 a.m. In this regard, my June 3, 1993, decision that the "accumulations were of three hours duration" was not intended literally as the accumulations must have occurred before they were noted in the preshift examination book. 15 FMSHRC at 1064. Rather, I was referring to Inspector Milburn's issuance of Citation No. 3809162 three hours after the accumulations were noted by the preshift examiner. Moreover, this conclusion comports with Inspector Milburn's testimony that "...I considered this to be a three hour violation -- or condition, that had been

⁴ At trial, Mullins position was that the accumulations could not be removed by shoveling. So overwhelmed by the thought of shoveling, he calculated, albeit erroneously, that the accumulations constituted over 20,000 square feet, or maybe even 40,000 square feet including the crosscuts. (Tr. 87-88). While this statement was made during Mullins' questioning of Milburn, it was nevertheless Mullins' statement and position at trial. While not presented by Mullins in his direct case, I considered the statement as testimony given the fact that Mullins is not an attorney. See Francis A. Marin v. Asarco, Inc., 14 FMSHRC 1269, 1273 (August 1992). Consequently, as the trier of fact, I did not afford any weight to the statement attributed to Mullins at page 89 in the transcript, also not made under oath, that "...it would have took (sic) several shovels..." to remove what he had immediately preceded to describe as 40,000 square feet of accumulations. I do not recall hearing this statement and the statement as attributed is inconsistent with my follow-up remarks. (See statement by the Court, tr. 89). Rather it is apparent that Mullins misspoke or was misinterpreted.

allowed to exist." (Tr. 24).⁵ Thus, three hours is the operable time period for considering the unwarrantable failure issue as this is the basis for the Secretary's case.⁶

A. Section 75.400 Violation

I have reviewed my initial decision in the context of the Commission's remand decision. While I have concluded that shoveling was not a reasonable alternative to using the low profile scoop given the dimensions of the entries and that three hours is the operable time period for considering the unwarrantable failure issue, I am cognizant of the Commission's expressed strong inclination to vacate my initial finding of no unwarrantable failure. Therefore, I have revisited this issue. An operator's failure to cease operations prior to the issuance of a citation for a significant and substantial violation is not unwarrantable per se if the operator has not demonstrated a conscious disregard or indifference. Nor is a violation of section 75.400 per se unwarrantable. The issue of unwarrantable failure must be resolved on a case by case basis based on what, if anything, the operator has done to remove the risk associated with the hazardous condition. In this case, while the respondent's charging of the scoop in recognition of the

⁵ Significantly, the Secretary does not assert that the accumulations in issue were permitted to occur over days or weeks as the basis for the respondent's unwarrantable failure. On the contrary, the evidence reflects these accumulations developed over the prior shift and that they were timely noted at the next preshift exam. (Tr. 24-25, 40, 69-72, 105). This conclusion raises the question of how such extensive accumulations could occur during only one shift. The answer lies in Inspector Milburn's equivocal estimation of the extent of the accumulations. As a threshold matter, Milburn testified the accumulations were three to six inches in depth as measured by a wooden ruler. (Tr. 20, 63). Thus, the accumulations were not uniformly six inches in depth. More importantly, Milburn stated he used his wooden ruler to measure the accumulations in each entry a total of "...four to five times on the section..." (Tr. 61-62). Five measurements are insufficient to accurately determine the extent of accumulations in six entries each 36 inches in height and 180 feet in length.

⁶ While the period of accumulations during the Friday, June 14, 1991, shift is relevant to the fact of occurrence of the violation of section 75.400, it is not a significant factor in resolving the unwarrantable failure issue. Had the accumulations been removed immediately after the preshift notation on Monday, June 17, 1991, it is apparent that the respondent would not have been cited for unwarrantable failure.

hazardous accumulations⁷ was something, it was not enough. Having opted to continue operations during the charging of the scoop, the respondent should have made a good faith attempt to remove the accumulations by assigning adequate personnel to manually shovel pending the scoop's return to service. Therefore, consistent with the Commission's remand decision, I hereby reinstate the unwarrantable failure findings in 104(d) Citation No. 3809162. In view of the significant mitigating factors discussed above I am assessing a civil penalty of \$700 for this violation of the mandatory safety standard in section 75.400.

B. Section 75.402 Violation

I have also reconsidered the respondent's responsibility to rock dust in light of the Commission's remand decision. Having elected to continue operations, the respondent had an obligation to neutralize the noted combustible accumulations if a means to do so was readily available. While I have concluded shoveling six low seam entries is labor and time intensive, the application of rock dust is not so onerous. In addition, the Commission's remand notes Inspector Milburn's testimony that operators are required by safety standards to rock dust areas after coal dust is removed. (Tr. 150-53); 16 FMSHRC ___, slip op. at 6. Therefore, I have determined the mitigating circumstances associated with the section 75.400 violation are not as applicable to the rock dusting failure. Accordingly, I conclude that the respondent's violation of the mandatory safety standard in section 75.402 is attributable to its unwarrantable failure.

With respect to the appropriate civil penalty, for 104(d) Order No. 3809164, I continue to believe the respondent's notation in the preshift examination book as well as its efforts to repair the scoop in order to remove the accumulations are mitigating factors. Consequently, I am adjusting the civil penalty to \$800 in recognition of the increase in the degree of respondent's negligence associated with the violation of the mandatory safety standard contained in section 75.402.

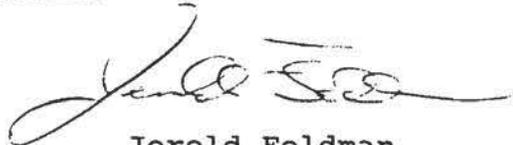
As a final note, I am concerned that this decision may be construed as punishing operators for acknowledging hazards in the preshift examination book. In fact, Inspector Milburn testified that operators are "...apprehensive about writing anything in the record book... [because] ...its MSHA's intent to use the record books as a "Gotcha" type of record." (Tr. 54). However, such notations constitute a recognition rather than a disregard of a hazard. Operators should be encouraged to make preshift

⁷ Inspector Milburn testified that he did not consider the subject accumulations to be an imminent danger because he found no potential ignition source. (Tr. 42-43).

notations. Unless the operator disregards such notations and takes no action to remedy the condition, preshift entries should be viewed as a mitigating circumstance rather than evidence of conscious neglect.⁸ Thus, I emphasize that while the degree of the respondent's negligence in this case was high, it would have been significantly greater if the respondent had failed to make the pertinent entry in the preshift examination book, or, if the respondent had failed to make any effort to repair the scoop after the preshift notation was made.

ORDER

In view of the above, **IT IS ORDERED** that the unwarrantable failure finding in 104(d)(1) Citation No. 3809162 **IS REINSTATED** and the citation **IS AFFIRMED** as written. The civil penalty associated with this citation has been increased to \$700. **IT IS FURTHER ORDERED** that the unwarrantable failure finding in 104(d)(1) Order No. 3809164 **IS REINSTATED** and the order **IS AFFIRMED** as written. The civil penalty for this order has been increased to \$800. **ACCORDINGLY, IT IS ORDERED** that the respondent **SHALL PAY** a total civil penalty of \$1500 in satisfaction of the citation and order in issue. Upon receipt of payment, this case **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

⁸ In Emery Mining Corp., 9 FMSHRC 1997, 1999 (December 1987), the Commission determined that the failure of a preshift examiner to note loose roof bolts that had existed for at least one week was not, alone, evidence of unwarrantable failure. Similarly, a preshift notation of an unresolved violation is not unwarrantable per se. Resolution of the unwarrantable failure issue must be accomplished on a case by case basis and not determined solely by whether or not an entry has been made by the preshift examiner.

Distribution:

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

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

Dale Mullins, Vice President, Mullins and Sons Coal Co., Inc., Box 4028, Upper John's Creek Road, Kimper, KY 41539 (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 7 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-713
Petitioner	:	A.C. No. 15-08357-03740
v.	:	
	:	Camp No. 11
	:	
	:	Docket No. KENT 93-714
	:	A.C. No. 15-08357-03741
PEABODY COAL COMPANY,	:	
Respondent	:	Camp No. 11

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
Carl B. Boyd, Jr., Henderson, Kentucky, for Respondent.

Before: Judge Amchan

These cases arise out of several different inspections of Respondent's Camp No. 11 underground mine in Union county, Kentucky. At the outset of the hearing three citations were settled. With regard to citation Nos. 3547717 and 3547573, Respondent agreed to withdraw its contests of the proposed \$50 penalties. Petitioner modified citation 3547578 to "non significant and substantial" and reduced the proposed penalty from \$309 to \$50. I find that the settlement of these penalties is consistent with section 110(i) of the Act and, therefore, grant the parties' motion for approval of this partial settlement.

Contested Penalties

Citation 3860644: Rock Dust

On January 25, 1993, MSHA Inspector Harold Gamblin took band samples of the rock dust on the mine floor, roof and ribs, in an area leading to the working face of respondent's mechanized

mining unit #5 (Tr. 17-20, 26, 44). Gamblin began taking samples at a point 2,300 - 2,500 feet from the working face and stopped taking them about 300 to 500 feet from the working face (Tr. 46 - 47, 68). In some of the areas sampled, the rock dust appeared to be inadequate in that the surface sampled was black in color, while adequate rock dusting normally gives the surface a white or grayish appearance (Tr. 21).

Inspector Gamblin's rock dust samples were sent to the MSHA laboratory which analyzed them and reported the results to his office in Madisonville, Kentucky (Exh. G-1, pp. 3 - 6). All 10 samples taken in the return aircourse complied with MSHA standards, but 5 of 25 taken in the intake aircourse did not (Exh. G-1, pp. 3-6).

MSHA regulations, at 30 C.F.R. § 75.403, require that the incombustible content of the combined coal dust, rock dust and other dust shall not be less than 65 percent, but not less than 80 percent in return aircourses. Where methane is present in any ventilating current the incombustible content of the combined dust must be increased by 1 percent in those areas where the 65 percent standard would otherwise be in effect, and must be increased by 0.4 percent in return aircourses.

As rock dust is 100% finely ground limestone and coal dust is combustible, a sample which contains an insufficient percentage of incombustible material indicates that an insufficient amount of rock dust has been applied to the surfaces in the mine (Tr. 23). Inadequate rock dusting may increase the severity of a fire or explosion if one should occur (Tr. 22-23, 36-37, 58, 73-74). Increased combustibility of the dust in the mine would propagate a fire or explosion (Tr. 73-74).

Analysis of Mr. Gamblin's samples revealed that sample 375937, taken 1500 feet inby from the point where the sampling started had an incombustible content of 59.7%. Sample 375940 taken 500 feet inby the starting point was 64% incombustible. Sample 375950 taken 500 feet inby the starting point was 56.9% incombustible. Sample 375952, taken 1500 feet inby was 51% incombustible. Sample 375953, taken 2,000 feet inby, and 300 - 500 feet from the working face was 64.3% incombustible (Exh. G-1 pp. 4-5, Tr. 68).

After receiving the laboratory results, Inspector Gamblin issued Respondent citation No. 3860644 on March 18, 1993. He characterized the violation as "significant and substantial" and Peabody's negligence as "moderate." A \$1,019 penalty was proposed for the violation.

The "S&S" characterization was predicated in large part on the fact that after taking the rock dust samples Inspector Gamblin found methane concentrations in excess of 2.5 percent

inby the site of the samples, 34 feet from the working face for mechanized mining unit # 5 (Tr. 36 - 37, 51). As the result of his methane readings, Inspector Gamblin issued Respondent an imminent danger order pursuant to section 107(a) of the Act (Tr. 65). Inspector Gamblin also found loose coal or coal dust accumulations in the same areas in which the rock dust violations were discovered (Tr. 33-34, 312). He cited Respondent for a violation of 30 C.F.R. § 75.400 on account of these accumulations (Tr. 33-34, 312).

Citation 3860644: Analysis

Respondent does not dispute the fact that a violation occurred with respect to citation No. 3860644; it contests the characterization of the citation as "S&S" and the assessment of the gravity for penalty calculation purposes (Respondent's Answer).

The Commission formula for a "significant and substantial" violation was set forth in Mathies Coal Co. 6 FMSHRC 1 (January 1984):

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.

The central issue in this case concerns the application of step 3 of the Mathies test. The Commission's decisions in Shamrock Coal Company, 14 FMSHRC 1306 (August 1992), cited in Respondent's post-hearing brief, and Texasgulf, 10 FMSHRC 498 (April 1988) support the proposition that a rock dust violation is "S & S" only if other conditions that make an accident reasonable likely exist at the same time, or are reasonably likely to occur in the future. In Texasgulf permissibility violations were found non "S&S" because there was no evidence that ignitable or explosive concentrations of methane were likely to occur in Texasgulf's mine. The Commission relied on low methane readings the day of the violation, the absence of any methane explosions or ignitions at the mine in the past, and the geological characteristics of the mine.

In Shamrock 31 of 38 rock dust samples in the return aircourse were violative, some as low as 56% instead of the required 80%. The Commission affirmed the judge's finding that this violation was non "significant and substantial" and

implicitly rejected the Secretary's argument that the judge failed to give proper consideration to "normal mining practices" 14 FMSHRC 1310.

The Commission concluded that the judge did not err in finding these violations to be non "significant and substantial" because of the absence of a "confluence of factors" which would make an explosion or ignition reasonably likely to occur, 14 FMSHRC 1311. It noted that there was no indication that the mine had experienced methane ignitions in the past or that it liberated excessive quantities of methane. The Commission also relied on the lack of evidence regarding impermissible equipment or violative coal dust accumulations on the day of the rock dust violation.

The question then becomes whether respondent's violation of 30 C.F.R. § 75.403 is "significant and substantial" because MSHA, on January 25, 1993, also detected in excess of 2.5% methane at the working face, about 800 to 1,000 feet from several obviously violative rock dust samples, and discovered loose coal accumulations near areas that were inadequately rock dusted.¹ Respondent's compliance manager, Mitchell David Fuson disagreed with MSHA that conditions on January 25, 1993, were such that an explosion or fire were reasonably likely (Tr. 304-313, 317-318, 319-320). His testimony in this regard is predicated on the fact that the rock dust violations were in the intake aircourse and that coal dust accumulations were not sufficient to cause an explosion.

Despite Mr. Fuson's opinion, I conclude that there was a reasonable likelihood of an ignition or explosion when inspector Gamblin detected methane concentrations of 2.5%.² At the time mining operations were ongoing (Tr. 304, 312-313). MSHA regulations at 30 C.F.R. § 75.323 require the withdrawal of miners from intake air courses when methane levels reach 1.5%. From this I conclude that at such concentrations an explosion or ignition is reasonably likely. Indeed, the Commission has recognized that methane is ignitable at a 1.0 to 2.0 percent concentration Texasgulf, 10 FMSHRC at 501.

Although this record indicates that an explosion is far more likely to travel out the return aircourse than the intake

¹I exclude consideration of the two samples that were barely under the required 65 percent.

²Inspector Gamblin's testimony indicates methane concentrations may have been even higher, possibly in the explosive range, at the working face. He was unable to take samples any closer to the face because the roof was not supported (Tr. 61).

aircourse, it does establish that they may travel through the intake side (Tr. 58, 65). Moreover, I infer from the requirement for rock dusting in the intake air courses that the danger of an explosion traveling through that aircourse is sufficiently likely to meet the requirements of the Mathies test. As I find no serious issue with regard to the other criteria set forth in Mathies, I find this violation to be "significant and substantial."

I find further that an \$800 civil penalty is appropriate for this violation considering the factors set forth in section 110(i) of the Act. The gravity of the violation warrants such a penalty because the increased danger to employees caused by inadequate rock dusting might have caused injury to miners who otherwise would not have been hurt, or resulted in more severe injuries than would otherwise have occurred.

I concur with inspector Gamblin's characterization of Respondent's negligence as moderate. He based this in part on the fact that the areas in which the violations occurred would not have been subjected to a pre-shift examination. I also take into consideration the fact the return areas were adequately rock dusted and most of the intake areas sampled were in compliance as well.

Peabody is large operator and an \$800 penalty will have no adverse impact on its ability to stay in business. Respondent demonstrated good faith in abating the violation. I see no reason to either raise or lower the penalty on the basis on Peabody's history of prior violations of the Act.

Citation 3547572: Airflow in the Belt Entry

On April 3, 1993, MSHA ventilation specialist, Troy Davis, conducted an inspection accompanied by Peabody representative, Clifford Alexander. At about 8:00 or 8:30 a.m. the inspection party passed an overcast on the belt line leading to mechanized mining unit #2, which was damaged later in the morning. When the inspection party passed by, there was nothing wrong with the overcast (Tr. 336).

The inspection party proceeded to the working face of unit #2 and performed a thorough ventilation inspection (Tr. 328). On the way back, Inspector Davis took some airflow readings in the neutral entries occupied by the conveyor belt (Tr. 99). At crosscut 31, one crosscut outby the beltline's tailpiece, Davis took two airflow readings that averaged 16 fpm (feet per minute) (Tr. 100). Peabody's ventilation plan required an airflow of 50 fpm.

The reason for the 50 fpm requirement in Respondent's ventilation plan is that Peabody had installed a low-level carbon

monoxide detection system in some of its conveyor belt entries (Exh. G-3, pp. 18 - 21). To insure that fires are detected promptly, Respondent's amended approved ventilation plan requires that air velocity of 50 feet per minute be maintained in the conveyor belt entries relying on the carbon monoxide detection system (Exh. G-3, pg. 18, paragraphs 3 and 4). The detectors are spaced 2,000 feet apart and, thus, an air velocity of 50 fpm will insure that any rise in carbon monoxide levels due to fire will be detected in 40 minutes or less (Tr. 138).

When Mr. Davis obtained the 16 fpm air velocity readings, Mr. Alexander attempted to get in touch by telephone with Terry Hall, the mine foreman. After one or two unsuccessful attempts to reach Mr. Hall, Alexander was able to reach him in approximately twenty minutes (Tr. 333). Alexander told Hall about Mr. Davis' air velocity readings. Mr. Hall informed Alexander that somebody had run into the overcast, which separates intake air and return air (Tr. 103-104). The overcast was being repaired while they spoke (Tr. 136-137, 145). While Mr. Alexander was talking to Mr. Hall, Inspector Davis took another sample of the air velocity and found that it was back up to 86 fpm (Tr. 102, 334).

As a result of the 16 fpm readings, inspector Davis issued Respondent citation No. 3547572 which alleged a "significant and substantial" violation of 30 C.F.R. § 75.370(a)(1). That regulation requires the operator to follow its approved ventilation plan. A \$1,610 penalty was proposed.

Analysis

I find that Respondent did violate the regulation as alleged but that the violation was not "significant and substantial" and that a penalty of \$50 is appropriate pursuant to the criteria set forth in section 110(i) of the Act. The record establishes that the violation was inadvertent in that airflow was reduced due to the accident involving the overcast. Moreover, there is nothing in the record indicating the degree of negligence responsible for this accident.

More importantly, the record establishes that the violation was abated almost as soon as Respondent became aware of the damage to the overcast. Indeed, Mr. Hall had the overcast repaired before he was made aware of the resulting drop in airflow. In applying the third element of the Mathies test to this violation, I conclude that given the prompt abatement of the violation by Respondent, it is unlikely that miners would be injured in this or similar situations occurring in the normal course of mining operations. Therefore, I find the violation to be non "significant and substantial."

Mr. Davis opined that Mr. Hall should have notified the supervisory personnel inby the damaged overcast. Further, Davis believes that Hall should have had the miners working inby this point removed to a point outby the damaged overcast until he established that air velocity had been restored to levels required by the ventilation plan (Tr. 120, 148-151)³. However, I find it difficult to fault Mr. Hall for not taking such steps even if he realized that airflow inby the damaged overcast could not have been in compliance with the ventilation plan.

I find that Mr. Hall responded reasonably in correcting the problem at its source rather than taking the time consuming steps of removing employees. It might be otherwise if Mr. Hall was aware of the reduced airflow but not what was causing it. However, since Mr. Hall could reasonably assume that fixing the overcast would restore the necessary airflow in very short time, I do not consider him negligent for failing to pull his employees outby the damaged overcast.

The violation may have lasted for only about 20 to 25 minutes (Tr. 137). Respondent's ventilation plan allows for a lapse of up to 40 minutes for the carbon monoxide monitors to detect a fire (Tr. 138). Considering all the facts surrounding this violation I deem the gravity of the violation and Respondent's negligence to be very low. Adding to that, Respondent's almost immediate abatement of the problem--without prodding from MSHA, I conclude that a \$50 penalty is appropriate.

Citation 3860363 and 3860368: Roof Dust in the Haulage Roads

On April 5, 1993, MSHA Inspector Robert Meadows observed 2 piles of roof dust 8 feet apart sitting in a haulage road leading to mechanized mining unit 001-0 (Tr. 170 - 171). Roof dust consists of rock, shale and, in some instances, a significant amount of quartz (Tr. 258). The piles of roof dust were about a foot high and 2 1/2 feet wide. There were tire tracks running through the piles (Tr. 173).

As a result of these observations, Meadows issued Respondent citation No. 3860363 alleging a "significant and substantial" violation of 30 C.F.R. § 75.370(a)(1). A \$506 penalty was proposed for the violation. A factor in assessing the gravity of the violation is that mechanized mining unit 001-0 was operating

³The Secretary contends that Respondent violated 30 C.F.R. § 75.324 in proceeding as it did (Tr. 149, Petitioner' brief at page 11). Section 75.324 pertains to **intentional** changes in the ventilation system and is not applicable to the circumstances of this citation.

pursuant to a requirement that miner exposure to respirable dust not exceed 1.7 mg/m³ due to the elevated quartz content of the dust in that area of the mine (Tr. 169).

The cited regulation requires compliance with the operator's approved methane and dust control plan (Exh. G-6). That plan requires that roof dust be deposited against the rib of the last open crosscut or in any entry or room near the rib outby the last open crosscut (Exh G-3, page 3 of plan).

The danger created by deposited roof dust in haulage roads is that when vehicles travel through such deposits, they increase the amount of dust in the air which can be inhaled. This can contribute to the development of pneumoconiosis or silicosis (Exh. G-8).

Respondent takes issue with the characterization of this violation as "significant and substantial." The appropriate criteria for "S&S" with regard to respirable dust is set forth in Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom. Consolidation Coal v. FMSHRC, 824 F. 2d 1071 (D.C. Cir. 1987).

As formulated in Consolidation Coal, supra, the question at step 3 of the Mathies test for respirable dust is whether there is a reasonable likelihood that the health hazard contributed to will result in an illness. Piles of roof dust in travelways are reasonably likely to contribute to the hazard that miners may develop pneumoconiosis or silicosis. While two piles of roof dust observed on one day may not be reasonably likely to lead to occupational illness, if such conditions continue to exist in the normal course of mining operations, it is likely that they will contribute to the likelihood that serious respiratory disease will result.

The fact that no samples were taken of the roof dust piles in this case has no bearing on whether this violation was significant and substantial. If roof dust is deposited in travelways, in the normal course of mining operations, it is likely that there will be an increase in the amount of respirable dust and quartz that is inhaled by miners.

Prevention of respiratory disease requires not only compliance with the exposure limit in section 70.100(a) but also with specific work practice requirements, such as depositing roof dust outside of travelways. If these requirements are not strictly adhered to, overexposure may occur which may not be reflected in bi-monthly sampling⁴. I regard any violation that

⁴If the sampling is done on days on which such violative conditions do not exist, or are conditions to which the designated miner sampled is not exposed, the sampling results may

may in the normal course of mining operations unnecessarily expose miners to additional amounts of respirable dust or quartz to be "significant and substantial." The rebuttable presumption that violative sampling results are "S&S" is applicable to this citation by way of analogy.

Citation No. 3860368 was issued for conditions very similar to those relating to citation No. 3860363. On April 5, Inspector Meadows discussed the roof dust citation with Respondent's walkaround representative, Mitchell David Fuson, who assured him that the violation would not recur (Tr. 183). Three days later, near the 005 working section, Meadows came upon two more roof dust piles sitting in the middle of a travelway (Tr. 183). As in the prior instance, equipment tracks ran through the dust piles.

The gravity of the violation on April 8 was somewhat less than that of April 5, in that the dust in the 005 section did not have an elevated quartz content. On the other hand, Respondent's negligence was greater in that it had been specifically told of the need for greater attention for proper disposal of roof dust and the deposits in this instance should have been discovered by pre-shift and on-shift examiners (Tr. 188-189).

I assess a \$506 penalty for each of these citations. The gravity of the first violation--given the quartz content of the dust, warrants such a penalty. Although the gravity of the April 8 violation was less, the higher degree of negligence warrants a \$506 penalty in consideration with the other statutory factors.⁵

Citation 3860369: Trailing Cable Exposed to Damage

In the course of his inspection of the 005 mechanized mining unit on April 8, 1993, MSHA Inspector Meadows came across a 990 volt trailing cable, part of which had come out into a roadway. This cable was coiled up behind a power transmission center and was providing power to a continuous mining machine approximately 200 feet away. The exposed portion of the cable had tire tracks over it and was being mashed into the ground (Tr. 193 - 194).

On the basis of his observations, Meadows issued Respondent citation No. 3860369 alleging a "significant and substantial"

Footnote 4 continued.

be misleadingly low.

⁵Despite the fact that the 005 section did not have an elevated quartz content in its dust, I have applied the same rationale in concluding citation No. 3860368 to be "significant and substantial" as I applied with regard to citation No. 3860363.

violation of 30 C.F.R. § 75.606. That regulation requires that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment." A \$288 penalty was proposed for this alleged violation.

Respondent concedes that the condition violated the cited standard but takes issue with the gravity assigned to the violation (Respondent's Answer). The thrust of Respondent's argument is that a 990 volt cable has safety features that make injury fairly remote if the cable is damaged by mobile equipment.

The dangers of explosion and electrical shock mentioned and experienced by Inspector Meadows (Tr. 195 - 197) are substantially reduced because the live electrical wires inside a 990 volt cable are wrapped in a metal shield that is grounded (Tr. 276). If the cable is damaged and the wires touch the metal shield, power to the cable will be cut off at the circuit breaker (Tr. 276, 289 - 292). Lower voltage cables, such as the 440 volt cables which injured Inspector Meadows, do not have such protective features (Tr. 277). Sam Sears, the chief electrician for Peabody at Camp 11, characterizes the potential for explosion of a damaged 990 volt cable as "minimal." (Tr. 278)

Analysis

I presume from the regulation that MSHA deemed it reasonably likely that injury would result in the normal course of mining operations if trailing cables are not protected from damage. However, this citation presents the complicating factor that there have apparently been technological changes since the standard was promulgated. The 990 volt cables, with the internal protection devices described by Mr. Sears, have apparently been in use only since the 1980s, while the standard was promulgated in 1969 (Tr. 296).

