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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 92-922. (Judge Maurer, April 30, 1993).

Secretary of Labor, MSHA v. Prabhu Deshetty, employed by Island Creek Coal Company, Docket No. KENT 92-549. (Judge Melick, May 6, 1993).

Secretary of Labor, MSHA v. Pittsburg & Midway Coal Mining Company, Docket No. CENT 92-142. (Judge Lasher, May 7, 1993).

Secretary of Labor, MSHA v. L.M. Karnes, employed by Shears Sons, Inc., Docket No. CENT 92-333-M. (Chief Judge Merlin, Default Decision of April 23, 1993).

Secretary of Labor, MSHA v. Island Creek Coal Company, Docket No. KENT 92-625. (Judge Melick, Settlement Approval of May 4, 1993 - unpublished).

Secretary of Labor, MSHA v. Kiah Creek Mining Company, Docket No. KENT 92-964. (Chief Judge Merlin, Default Decision of June 1, 1993).

Secretary of Labor, MSHA v. Cougar Coal Company, Inc., Docket No. KENT 92-878. (Chief Judge Merlin, Default Decision of May 20, 1993).

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 92-798. (Judge Feldman, May 17, 1993).

Secretary of Labor, MSHA v. Lynx Coal Company, Inc., Docket No. KENT 92-776. (Chief Judge Merlin, Default Decision of May 20, 1993).

The following cases were Denied for Review during the month of June:

Elmer Darrell Burgan v. Harlan Cumberland Coal Company, and Dixie Fuel Company Docket Nos. KENT 92-915-D, and KENT 93-101-D. (Judge Feldman, May 12, 1993).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 7, 1993

RONNY BOSWELL	:	
	:	
v.	:	Docket No. SE 90-112-DM
	:	
NATIONAL CEMENT COMPANY	:	
	:	

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

DECISION

BY THE COMMISSION:

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), is before the Commission a second time. Administrative Law Judge Roy J. Maurer sustained Ronny Boswell's discrimination complaint alleging that National Cement Company ("National Cement") had unlawfully disqualified him from his position as a utility laborer and reassigned him to a position as a payloader operator, but concluded that, although Boswell was entitled to reinstatement to his former position, he was not entitled to backpay. 13 FMSHRC 207 (February 1991)(ALJ). The Commission granted National Cement's petition for discretionary review, which challenged the judge's finding of unlawful discrimination. The Commission affirmed the judge's decision in part and vacated it in part, remanding the case to the judge to consider whether a particular incident involved protected activity by Boswell and whether National Cement had established an affirmative defense to Boswell's prima facie case of discrimination. 14 FMSHRC 253 (February 1992)("Boswell I").

On remand, the judge again sustained Boswell's discrimination complaint, but awarded Boswell backpay and interest, which he had not awarded in his earlier decision. 14 FMSHRC 541 (April 1992)(ALJ)("Boswell Remand"); 14 FMSHRC 1135 (July 1992) (ALJ). The Commission granted National Cement's petition for discretionary review of the judge's backpay award. For the reasons that follow, we conclude that Boswell's entitlement to backpay was not properly before the judge on remand, and we vacate his backpay award.

I.

Procedural History

The factual background of this matter is set forth in Boswell I, 14 FMSHRC at 253-55. In his first decision in this matter, the judge found that Boswell had engaged in several incidents of protected activity. 13 FMSHRC at 212-14. He also found that National Cement's disqualification of Boswell from his position as a utility laborer was motivated in major part by his protected activity and, thus, that he had been discriminated against in violation of the Mine Act. 13 FMSHRC at 213. The judge concluded that Boswell was entitled to reinstatement as a utility laborer and expungement from his personnel records of all derogatory information relating to his disqualification. 13 FMSHRC at 215. The judge determined, however, that Boswell was not entitled to backpay because his earnings as a payloader operator exceeded the pay of the miner who replaced him as a utility laborer. 13 FMSHRC at 214-15.

National Cement successfully petitioned for review of the judge's finding of unlawful discrimination. Boswell did not seek review of the judge's denial of backpay. On review, National Cement argued that certain of the judge's protected activity findings were in error, that Boswell's disqualification was not an adverse action, and that it would have transferred Boswell based on his unprotected activities alone.