It is quite clear that injury is far less likely to occur due to mobile equipment running over a 990 volt trailing cable than it is from similar damage to a lower voltage cable. On the other hand, the record indicates that injury is possible if there are failures elsewhere in the system which would prevent the circuit breaker from cutting off power to the cable (Tr. 295). Obviously, if there is an injury it is likely to be more serious the higher the voltage of the trailing cable.

The question then becomes whether the remote possibility that a number of factors coming together may cause injury meets the criteria for a significant and substantial violation under the Mathies and U. S. Steel Mining tests. To find that such a possibility does not meet this criteria would mandate a finding of non "significant and substantial" and indicate that noncompliance with this requirement will normally bring only a \$50 penalty from MSHA pursuant to 30 C.F.R. § 100.4.

In Peabody Coal Company, 15 FMSHRC 2578, I concluded that I would presume that MSHA deemed injury reasonably likely unless the operator established that the cited condition was distinguishable from those addressed by the regulation. In this case, since the 990 volt cable with its internal protective devices was not in use when the standard was promulgated, I find that Respondent has met that burden. Given this fact and my conclusion that the degree of negligence, Respondent's history of violations, good faith etc., do not warrant a higher figure, I conclude that this violation is non "significant and substantial" and assess a \$50 penalty.

Citation 9898030: Respirable Dust

On March 23 and 24, 1993, Respondent conducted its bi-monthly respirable dust sampling as required by 30 C.F.R. § 70.207 on the continuous miner operator of mechanized mining unit 005-0 (Exh. G-11). The samples taken by Respondent were analyzed by MSHA's Pittsburgh laboratory and were reported to average 2.5 mg of respirable dust per cubic meter of air, a level that exceeds the 2.0 mg/m³ limit set by MSHA's regulations at 30 C.F.R. § 70.100(a) (Exh G-11, page 2).

On the basis of these results, MSHA inspector issued Respondent citation No. 9898030 on April 2, 1993, alleging a significant and substantial violation of section 70.100(a). The company sampled again between April 13 and 15, 1993 and obtained an average respirable dust concentration of 0.8 mg/m³ (Exh. G-11, page 4).

Respondent in its post-hearing brief indicates an intention to withdraw its contest to the \$1,019 penalty proposed for this citation. Therefore, I assess a civil penalty in this amount. There is a rebuttable presumption that respirable dust violations are presumed to be significant and substantial Consolidation Coal Co. v. FMSHRC, 824 F. 2d 1071 (D. C. Cir. 1987). That presumption has not been rebutted in this case.

The April sampling results suggest that compliance with the standard is achievable if proper attention is given to work practices and dust control measures. Given the importance of controlling respiratory dust exposures in the statutory scheme, I consider any violation of 70.100a to very grave and any violation to be evidence of a considerable degree of negligence. The fact that the March samples were above the permissible limit suggests that during this time period employees were regularly overexposed to excessive concentrations of respirable dust.

Given the gravity of the violation and Respondent's negligence, I conclude that the \$1,019 penalty proposed is appropriate even after considering Peabody's good faith in

abating the violation. Such a penalty is also appropriate considering the company's size and prior history of violations. The penalties in this case obviously do not compromise Peabody's ability to stay in business.

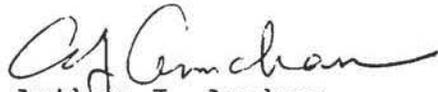
ORDER

The citations at issue in this case are affirmed and Respondent is ordered to pay the penalties set forth below within 30 days of this decision:

<u>Citation</u>	<u>Standard</u>	<u>Assessed Penalty</u>
3547578	75.370(a)(1)	\$ 50*
3547717	75.360(c)(1)	\$ 50
3547573	75.370(a)(1)	\$ 50
3860644	75.403	\$ 800
3547572	75.370(a)(1)	\$ 50*
3860363	75.370(a)(1)	\$ 506
3860368	75.370(a)(1)	\$ 506
3860369	75.606	\$ 50*
9898030	70.100(a)	\$1,019

Total: \$3,081

* Citation modified to non "significant and substantial" violation.


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

Distribution:

W. F. Taylor, Esq., Office of the Solicitor, U. S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville; TN 37215-2862 (Certified Mail)

Carl B. Boyd, Jr., Esq., Suite A, 120 N. Ingram St., Henderson, KY 42420 (Certified Mail)

/jff

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 7 1994

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MSHA, on behalf of	:	PROCEEDING
DANNY SHEPHERD,	:	
Petitioner	:	Docket No. KENT 94-69-D
v.	:	
	:	BARB CD 93-25
SOVEREIGN MINING COMPANY,	:	BARB CD 93-27
Respondent	:	
	:	Mine No. 1

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

On October 28, 1993, the Secretary filed an Application for Temporary Reinstatement on behalf of Danny Shepherd. The respondent did not contest the reinstatement application. Consequently, on November 18, 1993, I issued an Order requiring the respondent to reinstate Shepherd immediately. 15 FMSHRC 2365 (November 1993).

On December 3, 1993, the Secretary filed a Motion to Compel Compliance with my November 18, 1993, reinstatement order. The Secretary's motion was based on the respondent's alleged circumvention of my order as a result of the respondent's contemporaneous reinstatement and "layoff" of Shepherd on November 19, 1993. On December 17, 1993, the Commission remanded this matter to me for consideration of the issues raised in the Secretary's Motion to Compel and the respondent's response. Secretary, on Behalf of Danny L. Shepherd v. Sovereign Mining Company, 15 FMSHRC 2450 (December 1993).

Consistent with the Commission's Remand Order, I participated in several conference calls with the parties. These conference calls culminated in a conference on February 8, 1994, wherein the parties informed me that they had reached settlement. A Joint Motion to Approve Settlement was filed on February 23, 1994.

The terms of the agreement are that Danny L. Shepherd agrees to withdraw the instant temporary reinstatement application. Shepherd also agrees to withdraw his most recent discrimination complaint filed with the Mine Safety and Health Administration (MSHA) on December 2, 1993, after his November 19, 1993 layoff. (Case No. MSHA BARB-CD-94-10). In addition, Shepherd will also

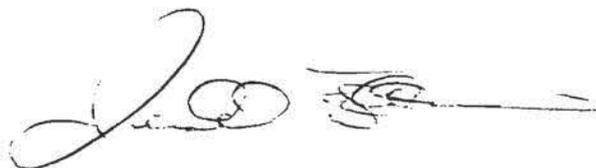
withdraw the underlying discrimination complaints involved in this action (Case Nos. BARB-CD-25 and 27), all of which are currently pending before MSHA. Finally, the Secretary agrees to file the necessary documents to dismiss a related civil penalty proceeding against the respondent in Docket No. KENT 94-265.

In consideration of the above noted actions by Danny L. Shepherd and the Secretary, Sovereign Mining Company agrees:

1. To pay Shepherd \$10,000 in liquidated damages;
2. to pay \$2,250 in attorney fees to the Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky; and
3. to pay MSHA \$2,750.00 in satisfaction of the proposed civil penalty for Citation No. 3402675, which was issued by MSHA to Sovereign Mining on November 23, 1993.¹

The settlement agreement further provides that all payments are to be made within ten days of the execution date (February 22, 1994) of the agreement. Finally, Sovereign Mining Company agrees to expunge all records of Shepherd's past discrimination complaints. If contacted by a prospective employer of Shepherd, Sovereign Mining agrees not to divulge any information concerning Shepherd's activities other than the dates of Shepherd's employment with the company.

After careful consideration of the joint settlement motion, I conclude that the settlement disposition is reasonable and in the public interest. **ACCORDINGLY**, in view of the mutually agreeable settlement, the settlement terms **ARE APPROVED** and the joint motion to dismiss this temporary reinstatement proceeding **IS GRANTED**.



Jerold Feldman
Administrative Law Judge
(703) 756-5233

¹ This citation is not before me. It is mentioned solely to document the terms of the settlement agreement.

Distribution:

Carl C. Charneski, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Leroy B. Lackey, Jr., President, Sovereign Mining Company, P.O. Box 450, Dwarf, KY 41739 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project, 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

/11

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 7 1994

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. KENT 94-396-D
ON BEHALF OF : BARB CD 94-02
DANNY SHEPHERD, :
Complainant : Mine No. 1
: :
v. : :
IRISHMAN ELKHORN COAL : :
COMPANY, : :
Respondent :

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

The Secretary has filed an application for Temporary Reinstatement pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), on behalf of Danny Shepherd. Shepherd was employed by the Irish Elkhorn Coal Company at its No. 1 Mine from September 30, 1993, until October 8, 1993, when he was discharged.

The Secretary's reinstatement application is supported by an affidavit of Lawrence M. Beeman, Chief, Office of Technical Compliance and Investigation for Coal Mine Safety and Health, Mine Safety and Health Administration. Beeman's affidavit alleges that Shepherd engaged in several protected activities, including his refusal to operate a continuous mining machine in an unsafe condition, his distribution of miners' rights booklets to mine personnel and his statements to miners that they did not have to work under various unsafe conditions.

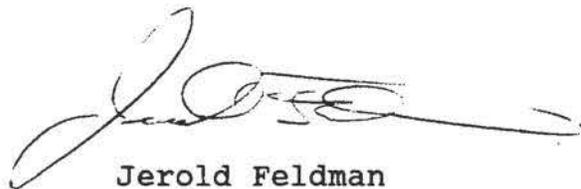
The Secretary's application was served upon Billy R. Watson, general manager of the respondent, and attorney C. Graham Martin, on February 4, 1994. Commission Rule 45(c), 29 CFR. § 2700.45(c) in part provides: "Within ten days following receipt of the Secretary's application for temporary reinstatement, the person against who relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and,

if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

The Secretary's application was followed by a letter filed on February 22, 1994, requesting Shepherd's reinstatement in view of the respondent's failure to request a hearing in this matter. Therefore, Commission Rule 45(c) requires me to review the Secretary's application to determine if Shepherd's complaint has not been frivolously brought.

The "not frivolously brought" standard set forth in Section 105(c), 30 U.S.C. § 815(c), is satisfied when there is a reasonable cause to believe that the underlying discrimination complaint is meritorious. J. Walter Resources v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990). Thus, the Secretary must prevail on an application for temporary reinstatement if the facts supporting the application are not insubstantial or frivolous. Id. at 747. Beeman's affidavit submitted in support of the Secretary's application specifies alleged protected activities that are contemporaneous with Shepherd's employment termination which occurred on or about October 8, 1993. Consequently, I conclude that Shepherd's complaint is not clearly without merit or pretextual in nature. Therefore, I find that Shepherd's complaint has not been frivolously brought.

Accordingly, the Irishman Elkhorn Coal Company **IS ORDERED** to immediately reinstate Danny Shepherd to the position from which he was discharged on or about October 8, 1993, or, to an equivalent position, at the same rate of pay and with the equivalent benefits. Shepherd's entitlement to backpay and benefits shall be calculated from the date of this order.



Jerold Feldman
Administrative Law Judge
(703) 756-5233

Distribution:

Carl C. Charneski, Esq. Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project, 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

Billy Watson, General Manager, Irishman Elkhorn Coal Company, Inc., P.O. Box 729, Hindman, KY 41922 (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 7 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 93-215
Petitioner : A. C. No. 12-02033-03589
v. :
: Buck Creek Mine
BUCK CREEK COAL, INC., :
Respondent :

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor,
U. S. Department of Labor, Chicago, Illinois,
for the Secretary;
Patrick A. Shoulders, Esq., Ziemer, Stayman,
Weitzel & Shoulders, Evansville, Indiana,
for Respondent.

Before: Judge Maurer

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) alleging a violation of the mandatory standard found at 30 C.F.R. § 75.400.¹ Pursuant to notice, the case was heard in Evansville, Indiana, on November 30, 1993. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law and I have considered them in the course of my adjudication of this matter.

The citation at bar, Citation No. 4053641, was issued by Inspector James Holland of the Mine Safety and Health Administration (MSHA) as a result of his inspection at the Buck Creek Mine on March 31, 1993. The citation was issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", and alleges a

¹/ 30 C.F.R. § 75.400, "Accumulations of combustible materials," provides:

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

"significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges that "Accumulation of loose fine coal and float coal dust, black in color was permitted to accumulate underneath the belt conveyor, tail roller, and feeder from the check curtain behind the feeder and extended inby the feeder and including all three dumping points, a distance of 116 feet. The accumulations ranged from 2 inches to 3-1/2 feet in depth and 18 feet in width."

Findings of Fact and Discussion

Inspector Holland testified that after observing the cited condition, an accumulation of loose coal, coal fines, and float coal dust, black in color, he measured the length, depth, and width of the accumulations with a measuring tape in the presence of the Buck Creek Mine Manager, Charlie Austin and the miner's representative, Ron McGhee. These measurements are recorded on the face of the citation as being from 2 inches to 3-1/2 feet in depth, 18 feet in width and for a distance of 116 feet. The heaviest accumulations were located at the dumping points of the feeder, where the inspector acknowledges you generally allow a certain amount of coal to accumulate, but at some point, even that has to be cleaned up as well. The accumulations he cited at the dumping points exceeded the bounds of the normal limits in his opinion, and I agree.

In fact, I find the respondent has generally failed to rebut the inspector's factual testimony vis-a-vis the extent of the cited accumulations and accordingly, I conclude that the coal accumulations cited by the inspector in the course of his inspection did in fact exist and that those accumulations constituted a violation of 30 C.F.R. § 75.400.

The "Significant and Substantial" Issue

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

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

In order to establish that a violation of a mandatory safety standard is significant and

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; Halfway, Incorporated, 8 FMSHRC 8, 12 (January 1986).

The Secretary has established by a clear preponderance of the evidence that a violation of 30 C.F.R § 75.400 existed. Furthermore, Inspector Holland's un rebutted testimony credibly establishes that there were substantial accumulations of loose coal, coal fines and float coal dust, in the feeder area, particularly at all three dumping points and the tailpiece. The tail roller was completely covered and was turning in the coal fines. The inspector also noted that the color of the accumulations was black. The significance of that fact being an indication that the accumulation was not mixed with rock dust and therefore not of the proper incombustible content. A heated roller turning in that combustible material could easily be an ignition source which could in turn cause a fire. I also take notice that the existence of nearby combustible material would serve to propagate any fire that got started from a hot roller. I therefore find that the cited accumulations presented a

discrete safety hazard - a fire hazard. Additionally, Inspector Holland credibly testified and I accept his opinion, that in the event of a fire, smoke and gas inhalation by miners in the area would cause a reasonably serious injury requiring medical attention.

Therefore, I find that in the normal course of continued mining it was reasonably likely that an ignition would have occurred, a fire would have resulted and that in that event, fire-related injuries of a reasonably serious nature would have been reasonably likely to occur. Accordingly, I conclude that the cited violation was "significant and substantial" and serious.

The "Unwarrantable Failure" Issue

The Secretary also alleges the violation was the result of the respondent's "unwarrantable failure" to comply with the cited standard.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993).

The inspector made this a "d" citation based on several factors. He testified at Tr. 17-18:

Q. In your opinion, did the Operator exhibit aggravated conduct constituting more than ordinary negligence in allowing this violation to take place?

A. Yes

Q. What facts did you rely upon in determining this was an unwarrantable condition?

A. The fact that the pre-shift exam had been made, and the section foreman had been on the unit approximately an hour and a half before I arrived, and there wasn't nothing, no action being taken on the condition.

Q. And did you rely upon anything else in determining that this was an unwarrantable failure to comply?

A. That's all.

He later added that he had previously issued an "a" citation for the same type violation in the same area earlier that month for a less severe condition, and he opined that from his experience, he felt the materials he cited had been allowed to accumulate for at least three shifts. However, he also admitted on cross-examination that he had no factual basis for that opinion, other than his long experience in the coal mining business.

I also note from the record that there was no one working to correct the cited condition when the inspector discovered it and that factor greatly influenced him toward the "d" citation vice an "a" citation.

The respondent vigorously opposes the "unwarrantable failure" finding.

Firstly, respondent, through Mr. Gary Timmons, their Safety Director, produced the on-shift examination of the belt conveyors for the date in question performed by the belt examiner between 6:00 a.m. and 7:00 a.m. (an hour or two prior to Inspector Holland's arrival). This examination would have included the feeder area and tail roller. No accumulations were noted. He also produced the pre-shift mine examiner's report for March 31, 1993, for the Section 002 Unit that was made by Roger Austin from 5:30 a.m. to 6:05 a.m. This report was called outside at 6:30 a.m., or approximately an 1-1/2 hours before the inspector's visit. Again, the feeder and the belt in the cited area were inspected with no accumulations noted. Mr. Timmons also sponsored the daily and on-shift report of the section foreman on the previous shift, which states his crew cleaned the feeder at 5:00 a.m., or approximately 3 hours before the inspector cited it.

Somewhat incongruously, although Inspector Holland opined that the accumulations had been present for at least three shifts, he did not cite the respondent for any failures or omissions in these prior examinations. The inspector admitted at

trial that this was an inconsistency on his part; he should have issued a second citation for an inadequate preshift examination.

Mr. Hedgepath, a shuttle car operator, testified that he personally "scooped" or cleaned the feeder area and then ran his shuttle car for approximately 30 minutes prior to the citation being written. But he explained that you could still have piles of coal in "furrows" because he had to be careful with the scoop bucket or he would hit and damage the feeder. He also testified that he had personally cleaned the tail roller that morning and it was running freely when he started dumping coal into the feeder.

Mr. Wayne Laswell, the section foreman, was made aware that the feeder was stopped at approximately 7:50 a.m., to "scoop" it in order to clean up coal accumulations. Half an hour later he was surprised to hear that they had a "d" citation issued for accumulations in the feeder area. He testified that "I thought it was just cleaned. That's what they told me." Furthermore, he was under the impression from the preshift examination that he came on the shift with a clean report.

Respondent's defense to the unwarrantable failure finding is somewhat illogical. On the one hand, their evidence would tend to show that no excess accumulations existed in the feeder area prior to the start of the shift in question. On the other hand, Mickey Hedgepath testified that he had to scoop up the cited area at the beginning of the shift because a shuttle car was "hung-up" in loose coal. He also testified that there were still substantial coal accumulations piled up in "furrows" even after he cleaned the cited area and started dumping coal into the feeder himself. Hedgepath estimated that he scooped up three buckets of loose coal at the start of the shift, yet there were no accumulations noted in the preshift examiner's report. Where did all this coal suddenly come from? The only reasonable answer seems to be that it was there all the time. I note here as an aside the obvious fact that just because these accumulations were not recorded in the preshift examiner's report does not necessarily mean the feeder area was clean at that time. It may only mean that the examiner failed to see and/or record the accumulations, and certainly does not bar an unwarrantable failure finding.

Respondent appears to be relying chiefly on the testimony of the section foreman, Laswell, that he was unaware of the violative condition that existed and had a right to rely on the clean preshift examination report. But assuming, arguendo, that this was so, the lack of actual knowledge by Laswell and/or other mine management likewise does not preclude an unwarrantable failure finding from being affirmed herein.

The Commission has previously recognized as relevant to unwarrantable failure determinations such factors as the extent of a violative condition, or the length of time that it has existed, whether an operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. See, e.g., Quinland Coals, 10 FMSHRC 705, 708-09 (June 1988); Youghiogheny & Ohio Coal Company, supra, 9 FMSHRC at 2011; Utah Power & Light Co., 11 FMSHRC 1926, 1933 (October 1989); and Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992).

The accumulations, if we believe the testimony of the inspector, and I do, were extensive. His testimony as to amounts of material, measurements, and so forth, is unrebutted in the record. Mr. Hedgepath even corroborates his testimony to some extent. He testified that up to 9 inches of coal under the feeder was a "natural" or "regular" accumulation. And in the area of the dumping points, his idea of a "regular" accumulation is up to the point where a shuttle car gets hung-up in a pile of coal, and they can no longer go on. Only then does anyone clean up the accumulated coal.

While there is no direct evidence in the record as to how long the accumulations were there, the preponderance of the circumstantial evidence would appear to indicate that they existed at least as far back as the previous shift. It just does not ring true that if the area had just been cleaned at 5:00 a.m., and been given a clean preshift examination at 6:00 a.m., that there would be enough coal piled around the feeder by 7:00 a.m., to hang-up a shuttle car. Moreover, there was enough coal accumulated at that point around the belt conveyor and feeder to cause Mr. Hedgepath to scoop up three scoops full of loose coal in a bucket that is 12 or 13 feet wide. Then, after only 20-25 minutes of mining on that shift, the inspector found the accumulations he described in his citation, which was yet still enough coal and coal dust to fill another scoop bucket in order to abate the violation. It took five employees approximately 2-1/2 hours to clean up the excess coal accumulations in that area.

This operator has also had prior notice that a problem with coal and coal dust accumulations existed in the cited area and indeed the mine generally. Inspector Holland himself issued a citation for the same violation in the same location on March 4, 1993, some 3 weeks before the "d" citation at bar. Additionally, it is noteworthy that the respondent received a grand total of nine citations for violations of 30 C.F.R. § 75.400 just during the month of March 1993, alone. This indicates to me that the operator has been placed on notice that greater efforts are necessary for compliance with this particular standard.

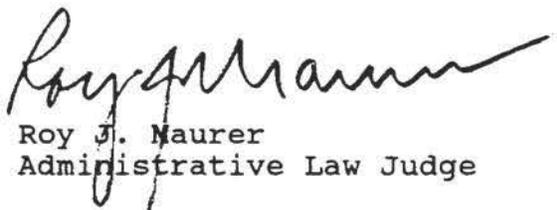
At the time the inspector issued the instant citation, no abatement efforts were underway to remove the accumulations. The coal mining operation was going on as usual, as if nothing was amiss. This was one of the factors the inspector cited in deciding on a "d" citation instead of the garden variety 104(a).

Under all the circumstances found in this record, I find a clear lack of due diligence, indifference, and a lack of reasonable care demonstrating aggravated conduct of both omission and commission on the part of the operator, constituting an "unwarrantable failure" to comply with the standard in question.

Considering all of the six statutory criteria contained in section 110(i) of the Act, I find that the civil penalty proposed by the Secretary in this case is appropriate, reasonable, and in the public interest.

ORDER

Section 104(d)(1) Citation No. 4053641 **IS AFFIRMED**. Respondent is directed to pay a civil penalty of \$2000 for the violation found herein.


Roy J. Maurer
Administrative Law Judge

Distribution:

Lisa A. Gray, Esq., Office of the Solicitor, U. S. Department of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604
(Certified Mail)

Patrick A. Shoulders, Esq., Ziemer, Stayman, Weitzel & Shoulders, 1507 National Bank Building, P. O. Box 916, Evansville, IN 47706
(Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 8 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. VA 93-72-M
	:	A. C. No. 44-02385-05511
	:	
D. M. CONNOR SAND COMPANY, Respondent	:	Connor Sand
	:	

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, VA
for Petitioner;
Humes J. Franklin, Jr., Waynesboro, VA
for Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) seeking a civil penalty of \$539¹ for the alleged violation, by the Operator of various mandatory regulatory standards. Pursuant to Notice, the case was scheduled for hearing on November 9, 1993 in Charlottesville, Virginia. On November 9, 1993, before the hearing commenced, I inquired of counsel if there had been any recent discussion concerning settlement of all, or some of the citations at issue. Counsel requested time to discuss settlement. Counsel advised me that a settlement had been reached regarding all citations at issue. The parties moved for approval of the settlement which reduces the proposed penalty for Citation No. 4084309 from \$189 to \$50, and amends the citation to non-significant and substantial. The parties also seek approval of the Operator's agreement to pay the full penalty assessed for citation numbers 4084310, 4084312, 4084313, 4084314, 4084316, 4084317, 4084318, 4084319, and 4084320.

¹ At the hearing, Counsel for the Secretary asserted that the proposed assessment in error sought a penalty for citation No. 4084315, and that the reference to this citation is to be excluded from the proposed assessment.

I have considered the representation of counsel, the documentation in this case, and the testimony of the inspector who issued these citations. I conclude that the proposed settlement is appropriate within the preview of Section 110(b) of the Federal Mine Safety and Health Act of 1977. The Motion to Approve the settlement is Granted.

It is ORDERED that the operator, D.M. Connor Sand Company, pay, within 30 days of this decision, \$500 as a civil penalty.



Avram Weisberger
Administrative Law Judge

Distribution:

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

Humes J. Franklin, Jr., Franklin, Franklin, Denney & Ward, P.O. Drawer 1140, Waynesboro, VA 22980 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 9 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-1279
Petitioner : A.C. No. 46-01453-04048
v. :
: Mine: Humphrey No. 7
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

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

Before: Judge Barbour

In this proceeding the Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA) and pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) seeks the assessment of civil penalties against Consolidation Coal Company (Consol) for four alleged violations of mandatory safety standards for underground coal mines found in Part 75 of Title 30, Code of Federal Regulations (C.F.R.). The Secretary also alleges that two of the violations constituted significant and substantial contributions to mine safety hazards (S&S violations) and that one of the S&S violations was caused by Consol's unwarrantable failure to comply with the cited standard. The purported violations are alleged to have occurred at Consol's Humphrey No. 7 Mine, an underground bituminous coal mine located in Monogalia County, West Virginia.

Consol denied the Secretary's allegations and a duly noticed hearing on the merits was conducted in Morgantown, West Virginia.

SETTLEMENTS

At the commencement of the hearing, counsel for the Secretary announced the parties had settled two of the alleged violations and he moved for approval of the settlement.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
3108480	5/26/92	75.1106-3(a) (3)	\$50.00	\$50.00

The citation was issued when MSHA Inspector Thomas W. May, Sr., observed two compressed gas cylinders that were not protected against contact with power lines. May concluded that it was unlikely an injury would occur as a result of the condition and that the condition was due to Consol's moderate negligence. Counsel for the Secretary stated that Consol agreed to pay-in-full the proposed civil penalty. Tr. 10.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>ASSESSMENT</u>	<u>SETTLEMENT</u>
3108497	5/27/92	75.1722(a)	\$189.00	\$113.00

The citation was issued when MSHA Inspector Charles J. Thomas observed a guard on a belt conveyor takeup pulley that was not placed so as to prevent a person from getting a hand caught between the pulley and the belt. Thomas concluded the violation was S&S and was due to Consol's low negligence. Counsel for the Secretary stated that while the guard was in fact not in place, an area guard at the end of the belt discouraged and perhaps even prevented persons from being in the vicinity of the inadequately guarded pulley. Tr. 10. Therefore, the Secretary requested the citation be modified to indicate an injury was unlikely and that the violation was not S&S. Tr. 11.

APPROVAL OF THE SETTLEMENTS

Based upon counsel's representations and the other applicable civil penalty criteria discussed below, I APPROVE the settlements. I will order payment of the agreed upon civil penalties, as well as modification of Citation No. 3108497, at the close of this decision.

STIPULATIONS

Prior to the taking of testimony the parties stipulated, in pertinent part, as follows:

1. Consol is the owner and operator of the Humphrey No. 7 Mine.
2. Operations of Consol are subject to the jurisdiction of the Mine Act.
3. The case is under the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judge.

4. Individuals whose signatures appear in block 22 of the subject citations and orders at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary when each of the subject citations and orders was issued.

5. True copies of each of the subject citations and orders were served on Consol or its agent as required by the Mine Act.

6. The total proposed penalty for the citations and orders at issue will not affect Consol's ability to continue in business.

* * *

See Tr. 7-8 (non-substantive editorial changes made).

CONTESTED VIOLATIONS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
3108488	5/18/92	75.303	\$267

The citation states:

In the 6 southwest longwall section a danger sign is not posted at the approach to a roof fall over the stage loader and headgate.

Gov. Exh. 5. In addition to finding a violation of section 75.303, the inspector found the violation to be S&S.

Effective November 16, 1992, section 75.303 was revised and replaced by 30 C.F.R. § 75.360. 57 FR 20914 (May 15, 1992), 34683 (August 6, 1992), 53857 (November 13, 1992).

RELEVANT TESTIMONY

THE SECRETARY'S WITNESS

Charles J. Thomas

Thomas stated that on May 17, 1992, he arrived at the Humphrey No. 7 Mine at approximately 11:30 p.m. He was there to conduct an inspection. Tr. 21-22. Thomas knew there had been a roof fall at the mine and he wanted to see it. Tr. 69-70. He proceeded underground accompanied by Benny Strahin, Consol's safety escort, and Mike Plevich, the representative of miners. Tr. 22.

Upon approaching the headgate at the 6 southwest longwall section, Thomas observed a roof fall that nearly covered the stage loader. The fall was approximately 45 feet long, 15 feet wide and at points 6 to 8 feet high. The stage loader measured approximately 50 feet long, 8 feet wide and 3 to 4 feet high. Tr. 27. There was fallen rock on both sides of the stage loader. Tr. 63. Although a person had to be careful of his or her footing, a person could travel on either side of the stage loader. Tr. 63

Thomas explained that coal from the longwall was dumped into the stage loader to be crushed and conveyed to the tailpiece of the section conveyor belt. Tr. 28. As the longwall advanced the stage loader was shoved down the headgate entry by jacks built into the base of the longwall roof support shields. Tr. 29

The roof fall had occurred 30 or 40 hours before Thomas viewed it. Tr. 30. Thomas testified he could see that Consol had removed approximately 15 feet of the fallen roof from the longwall end of the stage loader. However, much of the stage loader remained covered. Tr. 35, 72, 74.

When standing in the headgate entry facing the longwall, the controls for the stage loader were located on its left side, approximately in the middle of the equipment. Tr. 39; see Gov. Exh. 6. (Thomas could not recall if the controls were covered by rock when he saw the loader. Because of the bad roof he did not proceed inby to the controls. Tr. 75) The controls governed the power to the stage loader, the longwall shear and the longwall chain conveyor. While there were other controls for these latter pieces of equipment, power to them initially was turned on and off at the stage loader. Tr. 40. In fact, coal could not be cut without power being turned on and off at the stage loader controls and when the longwall was operating, there was always a man miner stationed at the stage loader. Tr. 41, 71.

In Thomas' opinion, despite the roof fall, mining had taken place between the time of the fall and the time he observed the area. As a consequence, the stage loader had been pushed down the tailgate entry about 15 feet. Tr. 42, 44. To have advanced the stage loader, a person would have had to travel to the controls of the equipment and turned on the power. Tr. 45.

In addition, during this time a pre-shift examination had been conducted. Tr. 82. (A pre-shift examination was carried out every eight hours. Id.) On May 18, the shift started at 12:01 a.m., Thomas cited the alleged violation at 3:20 a.m. The pre-shift examiner would have observed the roof fall area some time between 9:00 p.m. and midnight on May 17. Thomas believed it likely that the conditions observed by the pre-shift examiner

in the headgate entry were essentially the same as those he observed. Tr. 99-100.

If the pre-shift examiner found a condition hazardous to persons who might enter or be in the area, section 75.303 required the posting of a "danger" sign at all points where persons would be required to pass. In Thomas' opinion, a sign should have been posted at the tail end of the stage loader because the area of the roof fall was hazardous and miners had to advance into the area to get to the controls of the stage loader. Tr. 47. The fall had left the roof with hanging rock that could drop at any time. Tr. 84, 85. Thomas saw no sign posted, warning of danger, in the vicinity of the stage loader. Tr. 23. Thomas told Strahin that he, Thomas, was going to issue a citation to Consol for failing to post a danger sign. Id. No explanation was offered to Thomas as to why a danger sign was not posted. Tr. 42.

Thomas acknowledged that one crosscut over from the tailgate entry and one block of coal inby, a danger sign had been posted above a check curtain, but Thomas described this as the "back side" and indicated miners no longer used the area in which the sign was placed to enter the area where the stage loader was located. Tr. 47.

Thomas believed the area was hazardous for another reason -- he speculated that miners would climb on top of the stage loader to get to the longwall face. There was 3 or 4 feet between the fallen rock on top of the stage loader and the roof and in Thomas' opinion, this was enough room for a person to travel over the stage loader to the longwall face. Tr. 54, 87.

Thomas' fear was that any miner who entered the headgate entry in the vicinity of the stage loader could be struck by rock falling from the roof cavity. Tr. 48. Thomas did not recall that any efforts had been made to support the roof in the area of the fall, but agreed that some posts or cribs might have been installed. Tr. 49, 160, 163. If so, he still regarded the area as hazardous because rock could have fallen between the cribs or posts and struck a miner. Tr. 49. Without a danger sign posted, a person who was not familiar with the longwall section could walk right into the dangerous area without knowing it. Tr. 56. Even miners, familiar with the area, needed to be reminded of the dangerous roof. Tr. 64, Tr. 44; Gov. Exh. 6.

A miner who was hit by falling rock could have been seriously injured. In addition, it was "reasonably likely," in Thomas' opinion, that a miner would suffer such an injury. Miners walk under bad top because, "[T]hey like to see what's there." Tr. 65. It does not happen frequently, but it happens. Id.

Consol's management was negligent in not posting the danger sign. One had been posted on the backside of the fall, so management obviously knew signs were supposed to be hung. Tr. 66. The sign should have been posted when the fall was discovered. Tr. 67.

CONSOL'S WITNESS

Benjamin F. Strahin

Benjamin F. Strahin, Consol's safety escort, was with Thomas the day Citation No. 3108488 was issued. Strahin stated that when Thomas told him Consol needed to post a danger sign in the stage loader area, he responded, one was not needed because there was "no place to go." Tr. 106. According to Strahin, a crib had been build between the stage loader controls and the rib. The crib was 3 inches from the controls and its other side was flush with the rib. To get beyond the controls, a miner would have had to tear down the crib. Id. The other side of the stage loader was set with posts. Tr. 109. In addition, a steel crossbar was installed over the stage loader and under the roof, one end of the crossbar was on the crib and the other end was on a post. Id., Tr. 109, 112-113, 157. Strahin stated that when he arrived at the stage loader, it was possible to walk up the right side of the stage loader to the longwall face. Tr. 112.

According to Strahin, when he and Thomas arrived, only about 15 to 20 feet of the fall remained to be cleaned up. He stated that the way the fall was cleared from the stage loader was to use the ramjacks to push the loader forward so that the rock fell onto the panline and passed through the crusher. Tr. 114-115. (In other words, the stage loader had to be operating to clean up the fall.)

Strahin agreed that there was rock on the stage loader and removal of the larger pieces could have required a miner to be at the controls of the stage loader. Tr. 141. Strahin confirmed that power for the longwall was turned on at the controls of the stage loader. He maintained, when he and Thomas observed the area, a miner would not have had to proceed under unsupported roof to get to the controls. Tr. 116-117. However, he stated it was possible that before they saw the area a miner would have had to go under unsupported roof to get to the controls. Tr. 156. To abate the violation, Strahin put a danger sign on the crib. Tr. 117.

The pre-shift examination book contained entries indicating the presence of the fall from 40 hours before the subject inspection until after the violation was abated. Tr. 121. In Strahin's opinion, the fall was noted in the pre-shift book so that a foreman new to the section would understand he needed to keep an eye on the area. Tr. 122. Strahin agreed that the roof

fall was noted under a section in the book where observed violations or hazardous conditions were reported. Tr. 125-126.

Strahin maintained that although a miner could have crawled over the rock on top of the stage loader to attempt to get to the longwall face, no one would have been "dumb enough" to do it. Tr. 136. There would have been no purpose in such a venture. There were other and easier ways to reach the face. Tr. 158-159.

THE VIOLATION

Section 75.303 stated in pertinent part that if the pre-shift examiner "finds ... any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a 'danger' sign conspicuously at all points which persons entering such hazardous place would be required to pass." There is no question that a danger sign was not posted at the approach to the stage loader in the headgate entry of the 6 southwest longwall section. The issue is whether conditions in the area were hazardous to a person who might enter or be in such area. I conclude, the answer is "yes" and that a violation existed.

I accept Thomas' testimony that when he observed the area, there was fallen roof from the headgate end of the longwall up to the area very near the stage loader's controls. I further accept his testimony that although cleanup was in progress at the headgate end of the longwall, the fallen roof had not been removed from the entire area and that a significant portion of the entry, including much of the stage loader, remained covered.

However, I also conclude Thomas' memory was not infallible. He could not recall if rock from the fall actually covered the controls of the stage loader or if a crib had been erected adjacent to the controls or if posts had been set between the stage loader and the solid. Strahin's testimony was much more specific with respect to the presence of the crib and posts and I find it entirely believable the crib and posts were in place. After all, the roof fall had occurred some 30 to 40 hours before Thomas arrived on the scene, some cleanup had been in progress and it makes sense that between the fall and the time Thomas saw the area, Consol would have made efforts to alleviate the danger.

Because I accept Strahin's testimony that the crib was adjacent to the stage loader's controls, I do not believe that when Thomas observed the area, miners would have had to stand under unsupported roof when at the controls of the stage loader. Further, I am not persuaded, as Thomas seemed to maintain, that miners who traveled the headgate entry between the loader and the solid were subject to danger because roof could fall from between the posts and strike them. Tr. 49. Posts are a perfectly acceptable means of roof control and there is no indication the

roof was supported inadequately by the posts. Therefore, I am not convinced that at the time Thomas viewed the area, there was a present hazard to miners.

In addition, I find the inspector's theory that miners would climb on the top of the stage loader in order to travel toward the longwall face, too far fetched to credit. I agree with Strahin, there would have been no purpose to it. There were easier ways to get to the face. A mine operator need not anticipate and protect against totally bizarre behavior.

All of this said, I nonetheless, conclude a violation existed between the time the roof fell and the time Thomas arrived on the scene. It is important to remember, as Strahin explained, that cleanup of the fall began at the longwall end of the stage loader and that as the clean up progressed, the stage loader was shoved down the entry. Tr. 114-115. Strahin believed that 15 or 20 feet of the fall was left when the inspection party arrived on the section which means that 20 to 25 feet of the approximate 40 feet of fall had been cleaned up. Tr. 114. Thomas believed that approximately 15 feet of the fall had been cleaned. Tr. 74. Whoever is right, it is clear that to clean up the fall, the stage loader and longwall face equipment had to be energized. To energize the equipment, a person had to use the controls on the stage loader. Because the stage loader moved as the fall was cleaned up, the position of the controls would have been closer to the headgate and to the longwall than they would have when Thomas observed them. Therefore, they also would have been a similar and significant distance away from the location of the crib. In other words, during the cleanup operations that took place after the fall and before the area was first observed by Thomas, a miner or miners would have had to be in a then hazardous place, i.e., at the stage loader controls.

The area had to be pre-shift examined before the cleanup operations began. The pre-shift examiner should have noted the hazardous condition of the roof in the area of the stage loader and should have made sure a danger sign was posted.

SIGNIFICANT AND SUBSTANTIAL

The test set forth by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), for determining whether a violation is S&S is well known and need not be repeated here. I have concluded a violation of then mandatory safety standard section 75.303(a) existed. Moreover, I find the evidence establishes a discrete safety hazard in that by failing to post a danger sign, the pre-shift examiner did not give visual, written notice to miners traveling to the controls of the stage loader that the roof overhead was hazardous. Had a sign been posted, a miner or miners might not have worked under unsupported roof and been subjected to serious injury from roof fall. Fortunately, an

injury did not occur, nonetheless, one was reasonably likely. Between the time the fall occurred and the area was observed by Thomas, a miner or miners had traveled to the stage loader controls and worked in an area of unstable and unsupported roof, and each minute spent in the area increased the likelihood of injury from further roof fall during the course of continuing mining operations. While it is true that the lack of a danger sign was not likely to be the immediate cause of an injury, it was an important catalyst for the prevention of such an injury and thus was a significant and substantial contribution to the hazard to which the miner or miners were subjected. Therefore, I conclude the violation was properly designated S&S.

GRAVITY

As set forth more fully below, the concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. Here, the hazard was that a miner or miners would travel under unsupported and dangerous roof and be subjected to injury because of the operator's failure to warn against the danger. A miner or miners traveling to the controls of the stage loader would be intent on the job at hand, a posted reminder of the danger overhead would have altered them to the danger and would have reminded them to stop. Rational people do not purposefully subject themselves to serious injury. I conclude this was a serious violation.

NEGLIGENCE

The condition of the roof was obvious, as was the fact the roof had to be cleaned up and a miner or miners had to travel to the controls of the stage loader. By not posting a danger sign, the pre-shift examiner failed to meet the standard of care required of him. He was negligent and his negligence is attributable to Consol.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
3108477	5/20/92	75.1104	\$900

The order states:

The underground storage area for lubricating oil and grease located at B block on the 7 North supply track is not fireproof. There is an area 31.5 ft. x 10 ft. that has exposed coal roof with wooden planks. (#1) There [are] 57 - 5 gal. containers of gear oil (285 gal.), (#2) 84 - 5 gal. containers of permissible hydraulic fluid (420 gal.), and (#3) 25 - 5 gal containers of grease, hydraulic oil and permissible hydraulic fluid

with the tops open. Under this area, the mine floor has grease and oil soaked into the pavement. This is an area that is pre-shifted and should have been reported. It appears that all the mine roof had been covered with metal at one time.

Gov. Exh. 9. The order was issued pursuant to Section 104(d)(2) of the Act. 30 U.S.C. § 814 (d)(2). In addition to finding a violation of section 75.1104, the inspector also found the violation was the result of Consol's unwarrantable failure to comply with the cited standard.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESS

Thomas W. May, Sr.

On May 20, 1992, May conducted an inspection at the Humphrey No. 7 Mine. Upon arriving at the mine, he went to the mine office and checked the company's pre-shift examination books. In the pre-shift book for the track haulage, May observed that pre-shift examinations had not been recorded for areas near the haulage tracks around the tippie. Tr. 171. (The tippie is the coal haulage car loading point and there are two belts that dump onto it. Tr. 273.)

After reviewing the pre-shift books, May proceeded underground accompanied by John Weber, Consol's safety escort, and Sam Woody, the miners' representative. The inspection party traveled by rail through the area of the haulage car loading point to another part of the mine. Later in the day, the inspection party returned and stopped. May began an inspection of the area adjacent to the loading point to determine whether it had been pre-shift examined, even though the examination had not been recorded. Tr. 176-177. (May found the pre-shift examiner's initials and the date and time of the examination recorded on a date board in the area. Tr. 177)

Along the way to the date board, May passed a grease and oil storage area. May entered the storage area and observed oil and grease spilled on the mine floor. In addition, containers of grease, oil and emulsion fluid were stored in the area -- 57 - 5 gallon containers of grease and oil and 84 - 5 gallon containers of permissible hydraulic fluid. Tr. 182-183, 204-205. Further, 25 - 5 gallon containers of grease, hydraulic oil and permissible hydraulic fluid were lidless. They had been used and thrown in the area. They contained residues of their original contents. Tr. 178, 183-183, 203-204. Also, a 31 1/2 feet by 10 feet area of roof in the storage room did not have metal affixed to it. The metal had been there once, but had been

removed, exposing the coal roof. Tr. 180-181. In May's opinion, these conditions violated section 75.1104 in two ways. First, the exposed area of the roof was not of fireproof construction and, second, not all of the containers of grease, oil and emulsion fluid were closed. Tr. 182.

The hazard was one of a rapidly spreading fire that could not be contained once an ignition occurred. Tr. 183. (May testified that although metal over the roof coal would not prevent the roof from eventually catching fire, it would slow the time needed for it to ignite. Id.) Ignition sources were adjacent to the storage area, in that the area was 5 feet from a high voltage cable and 8 feet from a supply track trolley wire. Tr. 183-184. In addition, there was another trolley wire located approximately 15 feet from the area on the side opposite the supply track trolley wire. The second trolley wire ran along a track spur. Tr. 185.

If a fire started, it could have lead to injuries from smoke inhalation, as well as burns to those fighting it. Tr. 185. In addition, some of the smoke and fumes would have traveled over the coal car loading point. The person most likely to be affected was the tippie operator, who was always at the coal car loading point. It was possible also that a person traveling by rail past the area could have been affected. Tr. 188, 195. May believed, however, that such injuries was unlikely because the series of events needed for an ignition were unlikely -- events such as a short circuit of the high voltage cable in the immediate vicinity of the storage area or damage to the trolley wires. Tr. 186.

In May's opinion, because the area had to be pre-shift examined, Consol should have known of the condition of the storage area. Tr. 189. May related that Weber told him that several months before the inspection the part of the mine containing the storage area was idle. The missing metal roof covering was removed at that time in order to be used elsewhere in the mine, and it was not replaced. Tr. 190. May believed the area had been reactivated approximately 1 to 1 1/2 months before he observed the alleged violation. He based his opinion upon his recollection of seeing oil cans stored in the area at that time. Tr. 190-191. Moreover, he believed that there had been approximately one-hundred pre-shift examinations since he first noticed the oil cans. Tr. 202. Not only was the area pre-shifted examined three times a day, but a shift foreman would stop in the area on a daily basis. Tr. 192. The failure to fireproof the roof and to secure the lids to the used oil, grease and hydraulic fluid containers were unwarrantable because of the three daily visits by the pre-shift examiner and because miners who put the used containers in the area were acting on the direct orders of the shift foreman. Tr. 193.

To abate the alleged violation, Consol put metal over the exposed roof coal, cleaned the oil cans and rockdusted the storage area floor. Tr. 195-196.

John Weber

Weber described the storage area. The walls were made of cement block. There was a doorway-type opening, approximately 6 feet wide, in the east wall parallel to the track and an opening approximately 2 feet wide, in the west wall nearest the spur and the car loading point. Part of the roof of the storage area was covered with tin. Tr. 210. The empty containers lay under this part of the roof. Weber agreed that some of the empties contained the remains of their former contents. Tr. 211. Sealed containers were located at the other end of storage area under the portion of the roof that lacked metal. Tr. 210-211.

Weber stated the area had been used to store oil for "quite some time." Tr. 213. He maintained that a person riding on the track could "look right in" through the 6 foot opening. Tr. 213. He also believed that a person looking at the roof of the storage area from the track could determine the metal was missing. Tr. 213-214. However, usually a person would not have reason to look into the storage area. Tr. 216.

When asked whether the storage area was subject to pre-shift examinations, Weber responded that if a miner was going to work in the area, the area had to be examined. Tr. 207. Weber did not believe that Consol was negligent in allowing the alleged violation. Tr. 217. He asserted that MSHA's inspectors had passed the area many times and never issued a citation. The company, like the inspectors, simply had taken the area for granted. Tr. 217-218.

THE VIOLATION

Section 75.1104 requires in pertinent part that "[u]nderground storage places for lubricating oil and grease ... be of fireproof construction" and that "lubricating oil and grease ... be in fireproof, closed metal containers." Counsel for Consol agreed at the hearing that the cited conditions constituted "a clear violation" and I find the violation existed as charged. Tr. 248.

GRAVITY

May did not find that the violation was S&S in neither the Secretary's petition for assessment of civil penalty nor his subsequent pleadings and oral argument did counsel for the Secretary make that allegation. Therefore, the seriousness of the violation is before me only with respect to gravity, that is,

with respect to one of the statutory criteria I must consider in assessing a civil penalty for the violation. 30 U.S.C. § 820(i).

It has long been recognized that in the context of mine safety law, the gravity criterion requires that a violation be analyzed in terms of the potential hazard to the safety of miners and the probability of such hazard occurring. In addition, the potential adverse effects of any violation must be determined within the context of the conditions or practices existing in the mine at the time the violation was detected. Robert G. Lawson Coal Co., 1 IBMA 115, 120 (1972).

Here, the potential hazard to the safety of miners was grave indeed. If a fire had started in the storage area the residue of the lubricants in the opened containers would have fed it, as would the exposed roof coal. Obviously, miners fighting a storage area fire would have been subject to the possibility of serious burn injuries. An even greater danger to miners would have been the smoke and toxic fumes, which would have traveled to the coal car loading point and beyond.

May's testimony regarding the probability of a fire was unequivocal. He clearly stated it was unlikely and the Secretary produced no other witnesses to gainsay him in that regard. It is the Secretary's point to prove and I accept the testimony of the inspector, especially since none of the potential ignition sources mentioned by May were in the oil storage area. I agree with May that the improbability of a fire made this a non-serious violation.

UNWARRANTABLE FAILURE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogeny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable" ("not justifiable" or "inexcusable"), "failure," ("neglect of an assigned, expected or appropriate action") and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'.") Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991), citing Emery, 9 FMSHRC at 2001.

May's finding of unwarrantable failure mainly was premised upon his belief the storage area had to be pre-shift examined and that numerous pre-shift examinations had been made while the violative conditions existed. Tr. 193, 202. Weber confirmed that if a miner is assigned to work in an area, the area must be

pre-shift examined. Tr. 207. While not able to give a certain date regarding how long the area had been used to store lubricants, Weber stated it had been "quite some time." Tr. 213. The many stored lubricants and lidless containers corroborate his opinion and I accept it as true. In addition, the metal had been missing from the roof for "quite some time." The area was/or should have been pre-shift examined for this same time period. The record reveals no excuse for Consol's pre-shift examiners allowing the condition of the roof and that of the lidless containers to remain uncorrected. Both conditions were visually obvious. The repeated failures to correct the conditions constituted more than ordinary negligence. The violation was unwarrantable.

OTHER CIVIL PENALTY CRITERIA

The history of previous violations at the Humphrey No. 7 Mine indicates that in the 24 months prior to the May 18, 1992, 656 violations were assessed and paid by Consol and that in the 24 months prior to May 20, 1992, 663 violations were assessed and paid. Of these violations, 19 were violations of section 75.303 and 2 were violations of section 75.1104. Gov. Exh. 1. While the overall history of previous violations at the mine is large, the history of the particular violations at issue in this proceeding is not so large as to otherwise increase the penalty assessed.

Consol is a large operator and the Humphrey No. 7 Mine is a large mine. The parties have stipulated that the total penalties proposed will not affect Consol's ability to continue in business and I find the same is true for any penalty assessed. Stipulation 6. Finally, Consol exhibited good faith in attempting to achieve rapid compliance after being cited for the violations.

CIVIL PENALTIES

The Secretary has proposed a civil penalty of \$267 for the violation of section 75.303. The violation was S&S and serious. It was caused by Consol's negligence. Given the fact that Consol is a large operator with a history of previous violations, I find the Secretary's proposal inadequate. I therefore conclude a civil penalty of \$500 is appropriate for the violation.

The Secretary has proposed a civil penalty of \$900 for the violation of section 75.1104. The violation was not serious, but it was caused by Consol's unwarrantable failure to comply with the standard. Given these factors and the penalty criteria previously mentioned, I conclude a civil penalty of \$500 also is appropriate for this violation. Consol's unwarrantable failure to comply would have warranted a more substantial penalty, but it is offset by the violation's diminished gravity.

ORDER

Accordingly, Citation No. 3108488 is AFFIRMED and a civil penalty of \$500 is assessed for the violation of section 75.303. Order No. 3108477 is AFFIRMED and a civil penalty of \$500 is assessed for the violation. Consol is ORDERED to pay these civil penalties within thirty (30) days of the date of this decision.

With regard to the settled violations, Consol is furthered ORDERED to pay, within the same period, a civil penalty of \$50 for the violation of section 75.1106-3(a)(3) cited in Citation No. 3108480 and a civil penalty of \$113 for the violation of section 75.1722(a) cited in Citation No. 3108497. The Secretary is ORDERED to modify Citation No. 3108497, by deleting the S&S finding. Upon receipt of payment this matter is DISMISSED.


David F. Barbour
Administrative Law Judge

Distribution:

Charles M. Jackson, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington,
VA 22203 (Certified Mail)

Daniel E. Rogers, Consolidation Coal Company, Legal Department,
1800 Washington Road, Pittsburgh, PA 15241 (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 17 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 93-410
Petitioner	:	A. C. No. 15-14959-03548
v.	:	
	:	Docket No. KENT 93-550
BROKEN HILL MINING COMPANY, INC.,	:	A. C. No. 15-14959-03549
Respondent	:	
	:	Docket No. KENT 93-633
	:	A. C. No. 15-14959-03550
	:	
	:	Mine No. 3
	:	
	:	Docket No. KENT 93-634
	:	A. C. No. 15-15637-03547
	:	
	:	Mine No. 1

DEFAULT DECISION

Before: Judge Weisberger

On November 19, 1993, a Show Cause Order was issued which provided, inter alia as follows:

Therefore, it is ORDERED that by November 30, 1993, Respondent shall either contact Petitioner to discuss settlement and file a statement complying with the terms of the prehearing order, or show cause why it has not complied with the prehearing order. It is further ordered that if Respondent fails to comply with this order, a default decision will be entered ordering Respondent to pay the full assessed amounts in these cases.

To date Respondent has not complied with this order. ¹

¹ On January 24, 1994, an Answers were received from Respondent, which had already been filed on July 28, 1993. These Answers do not comply with the show cause order.

According, it is ordered that a default decision be entered in these cases in favor of the Secretary. It is further Ordered that Respondent pay a civil penalty of \$1,829 within 30 days of this decision.



Avram Weisberger
Administrative Law Judge

Distribution:

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

Mr. Hobart Anderson, President, Broken Hill Mining Company, P.O. Box 989, Ashland, KY 41105 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 17 1994

PONTIKI COAL CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	
	:	Docket No. KENT 94-441-R
	:	Order No. 4028302
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 94-442-R
	:	Citation No. 4028282
	:	Docket No. KENT 94-443-R
	:	Order No. 4028283
	:	
	:	Docket No. KENT 94-444-R
	:	Citation No. 4028284
	:	
	:	Docket No. KENT 94-445-R
	:	Order No. 4028285
	:	
	:	Pontiki No. 2
	:	
	:	MINE ID 15-09571

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell and Moring, Washington, D.C. and Susan E. Chetlin, Esq., Pontiki Coal Corporation, Lexington, Kentucky, for Contestant;
W. F. Taylor, Esq. and Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Respondent;
Lloyd McCoy, Pontiki No. 2 Mine, Lovely, Kentucky, Representative of Miners, for Intervenors.