The Commission affirmed the judge's findings of protected activity except as to a wheelbarrow incident involving a work refusal by Boswell. Boswell I, 14 FMSHRC at 258-60. The Commission also affirmed the judge's implicit finding that Boswell's disqualification was an adverse action, reasoning that the action was surrounded by indicia of discipline and, further, that Boswell was removed to a position with a lower rate of pay. 14 FMSHRC at 259-60. The Commission thus affirmed the judge's conclusion that Boswell had established a prima facie case of discrimination. 14 FMSHRC at 258-60. The Commission determined, however, that the judge had not considered National Cement's affirmative defense that it would have transferred Boswell in any event based on his unprotected activities alone. 14 FMSHRC at 260. The Commission remanded the proceeding to the judge to consider: (1) whether the wheelbarrow incident constituted a protected work refusal; and (2) whether National Cement had established that it would have disqualified Boswell for his unprotected activities alone. 14 FMSHRC at 261.

On remand, the judge determined that the wheelbarrow incident constituted a protected work refusal and that National Cement had failed to establish its affirmative defense. Boswell Remand, 14 FMSHRC at 544, 546-47. Noting the Commission's conclusion that Boswell's disqualification constituted an adverse action based, in part, on Boswell's reduced rate of pay, the judge held that Boswell was entitled to receive backpay. 14 FMSHRC at 547. In a supplemental decision, the judge awarded Boswell $6,094.28 in backpay and interest. 14 FMSHRC at 1136-37.

National Cement sought review of the judge's finding that the wheelbarrow incident constituted protected activity and of his award of backpay.

The Commission declined to review the first issue but granted review of the second.

II.

Disposition of Issues

National Cement contends that the judge lacked jurisdiction on remand to reexamine the question of damages and that, in any event, substantial evidence does not support the backpay award. We agree that the judge lacked jurisdiction on remand to award backpay.

Section 113(d)(2) of the Mine Act provides that, if the Commission grants review, the scope of review is limited to the questions raised by the petition and to questions directed for review sua sponte by the Commission. 30 U.S.C. § 823(d)(2). Following the judge's initial decision, Boswell did not petition the Commission for review of the judge's finding that he was not entitled to backpay. The issues raised in National Cement's petition were limited to the merits of Boswell's discrimination complaint. The Commission directed no issues for review on its own motion. 30 U.S.C. § 823(d)(2)(B). Consequently, no damages issues were before the Commission in Boswell I and the judge's conclusion that no backpay was due became, in effect, a final decision. Thus, under the review structure of the Mine Act and the circumstances of this case, the judge lacked authority on remand to address issues pertaining to damages.

We note that a judge's jurisdiction on remand is limited to the issues specifically remanded by the Commission. See generally Hermann v. Brownell, 274 F.2d 842, 843 (9th Cir.), cert. denied, 364 U.S. 821 (1960); Secretary on behalf of Mullins v. Consolidation Coal Co., 4 FMSHRC 1622, 1624 n.2 (September 1982). Here, the Commission directed the judge to answer two questions on remand relating to the merits of the discrimination complaint. The judge was not directed to reopen Boswell's entitlement to damages. It appears that the judge considered the backpay issue in an attempt to comply fully with the remand. See Tr. 6-9 (June 15, 1992). In so doing, however well intentioned, he exceeded his jurisdiction.

III.

Conclusion

For the foregoing reasons, we vacate the judge's supplemental damage award.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 92-333-M
L.M. KARNES, Employed by J.H. SHEARS SONS, INC.	:	

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

ORDER

BY: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

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 April 23, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to L. M. Karnes for failing to answer the notice of proposed civil penalty filed by the Secretary of Labor or the judge's February 11, 1993, Order to Show Cause. The judge assessed the civil penalty of $400 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On May 14, 1993, the Commission received a letter from Karnes asserting that he had not received the Order to Show Cause. Karnes requests that the Order of Default be vacated.

The judge's jurisdiction over this case terminated when his decision was issued on April 23, 1993. 29 C.F.R. § 2700.69(b). This decision has become final by operation of law, 30 U.S.C. § 823(d)(1). We can consider the merits of Karnes' submission if we construe it as a request for relief from a final Commission decision incorporating a petition for discretionary review. See 29 C.F.R. § 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. P. 60(b)(relief from judgment or order). We reopen this proceeding to consider Karnes' letter as a timely filed Petition for Discretionary Review, which we grant.

On the basis of the present record, we are unable to evaluate the merits of Karnes' 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, 1201 (June 1990).

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

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-449
TWENTYMILE COAL COMPANY	:	

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

DECISION

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)("Mine Act" or "Act"). The issue is whether the violation of 30 C.F.R. § 70.100(a)[1] by Twentymile Coal Company ("Twentymile") was of a significant and substantial nature ("S&S").[2] Commission Administrative Law Judge Michael A. Lasher, Jr. held that the violation was S&S. 14 FMSHRC 549 (April 1992)(ALJ). For the reasons set forth below, we affirm the judge's decision.