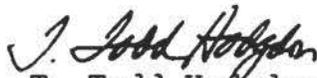
Before: Judge Hodgdon

These cases are before me on notices of contest filed by Pontiki Coal Corporation against the Secretary of Labor pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The notices of contest request modification of an order issued pursuant to Section 103(k) of the Act, 30 U.S.C. § 813(k), and challenge two citations and two orders issued pursuant to Sections 104(a) and (b), respectively, of the Act, 30 U.S.C. § § 814(a) and (b). For the reasons set forth below, the cases are dismissed.

An expedited hearing of the cases was held on March 8, 1994, in Prestonsburg, Kentucky. At the hearing, counsel for the Secretary moved to dismiss Citations No. 4028282 and 4028284 and Orders No. 4028283 and 4028285 and counsel for the Contestant moved to dismiss its contest of Order No. 4028302 (Tr. 8).

ORDER

Accordingly, good cause having been shown (Tr. 4 - 8), it is **ORDERED** that these cases and their respective citations, orders and requests for modification are **DISMISSED**.


T. Todd Hodgdon
Administrative Law Judge

Distribution:

Timothy M. Biddle, Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004 (Certified Mail)

Susan E. Chetlin, Senior Attorney, Pontiki Coal Corporation, 2525 Harrodsburg Road, Lexington, KY 40504 (Certified Mail)

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)

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

Lloyd McCoy, Representative of Miners, Pontiki No. 2 Mine. P.O. Box 387, Lovely, KY 41231 (Certified Mail)

/lbk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

March 21, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-197-A
Petitioner	:	A.C. No. 29-00845-03540
	:	
v.	:	
	:	York Canyon Underground Mine
PITTSBURG AND MIDWAY COAL,	:	
MINING COMPANY-YORK CNYN	:	
COMPLEX,	:	
Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

After the remand of the above case, the parties were granted an opportunity to file supplemental briefs.

The Secretary declined to file a supplemental brief but stated in a letter filed on December 14, 1994, that the truck in question did not have an "unobstructed rear view" and that an S&S designation should be affirmed.

Respondent filed a statement in lieu of a supplemental brief and relied on its petition for discretionary review filed with the Commission.

In its remand of Citation No. 3293236 the Commission stated that the Judge relied on an outdated standard.¹ The updated standard provides as follows:

¹ § 77.410 Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

Section 77.410

(a) Mobile equipment such as front-end loaders, forklifts, tractors and graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that--

(1) Gives an audible alarm when the equipment is put in reverse;

The issues here are whether Pittsburg and Midway ("P&M") violated the regulation and, if so, was the violation S&S. If a violation occurred, what penalty is appropriate?

MSHA INSPECTOR DONALD JORDAN issued Citation No. 3243235 because P&M's explosives truck had a non-functioning backup alarm.

He further opined that pickup trucks are required to have a backup alarm if vision is not clear to the rear.

The updated standard provides an exception to the requirement for audible alarms on mobile equipment. The exception excludes from coverage "pickup trucks with an unobstructed rear view."

MICHAEL KOTRICK, P&M safety manager, identified photographs that show a relatively clear view looking to the rear of the explosives truck. (See R-1, R-2, R-3). In his opinion, the wire mesh on the truck permits a greater "see through" than does a standard pickup truck with an ordinary tailgate.

It is true that Exhibits R-1 and R-2 show a relatively clear view to the rear. This relatively clear view is the result of a see-through wire mesh screen in lieu of a solid metal tailgate on most pickup trucks. However, the regulation requires "an unobstructed² rear view." The rear view of P&M's truck is at least partially obscured by explosive boxes on each side of the truck bed. (Exhibits R-2 and R-3 show the boxes.)

The boxes are explosive magazines used to transport detonators, boosters, primer cord, etc. They extend 2/3ds of the length of the truck bed from the cab towards the rear. (Tr. 60, 61). Each storage compartment is 2 to 2.5 feet wide. The bed of the truck is 4 to 6 feet wide and the width of the truck bed between boxes is 4 feet. (Tr. 82, 83).

² "Unobstructed" means "not obstructed, clear, unhindered [an - view]." Webster's Third New International Dictionary, unabridged, 1976, at 2505.

The above uncontroverted facts establish the view to the rear was not "unobstructed." Accordingly, the exception in Section 77.410(a) does not apply.

A further issue to be determined is whether the violation was "S&S." A violation is properly designated as being "S&S" "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 an illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission explained:

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.

Following the above criteria, it appears there was an underlying violation of Section 77.410.

Further, there was a discrete safety hazard contributed to by the violation.

In its appeal, P&M asserts the Judge failed to address whether the violation presented a reasonable likelihood of injury and failed to address how the relatively clear rear view would bear upon the risk of injury.

The third facet of the Mathies formulation is established by these facts: The truck was in use in the pit. (Tr. 17-18). The workers were off-loading explosives. (Tr. 18). Inspector Jordan testified he could not see anything from a point 8 to 10 inches below the waist of the man shown in Exhibit P-9. (Tr. 19). Workers were exposed to the hazard since they were off-loading explosives in preparation for charging the holes. This occurred in the area behind the truck. (Tr. 20-21). There are always workers around the truck. (Tr. 21). The workers take priming materials off the truck and put the materials into the hole. (Tr. 21-22). After they put the priming materials into the hole, they kick the dirt in and curl up the cords. Normally, they must kneel to do this and they are behind the truck. (Tr. 22).

Contrary to Inspector Jordan's testimony, Mr. Kotrick, P&M's manager for safety, testified that kneeling by workers is not

part of the procedure in drilling and blasting.³ In addition, backing up the explosives truck to a hole is not standard procedure. (Tr. 61-62). Finally, the truck is stationary, does not straddle any holes, and boosters are hand-delivered. (Tr. 62, 63).

I am not persuaded by Mr. Kotrick's testimony. Workers do not always follow "standard procedure." Further, I do not find it credible that workers could prepare a hole for blasting (as described here) without kneeling. In addition, the explosives truck is not always stationary as its very purpose is to deliver explosives to the blasting site. Finally, Mr. Kotrick's testimony does not reduce the activities by the workers in close proximity to the truck.

The credible evidence establishes the third element of Mathies.

The relatively clear view to the rear (as a result of the mesh screen) does not affect the S&S designation. The explosive boxes on each side substantially obstruct the rear view. A worker kneeling behind the truck could be out of sight and in danger of being run over.

The fourth element of the Mathies formulation is apparent. If a truck backed over a worker, the result would reasonably be a fatality or an injury of a reasonably serious nature. In sum, I note that, based on MSHA's experience, there have been many fatal accidents or serious injuries from violations of this type. (Tr. 20).

In sum, I agree with Inspector Jordan that the violation was S&S.

For the foregoing reasons, Citation No. 3243236 should be affirmed.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of certain criteria in assessing appropriate civil penalties.

1. P&M is a large operator. (Stip. ¶ 5).

³ I credit Mr. Jordan's testimony that he observed the workers putting priming materials into the hole and kneeling to curl up the cords. (Tr. 22).

2. The assessment of a civil penalty in this case will not affect P&M's ability to continue in business. (Stip. ¶ 3).

3. P&M's previous adverse history at York Canyon Surface Mine, as evidenced by Exhibit P-3, indicates P&M paid penalties for 43 violations in the period between March 12, 1989, and February 21, 1991.

4. P&M was negligent as it should have known the backup alarm was inoperative.

5. The gravity of the violation has been discussed under the S&S issues.

6. P&M demonstrated good faith in achieving prompt abatement of the violation.

In view of the statutory criteria, I believe a penalty of \$200.00 is appropriate.

Based on the foregoing findings, I enter the following:

ORDER

In Docket No. CENT 91-197-A, Citation No. 3243236 is **AFFIRMED** and penalty of \$200.00 is **ASSESSED**.


John J. Morris
Administrative Law Judge

Distribution:

William E. Everheart, Esq., Deputy Regional Solicitor, 525 Griffin Square Building #501, Dallas, TX 75020 (Certified Mail)

Tana Adde, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

John W. Paul, Esq., PITTSBURG AND MIDWAY COAL MINING COMPANY, 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

March 21, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-197-B
Petitioner	:	A.C. No. 29-00845-03540
	:	
v.	:	
	:	York Canyon Underground Mine
PITTSBURG AND MIDWAY COAL	:	
MINING COMPANY-YORK CNYN	:	
COMPLEX,	:	
Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

After the remand of the above case, the parties were granted an opportunity to file supplemental briefs.

The Secretary declined to submit a supplemental brief but stated by letter filed December 14, 1994, that he relied on the Secretary's response to Pittsburg and Midway Coal Mining Company ("P&M")'s Memorandum of Authorities filed with the Judge on April 20, 1992.

P&M filed a statement in lieu of a supplemental brief and relied on its brief submitted to the Commission on February 19, 1993.

In this case, Citation 3243237 alleges P&M violated Section 77.1104.¹

¹ The cited regulation reads:

§ 77.1104 Accumulation of combustible materials.

Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

In his initial decision, the Judge vacated the citation because the Secretary failed to establish the presence of an ignition source as well as fuel to support a fire. (14 FMSHRC 1947). The Commission held this analysis imposed on the Secretary a greater burden of proof than is required by the regulation.

However, the Commission noted in its order of remand that the Secretary failed to set forth what he believes is necessary to establish a violation but he provided little additional guidance beyond repeating the language of the regulation.

The issues outlined in the order of remand are whether P&M violated Section 77.1104, whether the violation was S&S and, if a violation occurred, what is the appropriate penalty?

DID P&M VIOLATE SECTION 77.1104?

The evidence in this case is set forth in detail at 14 FMSHRC 1941, 1945-1947.

In its memorandum filed April 20, 1992, the Secretary contended that P&M violated the regulation and that the violation was S&S.

In particular, the Secretary relies on the evidence that oil and float coal dust averaging 1/16 inch thick were allowed to accumulate on the flat metal surfaces surrounding two 460-volt A.C. motors contained in a Class II enclosed area. A Class II, Division II area is a designation obtained by a mine operator from MSHA which allows the operator to maintain non-explosion proof equipment in an enclosed area.

The Secretary contends that inherent in the Class II classification is the requirement that the area be kept free of combustible materials. The view urged by the Secretary is not supported by Section 77.1104. If the Secretary desires such a construction of the regulation, MSHA and the operator should consider whether such a requirement should be part of a ventilation plan pursuant to 30 C.F.R. § 75.370 - .372 (1992).

Section 77.1104 basically states that it prohibits: (a) an accumulation of (2) combustible materials where (3) such materials can create a fire hazard.

The first portion of the regulation is established by the facts. At P&M's workplace, a Class II, Division II area, oil and float coal dust existed to a depth averaging 1/16 of an inch on a flat metal surface. A depth averaging 1/16 of an inch is an

accumulation.² There may well be accumulations of minimal amounts; however, an average depth of 1/16 of an inch is substantial.

The second portion of the regulation refers to combustible materials. In this case P&M admits the materials were combustible.³ (Tr. 74-75; Brief before Commission filed February 10, 1993, pg. 2). However, as the record here indicates, a material can be classified as a combustible but it will not be capable of combustion until it is heated. (Tr. 75)

The third portion of the regulation deals with the issue of whether such materials "can"⁴ cause a fire hazard. The verb "can" does not require an absolute certainty but refers to the possibility of an event.

In sum, I agree with the Secretary that to establish a violation of Section 77.1104, he is not required to prove that an ignition or explosion was reasonably likely to occur. Rather, he is required to prove the presence of sufficient accumulations that can create a fire hazard or add to a fire hazard if an ignition source is introduced. Factually, I have concluded that an accumulation of 1/16 of an inch is a sufficient accumulation to establish a violation of Section 77.1104. It is not necessary to explore in this case what might be an insufficient accumulation and hence no violation of Section 77.1104.

P&M argues that the Secretary failed to prove that the combustible materials observed by the inspector might reasonably have been expected to contribute to the risk of a fire.

This issue was resolved by the order of remand wherein the Commission ruled it was error for the Judge (in the original decision) to require the Secretary to prove that an ignition or explosion was reasonably likely to occur.

The cases cited by P&M are not controlling as they deal with whether the cited violation was S&S. Eastern Associated Coal

² Accumulate: to heap or pile up; Webster's New Collegiate Dictionary, 1979 at 8.

³ Combustible: capable of combustion; Combustion: an act or instance of burning. Webster's Dictionary at 221.

⁴ Can: e: be made possible or probable by circumstances to (be ~ hardly have meant this), Webster's Dictionary, at 158.

Corp., 13 FMSHRC 178, 182 (1991); Texasgulf, Inc., 10 FMSHRC 498, 501 (1988) and Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984).

P&M further argues that the mere presence of combustible materials does not constitute a hazard nor a violation of Section 77.1104, citing Utah Power and Light Company, 11 FMSHRC 1926 (1989).

The Commission in its order of remand basically ruled to the contrary: the mere presence of combustible materials constituted a violation of Section 77.1104. Utah Power, relied on by P&M, involves Section 75.1704, Escapeways, and it is not controlling here.

WAS THE VIOLATION S&S?

A violation is properly designated S&S "if, based upon 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 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 1093-104 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The commission has held 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) (emphasis in original).

A credibility issue arises as to the third paragraph of the Mathies formulation. Inspector Jordan opined that the violation was S&S. Michael Kotrick stated a contrary opinion.

The Mathies formulation in paragraph 3 requires a "reasonable likelihood that the hazard contributed to will result in an injury." The hazard involved here is a fire.

Mr. Kotrick is knowledgeable in this matter. He explained the three legs of a fire triangle which consist of oxygen, an ignition source, and a fuel in vaporized form. Oxygen is present in the air. Main ignition sources (not present at this site) could be an open flame of sufficient temperature or a spark from an electrical malfunction. (Tr. 66, 75). He further explained combustibility. (Tr. 65).

The materials on this site as inspected are combustible but combustibility comes into effect when the materials reach vapor proportions, i.e., when enough vapors are given off that the materials can be ignited. (Tr. 75).

In the area of the motors were several combustible fluids. The transmission fluid had the lowest flash point at 160 degrees Centigrade (Tr. 68) or 320 degrees Fahrenheit.

It is possible to determine the flash point of any substance. (Tr. 67). The flash point for the coal was in excess of 500 degrees Fahrenheit. (Tr. 70). The substances involved here have a minimum flash point of 160 degrees Centigrade (Tr. 68) or 320 degrees Fahrenheit (Tr. 68).

A digital readout thermometer tested places over the motor, the fans, the drive coupler, and base the motor sits on. The highest temperature was 13 degrees Centigrade, around 55 degrees Fahrenheit. This was approximately the outside temperature that day. The motor does not run hot while it's in operation. (Tr. 71).

Mr. Kotrick read the explanation of a Class 2, Division 2 location from the National Electrical Code. (Tr. 72-73).

Mr. Kotrick concluded that the accumulations were not a combustible mixture. A combustible materials is something with a flash point above 100 degrees Fahrenheit. (Tr. 74-75). The particular oils in this case happen to be a Class 3 combustible liquid which have a flash point above 200 degree Fahrenheit. (Tr. 75).

Mr. Jordan's opinion concerning S&S is not persuasive. He testified float coal dust in the presence of oil prevents a motor from adequately cooling and 1/16 of an inch would propagate ignition if given proper heat. (Tr. 27). However, any material will ignite with proper heat.

However, Mr. Jordan admitted he did not do any testing nor did he have any knowledge of the flash point of the material he observed that day. (Tr. 34, 36). In addition, he had no information or data regarding the heat given off by the motors where the dust and oil had accumulated. (Tr. 34).

In addition, he observed no short circuit nor malfunction in the machine. (Tr. 350).

He further agreed he had no way of knowing if enough materials had accumulated on the cooling fans to cause excessive heat. (Tr. 35).

In sum, the Secretary failed to prove that there was a reasonable likelihood that the hazard contributed to would result in an injury. See Texasgulf, Inc., supra, and Eastern Associated Coal Corporation, supra.

The S&S allegations are **STRICKEN**.

CIVIL PENALTIES

Section 110(i) of the Act mandates consideration of certain criteria in assessing appropriate civil penalties.

Considering this criteria, I conclude the following:

1. P&M is a large operator. (Stip. ¶ 5).
2. The assessment of a civil penalty in this cases will not affect P&M's ability to continue in business. (Stip ¶ 3).
3. P&M's previous adverse history, as evidenced by Exhibit P-3 indicates P&M paid penalties on 43 violations in the two-year period ending March 11, 1991.
4. P&M was negligent as it should have known of the accumulations.
5. The gravity of the violation is low.
6. P&M demonstrated good faith by promptly abating the violation.

In view of the statutory criteria, I believe that a penalty of \$75.00 is appropriate.

Based on the foregoing findings, I enter the following:

ORDER

In Docket No. CENT 91-197-B, Citation No. 3243237 is **AFFIRMED** and a penalty of \$75.00 is **ASSESSED**.


John J. Morris
Administrative Law Judge

Distribution:

Tana Adde, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

William E. Everheart, Esq., Deputy Regional Solicitor, 525 Griffin Square Building #501, Dallas, TX 75020 (Certified Mail)

John W. Paul, Esq., PITTSBURG AND MIDWAY COAL MINING COMPANY, 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

MAR 21 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 91-202
Petitioner : A.C. No. 29-00095-03561
: :
v. :
: York Canyon Underground Mine
PITTSBURG AND MIDWAY COAL :
MINING COMPANY-YORK CNYN :
COMPLEX, :
Respondent :

DECISION AFTER REMAND

Before: Judge Morris

After the remand of the above case, the parties were granted an opportunity to file supplemental briefs.

The Secretary declined to submit a supplemental brief but stated by letter filed December 14, 1994, that the facts authored in the FMSHRC decision of November 17, 1993, justify a finding that the violation was "S&S".

P&M filed a statement in lieu of supplemental briefs.

In its order of remand the Commission vacated the Judge's finding that the violation was not S&S and directed the Judge to reconsider and evaluate all of the evidence bearing on the S&S issues. Finally, if the Judge found the violation was S&S, he should then assess an appropriate penalty.

THE EVIDENCE

MSHA Inspector DONALD JORDAN issued Citation No. 3243321 at the York Canyon Underground Mine. The citation alleges a violation of 30 C.F.R. 77.400(a).¹ (Tr. 30; Ex. P-15).

¹ The cited regulation reads:

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts

He issued the citation because a feeder slide, a moving machine part adjacent to a walkway was not guarded. The area where the feeder slide is located must be examined several times a shift. The tail of the belt needs to be greased. (Tr. 31).

Mr. Jordan stated that the handrail adjacent to the walkway was 12 to 18 inches from the feeder slide. The handrail does not prevent anyone from reaching into the feeder slide when greasing or cleaning the equipment. The feeder slide was about waist-high. (Tr. 32).

The operator abated this violation by installing a mesh guard.

Mr. Jordan believed this was an S&S violation because someone, upon reaching into the unguarded area while it was in motion, could become entangled and be seriously injured. (Tr. 32). The result could be lost work or restricted duty.

Mr. Jordan considered the operator's negligence to be moderate. (Tr. 33).

MICHAEL KOTRICK, P&M manager for safety, testified that a supervisor enters this isolated area to do a methane check and a preshift examination. A utility man or clean-up person enters the area one to three times a shift, depending on the type of coal being run through the plant. (Tr. 58, 77). He may summon a repairman if necessary. (Tr. 77).

The walkway adjacent to the feeder slide is 36 inches wide and is made of a heavy metal grating. Water is used to clean the area. (Tr. 77, 78).

As an individual approaches the hazard area, there is a cement wall on one side and a handrail on the other. The unguarded hazard is 12 to 18 inches beyond. (Tr. 780). If someone slipped, he would probably grab for the railing which also serves as a balancing point. As you walk along, you can hold the railing. However, it is not much of a physical barrier as it consists of one-half inch to two-inch pipe. (Tr. 79).

Mr. Kotrick would not say that no one showers the area but it's easier to wash it into the sump and pump it back into the cleaning system. (Tr. 79).

which may be contacted by persons, and which may cause injury to persons shall be guarded.

DISCUSSION

WAS THE VIOLATION S&S?

A violation is properly designated S&S "if, based upon 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 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 1093-104 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held 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) (emphasis in original).

Following the Mathies formulation, I conclude the record establishes that there was an underlying violation of 77.400(a) in that the moving machine part, the feeder slide, was not guarded. Also, there was a measure of danger contributed to by the violation.

The third paragraph of the Mathies formulation is established by the facts. Mr. Jordan described the hazard as "the tail of the belt that needs to be serviced--greased, if you will." (Tr. 31-33). A worker servicing the equipment would be exposed to the hazard of becoming entangled with the unguarded machine parts. In sum, I agree with Inspector Jordan that the violation was S&S because someone reaching toward the unguarded feeder slide to grease or clean it could become entangled in the moving parts and be seriously injured. (Tr. 32-33).

In addition to the hazard described above, there also is a hazard involving a supervisor and utility cleanup man entering

this area on the narrow walkway. A utility man enters the area as frequently as three times a day. Washing down the area will likely result in some residual dust or water on the walkway. This could cause some unsure footing and, if the worker slips, he could fall into the unguarded machine part which is only 12 to 18 inches away.

Mr. Kotrick testified for P&M, that if a worker slipped, he would probably grab for the railing which serves as a balancing point. (Tr. 78, 79).

I am not persuaded by Mr. Kotrick's evidence. The railing can hardly serve as a guard and P&M does not contend it is a guard. In addition, Mr. Kotrick conceded the handrail did not provide much of a physical barrier. Finally, if any workers were carrying objects, the handrail would provide little protection, since their hands would be occupied.

Based on the credible evidence, I conclude that there was a reasonable likelihood that the hazard contributed to will result in an injury.

The fourth element of the Mathies formulation is also established. An injury will be of a serious nature if a worker becomes entangled in moving machine parts.

P&M argues that a generalized concern that maintenance workers may work around unguarded equipment does not by itself support an S&S designation. An S&S designation is established if the evidence supports the Commission's mandates concerning S&S. In the instant case, the workers were within 1.5 feet of the unguarded machine parts. This fact and the previously discussed criteria require the S&S designation.

P&M also contends the Secretary failed to prove potential risk to maintenance and repair workers. Specifically, P&M asserts Petitioner produced no evidence of the frequency of such work while the equipment was operating.

I reject P&M's argument. The evidence establishes that a supervisor enters the area for a methane check and a preshift examination. A utility cleanup worker enters the area one to three times a shift. (Tr. 77). It is not the Secretary's obligation to prove that each unguarded machine part was operating at all times. Further, P&M offered no evidence supporting its position.

P&M further criticizes the Secretary's argument concerning the cement wall on the opposite side of the walkway. P&M's argument fails to establish a defense to the violation.

After carefully considering all of the evidence, I conclude P&M's violation of 77.400(a) was S&S. Citation No. 3243321 should be affirmed.

CIVIL PENALTIES

The statutory criteria to be followed in assessing civil penalties is contained in Section 110(i) of the Act.

P&M's history of previous violations, as contained in Exhibit P-2 indicates the operator was assessed and paid penalties on 70 violations in the two years ending March 26, 1991.

P&M is a large operator and the penalty will not affect its ability to continue in business. (Stip. ¶ 3).

The gravity of the violation was high since a worker could be severely injured if he became entangled in the machine parts.

P&M demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation.

For the foregoing reasons, I consider that a penalty of \$150.00 is appropriate and I enter the following:

ORDER

Citation No. 3243321 is **AFFIRMED** and civil penalty of \$150.00 is **ASSESSED**.


John J. Morris
Administrative Law Judge

Distribution:

Tana Adde, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

William E. Everheart, Esq., Deputy Regional Solicitor, 525 Griffin Square Building #501, Dallas, TX 75020 (Certified Mail)

John W. Paul, Esq., PITTSBURG AND MIDWAY COAL MINING COMPANY, 6400 South Fiddler's Green Circle, Englewood, CO 80111-4991 (Certified Mail)

ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 23 1994

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. LAKE 93-154
	:	A.C. No. 11-00589-03879
	:	Mine No. 24
OLD BEN COAL COMPANY, Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner; Thomas L. Clarke, Esq., Fairview Heights, Illinois, for Respondent.

Before: Judge Amchan

Statement of the Case

On January 5, 1993, Michael Woodrome conducted an MSHA inspection of Respondent's number 24 mine in Franklin county, Illinois. Mr. Woodrome, who is an electrical specialist, came to the mine primarily to inspect two diesel-powered S&S scoops that Respondent used only in intake or neutral air to haul supplies (Tr. 12 - 15, 87).¹ One of these scoops had caught fire at the mine in December 1992 (Tr. 12).

After looking at the fire-damaged scoop, designated number 4 by Respondent, Inspector Woodrome proceeded to a wash station where the other diesel-powered scoop, designated number 15 by Respondent, was being cleaned (Tr. 20, 87). While examining the operator's panel, he noticed that a spad, a nail-like device (Exh. R-3) used to hang ventilation curtains, had been bolted onto the panel (Tr. 21, Exh R-4). The spad was positioned so that it depressed the Murphy switch, a device that automatically shuts off the engine of the scoop when the engine temperature

¹The scoops had originally been battery-operated but were rebuilt and converted to diesel-power in 1990. Respondent does not allow these scoops to operate in return air. Two other scoops, which are battery-operated "permissible" vehicles, operate at the working face and in return air.

exceeds 205 degrees Fahrenheit, when the oil pressure drops below 20 psi, or when the scoop's fire suppression system is activated (Tr. 16 - 17, 92 - 99, Exh. R-1, R-4).

Inspector Woodrome issued Respondent citation No. 3536978, pursuant to section 104(d)(1) of the Act (Exh. G-1). The citation alleges a violation of 30 C.F.R. § 75.1725(a) which provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The violation was alleged to be "significant and substantial" and, due to the "unwarrantable failure" of Respondent to comply with the regulation. A \$4,400 civil penalty was proposed by MSHA.

The inspector believes that by continuously running the scoop with the Murphy switch depressed, Respondent is creating a fire hazard (Tr. 17 - 18). If the engine is allowed to operate in an overheated condition, Woodrome believes, the engine surface may ignite coal dust or other combustible materials.

MSHA is also concerned that if a fire starts on the scoop due to some other reason, the continued operation of the engine will make the fire worse and interfere with firefighting efforts. This concern arises because the continued revolution of the engine fan blades may, in some circumstances, draw air over the fire (Tr. 118, 168).

Respondent submits that the Murphy switch is designed to protect the engine and is not intended to protect employees (Tr. 105, 159, 166). If an engine runs for an appreciable period in an overheated condition, its metal parts may stick together, ruining the engine (Tr. 161 - 162). The purpose of the Murphy switch is to prevent damage that would require spending approximately \$5,000 to replace the scoop's diesel engine (Tr. 166).

Old Ben states that it relies primarily on an automatic fire suppression system to protect employees from fire. It argues that the hazard posed by MSHA, fire caused by the engine igniting combustible materials at 300-400 degrees is inconsequential

given the fact that the exhaust manifold on the scoop reaches temperatures of 900-1000 degrees during the normal operation of the scoop (Tr. 100, 162).²

Moreover, Respondent notes that there is no MSHA regulation requiring a Murphy switch (Tr. 37). Thus, all the hazards postulated by the inspector would exist on a scoop which had never been equipped with such a switch. MSHA concedes that a scoop which had never been equipped with a Murphy switch would not be in violation of section 75.1725(a) (Tr. 37, 46 - 52). The essence of the Secretary's case is that if a piece of equipment has a safety device, the mine operator must maintain that device in operating condition, even if the device is not required (Tr. 26).

Analysis

MSHA's witnesses indicated that they might write a safeguard requiring a diesel powered scoop to be equipped with a Murphy switch (Tr. 48 - 51). However, it is clear that the rationale of the instant citation was the apparently intentional and long-term bypassing of the switch on scoop number 15 (Tr. 34, 53).

The major difficulty with the Secretary's case is its admission that this scoop can operate without violating section 75.1725(a) if a Murphy switch had never been installed (Tr. 46). The undersigned can envision a situation in which bypassing a safety device which is not legally required would constitute an unsafe condition. For example, if the device is one which a machine operator is likely to rely upon, it may be dangerous to operate a machine with a nonfunctional safety device, even if it would not be unsafe to operate the machine if it never was equipped with the device.

In the instant case, however, there is nothing that indicates that an operator would behave any differently on the assumption that the Murphy switch was operative than if the scoop

²Since the fire on scoop number 4, Respondent has taken a number of steps to reduce the fire hazard on its diesel-powered scoops. Most importantly, it raised the muffler, so that it would be less likely to become coated with combustible material. It also increased the capacity of its fire suppression chemicals, added an additional spray nozzle for the fire suppression system, reinforced the fuel lines, and installed a shut-off valve which prevents fuel from exiting the tank once the ignition is turned off (Tr. 128, 136-37).

The fire suppression system on scoop #4 was inadequate to put out the fire that occurred on December 28, 1992. The operator had to summon other employees who used fire extinguishers to put out the fire (Tr. 108-111).

had never been equipped with such a switch. Therefore, I cannot find an unsafe condition on the basis that the Murphy switch was bypassed.

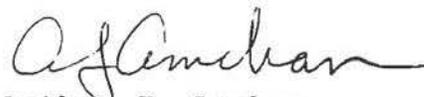
Even if I were to regard the instant citation as evidence of a change in MSHA policy that 30 C.F.R. § 75.1725(a) requires all diesel-powered scoops to be equipped with a Murphy switch, I would vacate the citation. In order to find that a general standard such as section 75.1725(a) requires a Murphy switch, I would have to conclude that a reasonably prudent person familiar with the factual circumstances surrounding that allegedly hazardous condition would recognize a hazard warranting corrective action Alabama Byproducts Corp. 4 FMSHRC 2128 (December 1982).

In the instant case, I conclude that a reasonably prudent person familiar with the operation of a diesel-powered scoop in intake and neutral air in an underground coal mine would not necessarily recognize that it is dangerous to employees to operate the scoop without a Murphy switch, or with the Murphy switch depressed. In so doing, I do not discredit the opinions of Inspector Woodrome, or MSHA's Dennis Ferlich. However, I conclude, on the basis of the testimony of Respondent's witnesses, Kirby Smith, the maintenance supervisor at Mine 24, and Keith Whitlow, territory manager for the distributor of the diesel engines, that a reasonably prudent person might not conclude that it was unsafe to miners to operate such a scoop.

In the terms used in Alabama Byproducts Corp., it is clear that a reasonably prudent person would recognize the need for corrective action if they were aware of a Murphy switch which was being by-passed on a long-term basis. However, based on this record the Secretary has not established that a reasonably prudent person would recognize that such condition poses a hazard to employees, as opposed to merely putting the equipment at risk. Given the legitimate difference of opinion on this matter, I believe that if MSHA wants to require the Murphy switch, or make it a violation of the Act to bypass the switch, it must do so through notice and comment rulemaking.

ORDER

Citation No. 3536978 is hereby vacated and this case is dismissed.



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

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Dept. of
Labor, 8th Floor, 230 S. Dearborn St., Chicago, IL 60604
(Certified Mail)

Thomas L. Clarke, Esq., 50 Jerome Lane, Fairview Heights, IL
62208 (Certified Mail)

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 23 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
REVIEW COMMISSION,	:	Docket No. PENN 93-51
Petitioner	:	A. C. No. 36-02713-03576
v.	:	
	:	Docket No. PENN 93-152
POWER OPERATING COMPANY, INC.,	:	A. C. No. 36-02713-03578
Respondent	:	
	:	Docket No. PENN 93-202
	:	A. C. No. 36-02713-03582
	:	
	:	Frenchtown Mine
	:	
	:	Docket No. PENN 93-133
	:	A. C. No. 36-04999-03534
	:	
	:	Leslie Tipple

DECISION

Appearances: Linda Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Tim D. Norris, Esq., and Farrah Lynn Walker, Esq., Stradley, Ronon, Stevens & Young, Philadelphia, Pennsylvania for Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

These cases, consolidated for hearing, are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner), alleging violations by the Operator (Respondent), of various mandatory safety standards. Subsequent to a discovery,¹ and pursuant to notice, the cases were heard in

¹ On July 19, 1993, Respondent filed a Motion to Compel Response to Interrogatories, Response to Request for Production and Deposition Testimony. On August 3, 1993, Petitioner's filed a Response in Opposition. On August 16, 1993, an Order was issued requiring Respondent to file a statement identifying the specific requests it wanted to compel Petitioner to answer along with a statement setting forth facts to establish its need for the information sought. Petitioner was ordered to describe and

Johnstown, Pennsylvania, on December 7, 8, and 9, 1993. The parties each filed a brief along with proposed findings of fact on February 18, 1994. Respondent filed a Brief in Reply on February 28, 1994.

Findings of Fact and Conclusions

I. Citation No. 3709903 (Docket No. PENN 93-152)

Perry Ray McKendrick, an MSHA inspector, testified that on December 3, 1992, he observed that there was no bulb in the light on the right side of the rear of a 4600 Ford Tractor that was parked adjacent to an office. He indicated that the wires were hanging loose, and that this condition was "very visible". (Tr. 21, December 7, 1993). He issued a citation alleging a violation of 30 C.F.R § 77.1605(d) which, as pertinent, provides that, with regard to mobile equipment, "Lights shall be provided on both ends when required."

Peter Baughman, an employee of Respondent who operates the tractor in question, indicated that it is used on paved areas to clean up coal from the road. He said that the tractor has a yellow beacon light on top of the tractor towards the rear of the tractor. He said this light is visible from the rear of the tractor. He indicated that the tractor is not operated at night.

Based upon the clear language of § 77.1605(d) supra "lights" are to be provided "on both ends" when required. Hence, if there are not "lights" at both ends Section 1605(d) supra, has not been complied with. In other words if there is only one light at either end, Section 1605(d), has not been complied with. According to the uncontradicted testimony of McKendrick, the rear of the tractor, which was equipped with two lights, had only one light in working order. Hence, although the vehicle did have a light on top, there were not "lights" at both ends.

statement setting forth facts to establish its need for the information sought. Petitioner was ordered to describe and summarize the documents it claimed were privileged, and to file a formal claim of privilege. On October 29, 1993, oral argument was held on the issues raised by Respondent's Motion and Petitioner's Response. On the record, at the oral argument, Orders were issued regarding all the issues raised by the Motion and Response.

Also, prior to the hearing, on September 21, 1993 Petitioner filed a Motion to amend its Petition in Docket No. Penn 93-133 to add "eight additional citations". Respondent filed a Response. On November 19, 1993, an Order was issued denying the motion.

Baughman testified that the tractor is not used at night. Since he works the day shift, from 6:00 A.M. to 6:00 P.M., not much weight is accorded his testimony regarding the use of the vehicle at night, as it is beyond his personal knowledge.

The vehicle was used during the 6:00 A.M. to 6:00 P.M. shift. I take administrative notice of the fact that there are times during the year, when there is no sunlight for that entire 12 hour period. Thus, lights would be required, during the period before the sun rises, and after the sun sets, when this occurs in the 6:00 A.M. to 6:00 P.M. shift. Hence, I find that it has been established that Respondent herein did violate Section 1605 supra.

The vehicle in question had one functioning rear light along with a beacon located towards the rear of the vehicle that was visible from the rear of the vehicle. Also there is no evidence that it is used not during daylight for significant periods during the year. I conclude that the gravity of the violation herein is low. Considering also the additional factors set forth in Section 110 of the Act, as stipulated to by the parties, I conclude that a penalty of \$50.00 is appropriate for this violation.

II. Citation No. 3709643 (Docket No. PENN 93-51).

Charles S. Lauver, an MSHA inspector, testified that on September 16, 1992, he observed a truck dumping its load on a ramp. The truck was not dumping parallel to the slope of the ramp at the designated dump area which is level. Instead, the truck was dumping "sideways" perpendicular to the ramp. Based on measurements that he took, Lauver indicated that the grade of the ramp was 13 percent.

Lauver issued a citation alleging, in essence, that Respondent was not in compliance with 30 C.F.R. § 77.1000, in that it was not following its Ground Control Plan which, as pertinent, requires as follows: "Truck dumps and similar areas shall be maintained reasonably level."

According to Robert A. Greenawalt, Respondent's foreman, in general, a ramp is built in order to get access to a pit. In essence, he explained that in normal operations, ramps are built frequently" (Tr. 83, December 7, 1993), and that in building a ramp, it is necessary to dump on a grade (Tr. 85, December 7, 1993). It appears to be a Respondent's position, that to require trucks to dump only on level areas, would preclude an operator from building a ramp.

According to Lauver, if a truck dumps sideways on a sloped ramp, it could become unstable and roll over, because the bed of the truck is raised nearly vertical.

The Ground Control Plan, does not regulate the manner in which loads are to be dumped. It requires only that "truck dumps", and "similar areas," shall be maintained "reasonably level". The designated truck dump areas was level. There is no evidence that the specific area where Lauver observed the truck dumping sideways, was used as a dump area more than the one time observed by him. In the absence of such evidence, it must be concluded that the area of in question was not a "truck dump" or a "similar area", as it was not an area used on any regular basis for dumping. Accordingly, I conclude that it has not been established that Respondent violated its Ground Control Plan, and hence there was no violation of Section 77.1000 supra. Accordingly, Citation No. 3709643 is to be dismissed.

III. Citation No. 3709904 (Docket No. PENN 93-152).

McKendrick indicated that he observed an accumulation of grease, oil, and coal dust on the top and lower center "pins" of the "5500 Trojan mover". He said that the material was approximately 1 foot in diameter at the top and lower "pin", and was up to 1 inch thick. He also said that the approximately 3 foot by 5 foot engine area was coated with coal dust. He indicated that heat from the manifold and turbo constituted ignition sources. He also indicated that if a wire would become bare it could cause a spark.

McKendrick issued a Citation alleging a violation of 30 C.F.R. § 77.1004 which, as pertinent, provides that combustible materials shall not be allowed to accumulate, ". . . where they can create a fire hazard."

On cross-examination, McKendrick indicated that he was concerned about the possibility that heat from the manifolds or turbos, could ignite the accumulated materials should contact occur. In this connection, he estimated that the coal was "at the most" 2 to 3 inches from the manifold and to the turbo, but that the materials were not in contact with the turbo or manifold. In contrast, Philip D. Smeal, who has operated the loader in question for approximately 6 years, indicated that the center pin is approximately 8 feet from the turbo and manifold. I place more weight upon Smeal's estimate due to his greater familiarity with the equipment in question, based upon the amount of time that he has spent operating it. I thus find that it has not been established that there was a hazard of the materials being ignited upon contact with either the manifold or turbo. Similarly, although McKendrick was concerned about a bare wire causing a spark, the record does not established that sparks do occur in the area in question, or that sparks are sufficient to ignite the accumulated material. Hence, I find that it has not been established that the accumulation of materials were in an area "where they can create a fire hazard." Hence, I conclude that it has not been established that Respondent violated Section 77.1004 supra.

IV. Citation No. 3490531 (Docket Penn 93-152).

Thomas George Partash, testified that on December 3, 1992, he observed that there was no guard protecting the V-belts and pulleys on a caterpillar bulldozer. He issued a citation alleging a violation 30 C.F.R. § 77.400(a), which in essence, provides for the guarding of exposed moving machine parts which may be contacted by persons. Respondent does not challenge the Citation. Hence, and taking into account the testimony of Partash, I conclude that Respondent did violate Section 77.400(a) supra.

a. Significant and Substantial

The Commission has set forth the elements required to establish a significant and substantial violation in Cement Division, National Gypsum Co., 3 FMSHRC 822, (April, 1981). A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Id. at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January, 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December, 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August, 1984)).

According to Partash, the operator of the vehicle is required to travel the area in question in order to access the cab. He indicated that he observed persons getting on and off the bulldozer while it is in operation. In essence, he stated that in getting on and off the bulldozer, an operator would utilize a step to climb on the dozer at the lowest access point, and would thus traverse the area in question. Partash did not

describe with any degree of specificity the horizontal, vertical, or diagonal distances of the exposed moving parts to the path that would be taken by a person on the way to the cab. On the other hand, Smeal who operated the bulldozer in question, estimated that in walking to the cab, the operator would be, at the closest, 2-1/2 to 3 feet, from the V-belt in issue. Also, on cross-examination, Partash indicated that it is possible to access the cab by entering from the guarded side. Since Smeal operated the bulldozer, I place more weight on his testimony regarding the path actually travelled to the cab. In contrast, I place less weight on the theoretical testimony of Partash.

The evidence does establish that Respondent violated a mandatory safety standard and that this violation contributed to a hazard, *i. e.* contact with moving machinery. However, within the framework of the above evidence, I conclude that it has not been established that such contact was reasonably likely to have occurred. Thus, I find that it has not been established that the violation was significant and substantial.

There is no evidence concerning the length of time that the area in question was not guarded. I accept the uncontradicted testimony of Greenawalt that this bulldozer was only used if another one was broken. I find that a penalty of \$250 is appropriate for this violation.

V. Citation No. 3709821 (Docket No. PENN 93-152).

According to Partash, on December 4, 1992 he observed an accumulation of oil underneath the operators' cabin and on the engine of the G-3 Caterpillar road grader. He indicated that there was electrical wiring under the cab, and a turbo charger and hydraulic pumps in the area. According to Partash, the hoses underneath the cab of the caterpillar grader were covered in coal dust and oil. The inspector testified that all 150 to 200 feet of hoses underneath the cab were covered in oil. No firewall separated the engine from the oil an dust covered hoses. According to Partash, the turbo and the engine, ignition sources that generated heat, were two inches away from the oil soaked hoses.

Partash issued a citation alleging violation 30 C.F.R. § 77.1104 which, as pertinent provides that combustible materials should not be allow to accumulate ". . . where they can create a fire hazard."

On cross-examination, Partash indicated that there was no oil on the turbo or manifold, and that oil in the absence of hot wires is not a hazard. He also indicated that just sparks could not ignite the oil. There is no evidence of any lack of insulation of any the wires in the area. I conclude that the

evidence does not establish that the oil and coal dust accumulation was in any area where they can create a fire hazard. Hence, a violation of Section 77.1104 supra, has not been established.

VI. Citation No. 3709822 (Docket No. PENN 93-152).

According to Partash, the reverse alarm on a caterpillar 777B rock truck did not operate. Respondent does not dispute this fact. Accordingly, I conclude that Respondent did violate Section 77.410(c) as alleged in the citation issued by Partash.

In the citation, Partash alleged that the violation was significant and substantial. He testified that as a consequence of the violation, an injury was reasonably likely to have occurred as rock trucks, pickup trucks, shovels, and bulldozers operated in the immediate area. He explained that it was possible that, since the backup alarm did not work, other equipment operators might not be aware when the rock truck would back up. He said that if another piece of equipment would be hit the operator of the rock truck could be injured.

The presence of other vehicles in the area raises the possibility of collision as a consequence of the violation herein. However, no specific facts were adduced to established that such was reasonably likely to have occurred. Hence, I conclude that it has not been established that the violation was significant and substantial. (See, Mathies, supra, U.S. Steel, supra.

Contemporaneous note take by Partash indicate that the operator of the vehicle informed him that the alarm was functioning at the start of the shift. Hence, it was only inoperative for a short time until it was cited. Ronald E. Gresh, an MSHA Supervisory Inspector, stated that he had several discussions with Respondent's Management regarding the need to improve inspection and maintenance, of trucks, dozers, shovels, loaders, and tractors. However, he indicated that in the discussions there was no specific identification of each item. He said that problems with steering, breaking, were discussed. Also discussed were the presence of grease on rock trucks, and tire maintenance. According to Gresh, he meet with Respondent's officials on a monthly basis to discuss improvements regarding maintenance at the mine.

Although Respondent was made aware, in general, of the need to make careful inspections and to perform maintenance, there is no evidence as to how long the specific violative condition at

issue existed. Partash's notes indicate that the operator had told him that the alarm did function at the start of the shift. I find that Respondent was negligent to a moderate degree. I conclude that a penalty of \$300 is appropriate for this violation.

VII. Citation No. 3709754

A. Violation of 30 C.F.R. § 77.160(a)(a)

Lauver testified that, on December 4, 1992 he observed a rock truck parked at the hard stand area. He said the truck was fully loaded, and rocks were "jutting out" all around the top of the bed.

He said that nothing was falling off the truck, but that the rocks appeared ready to fall at any time. He said that the rocks were above the top of the bed, and were lying off the back of the truck. He said that the center of the pile of rocks on the truck was approximately 5 to 6 feet higher than the sides. He estimated the rocks on the trucks were approximately 1 foot long, 10 inches wide, and 1 inch thick. McKendrick, who was present, corroborated Lauver's testimony that rocks were sticking out at the back of the truck.

Lauver issued a citation alleging a violation of 30 C.F.R. § 77.1607(a)(a), which in essence, requires trucks to be trimmed properly when loaded higher than their cargo space.

According to Greenawalt, the truck was loaded in a normal fashion and was not overloaded. He indicated that he did not notice a "piece of rock" sticking out the side of the truck. (Tr. 289, December 7, 1993). On cross-examination, Lauver indicated that once a truck is loaded, it cannot be trimmed. He also indicated that the only way to insure that a load is within the confines of the truck, is to load it properly.

I accept the testimony of Lauver, inasmuch as it was corroborated by McKendrick, that the rocks in the truck were lying beyond the cargo space. I also accept the uncontradicted testimony of Lauver that the center of the load was approximately 6 feet higher than the sides, and that there were rocks jutting out around the top of the bed. Further, the center of the pile was approximately 6 feet higher than the sides. Hence, I conclude that the truck was loaded higher than the cargo space.

The term "trimmed properly" is not defined in the Act, or in Title 30 of the Code of Federal Regulations. "Trim" is defined in Webster's Third New International Dictionary (1979 ed), as pertinent, as "to reduce by removing excess or extraneous matters." Hence, the term "trimmed properly" herein means that if a truck contains excess material that juts out beyond the

confines of the cargo area, the material must be trimmed. (See, Peabody Coal Company, 2 FMSHRC 1072 (1980) (Judge Laurenson)). I accept the testimony of Lauver, as it was corroborated by McKendrick, and find that material juttred out beyond the confines of the cargo area. I thus conclude that Respondent did violate Section 77.1607.

B. Significant and Substantial

According to the testimony of Lauver, "rocks juttred out all the way around the top of the bed and off the back of the bed . . . the material was --- appeared to be about to fall" (sic.) (Tr. 266, December 7, 1993). Since his testimony was corroborated by McKendrick, I accept it, and reject the testimony of Greenawalt that rocks were not sticking out of the truck. Respondent did not impeach or contradict Lauver's testimony that he observed ". . . a man walk from the other side across beneath the bed of the truck and around the side" (Tr. 269, December 7, 1993). I thus find that an injury producing event was reasonably likely to have occurred resulting in injuries of a reasonably serious nature. I find that the violation was significant and substantial (See, U.S. Steel, supra).

Taking into account the fact that the truck was not in operation but was parked at the repair station as it had mechanical problems, I find that Respondent's negligence was less than moderate. I find that a penalty of \$200 is appropriate for this violation.

VIII. Citation No. 3709751 (Docket No. PENN 93-152)

On December 3, 1992, Lauver asked the operator of a Caterpillar rock truck which was not loaded, to start down the grade and apply the brakes. According to Lauver, when the brakes on the truck were applied, the left rear wheel locked up and slid, and the other three wheels continued to roll. He estimated that the truck traveled 30 to 35 feet before it came to a full stop. Lauver indicated that the road was well packed, very hard and contained gobs of mud. According to Lauver, all the wheels were on the same type of material. He said that he did not recall any ice on the road. Lauver issued a citation alleging a violation of 30 C.F.R. § 77.1605(b) which, as pertinent, provides that mobile equipment shall be equipped with "adequate brakes".

A. Violation of Section 77.1605, supra

Melvin James Muth, a field service technician employed by Beckwith Machinery Company, repairs Caterpillar equipment. Muth testified that the rear brakes on the vehicle in question were rebuilt in July 1992. According to Muth, after he was informed that Lauver had issued his citation, he backed the truck up a grade, applied the brakes, and the truck stopped. He said that

it went a "short distance" but it did not take long for the truck to stop. He said that he has not seen any caterpillar specifications regarding the distance in which the vehicle in question should stop once brakes are applied.

In addition, while the truck was parked, Muth checked the brake pressure at the rear and front wheels when by the retarder system was applied.² Muth also tested the wear on the brake pads. All of the tests were where within Caterpillar specifications. In essence, Muth opined that the breaks were working properly.

Muth indicated that if the service brakes are applied, all four wheels should stop fairly close to the same time. He opined that if one rear wheel locked-up when the service brakes were applied, it is conceivable that the vehicle was on mud or ice. Also, he opined that it is possible that the front brakes might have been turned off. In that event, it is possible that the front brakes only the rear breaks would be activated.

Muth indicated that in testing the brakes, he noted a little air in the brake system. He surmised that the air had entered the system when he opened a screw to bleed the brakes earlier that morning when he tested the vehicle. Muth did not consider the air in the system to be significant, since all tests on the braking system were within the specifications of the manufacturer.

Although the tests performed by Muth where within Caterpillar's specifications, I accept the testimony of Lauver, in as much as it was not contradicted, that he observed one wheel lock-up when the brakes where applied on a grade. Muth indicated that, as designed, all four wheels are to stop very close to the same time when the service brakes are applied. He indicated that a rear wheel might lock if there is mud³ or ice on the road, or

² The retarder system actives only the rear brakes and applies less pressure than the service brakes which are designed to operate the front and rear brakes. The retarder system is used to slow the vehicle when it is going down hill, but not to stop it. The retarder system applies variable pressure.

³ According to Lauver, the road was handpacked and there was no ice. He stated that there were "gobs" of mud. However, there is no evidence that there was mud in the specific path the tires travelled when the operator applied the brakes when requested by Lauver.

if the front brakes are not applied⁴. The evidence does not establish any of these factors. Within this framework, I conclude that vehicle in question was not equipped with adequate brakes, and as such Section 77.1605, supra was violated.

B. Significant and Substantial

Lauver opined that since the brakes were not adequate when the vehicle was not loaded, an injury was reasonable likely to occur when the vehicle was fully loaded. He explained that it is possible for the operator to loose control, and hit an object. He indicated, however, that due to the slow speed at which the vehicle operates, he did not feel that a major collision was likely, and that an injury that could occur would be comparatively minor. Taking in account the following: (1) all the tests performed by Muth did not reveal any abnormality; (2) Lauver did not measure the amount distance the truck rolled after the brakes were applied; (3) the lack of evidence as to the specific distance the truck should roll once the brakes are applied, and (4) the fact that in normal operations the truck travels at a slow speed, I conclude that it has not been established that an injury producing event was reasonably likely to have occurred. (See, U.S. Steel, supra). I thus, conclude that it has not been established the violation was significant and substantial. (See, U.S. Steel, supra).

C. Penalty

According to Lauver, he inspected the equipment examination records, filled out by drivers of the vehicle in question. He indicated that these records, for the period subsequent to November 4, 1992, indicate that brakes problems have been reported by three drivers. However, he did not recall the wording in the records, and the records themselves were not offered into evidence. Gresh indicated that he had discussed maintenance of brakes previously with Respondent's management. There is no evidence regarding the specifics of these discussions. It is significant that when the brakes were tested by Muth, all tests were within the manufacturer's specifications. Within this framework, I conclude that Respondent's negligence was less than moderate. I conclude that a penalty of \$200 is appropriate for this violation.

IX. Citation No. 3709642 (Docket No. PENN 93-51)

On September 16, 1992, Lauver observed a three inch long crack on the front surface on the cross member of a rig truck. He also observed a 4 inch long crack across the top of the cross-member. Lauver estimated the width of the cracks, i.e., the gap in the crack, from a hairline to up to a 16th of an inch.

⁴ There is no evidence that anyone observed that the front brake switch was in the "off" position."

According to Lauver, the cross-member connects the two sides of the mainframe, and is also one of the supports for the engine. Lauver opined that since the roads upon which the truck travels are hard packed, rough, and contain bumps and dips, the cracks at issue can only get worse. He opined that failure of the cross-member will cause a jolt which can injure the driver. He issued a Citation alleging a significant and substantial violation of 30 C.F.R. § 77.1606(c) which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used." (Emphasis added).

William Dean Bratton, a mechanic employed by JEM Industry, explained that the two main side members of the frame of the vehicle in question, provide the majority of the strength to support the truck and its load. He said that "item "C" depicted on Exhibit R-2, is the main support beam for the suspension cylinders, and it also ties the main side together. In addition, the front bumper and three other cross-members hold the frame together. He indicated that cross-member "E" (Ex. R-2) is the more significant cross-member in holding the sides of the frame together. According to Bratton, that the cross-member in question "assists somewhat" in holding the frames together and is the least significant cross-member. He explained, as depicted in Exhibit R-2, that the two side members of the frame contain the mounts for the engine, and the cross-member at issue does not have, any engine supports, and does not support the engine. None of this testimony was specifically rebutted by Lauver or any other witness. Based upon Bratton's experience and background, it is accepted.

Bratton testified that on September 16, he examined the cracks at issue. He said that the circumference of the cross-member upon which the cracks were noted is 52 inches. He indicated that the cross-member is approximately 12 feet in length. Bratton said that the top surface where one crack was located is 14 inches wide, and the other surface where another crack was located is 12 inches wide.

The testimony of Bratton tends to established that should the cross member at issue fail due to expansion in the crack, there would not be a significant impact upon support of engine, and the structural integrity of the vehicle. However, he did not specifically contradict Lauver's testimony that should this member fail, the resulting jolt could injure the operator of the vehicle. Hence, I conclude that the cracks, are defects that do, to some degree, affect safety. Since they were not corrected prior to use, I conclude that Respondent did violate Section 77.1605 supra.

Considering the credible testimony of Bratton that the cross member at issue does not support the engine, and only assists somewhat in holding the sides together⁵, I conclude that it has not been established that an injury producing event was reasonably likely to occur as a consequence of the cracks. Accordingly, I conclude that it has not been established that the violation was significant and substantial.

Lauver testified the same condition had been cited in the past, and should have been noted in the reports on this piece of equipment. However, there is no evidence as to how long these specific cracks had been in existence. In this connection, Bratton opined on cross-examination that the cracks most likely developed from wear and tear, and from being bounced on the roads. On re-direct examination he opined that a rock strike could have cause the cracks. I find that a penalty of \$100 is appropriate for this violation.

X. Citation No. 3709869 (Docket No. PENN 93-133)

On November 3, 1992, Lauver observed a layer of coal and small chunks of coal on the feeder belt walkway at the Leslie Tipple. He issued a Citation alleging a violation of 30 C.F.R. § 77.205(b). Respondent does not challenge the violation. Accordingly, and based upon the testimony of Lauver I find Respondent did violate Section 77.205(b) supra as alleged.

Lauver termed the violation significant and substantial. He said that the entire width of the walkway was covered with the material for approximately 15 feet. According to Lauver, the handrail next to the walkway was twisted and bent in the area at issue so that a person could fall between walkway and handrail. He opined that it was reasonable likely that one would stumble and fall. However, according to Lauver, this would not result in a serious injury, as the walkway was only 5 or 6 feet above the ground. According to Lauver, he had observed persons using the walkway.

Gary Crago, the assistant manager at the tipple, indicated that the walkway at issue was at an 8 percent incline, and was 30 inches wide, and the handrail was 3 feet high. He described the presence of a cover over the belt to keep persons from falling onto the belt. He also noted the purpose of a safety pull cord

⁵ I place more weight on the testimony of Bratton, as I found it well-reasoned, and supported by a diagram set forth in the Unit Rig service manual (Respondent's Exhibit 2). In contrast, I place less weight on Lauver's testimony on this point, as his experience with this specific vehicle is not as extensive as Bratton's. Also Lauver's testimony is not supported by the Unit Rig manual. (Ex. R-2)

to stop the operation of the belt. He said normally persons travel the walkway a couple times a day to check the feeder. The walkway is lit by two lights, and during the day it is visible.

Lauver did not describe with specificity the traction on the walkway, and the size and placement of the materials at issue. Nor did he describe their depth. Within the framework of this record, I cannot find that it has been established that an injury producing event, i.e., stumbling, or tripping, was reasonably likely to have occurred. For these reasons it is concluded that it has not been established that violation was significant and substantial.

According to Crago the four employees at the plant were engaged in repairs so that the plant could be restarted, and that the spill was to be cleaned prior to startup. There is no evidence as to the length of time that the spill existed on the walkway. I conclude that a penalty of \$50 is appropriate for this violation.

XI. Citation No. 3709878 (Docket No. PENN 93-133)

According to Lauver, on November 5, 1992, he observed fine, dry, float coal dust on the belt structure in the preparation plant. He said that it covered the entire belt structure i.e., the belt and the supporting elements as well as the drive motors and pulleys. Lauver said the materials were up to a half-inch thick, but "tapered down to nothing at certain points" (Tr. 166, December 8, 1993). He estimated the belt was between 50 and 75 feet long, and was in operation at the time.

According to Lauver, dry float coal dust in suspension can be ignited by a spark. However, he did not see any coal dust in the air. Lauver opined that dry float coal dust on a surface can be placed in the air by a breeze or by vibration, and then a spark can cause it to explode. He said that he did not note any frozen rollers which could have caused a friction ignition. According to Lauver the electric drive motors for the belt are an ignition source, although there was nothing wrong with the motors at the time of the inspection. Lauver issued a Citation alleging a violation of 30 C.F.R. § 77.202.

Crago indicated that all rollers were running free, and there were no problems with any motor. He also indicated that he tested fine coal by placing it 2 inches away from a heat lamp for 15 minutes, and it did not burn. He was with Lauver during the inspection, but he did not contradict any of Lauver's factual testimony.

Although there were no actual ignition sources present the rollers presented a potential ignition source should they freeze, and cause friction sparks. Also, the electric motors presented a

potential ignition source. Since there were potential ignition sources present in the vicinity of the accumulation, it is concluded that the accumulation existed in dangerous amounts (Pittsburgh and Midway Coal, 8 FMSHRC 965, (January 1986)). Accordingly, it is concluded that Section 77.202 supra which provides that coal dust on surfaces or structures shall not be allowed to exist or accumulate "in dangerous amounts", has been violated as alleged by Lauver.

Since there were no actual ignition sources present in the vicinity, I conclude that the likelihood of an injury producing event i. e., fire or explosion was not likely. Accordingly it must be found that the violation was not significant and substantial.

Lauver opined that due to the extent of the accumulations, they built up over a minimum of 24 hours. Crago, who was present at the time, did not contradict Lauver's testimony on this point. There is no evidence as to the actual amount of time the accumulations had been in existence. I find that a penalty of \$150 is appropriate for this violation.

XII. Citation Nos. 3709748 and 3709749 (Docket No. PENN 93-152)

On December 3, 1992, Lauver observed that a guard was missing at the fan inlet for the left engine on a O & K shovel, ("shovel") and at another shovel, guards were missing on both engines. He issued two citations, one for each shovel, alleging a violation of 30 C.F.R. § 77.400(a) which provides, in essence, that exposed machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded. Respondent does not challenge the violation. Based upon this admission, as well as the testimony of Lauver, I conclude that Respondent did violate Section 77.400(a) supra.

According to Lauver, the exposed moving parts on the engines in question are located in a compartment that is accessed by the way of a ladder which one descends through a 3 foot square opening. He indicated that if a person stands in the center of this compartment, one or two steps in either directions would bring that person in contact with the engine. Accordingly, he opined that an injury was reasonably likely to have occurred. He said that contact with the fan belts or pulleys would cause bruises resulting in loss of work days or restricted duties.

Ronald L. Krise, who had operated one of the shovels for 2 years, indicated that maintenance personnel go down to the compartment in question to check the oil for the engines.

Lauver conceded on cross-examination that in order for an injury to occur, there must be contact with the exposed parts when the engine is being operated. The record does not established that, in the ordinary operation of the equipment in issue, persons descended to the compartment where the engines are located. Although Lauver testified that a persons standing in center of an compartment would be nearly in contact with the engine, he did not describe in specificity the location of the unguarded area. There is no description of the dimension of the exposed area, its distance from the floor, and its distance from the center of the compartment. Within the framework of this evidence, I conclude that it has not been established that an injury producing event i.e., contact with moving exposed parts, was reasonably likely to have occurred. Hence, I conclude that it has not been established that the violation was significant and substantial.

Lauver opined that the operator was aware of guarding requirements, and that there was no reason why the area in question was not guarded. Respondent did not offer any evidence to explain why the area in question was not guarded. I conclude that a penalty of \$300.00 is appropriate for the violation alleged in citation no. 3709748, and a penalty of \$300 is appropriate for the violation alleged in Citation No. 3709749.

XIII. Citation No. 3709644 (Docket No. PENN 93-51).

On September 16, 1992, Lauver observed an employee of Respondent steam cleaning a rock truck with a steam jenny, which applies water under high pressure. Lauver testified that the employee was not wearing goggles or a face shield. He issued a citation alleging a violation of 30 C.F.R. § 77.1710(a) which in essence requires the wearing of face shields or goggles when a hazard to the eyes exists. Respondent has conceded the violation. Based upon this concession, and Lauver's testimony I conclude that Respondent did violate Section 77.1710(a) as alleged.

According to Lauver, the application of the high pressure steam and liquid from the steam jenny dislodges dirt and grease from the truck, which splattered in all directions. He opined that it was extremely likely that the operator of the steam jenny would get hit by the splattered material. Lauver indicated that the face of the operator was splattered with black materials. He concluded that the violation was significant and substantial.

Peter Baughman testified that he operates the steam jenny two to three times a week. He said that he has used the jenny without wearing goggles, and his has never gotten anything in his

eyes. He said that when he operates the jenny and places the nozzles at a distance of 3 feet away from a truck, water gets splashed on him, but that the solid material loosened from the truck falls down the truck.

The observation of Lauver that the employee who was operating the jenny in question was observed with black materials splattered over his face was not rebutted or contradicted. Neither was Lauver's opinion that dirt and grease dislodged by the jenny splatters in all directions. Baughman indicated that usually the nozzle of the jenny is kept about 3 feet away from the truck when it is being used. He also indicated that water does splash upon him.

Based on this record, I concluded that an injury producing event, i.e., some materials dislodged from the truck being splattered in the eye of an operator who was not wearing goggles was reasonable likely to have occurred. However, the record does not established any evidence regarding the level of severity of an injury occasioned by contact of the materials with an eye. I thus cannot conclude that an injury of a reasonably serious nature was likely to have occurred as a consequence of the violation found herein. I conclude that it has not been established that the violation was significant and substantial.

Baughman indicated that the Respondent does require the wearing of safety goggles. Greenawalt testified that persons who run the jenny are supplied with goggles, and Respondent does enforce the rules of wearing safety goggles. He indicated that if he catches a person operating the jenny without safety goggles, he tells him to put them on. I find that Respondent's negligence is less than moderate. I conclude that a penalty of \$100 is appropriate for this violation.

XIV. Citation No. 3709905 (Docket No. PENN 93-152).

On December 3, 1992, McKendrick issued a citation alleging a violation of 30 C.F.R. § 77.1103 which, in essence, requires flammable liquids to be stored in accordance with the standards of the National Fire Protection Association. He indicated that gasoline was being kept in containers that were not approved as safety cans. Respondent indicated that it conceded the violation. Based upon this concession and testimony of McKendrick, I concluded that Respondent did violate Section 77.1103(a). Supra

McKendrick indicated that he could smell fumes in the building that contained the gasoline cans. McKendrick explained that the gasoline at issue is stored in cans that do not have safety lids to prevent spillage in transportation. He related an incident, contained in an accident report he read, wherein an individual was driving a vehicle containing gas in plastic

containers that did not have safety lids, and gas fumes escaped causing the individual to become overcome with fumes which resulted in a fatal accident. McKendrick opined that an injury was reasonably likely to have occurred as a result of the violation herein.

Baugaman testified that approximately once a week he goes to the area in question, removes a container of gas, and carries it to a bus where it is consumed.

Within the framework of this evidence, I find that it has not been established that any reasonably serious injuries were reasonably likely to have resulted as a consequence of the storage of gasoline herein in containers that were not within the standards of the National Fire Protection Association. I find that the violation was not significant and substantial.

McKendricks indicated that the area in which the gasoline was stored is required to be inspected, and that an inspection would be revealed that the gas cans did not have safety lids. I find the Respondent negligence to have been of a moderate degree. I conclude that a penalty \$100 is appropriate for this violation.

XV. Citation No. 3709907 (Docket No. PENN 93-152).

On December 3, 1992, McKendrick inspected a pavilion (storage area). He indicated that an area of the floor of the pavilion approximately 8 feet by 15 feet, had been removed. He issued a citation alleging a violation of 30 C.F.R. § 77.204 which requires as follows: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers covers, or other protective devices." Respondent conceded the violation, and based upon the testimony of McKendrick, I find that Respondent did violate Section 77.204, supra.

He said that some of the areas when the floor was removed was were two feet in depth, and that it was possible that in some areas the depth was a foot and a half. McKendrick's testified that he saw fresh foot prints on the floor of the pavilion within less than a foot from the area where the floor had been removed. He indicated that throughout the day that he was at the subject premises, he saw two persons on the pavilion. McKendrick concluded that an injury was reasonable likely to have occurred as there were boards lying in the vicinity which created a stumbling hazard. He indicated that should one stumble and fall, a broken limb was possible.

McKendrick did not testify regarding the dimensions of boards scattered in the area, the precise manner in which they were placed, and their distance relative to the area in which the floor had been removed. Greenawalt indicated that some of the

floor was just about a foot off the ground, and that employees worked on the pavilion only during the day. He testified that the day prior to the citation, he created the hole in question by removing six boards. He said that the resulting hole was 4 feet by 4 feet, and 2 feet below the surface of the rest of the pavilion platform. He said that the hole was backfilled with material that was taken out of the hole. I accept Greenawalt testimony regarding the dimension of the hole, and the dimensions of the platform, 30 feet by 40 feet, due to his having had personal knowledge of the creation of the hole.

Within the framework of this record, I conclude that it has not been established that tripping or stumbling was reasonably likely to have occurred as consequence of the violation herein. It has also not been established that any serious injury was reasonably likely to have occurred as a consequence of violation herein. I thus find that the violation was not significant and substantial.

According to McKendrick, the hole was visible from the office, and from the hard stand where repairs are made, and where persons work. This testimony has not been rebutted. However, Greenawalt explained that the hole was made the previous day on the orders of Pennsylvania Department of Environmental Resources personnel who wanted to take a soil sample. I thus find that Respondent was negligence to a moderate degree regarding this violation. Within this framework I conclude that a penalty of \$100 is appropriate for this violation.

XVI. Citation No. 3490533 (Docket No. PENN 93-202).

Partash indicated that on December 3, 1992 he was informed by Respondent's employee Larry Kanour, that Ronald L. Krise was no longer in charge of safety. Contemporaneous notes taken by Partash indicate as follows "Krise removed from foremen position on October 26, 1992". Partash issued a Citation alleging a violation of 30 C.F.R. Section 41.12 which requires an operator to report, in writing, to the appropriate district manager of MSHA, any change in information required by Section 41.11. Section 41.11 requires an operator, in its legal identity report to provide ". . . the name and address of the person at the mine in charge of health and safety". . . .

The legal identity report filed by Respondent (Government Exhibit 34) indicates as follows under the section headed. Person at mine in charge of health and safety (Superintendent or Principal Officer):
"Name and Title
Ronald L. Krise
Robert Greenawalt"

The legal identity report contains the names of two persons in charge of health and safety, in conformity with the requirements of Section 41.11(d)(2). Although only one person is required in order to comply with Section 41.11 supra, Respondent chose to include two names. Any change in this information is thus required to be reported to MSHA pursuant to Section 41.12 supra. In essence, Partash's evidence indicates that Krise was no longer in charge of safety as of October 26. Respondent did not offer any testimony to contradict Partash, nor did it impeach the testimony of Partash in this regard. Accordingly, I accept his testimony and I conclude that Section 41.12, supra has been violated by as alleged by Partash. I conclude that since the Section 41.11 is satisfied by reporting only one individual being in charge of health and safety and since there was no change regarding one individual previously reported, that the failure to report the fact that Krise was no longer also in this position is not of great consequent. I find that a penalty of \$10 is appropriate for this violation.

XVII. Citation No. 3709908 (Docket No. PENN 93-152).

According to McKendrick on December 3, 1992, he observed a bus used to transport persons at the mine. He noted that two left front head lights were broken, and were not functioning. The bus traveled over mine roads each day for about a mile in each direction. The bus traveled in the dark, as the shifts began at 5:45 a.m. and ended at 5:45 p.m. in December, 1992. McKendrick issued a Citation alleging a violation of 30 C.F.R. § 77.1605(d) which provides, that, relating to mobile equipment, "Lights shall be provided on both ends when required."

The bus was equipped with rear tail lights and four front headlights. At the time of the citation, all of these lights were operational except two of the headlights which were broken. Hence, since the bus had rear tail lights that were operational, and two headlights that were operational, it did have functioning lights on both ends. Accordingly, the vehicle satisfied the plain language of Section 77.1605(d) supra, which requires the provision of lights on both ends.⁶

ORDER

It is Ordered that (1) the following citations shall be Dismissed: Nos. 3709643, 3709904, 3709821, and 3709908; (2) the following citations be amended to violations that are not

⁶ In contrast, the vehicle cited in Citation No. 3709903, (I, infra) which was found to violate Section 77.1605(d), supra, had only one functioning light in the rear.

significant and substantial: Nos. 3490531, 3709751, 3709642, 3709869, 3709642, 3709505 and 3709707; and (3) Respondent shall pay, within 30 days of this decision a penalty of \$2,210.00.



Avram Weisberger
Administrative Law Judge

Distribution:

Linda Henry, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

Tim D. Norris, Esq., and Farrah Lynn Walker, Esq., Stradley, Ronon, Stevens & Young, 2600 One Commerce Square, Philadelphia, PA 19103-7098 (Certified Mail)

/efw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 23 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-333
Petitioner	:	A. C. No. 40-02045-03593
v.	:	
	:	S & H Mine No. 2
S & H MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Petitioner;
Imogene A. King, Esq., Frantz, McConnell & Seymour, Knoxville, Tennessee, for the Respondent.

Before: Judge Feldman

This case is before as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (the Act). This matter was heard in Knoxville, Tennessee on December 14, 1993. Mine Safety and Health Administration (MSHA) inspectors Ted E. Phillips and Stanley L. Sampsel testified on behalf of the Secretary. Paul G. Smith, president of S & H Mining, Incorporated, and employees Cecil Broadus, Richard Wright and Larry Bullock testified for the respondent. The parties' posthearing proposed findings and conclusions are of record.

This case concerns eleven 104(a) citations that are all designated as significant and substantial. Therefore, the issues for resolution in this proceeding are whether the violations in fact occurred, and if so, whether they constituted significant and substantial violations. In addition, the appropriate civil penalty to be assessed for each established violation must also be resolved. The parties have stipulated to my jurisdiction in this matter and to the pertinent statutory civil penalty criteria in Section 110(i) of the Act, 30 U.S.C. § 820(i).

At the hearing, I approved a settlement agreement with respect to Citation No. 4041541. The terms of the agreement will be incorporated in this decision. The respondent has stipulated to the fact of occurrence of the violations cited in four of the remaining ten citations. These are Citation Nos. 4041543, 4041547, 3825085 and 3825086.

The Applicable Significant and Substantial Standard

The Secretary has the burden of proving that a particular violation is significant and substantial in nature. The Commission, in Mathies Coal Co., 6 FMSHRC 1 (January 1984), enumerated the elements that must be established for the Secretary to prevail on the significant and substantial issue. The Commission stated:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

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

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).

In addressing the significant and substantial question, the Commission has noted the likelihood of injury must be evaluated in the context of an individual's continued exposure during the course of continued normal mining operations to a hazard created by the subject violation. Halfway, Inc., 8 FMSHRC 8, 12 (August 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985); U.S. Steel Mining Company, 6 FMSHRC 1573, 1574 (July 1984).

Citation No. 3825085

Citation No. 3825085 was issued on March 22, 1993, by MSHA Inspector Ted Phillips for violation of the mandatory safety standard in 30 C.F.R. § 75.204(c)(1). This safety standard requires that "a bearing plate shall be firmly installed with each roof bolt." The respondent has stipulated to the fact of occurrence of this violation.

The respondent utilizes resin grout-type bolts which are steel bolts four feet in length inserted into holes drilled four feet long upward into the roof. A resin cartridge is inserted into the hole. The roof bolt operator then spins the bolt into the roof plate and hole applying pressure to the resin in order to form a solid bond between the steel bolt, bearing plate and roof. (Tr. 45). Bearing plates are secured by the roof bolt head and resin on four foot centers, four across the 20 feet width of the entry. The roof bolts and bearing plates along with the right and left rib create a "beam" that draws the rock together providing roof support. (Tr. 21). These "beams" are installed along the full length of the entry, four feet on center.

Citation No. 3825085 was issued by Phillips for a roof bolt on which the bearing plate was not situated firmly against the roof. Instead, due to sloughage of draw rock around the bolt, the bearing plate was approximately six inches from the roof. Phillips testified that the loose plate was located in the number three entry closest to the left hand rib. To the right of this loose plate were three secure plates, four feet on center and the right rib. Four feet in front and four feet behind this row of plates were other similarly installed "beams" consisting of bearing plates, roof bolts and ribs.

As a justification for his significant and substantial designation, Phillips testified that a loose bearing plate could contribute to a roof fall if other bearing plates were loose. However, Phillips conceded that a roof bolt without a secure plate still provides partial roof support because of the bond between the resin and steel bolt. More importantly, Phillips testified that even with the loose bearing plate, an effective support structure was created by the remaining bolts and ribs in that "beam" and by the "beams" to the front and rear of the bolt with the loose bearing plate. (Tr. 52). Phillips stated that he inspected approximately 500 roof bolts in the immediate face area. Of these 500 bolts, only the subject bolt had a loose bearing plate. (Tr. 29-30).

In addressing the significant and substantial issue, the Secretary must establish that there is a reasonable likelihood that the hazard contributed to, i.e., a compromised roof support system, will result in an event, i.e., a roof collapse, which will contribute to an injury of a serious nature. While roof

support is a leading cause of serious injury and death in underground coal mines, the determinative question is the likelihood of a roof fall under these circumstances. The Secretary does not contend, nor am I prepared to conclude, that one loose bearing plate with secure roof bolts, plates and ribs both to the right and left, and, front and rear, significantly compromises the effectiveness of the roof support system. In this regard, even Inspector Phillips opined the structural integrity of the "beam" given one loose bearing plate, would not be "exceptionally weak." (Tr. 51-52). Thus, the Secretary has not prevailed on the significant and substantial question. Accordingly, the significant and substantial designation in Citation No. 3825085 shall be deleted. Consequently, I am assessing a civil penalty of \$100 instead of the \$178 civil penalty initially proposed by the Secretary.

Citation No. 3825086

Inspector Phillips issued Citation 3825086 on March 22, 1993, for an alleged violation of the mandatory safety standard in 30 C.F.R. § 75.208 which requires the end of a permanent roof support area to be posted with a readily visible warning, or, to have installation of a physical barrier, to impede travel beyond the permanent support. The citation was issued because a flag or warning device had not been placed at the last row of bolts inby the face in the No. 4 entry to warn miners of unsupported roof where the last bolt on the far right corner inby the face had not been installed.

According to Inspector Phillips, the hazard created by the failure to display the flag or warning device was that a miner could go inby unsupported roof. (Tr. 33). The subject citation concerns a missing roof bolt from the far uppermost right hand corner. (Tr. 55). Immediately, inby the missing roof bolt was a solid rib of coal. To the left and right behind the missing bolt were properly installed roof bolts on four foot centers. (Tr. 55, 56). To the immediate right of the missing bolt was a solid rib of coal. (Tr. 55.) The ribs on the sides provide support in the area. (Tr. 64.).

The final bolt in the No. 4 entry had not been installed in its normal sequence because the floor in the immediate area was too soft to bring in the roof bolt machine. (Tr. 78, 84). The roof bolt machine operator, Richard Wright, testified that before the final bolt could be installed, the soft bottom beneath it would have to be scooped out in order to allow access by the bolt machine. (Tr. 79). However, the continuous miner blocked the area from access by the scoop (Tr. 79). Wright's plan was to return to the area as soon as it was accessible with the scoop, and to install the bolt after the area was cleaned before the next cut of coal was made. (Tr. 80, 88).

Wright was responsible for hanging the flag or warning device at the site of the missing bolt. (Tr. 39). However, Wright testified that he simply forgot to hang the flag. (Tr. 78). The respondent has admitted the fact of the violation but contests the significant and substantial designation.

Phillips testified that the significant and substantial hazard posed by failing to hang a warning device is that a person could go in by unsupported roof and be exposed to the risk of roof fall. (Tr. 32, 33). Phillips testified that the individual most likely to be exposed to this risk was the preshift examiner. Wright testified that David Miles was the preshift examiner. Wright further testified that he informed Miles that the last corner bolt had not been installed. (Tr. 89). In view of Miles' awareness of the missing corner bolt, the respondent asserts that Miles' exposure to unsupported roof was highly unlikely.

In resolving the significant and substantial question, it is helpful to examine the exposure to risk the mandatory safety standard seeks to avoid. In this regard, Section 75.208 requires a visible warning or physical barrier to impede travel beyond permanent roof support. Thus, the safety standard does not recognize verbal warning as an effective preventative measure. In this regard, such warnings can be forgotten or neglected to be communicated to personnel who, for whatever reason, may have a necessity to traverse the area. Thus, I conclude that, in the absence of any physical warning or barrier, the violation cited in Citation No. 3825086 was properly characterized as significant and substantial. Accordingly, the Secretary's proposed civil penalty of \$235 is affirmed.

Citation Nos. 4041543 and 4041547

The respondent has stipulated to the fact of occurrence of the violations cited in Citation Nos. 4041543 and 4041547. These citations concern violations of 30 C.F.R. § 75.517 on two 440 volt cables providing power to the No. 1 and No. 2 Jeffrey bridge carriers. The citations were issued because the abrasion-resistant cable jackets which surround and protect the softer, insulated electrical wires, had been torn. (Tr. 96, 105). These citations were issued by Inspector Stanley Sampsel on March 22, 1993. Torn cable jackets are frequent occurrences in coal mines. (Tr. 97). Sampsel was unable to recall the length or specific location of the tears in question. (Tr. 104, 113). However, he testified that the tears could be immediately repaired with electrical tape. (Tr. 115). The parties agreed that my resolution of Citation No. 4041543 would govern my decision on Citation No. 4041547.

Sampsel justified his significant and substantial finding by testifying that torn outer jackets expose the softer insulated electrical wires in the cable. These wires could be further

compromised by subsequent wear and tear within the mine. These cables are frequently handled by mine personnel. Thus, electrical injury could occur to a miner coming into contact with open phase wires while handling the cables. (Tr. 106-7). Since the inner insulation was not damaged, Sampsel conceded that the cable could be repaired without turning the power off. (Tr. 121).

In challenging Sampsel's significant and substantial designation, the respondent argues that its personnel would have promptly discovered and repaired the compromised outer jackets before further damage to the inner insulated wires occurred. (Tr. 121). However, the issue of significant and substantial must be viewed in the context of continuing normal mining operations. U.S. Steel Mining Company, Inc., supra. Periodic preventative or remedial maintenance on the part of an operator is presumed. However, the use of caution by mine personnel is not an appropriate consideration for mitigation of a significant and substantial violation. See Eagle Nest, Incorporated, 14 FMSHRC 1119, 1123 (July 1992). Consistent with the Commission's Eagle Nest decision, I conclude that a maintenance program does not mitigate the degree of risk associated with an undetected or unremedied violation.

I credit Inspector Sampsel's testimony that continued mining operations could expose the inner insulated electrical wires to further damage. Sampsel also testified that miners frequently have occasion to move or otherwise come in contact with these trailing cables. Under such circumstances, exposure to exposed wires could result in serious electrical injury. Consequently, I conclude that there was a reasonable likelihood, in the context of continued mining operations, that the more delicately insulated electrical wires inside the torn cable could become further compromised and contribute to the serious electrical injury of a miner exposed to these wires. Accordingly, the significant and substantial designations in Citation Nos. 4041543 and 4041547 are affirmed. Consequently, I am also affirming the proposed civil penalties of \$288 for each of these citations.

Citation Nos. 4041548, 4041549, 4041550 and 4041551

Citation Nos. 4041548, 4041549, 4041550, 4041551, were all issued for alleged violations of 30 C.F.R. § 75.1722(a). This mandatory safety standard provides, in pertinent part, that exposed moving machine parts which may be contacted by individuals, and which may cause injury, shall be guarded. These four citations concern alleged inadequate guarding of chain drive shafts on the No. 1 and No. 2 Jeffrey bridges and the No. 1 and No. 2 Jeffrey carriers. As the four guarding citations address essentially the same type of equipment, *i.e.*, the motor drive assemblies that move the conveyors attached to the left of the motor drive assemblies, the parties agreed that these citations would be considered collectively. (Tr. 9-10, 170).

These four citations concern the adequacy of the factory installed guarding of the motor drive assemblies of bridges and carriers manufactured by the Jeffrey Manufacturing Company. These bridges and carriers are connected to the continuous miner. The coal cut by the continuous miner is loaded on conveyors on these bridges and carriers which conveys the coal from the face to the belt conveyor system which in turn transports the coal to the surface. (Tr. 169).

The subject bridges and carriers were purchased by the respondent as new equipment in 1978. (Tr. 217). The four cited pieces of equipment came from the manufacturer with, yellow, metal, factory-installed guards, which are demonstrated in the closed position in photograph C of respondent's exhibit three and in the open position in photographs A and B of respondent's exhibit three. These guards cover the motor drive assemblies which are located immediately to the right of the conveyor. Each drive assembly consists of a gray motor and a black, ribbed speed reducer. (Tr. 198, 199). The motor and reducer are connected by a drive shaft which measures 1 3/8 inches in diameter and 18 inches in length. (Tr. 188, 199, 207, 215; respondent's exhibit 4). The factory-installed guard is three inches higher than the drive shaft. The guard has a curved lip which covers the side of the drive shaft. (Tr. 215; respondent's exhibit 3).

Located along the drive shaft, approximately three inches from the gray motor, is a shearing hub which is approximately five inches in diameter. (Tr. 202). The factory-installed guard, which measures 14 inches in length, covers the drive shaft and shearing hub. (Tr. 202). Clearance between the shearing hub and guard is only one-half inch. (Tr. 203). The shearing hub, which is more than 3 1/2 inches larger in diameter than the drive shaft, prevents access to the remainder of the guarded drive shaft. (Tr. 209). Paul Smith estimated that the dimensions and placement of the factory-installed guards resulted in an exposure of a three inch length of drive shaft between the gray motor and the guarded shearing hub and an exposure of one inch of drive shaft between the guard and the black, ribbed speed reducer. (Tr. 208-9).

In support of these citations, Inspector Sampsel testified that the factory-installed guards were deficient in their design and length. In this regard, although Sampsel conceded that the guards effectively shielded the center of the drive shaft, he opined that a person could "stick [his] hands" past the ends of the guards into the shaft itself. (Tr. 171, 173-4). In addition, Sampsel stated that there was enough clearance between the guards and the shafts to enable someone to "reach right in" to the moving parts. (Tr. 174). Although Sampsel expressed concerns with regard to the clearance between the guard and shafts, he stated that the violations were attributable to the length of the guards. (Tr. 182). Sampsel testified that miners tend to hold

on to the carriers and bridges "as kind of a crutch" as they traverse the belt entries. Therefore, Sampsel expressed his concern that a miner could inadvertently come into contact with the drive shaft if he inattentively grabbed the carrier or bridge system for support. Sampsel opined that under such circumstances a miner could sustain serious moving part contact injuries to his hand or arm. (Tr. 175, 176).

Section 75.1722(a), the cited mandatory safety standard, requires that "...shafts...and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." This mandatory safety standard contemplates guarding that satisfies a fitness for purpose standard. Significantly, Inspector Sampsel testified a primary purpose of the subject guarding is to prevent individuals who may suddenly grab the bridges and carriers for support from inadvertently sticking their hands between the end of the guard and the moving drive shaft. Paul Smith conceded the primary exposed area was a three inch length of drive shaft between the gray motor and the guarded shearing hub. This three inch area, which is adequately depicted in the photographs in respondent's exhibit 3, poses a risk of hand injuries to personnel who may suddenly grab the drive shaft area. Consequently, there is an adequate basis for concluding the factory-installed guarding was insufficient in length in violation of Section 75.1722(a).

Although I have concluded that the subject guards posed a risk to mine personnel, it is the degree of risk and the likelihood of injury that must be evaluated in order to determine if these citations were properly designated as significant and substantial. Sampsel testified that the guards shielded the major portion of the moving drive shaft. Smith's testimony that approximately three inches of the drive shaft was exposed is supported by the photographic evidence. Consequently, while I have concluded that miner's were exposed to risk, the minimal area of mine shaft area exposure does not warrant a finding that injury was reasonably likely to occur. Thus, the significant and substantial designations shall be deleted from these guarding citations. Accordingly, I am assessing a penalty of \$75 for each citation.

Citation No. 4041556

Citation No. 4041556 alleges a citation of 30 C.F.R. § 75.370(a)(1) in that the respondent failed to comply with its approved ventilation plan because a check curtain was not located at the end of the permanent belt line. The purpose of a check curtain at the end of the permanent belt structure is to prevent air from traveling up the belt line to the working face in the event of a fire or other emergency. (Tr. 231, 235). The respondent admits the check curtain was not installed at the time the citation was written by Inspector Sampsel at 11:00 a.m. on

March 23, 1993. However, the respondent asserts that at the time of the citation, it was in the process of advancing the belt forward one break. (Tr. 245-6). Consequently, it argues that no mining was under way because the belt line is inoperable during the set-up process. (Tr. 246, 248).

Inspector Sampsel testified that he believed coal production had taken place the morning he issued the citation. (Tr. 237-8). However, he could not specifically recall whether production was actually occurring at the time the citation was issued. (Tr. 240) Significantly, Sampsel's contemporaneous notes made at 11:00 a.m. on March 23, 1993, do not reflect that the operator had suspended production activities. (Tr. 265-266).

In considering the respondent's assertion that no production activities were in progress, I had the following exchange with respondent witness Larry Bullock:

THE COURT: Mr. Bullock, were you aware that a citation had been written on that date for no check curtain and no regulator?

THE WITNESS: Yes.

THE COURT: Did you ever talk to Inspector Sampsel about the fact that the reason the check curtain and regulator was not installed was because the belt line was being advanced?

THE WITNESS: No, I didn't.

THE COURT: To your knowledge, did anybody else ever tell that to Mr. Sampsel?

THE WITNESS: Not to my knowledge.

THE COURT: Does that seem strange to you in the context of check curtains [having] to be removed and replaced, and in the interim period while a belt is being advanced [the check curtain] is not going to be in place?

Do you have any explanation for why the personnel at the mine didn't tell Inspector Sampsel, it is not in place because we are in the process of moving?

THE WITNESS: No, I don't.

Bullock's testimony is consistent with the testimony of respondent witness Cecil Broadus that, to his knowledge, no one conveyed to Inspector Sampsel that the belt curtain and regulator were removed because the belt line was in the process of being

advanced. (Tr. 250).

As previously noted, this citation was issued on March 23, 1993. This hearing proceeding was conducted approximately nine months later on December 14, 1993. If the subject citation was issued as a result of Sampsel's erroneous assumption that mine production was in progress, it was incumbent on the respondent to try to dissuade Inspector Sampsel of this notion at the time the citation was issued. The respondent does not contend that Inspector Sampsel was advised that production had been suspended. Having failed to even attempt to convince Sampsel that production was suspended at the time the citation was issued or during the Health and Safety Conference process provided to discuss the merits of citations shortly after they are issued, the respondent's belated self-serving assertion at the hearing regarding the non-production status must be afforded little weight. Accordingly, the fact of the violation and the significant and substantial nature of the subject citation is affirmed. The Secretary's proposed \$178 civil penalty for Citation No. 4041556 is also affirmed.

Citation 4041557

Citation No. 4041557 alleged a violation of 30 C.F.R. § 75.1704-2(d). The citation specified that an up-to-date escapeway map was not provided in the No. 1 Section. The cited escapeway map was shown to Inspector Sampsel by David Miles who is no longer employed by the respondent. (Tr. 268). The respondent asserts that it had a current escapeway map on the surface. However, for reasons unknown to the respondent, Inspector Sampsel was apparently shown an out-of-date map. Although Smith requested a conference pursuant to the procedures set forth in Section 100.6, 30 C.F.R. § 100.6, MSHA denied Smith's conference request as untimely. (Tr. 337-38).

It is unfortunate that Smith's request for a conference was untimely. Once again, I find myself in the position of being asked to save the respondent from itself. As the respondent's counsel noted in her proposed findings and conclusions, "...it is conceivable that an up-to-date escapeway map was on the section, ...but for some reason, Inspector Sampsel saw or was erroneously shown an out-of-date map....Equally regrettably, S & H did not question the inspector or voice the opposition to him. Had the parties communicated more fully, a misunderstanding of this type could have been resolved." (Resp.'s Proposed Findings, p.31).

Although the Secretary has the burden of proving the fact of a violation, an operator has the obligation to provide an inspector with sufficient information if it believes a violation has not occurred. I have no reason to doubt Inspector Sampsel's testimony that he was not shown a current escapeway map. If a current escapeway map was not made available to Sampsel, it follows that a current map may not have been provided to mine personnel in the event of an emergency. Consequently, Citation No. 4041557, designated as significant and substantial, shall be affirmed. The \$178 proposed assessment shall also be affirmed.

Citation No. 4041541

At the hearing, the parties moved to settle Citation No. 4041541. The terms of the settlement agreement are that the significant and substantial designation in this citation shall be deleted and the proposed penalty of \$309 will be reduced to \$75. In addition, pursuant to the terms of this settlement agreement, the respondent has submitted to the MSHA District Office a request for modification of its roof control plan in order to resolve ambiguities in the plan concerning corner cuts and permissible widths. The terms of this settlement agreement are incorporated herein.

ORDER

In view of the above, **IT IS ORDERED** that:

1. Citation No. 3825085 **IS MODIFIED** by removing the significant and substantial designation. The civil penalty assessed for this citation is \$100.00.

2. Citation No. 3825086 **IS AFFIRMED**. The civil penalty assessed for this citation is \$235.00.

3. Citation Nos. 4041543 and 4041547 **ARE AFFIRMED**. Each of these citations is assessed a civil penalty of \$288.00.

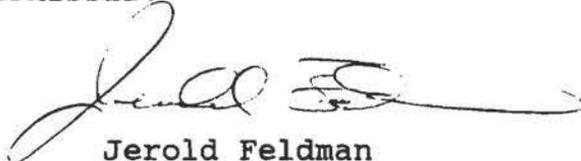
4. Citation Nos. 4041548, 4041549, 4041550 and 4041551 **ARE MODIFIED** by removing the significant and substantial designations. Each of these citations is assessed a civil penalty of \$75.00.

5. Citation No. 4041556 **IS AFFIRMED**. The civil penalty assessed for this citation is \$178.00.

6. Citation No. 4041557 **IS AFFIRMED**. The civil penalty assessed for this citation is \$178.00.

7. Consistent with the terms of the parties' settlement agreement, Citation No. 4041541 **IS MODIFIED** by removing the significant and substantial designation. The respondent has agreed to pay a civil penalty of \$75.00 for this citation.

IT IS FURTHER ORDERED that the respondent **SHALL PAY**, within 30 days of the date of this decision, a total civil penalty of \$1642.00 in satisfaction of the citations in issue. Upon receipt of payment, this case **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

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

Imogene A. King, Esq., Frantz, McConnell & Seymour, P. O. Box 39, Knoxville, TN 37901 (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 25 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 93-3-M
Petitioner	:	A. C. No. 41-03200-05518
	:	
v.	:	Docket No. CENT 93-4-M
	:	A. C. No. 41-03476-05522
MORRIS SAND AND GRAVEL,	:	
Respondent	:	Docket No. CENT 93-8-M
	:	A. C. No. 41-03476-05521
	:	
	:	Docket No. CENT 93-20-M
	:	A. C. No. 41-03200-05519
	:	
	:	Docket No. CENT 93-21-M
	:	A. C. No. 41-03476-05523
	:	
	:	Docket No. CENT 93-42-M
	:	A. C. No. 41-03476-05524
	:	
	:	Docket No. CENT 93-57-M
	:	A. C. No. 41-03476-05525
	:	
	:	Docket No. CENT 93-88-M
	:	A. C. No. 41-03200-05520
	:	
	:	Docket No. CENT 93-101-M
	:	A. C. No. 41-03200-05521
	:	
	:	Docket No. CENT 93-102-M
	:	A. C. No. 41-03476-05526
	:	
	:	Docket No. CENT 93-246-M
	:	A. C. No. 41-03476-05527
	:	
	:	Plants No. 1 and No. 2

DECISION

Appearances: Olivia Tanyel Harrison, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Petitioner; Harriett Morris and Thomas Lee Morris, Pro Se. for the Respondent.

Before: Judge Feldman

This consolidated proceeding is before me based upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et. seq., charging the respondent with various violations of the Act and mandatory regulatory safety standards. Pertinent jurisdictional stipulations as well as stipulations pertaining to the civil penalty criteria in Section 110(i) of the Act, 30 U.S.C. § 820(i), are of record. The parties waived the filing of posthearing briefs.

These matters were heard on February 23, 1994, in Houston, Texas, at which time Mine Safety and Health Administration (MSHA) Inspector Joseph Watson testified on behalf of the Secretary and Thomas and Harriet Morris testified for the respondent company. At the hearing, the parties moved to settle nine of the eleven captioned docket proceedings. The terms of this comprehensive settlement resulted in an agreed upon total assessment of \$2,125. At trial I considered the representations and documentation submitted in support of the parties' agreement, and I concluded that the proffered settlement was appropriate under the criteria set forth in Section 110(i) of the Act. (Tr. 8-33, 177-179). An order directing payment of the agreed upon total civil penalty will be incorporated in this decision.

The parties could not reach a consensus on Docket Nos. CENT 93-57-M and CENT 93-102-M. Docket No. CENT 93-57-M concerns combined 104(a) and 107(a) Order No. 3898640 issued on March 18, 1992, by Inspector Joseph Watson at the respondent's No. 2 Plant. This order alleges the service brakes on the respondent's Trojan, Model 2500, front loader, which was being used to load trucks, constituted an imminent danger because the brakes could not stop the loader on level ground in violation of section 56.14101(a)(3), 30 C.F.R. § 56.14101(a)(3). This mandatory safety standard specifies that all braking systems installed on equipment must be maintained in functional condition. Docket No. CENT 93-102-M involves 107(a) Order No. 3899545 issued by Watson the following day on March 19, 1992, as a result of the respondent's continuing failure to remove the cited Trojan front-end loader from service.

The respondent, Morris Sand & Gravel, is a sole proprietorship owned by Thomas Morris. The company has a history of financial difficulties manifested by a petition for protection under Chapter 11 of the U.S. Bankruptcy Code filed on August 21, 1987, by Thomas L. Morris, d/b/a Morris Sand & Gravel. (Resp.'s ex. 2). Although not a formal partnership, Harriett Morris testified that she considers Morris Sand & Gravel to be jointly owned. (Tr. 9-10).

Morris Sand and Gravel is a small operator that employs a total of six employees. (Joint stipulations, Government E x. 9). The company dredges sand and gravel from the San Jacinto River. The material is dredged at the river level and pumped to a wet screen plant where it is processed over a series of screens that separate the various grades of material. The material is ultimately transported by conveyor to the plant where it is loaded onto customers' trucks. (Tr. 50-53).

Inspector Watson arrived at the respondent's No. 2 Plant at approximately 8:00 a.m. on March 18, 1992, for the purpose of performing a routine inspection. Upon arriving at the plant, Watson observed Fidencio Ruiz, the respondent's loader operator, loading trucks with sand and gravel materials with a Trojan front-end loader. As Watson approached the loader, Ruiz advised him that the brakes on the vehicle were not operating. Watson observed the loader in operation and concluded that the service brakes failed to stop the vehicle. (Tr. 57). He tested the vehicle and confirmed that the brakes would not hold on level ground.

Watson estimated the vehicle weighed approximately 30,000 lbs. and held approximately 3 1/2 yards in its scoop. He concluded, given the size and weight of the vehicle, that its inoperable brakes could reasonably have been expected to cause death or serious physical injuries to Ruiz or to operators of the trucks that were being loaded. Specifically, Watson testified that the loader could easily crush the cab of a haulage truck seriously injuring or killing the truck driver. (Tr. 58). Thus, Watson concluded the condition of the loader posed an imminent danger. Consequently, Watson issued combined 104(a) and 107(a) Order No. 3898640 at 1:40 p.m. (Government Ex. 10). The Order required the respondent to immediately remove the loader from service until the service brake system was repaired and reinspected by an authorized MSHA representative. The Order was served by Watson on Ruiz who is not fluent in English.

Watson returned to the respondent's plant the following morning on March 19, 1992. At approximately 10:30 a.m. Watson explained to Thomas Morris that the imminent danger order given to Ruiz the previous day required the front-end loader to be taken out of service and not used until such time as it could be repaired and reinspected.¹ Morris became upset and accused Watson of trying to put him out of business by shutting down his loader. Shortly after the conversation with Watson, Morris called Doyle Finke, Watson's supervisor assigned to the

¹ Section 107(a) of the Act requires equipment posing an imminent danger to be immediately withdrawn from service. 30 U.S.C. § 817(a).

San Antonio, Texas field office. Morris complained to Finke that Watson had shut down his business operations. Morris told Finke that his other loader was not operational because his mechanic was working on it and that if he could not use the cited loader, he could not load material for customers. Morris asked Finke if he could use the loader if the brakes were repaired. Finke replied that Morris could not legally use the loader until it was reinspected by an MSHA inspector. Morris told Finke that he would use the loader anyway and take full responsibility for its operation. (Tr. 161-162; Gov.Ex. 4).

Approximately four hours after Watson explained the respondent's statutory obligation to remove the loader from service, Watson returned to the plant and found the loader in operation. Consequently, Watson issued 107(a) imminent danger Order No. 3899545 at 3:20 p.m.

The respondent asserts Ruiz crimped the brakeline on the loader sometime after the initial imminent danger order was issued at 1:40 p.m. on March 18, 1992, and before the subsequent imminent danger order was issued on March 19, 1992, at 3:20 p.m. Therefore, the respondent argues the service brake system had improved. However, Watson testified crimping the brakeline increased the danger because it results in uneven braking, sliding, skidding and loss of control. (Tr. 117-118). Therefore, Watson opined that the crimping of the brakeline did not remove the imminent danger. (Tr. 118-119).

In apparent recognition that the front loader was being operated in less than optimum condition, Harriett Watson testified that "...we're doing the best [we] can -- the best we can to stay in business. We were trying to get another loader. If we shut down our loader, we have to shut down our business." (Tr. 156).

Similarly, Thomas Morris testified that:

Well, we knew that we had another loader about to be repaired and about to be back on stream, and that it was not going to take us very long to have to use this loader. So, we went ahead and used it and I called Mr. Finke and it appears now that they had either changed their mind about agreeing to let me use that loader or I misunderstood or whatever the case is. My understanding was that we could go ahead and use that loader, and we were just responsible for it. ...I [mean] if anyone got hurt or injured on the job, it was not -- we were not going to hold MSHA responsible for anybody getting hurt or any damage that we did to a truck. (Tr. 161-162).

In addressing the question of imminent danger, the Commission has noted that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975). Although an inspector must have a reasonable basis for concluding a condition presents an impending hazard that requires the immediate withdrawal of effected miners, an inspector is "granted wide discretion because he must act quickly" under such circumstances. Island Creek Coal Co., 15 FMSHRC 339 (March 1993).

After considering the testimony in this matter I issued the following bench decision affirming the subject imminent danger orders which is edited with nonsubstantive changes:

These matters concern Imminent Danger Order No. 3898640 that was issued on March 18, 1992, at 1:40 p.m. and Imminent Danger Order 3899545 that was issued the following afternoon on March 19, 1992, at 3:20 p.m.

These citations deal with the issue of imminent danger. The term "imminent danger" is defined in Section 3(j) of the Mine Act as "the existence of any condition or practice in a coal or other mine which would reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

Turning to the issue of whether or not there was an imminent danger with respect to Order No. 3898640, Inspector Watson testified that during his inspection Mr. Ruiz, the operator of the cited front-end loader, complained to him about the brakes not operating properly. Watson then checked the brakes and determined they could not hold the loader on level ground. The loader is a large piece of equipment that holds tons of materials and weighs tons in its own right. As this loader with inoperable brakes approached trucks, there was an imminent danger to Ruiz in that he could lose control of the loader which could result in serious or fatal injuries to him or to operators of the trucks he was loading.

I reject Mrs. Morris' assertion that the loader does not approach the cab of the truck. A loader approaches a truck from many different directions and, in its maneuvering, it is frequently directed towards the front driver compartment of a truck.

I am also not persuaded by Mrs. Morris' attempt to find mitigating circumstances by alleging that the loader can be downshifted or that the shovel on the scoop can be lowered to stop the loader in lieu of properly operating brakes. Watson testified that if the scoop on the loader was loaded with material, the operator would be in no position to lower the scoop to stop the loader. It is also not an enviable position for anybody to be in front of a multi-ton loader that must rely on lowering the scoop or downshifting the transmission to stop the vehicle. In fact, lowering the scoop could contribute to a fatality if the scoop is lowered on the cab of the truck.

In any event, it is clear the brakes were not working in the context of the Secretary's burden of proving the fact of the violation and the resultant imminent danger. My conclusion is consistent with Ruiz' complaint. Moreover, the Morrises have presented no evidence that the brakes were, in fact, functional. Therefore, the Secretary has satisfied his burden of establishing the violation of Section 56.14010(a)(3) and that the inoperable brakes constituted an imminent danger.

The next issue is the service of the initial imminent danger order on Ruiz. The Morrises claim they did not receive actual notice of the withdrawal order from Ruiz because Watson was misunderstood by Ruiz who is not fluent in English. Assuming for the sake of argument that the Morrises did not have actual notice, they had constructive notice. Constructive notice is a concept in law where owners of a company are responsible for information provided to their agents. Mr. and Mrs. Morris knew, or should have known, about the imminent danger order. It was their responsibility to find out if there was a problem in communication. Therefore, I conclude that, although there may have been confusion, the Morrises are charged with notice of the imminent danger order issued at 1:40 p.m. on March 18, 1992.

Moreover, even if there were confusion, the confusion was remedied at 10:30 a.m. on March 19, 1992, when Watson, apparently aware of the difficulty in communicating with Ruiz, had a conversation with Mr. Morris informing him that the front-end loader must be taken out of service immediately. Morris apparently disagreed with this requirement and called Mr. Finke, Watson's supervisor, and received essentially the same information, i.e., that the scoop had to be taken out of service.

Therefore, although there may have been confusion before 10:30 a.m. on March 19, 1992, there is no basis for concluding there was any confusion after the 10:30 a.m. meeting between Watson and Morris.

Finally, there has been quite a bit of testimony about why the respondent continued to operate after 10:30 a.m. The testimony concerns pressure from customers who desired their trucks to be loaded. Section 2 of the Mine Act explicitly recognizes the dangers in the mining industry. 30 U.S.C. § 801. It imposes an obligation on operators to prevent the existence of dangerous conditions. Prevention must take precedence over concerns about production. Consequently, I do not find the pressures brought to bear by the respondent's customers on the Morrises as a mitigating circumstance.

Nor do I find the Morrises' testimony that Ruiz was satisfied with the operational performance after crimping the brakeline as a mitigating factor. I am certain very few victims of serious injuries or fatalities were aware they were operating equipment that exposed them to an imminent danger at the time of their injury or death. The effective method of eliminating such imminent dangers is to have defective equipment reinspected by authorized inspectors before permitting such equipment to be returned to service.

I also do not find Mr. Morris' willingness to take responsibility for the operation of the loader as particularly relevant or appropriate. The issue is not who is responsible for the occurrence of an injury or death. Rather, the issue is preventing the potential injury or death. Preventative measure must not be sacrificed to the interests of production and continuing operations. Accordingly, the Secretary has also prevailed with respect to Imminent Danger Order No. 3899545 issued on March 19, 1992, at 3:28 p.m.

The March 19, 1992, violation was more serious than the March 18, 1992, violation as production concerns became more urgent than safety concerns. While I am confident this was not a conscious decision by the Morrises, it was, nevertheless, the result. In recognition of the fact that the respondent is a small operator with a history of financial problems, I am assessing an \$800.00 civil penalty for Order No. 3898640 issued on March 18, 1992, and a civil penalty of \$1,000 for Order No. 3899545 issued as a result of the Morrises continued failure to remove the loader from service.

As previously noted nine of the captioned docket proceedings were settled at trial. The terms of the settlement agreement with respect to these docket proceedings are as follows:

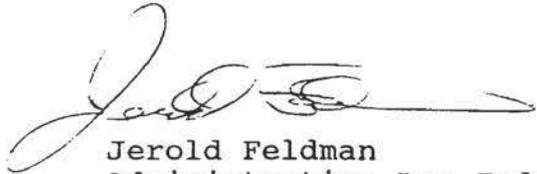
<u>Docket No.</u>	<u>Citation/Order No.</u>	<u>Settlement Disposition</u>	<u>Assessed Penalty</u>
CENT 93-3-M	104(a)-4107128	S&S deleted	\$50.00
CENT 93-4-M	104(d)-4107131	Modified to 104(a); S&S deleted	\$50.00
	104(d)-4107133		\$200.00
CENT 93-8-M	104(a)-3899547		\$100.00
CENT 93-20-M	104(a)-4107125	S&S deleted	\$50.00
	104(a)-4107126		\$35.00
CENT 93-21-M	104(a)-4107130		\$50.00
	104(a)-4107132	S&S deleted	\$50.00
CENT 93-42-M	104(d)-4107129		\$690.00
CENT 93-88-M	107(a)-4107124		\$800.00
CENT 93-101-M	104(a)-4107127	S&S deleted	\$50.00
CENT 93-246-M	104(a)-4107663		vacated
Total Settlement:			\$2,125.00

ORDER

Accordingly, **IT IS ORDERED** that 104(a)-107(a) Order No. 3898640 in Docket No. CENT 93-57-M and 107(a) Order No. 3899545 in Docket No. CENT 93-102-M **ARE AFFIRMED. IT IS FURTHER ORDERED** that Thomas L. Morris, d/b/a Morris Sand and Gravel, **SHALL PAY** a total civil penalty of \$3925.00 which represents the sum of the agreed settlement of \$2125.00 and the \$1800.00 civil penalty imposed as a result of the adjudication in this proceeding.

The respondent is currently paying monthly installments of \$300.00 through October 1994 in satisfaction of previous assessed

civil penalties. In recognition that the respondent is a small operator, the Secretary has agreed to defer the required payment in this matter and to accept an installment plan whereby the respondent will remit to MSHA payments of \$392.50 on the 15th of every other month beginning on November 15, 1994, and ending on May 15, 1996, in satisfaction of the \$3925.00 civil penalty. This payment schedule **IS HEREBY APPROVED**. If Thomas Morris fails to abide by this payment schedule, the remaining balance will become due immediately. Upon receipt of the total \$3925.00 civil penalty, these cases **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

O. Tanyel Harrison, Esq., Office of the Solicitor, U. S.
Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX
75202 (Certified Mail)

Mr. and Mrs. Thomas Morris, Morris Sand & Gravel, 6106 Larkmount
Road, Spring, TX 77389 (Certified Mail)

/11

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 28, 1994

C AND S COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 94-20-R
v.	:	Citation No. 3773701; 6/8/93
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 94-21-R
ADMINISTRATION (MSHA),	:	Order No. 3773702; 6/8/93
Respondent	:	
	:	Docket No. VA 94-22-R
	:	Order No. 3773703; 6/8/93
	:	
	:	Docket No. VA 94-23-R
	:	Order No. 3773704; 6/8/93
	:	
	:	Docket No. VA 94-24-R
	:	Order No. 3773705; 6/8/93
	:	
	:	Mine No. 3
	:	
	:	Mine ID 44-03465

ORDER OF DISMISSAL

Before: Judge Merlin

On December 14, 1993, the operator filed notices of contest in the above captioned actions. Each case contains one alleged citation dated June 8, 1993, and all of them were issued on the ground that the operator had submitted invalid respirable dust samples. On February 2, 1994, the Solicitor filed a motion to dismiss these cases as untimely. On February 15, 1994, the operator filed a response.

The Federal Mine Safety and Health Act affords an operator two ways to challenge a citation. First, the operator may file a notice of contest under Section 105(d), 30 U.S.C. § 815(d), which provides in relevant part as follows:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in

a citation or modification thereof issued under section 104 * * * the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing * * * *.

The second way that an operator may challenge a citation is through the penalty assessment procedure. Under the Act the Secretary of Labor must propose a civil penalty for every violation and notify the operator. Section 105(a), 30 U.S.C. § 815(a), provides in this respect as follows:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

In his motion the Solicitor seeks dismissal on the ground that the contests filed on December 14 for review of the citations dated June 8 were untimely under 30 U.S.C. § 815(d), 29 C.F.R. § 2700.20.

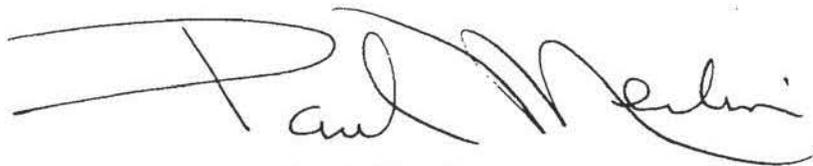
In its response the operator mixes up the two avenues of relief available to operators. It cites 29 C.F.R. § 2700.20 as indicating that an operator can challenge a proposed penalty assessment within 30 days of notification and the Secretary must thereafter answer. However, the cited section has nothing to do with penalty assessments. It is 29 C.F.R. § 2700.25 which provides that an operator has 30 days to notify the Secretary it wishes to contest a proposed penalty and that the Secretary will then notify the Commission. Under 29 C.F.R. § 2700.27 the Secretary must file with the Commission a petition for the assessment of civil penalties and under 29 C.F.R. § 2700.29 the

operator thereafter must file an answer. Clearly, therefore, the operator has confused the filing of a notice of contest to a citation with the challenge to a penalty proposal which as set forth herein, has its own distinct procedures.

A long line of decisions going back to the Interior Board of Mine Operation Appeals holds that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Peabody Coal Company, 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990); Prestige Coal Company, 13 FMSHRC 93 (January 1991); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Cf. Rivco Dredging Corp, 10 FMSHRC 889 (July 1988); Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980); Wallace Brothers, 14 FMSHRC 596 (April 1992). The notices of contest in these cases filed 189 days after the issuance of the citations, were therefore, 159 days late and must be dismissed as untimely.

However, it is noted that under the regulations the operator in the penalty assessment case may challenge not only the penalty assessment, but also the fact of the violation or any special findings contained in the citation. 29 C.F.R. § 2700.21. The operator has properly filed a contest to the proposed assessments which it received on December 6, 1993, and contested within 30 days on December 14, 1993. This penalty case has been docketed with the Commission and assigned Docket No. VA 94-27. The Solicitor filed a penalty petition on February 4, 1994, and the operator apparently answered on March 7, 1994, but improperly used the docket numbers of these cases instead of the docket number for the penalty proceeding.

In light of the foregoing, it is **ORDERED** that these cases be, and are hereby, **DISMISSED**.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Thomas R. Scott, Esq., Terrence Shea Cook, Esq., Street, Street,
Street, Scott & Bowman, P. O. Box 2100, Grundy, VA 24614

Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department
of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Mr. Carl Mullins, Miner's Representative, HCR Box 46, Hurley, VA
24620

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 26 1994

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEVA 92-1250-A
Petitioner : A. C. No. 46-01968-04040
:
v. : Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

ORDER LIFTING STAY
ORDER OF DISMISSAL

Before: Judge Merlin

On March 24, 1993, the above captioned case was placed on stay pending a decision on the single sample dust issue by the Commission in Keystone Coal Company, Docket Nos. PENN 91-1480-R, etc. On January 4, 1994, the Commission decided Keystone adversely to the Secretary. 16 FMSHRC 6. The Secretary did not appeal, but instead on February 18, 1994, instituted a notice of proposed action in the Federal Register. 59 Fed. Reg. 8356. It is further noted that by memorandum dated March 8, 1994, the Administrator for Coal Mine Safety and Health instructed District Managers to vacate single sample dust citations.

I further take account of the fact that in connection with Docket No. Penn 91-1480-R the Solicitor in that case sent Administrative Law Judge Weisberger a list of citation numbers which allegedly present the single sample dust issue. This list is not adequate or helpful because it does not identify the citations by Commission docket numbers. Because of the Solicitor's failure to furnish the required information, it has been necessary to search every judge's docket case by case to locate the ones that involve single samples. It is a strange turn of events when the court must find for counsel the cases on which he needs to take action.

Finally, there are many cases on the Solicitor's list which have not been located in the search of the judges' dockets. The Solicitor should revisit his list to straighten out these matters.

It is clear in light of the foregoing data including the memorandum of the Coal Administrator, that this case should be dismissed. This case and others like it are cluttering the dockets of the Commission's judges. No useful purpose would be served by requiring the Solicitor to file a motion to dismiss here.

Accordingly, it is hereby **ORDERED** that the Order of Stay previously entered herein be **LIFTED** and that this case be and is hereby **DISMISSED**.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in dark ink on a white background.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

Douglas N. White, Esq., Counsel, Trial Litigation, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

Robert S. Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

MAR 28 1994

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-79-D
on behalf of	:	
WILLIAM H. CRANFORD,	:	Deer Creek Mine
Complainant	:	
	:	
v.	:	
	:	
ENERGY WEST MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This case is a discrimination proceeding initiated by the Secretary of Labor on behalf of William H. Cranford against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

Prior to a hearing the Secretary filed a motion seeking to settle the case.

Under the terms of the motion Respondent has agreed as follows:

1. It will post a notice stating it understands Section 103(g) rights of all employees.
2. It will not harass or treat differently any employee who makes a Section 103(g) complaint or provides information to MSHA.
3. It agrees to remove Complainant's reprimand from any and all files.

The fourth paragraph of the settlement motion states "the Secretary agrees to waive the penalties proposed for Respondent's violation of Section 105(c) of the Act."

As to above paragraph Respondent states that it "did not commit and does not admit a violation of Section 105(c), but has entered into the proposed settlement solely to avoid the costs of

further litigation and as a reasonable, good faith compromise of the dispute."

With the above clarification Respondent fully supports the motion and requests that it be approved.

Finally, the agreement provides each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

I have reviewed the proposed settlement and discussed it with parties in a conference call on March 22, 1994. I further find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is **APPROVED**.
2. Respondent is **ORDERED** to **COMPLY** with the terms of the settlement agreement within 30 days of the date of this order.


John J. Morris
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Timothy M. Biddle, Esq., Thomas C. Means, Esq., CROWELL & MORING,
1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595
(Certified Mail)

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 29 1994

LION MINING COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 94-71-R
: Citation No. 3711869; 11/17/93
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Grove No. 1 Mine
ADMINISTRATION (MSHA), : Mine ID 36-02398
Respondent :

DECISION

Appearances: Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania
for Contestant;
Richard T. Buchanan, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia,
Pennsylvania for Respondent.

Before: Judge Hodgdon

This case is before me on a notice of contest filed by Lion Mining Company against the Secretary of Labor pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of Citation No. 3711869 to it on November 17, 1993. For the reasons set forth below, I affirm the citation as modified herein.

The case was heard on January 13, 1994, in Somerset, Pennsylvania. Mine Safety and Health Administration Inspector Kenneth J. Fetsko testified on behalf of the Respondent. Mr. George Sosnak, Mr. Hiram Ribblett, Mr. Arthur B. Jones and Mr. Ted Marines testified for the Contestant. The parties have also filed post hearing briefs which I have considered in my disposition of this case.

FINDINGS OF FACT

This case arose as a result of Inspector Fetsko's inspection of Lion Mining's Grove No. 1 mine on November 17, 1993. During his inspection of the four and one-half right section of the mine, he observed a shuttle car being loaded with coal by a continuous miner in the roadway between Pillar Blocks 37 and 38.

Because of his location between Pillar Blocks 37 and 44, Inspector Fetsko could not see the front of the continuous miner to determine from where the coal was coming. At this vantage point, the inspector observed the miner load three or four shuttle cars.

While watching the shuttle cars, Mr. Fetsko noticed that roadway posts had not been placed in the crosscut between Pillar Blocks 38 and 39 as he believed was called for in Lion Mining's roof control plan. He also saw Mr. Jones, the Mine Superintendent, and Mr. Marines, the Section Foreman, standing in the crosscut. The inspector then went over to the crosscut and watched the continuous miner load a shuttle car from a notch it cut from Pillar Block 37.¹

At this point, Inspector Fetsko issued Citation No. 3711869 pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1).² He cited the operator for a violation of Section 75.220(a)(1) of the Secretary's Regulations, 30 C.F.R. § 75.220(a)(1), because Lion Mining did not comply with Note No. 6 to Drawing A of its tentatively approved roof control plan for pillar recovery by installing roadway posts in the crosscut between Pillar Blocks 38 and 39 to limit the roadway width to 18 feet. The violation was abated 30 minutes later when roadway posts were installed in the crosscut. On December 9, 1993, the inspector modified the citation to indicate that Note No. 7 of Lion Mining's roof control plan, rather than Note No. 6, had been violated (Govt. Ex. 1).

¹ While there was disagreement as to how many shuttle cars were loaded from the notch in Pillar Block 37, the parties were in agreement as to the approximate size of the notch itself (Tr. 88, 105, Jt. Ex. 1).

² Section 104(d)(1) provides, in pertinent part:

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

In its brief, Lion Mining "concedes that a violation existed when it failed to install several additional posts across the crosscut between blocks 38 and 39 prior to mining . . . from block 37" (Cont. Br. 6). It argues, however, that the violation was not "significant and substantial" and was not the result of its "unwarrantable failure" to comply with the Secretary's Regulations. On the other hand, the Secretary is of the opinion that the violation was both "significant and substantial" and the result of Lion Mining's "unwarrantable failure."

FURTHER FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Section 75.220(a)(1) of the Regulations provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons is unusual hazards are encountered.

Lion Mining's proposed pillar recovery roof control plan for its Grove No. 1 mine was tentatively approved by the District Manager on May 6, 1993. Note 7 to Drawing A of the plan provides, in pertinent part, that "[r]oadway posts installed in roof bolted entries, rooms, and crosscuts shall be installed to limit the roadway width to 18 feet" (Govt. Ex. 2).

Fact of Violation

As noted above, Lion Mining concedes that it violated Section 75.220(a)(1) by not following its approved roof control plan and installing roadway posts in the crosscut between Pillar Blocks 38 and 39. Accordingly, I conclude that Lion Mining's failure to install the roadway posts was a violation of the Regulation as alleged.

Significant and Substantial

On the citation, Inspector Fetsko designated the violation as being "significant and substantial" (Govt. Ex. 1). A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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."

A violation is properly designated S&S "if, based upon 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 safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of 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.

As happens in most cases involving an S&S designation, the point of contention in this case concerns the third element of the Mathies test. In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission clarified this element as follows:

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

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

In its brief, Lion Mining argues that the likelihood of an injury resulting from the failure to install the roadway posts was very remote because: (1) the area had been completely roof bolted, (2) Pillar Block 37 was almost totally intact, (3) two rows of breaker posts and six radius turn posts had already been installed in the immediate vicinity of the continuous miner, (4) the missing roadway posts were not in the area where coal was being extracted, and (5) no more coal was, or would have been, extracted before the posts were installed (Cont. Br. 9-10).

The Contestant notes that Inspector Fetsko was of the opinion that using the continuous miner to clean-up loose coal in the roadway between Pillar Blocks 37 and 38 would not have required installation of the roadway posts (Tr. 87). Thus, it contends that "[t]he likelihood of an injury occurring did not immediately raise (sic) from none to a reasonable likelihood as the result of the extraction of one quarter of a shuttle car of coal from the block" (Cont. Br. 9).

In opposition, the Secretary asserts that the purpose of installing roadway posts is to guard against roof falls while natural roof support is removed. He argues that there was a reasonable likelihood that a roof fall would occur because the roadway posts were not installed and that this is demonstrated by the fact that "the rib was rolling" between Pillar Blocks 38 and 39, i.e. pieces of the rib were breaking off, which indicates pressure from the roof, and that there was a history of roof falls in the four and one-half section (Resp. Br. 16-18).

The Secretary has not established that a serious injury was reasonably likely to have resulted from Lion Mining's failure to install the roadway posts in this case. In the first place, according to the Dictionary of Mining, Mineral, and Related Terms 931 (1968), roadway supports, which include roadway posts, serve two functions, to: "(1) ensure safety by preventing falls of ground, and (2) maintain the maximum possible roadway size by resisting the tendency of the roadway to contract and distort." It is not at all clear from Lion Mining's roof control plan that the sole, or even the primary, function of the roadway posts in this case was to serve as roof support.³

³ Significantly, Section 75.207 of the Regulations, which governs pillar recovery and which Lion Mining's roof control plan closely follows, does not require the installation of roadway posts until "mining is started on a final stump." 30 C.F.R. § 75.207(c). That was not occurring in this case (Tr. 83-85). The Regulation does require the installation of "breaker posts" and "roadside-radius (turn) posts" prior to beginning mining in a pillar, 30 C.F.R. § 75.207 (b), but there is apparently no dispute that Lion Mining had installed those.

In the second place, and most importantly, even without the roadway posts, Lion Mining had several other means of preventing a roof fall in place at the time the notch was taken out of Pillar Block 37. As noted in the citation, as well as Contestant's Brief, the area was completely roof bolted. In addition, breaker posts and radius (turn) posts had been installed. Finally, contrary to what the inspector believed at the time he issued the citation, Pillar Block 37 had not had any coal extracted from it prior to the extraction in question.⁴

Based on this evidence, I conclude that while the failure to install the roadway posts before coal was mined from the notch on Pillar Block 37 (Jt. Ex. 1) may have slightly increased the possibility of a roof fall in the area, it did not increase it to a level where the failure to install the posts would contribute to a reasonable likelihood that there would be a roof fall in the area. Accordingly, the violation was not "significant and substantial" and the citation will be modified as indicated in the order at the end of this decision.

Unwarrantable Failure

The inspector also found that the failure to install the roadway posts resulted from Lion Mining's "unwarrantable failure" to comply with the Secretary's safety and health standards. The Commission has held that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

In Emery Mining, supra at 2001, the Commission stated that:

"Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (unabridged) 2514, 814 (1971) (Webster's). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

⁴ Inspector Fetsko testified that he assumed that half of Pillar Block 37 had already been pillared at the time of the violation because of the location of breaker posts and a line curtain between Pillar Blocks 37 and 44 which prevented him from seeing the back half of Pillar Block 37 (Tr. 86, 92-3, 101). In fact, none of Pillar Block 37 had been mined (Tr. 105).

Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness or inattention.

The Secretary's case that Lion Mining's failure to install the roadway posts is not justifiable and inexcusable is based on the fact that the Mine Superintendent and the Section Foreman were present when the violation occurred and that citations for violation of the roof control plan had previously been issued to the company. These factors are not sufficient to establish an "unwarrantable failure" in this case.

First, as the Contestant points out, although Lion Mining had previously been cited for violating various sections of its roof control plan, it had never been cited for failing to install roadway posts. Secondly, the evidence in this case is insufficient to demonstrate that either the Mine Superintendent or the Section Foreman deliberately and consciously failed to act or engaged in aggravated conduct.

Mr. Jones, the Superintendent, testified that he did not know about the provisions of the roof control plan concerning roadway posts and was not required to know all of the provisions of the roof control plan (Tr. 124). However, even if it is assumed that he did have a duty to know and breached that duty, that breach is not necessarily an "unwarrantable failure." Virginia Crews Coal Company, 15 FMSHRC 2103, 2107 (October 1993).

The Section Foreman, Mr. Marines, testified that he observed the continuous miner operator cleaning up the roadway between Pillar Blocks 37 and 38, that he left area for a short time to check on something else and that when he returned the last shuttle car was being loaded, including coal from the notch. He stated that he told the shuttle car operator to return with timber to install the roadway posts, although no one, specifically including Inspector Fetsko, had reminded him that the posts should be installed (Tr.133-34). This testimony was un rebutted.

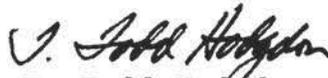
Based on this evidence, it is clear that further mining of Pillar Block 37 would not have taken place until after the roadway posts were installed. It is equally clear that the failure to install the roadway posts prior to cutting the notch, under the facts in this case and particularly in view of the roof control measures which were in effect, was not conduct which could be called "reckless disregard," "intentional misconduct,"

"indifference" or a "serious lack or reasonable care." Emery Mining at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991).⁵

Therefore, I conclude that this violation did not result from an "unwarrantable failure" to comply with the Regulations on Lion Mining's part. Reassessing the violation in light of the evidence, I find that Lion Mining demonstrated moderate negligence in this case. The citation will be modified accordingly.

ORDER

Citation No. 3711869 is **MODIFIED** by deleting the "significant and substantial" and "unwarrantable failure" designations, reducing the negligence to "moderate" and changing it from a Section 104(d)(1) citation to a Section 104(a), 30 U.S.C. § 814(a), citation. The citation as modified is **AFFIRMED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Joseph A. Yuhas, Esq., Lion Mining Company, 1809 Chestnut Avenue, Barnesboro, PA 15714 (Certified Mail)

Richard Buchanan, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

/lbk

⁵ Although the Contestant has conceded that a violation occurred in this case, I have also considered the fact that Note 7 of the roof control plan does not specifically state that roadway posts must be installed prior to beginning mining in a pillar block as a factor against finding the violation to be an "unwarrantable failure." Compare Note 7 with Note 6 which states "[r]ooms and crosscuts shall be fully bolted before pillaring is started" (Govt. Ex. 2).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAR 29 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 93-119
Petitioner	:	A.C. No. 40-01977-03619
v.	:	
	:	No. 2-3 Mine
U. S. COAL, INC.,	:	
Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for petitioner;
Charles A. Wagner, III, Esq., Wagner, Myers &
Sanger, Knoxville, Tennessee, for Respondent.

Before: Judge Fauver

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

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

FINDINGS OF FACT

1. On April 16, 1992, Lonnie Phillips, a certified electrician at Respondent's No. 3-2 Mine in Scott County, Tennessee, was called to repair an electrical malfunction in a continuous mining-machine.

2. The electrician opened the electrical panel cover and began work with a screwdriver without first de-energizing the power circuits and without locking out and tagging disconnecting devices for the 480-volt circuit he was working on. His attempted repair work was not "troubleshooting" within the meaning of federal safety regulations.

3. While trying to repair the energized circuit, the electrician received a severe electrical shock. Other miners saw him shaking, and cut the power off. He continued to shake, and it took five miners to hold him down and transport him to the surface. He was taken to a hospital by helicopter, suffering from electrical shock and burns to his hand.

4. Federal Mine Inspector Don A. McDaniel investigated the accident and issued Citation No. 3383505, alleging a violation of 30 C.F.R. § 75.509, which requires all power circuits and electrical equipment to be de-energized before work is done on the circuits and equipment, and Citation No. 3383506, alleging a violation of 30 C.F.R. § 75.511, which provides that no electrical work shall be performed on circuits or equipment without first locking out and tagging disconnecting devices.

5. On each citation, Inspector McDaniel indicated that the violation was significant and substantial, affected one person, and was due to a high degree of negligence.

6. The parties stipulated that annual production for all of Respondent's mines is about 190,000 tons, and that the proposed civil penalties would not affect the operator's ability to remain in business. The parties further stipulated that there were no prior citations for violations of 30 C.F.R. §§ 75.509 and 75.511, and that all penalties assessed against Respondent during the previous 24 months, except for those currently in litigation, have been paid by the operator.

7. Because of his injuries, Lonnie Phillips was absent from work for 2 to 3 months. After he returned, he showed signs of memory loss and impaired thinking that were not present before the electrical shock. Because of his impaired mental condition, which included an inability to understand, remember and follow work rules and standards, the company terminated his employment.

DISCUSSION, FURTHER FINDINGS

The statutory standards for assessing civil penalties for violations are set forth in § 110(i) of the Act, as follows:

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil

penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

If an operator contests the Secretary's proposed civil penalties, the Secretary brings an action before the Commission. Hearings before a Commission judge are de novo and the judge applies the six statutory criteria without consideration of the Secretary's administrative formulas and regulations for proposing civil penalties. See Sellersburg Stone Co. v. Fed. Mine Safety & Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Respondent is a relatively small operator. It demonstrated good faith in attempting to achieve rapid compliance after notification of the two violations.¹

I find that the electrician violated the safety standards cited and committed gross negligence in doing so. The inspector routinely cautioned Respondent's mine management and electricians not to work on energized circuits and reminded them of the safety standards requiring that circuits be disconnected, locked out and tagged. He specifically talked to Lonnie Phillips about locking and tagging out circuits before working on them. I find that Mr. Phillips knew of the requirements of the relevant safety standards and was grossly negligent in attempting to repair the electrical circuit without de-energizing it, locking the disconnecting device and tagging out the circuit.

I also find that the violations were "significant and substantial" (as defined in § 104(d) of the Act) because it was "reasonably likely" that the violations would result in injury. Mathies Coal Co., 6 FMSHRC 1 (1984).

Under the Mine Act, an operator is liable without fault for its employees' violations of the Act and safety standards promulgated under it. Southern Ohio Coal Company, 4 FMSHRC 1459, 1462 (1992). Respondent is therefore liable for the violations of its electrician.

The major issue here is whether the electrician's negligence is imputable to the operator for civil penalty purposes.

¹Inspector McDaniel testified that the practices cited were corrected by the company holding a safety meeting, at which Inspector McDaniel again cautioned management and the electricians as to the rules for de-energizing circuits and locking and tagging them out before doing electrical work.

As a general rule, negligence of rank and file employees is not imputed to the operator for civil penalty purposes. The question in such cases is whether the operator was negligent by its own acts or omissions in supervising, training and disciplining its rank and file employees to ensure compliance with safety standards. Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (1982); Old Dominion Power Co., 6 FMSHRC 1886, 1895-6 (1984); Nacco Mining Co., 3 FMSHRC 848, 850 (1981). However, the negligence of a supervisor, foreman or other agent of the operator is imputable to the operator for civil penalty purposes. This rule furthers the Congressional purpose in providing for penalties, *i.e.*, to ensure the operator's compliance with the requirements of the Mine Act. A "designated person to conduct electrical examinations of electrical equipment" is regarded as an agent of the operator and his negligence is imputable to the operator. Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991); Mettika Coal Corp., 13 FMSHRC 760 (1991).

In Nacco, *supra*, the Commission held that the negligence of a supervisor is not imputed to the operator if two general conditions are met: (1) the operator had taken reasonable steps to avoid the kind of accident in question; and (2) no other miners were put at risk by the supervisor's conduct.

Applying these principles, I find that electrician Phillips' gross negligence is imputable to Respondent.

The inspector testified that although he marked the citations to show that one person was affected by the violations, other persons could have been affected. By using a screwdriver to work on an energized circuit, the electrician ran the risk of energizing the frames of equipment and causing electrical shock to other miners. Also, by negligently using a screwdriver to work on a live 480-volt circuit, the electrician endangered other miners who might try to rescue him if he became electrically shocked -- *i.e.*, by their touching energized equipment, a cable, or the electrician's body while it was conducting electricity.

I therefore find that electrician Phillips created a serious risk to himself and to other miners by violating the cited standards.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that a civil penalty of \$4,000 for each violation is appropriate.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated 30 C.F.R. § 75.509 as alleged in Citation No. 3383505.
3. Respondent violated 30 C.F.R. § 75.511 as alleged in Citation No. 3383506.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation Nos. 3383505 and 3383506 are AFFIRMED.
2. Respondent shall pay civil penalties of \$8,000 within 30 days of the date of this Decision.


William Fauver
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Charles A. Wagner, III, Esq., Wagner, Myers & Sanger, 1801 Plaza Tower, P.O. Box 1308, Knoxville, TN 37901-1308 (Certified Mail)

/lt

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 1994

DANNY SPARKS, et al., : COMPENSATION PROCEEDING
Complainants :
v. : Docket No. VA 92-133-C
: :
VP-5 MINING, COMPANY, : VP-5 Mine
Respondent :

ORDER OF DISMISSAL

Respondent's Motion to Dismiss is GRANTED and this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Danny Sparks, Representative of Miners, VP-5 Mine, Rt. 1,
Box 287, Cedar Bluff, VA 24609 (Certified Mail)

Thomas A. Stock, Esq., Crowell & Moring, 1001 Pennsylvania
Avenue, NW., Washington, DC 20004-2595 (Certified Mail)

/lt