---

[1] Section 70.100, entitled "Respirable dust standards," provides in subsection (a):

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device ....

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

I.

Factual and Procedural Background

Twentymile contested only the S&S designation of the citation, and the matter was submitted to Judge Lasher on stipulated facts. The stipulations pertinent on review are as follows:

> 1. On October 10, 1990, Citation No. 9996580 was issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 ("the Act").
>
> 2. The Citation alleged a violation of 30 C.F.R. § 70.100(a) as follows:
>
> > Based on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation, code 036 in mechanized mining unit 006-0 was 2.1 milligrams which exceeded the applicable limit of 2.0 milligrams.... Management will take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. Approved respiratory equipment shall be made available to all persons working in the area.
>
> 3. The Citation alleged that the condition significantly and substantially contributed to the cause and effect of a mine safety or health hazard.
>
> 4. The miners who were the subject of the sampling on which the Citation was based were not wearing respirators at the time the sampling was conducted.
>
> 5. The average concentration of respirable dust on which the Citation was based was 2.1 mg/m^3, which exceeded the applicable limit by 0.1 mg/m^3.
>
> * * * * * *
>
> 9. The parties agree and stipulate that the only issue for hearing in this matter is whether a citation based upon an average respirable dust concentration of 2.1 mg/m^3 may properly be designated as "significant and substantial." Twentymile wishes

> to seek review of such issue by the Commission. The parties believe that a hearing is not necessary on such issue, since the issue is a legal one based upon the Congressional findings contained in the legislative history of the Federal Mine Safety and Health Act and the regulatory history.
>
> 10. To that end, the parties agree and stipulate that a violation of the cited standard existed and that, if the citation is designated "significant and substantial," the appropriate penalty is $276.00, the full proposed penalty.

The judge upheld the inspector's S&S designation based on the Commission's decision in Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987)("Consol"), and Chief Administrative Law Judge Merlin's decision in Consolidation Coal Co., 13 FMSHRC 1076 (July 1991)(ALJ)("Consol II"). Judge Lasher held that, "when the Secretary finds a violation of § 70.100(a), a presumption that the violation is significant and substantial is appropriate." 14 FMSHRC at 552, quoting Consol II, 13 FMSHRC at 1079. He applied the presumption to the facts in this case and concluded that the violation was S&S. Judge Lasher noted that Twentymile did not seek to rebut the presumption. The Commission granted Twentymile's Petition for Discretionary Review and heard oral argument.

II.

Disposition of the Issues

A. S&S Presumption

Twentymile contested the inspector's S&S finding on the grounds that a violation of the health standard based on an average concentration of less than 2.2 mg/m^3 is not S&S. Although Twentymile acknowledges that, in Consol, the Commission held that any concentration of respirable dust over the 2.0 mg/m^3 standard is presumptively S&S, Twentymile argues that the Commission did not focus on whether this presumption should apply to "concentrations of respirable dust that are marginally above the standard." Tm. Br. 4. Twentymile bases its argument on a report of the U.S. House of Representatives prepared at the time the House was considering the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977). In the Report of the House Committee on Education and Labor, dated October 13, 1969, to accompany H.R. 13950, a section entitled "Justification for Dust Standards" refers to British studies that used a statistical analysis to predict the probability of a miner contracting pneumoconiosis after 35 years of exposure at specific levels of respirable dust. H. Rep. 563, 91st Cong., 1st Sess. 15-20 (1969), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 94th Cong. 1st Sess. Part I Legislative History of the Coal Mine Health and Safety

Act of 1969, at 1045-50 (1975)("Legis. Hist."). The House Report states, in part:

> In a dust environment below about 2.2 mg/m^3, there is virtually no probability of a miner contracting pneumoconiosis (ILO category 2 or greater), even after 35 years of exposure to such concentration. It is significant that simple pneumoconiosis below ILO category 2 is not disabling.

Legis. Hist. at 1048. Twentymile contends that this statement is essentially a Congressional finding of fact that exposures below 2.2 are not significant and substantial. Twentymile further argues that Judge Lasher's decision is incorrect as a matter of law because the Mine Act does not provide that all respirable dust violations are S&S. It asserts that the application of the presumption to "marginal" violations of the respirable dust standard ignores the Mine Act's graduated scheme of enforcement.

The Secretary argues that the presumption established in Consol is applicable to this case. The Secretary contends that Congress set the respirable dust standard at 2.0 mg/m^3 in order to eliminate respiratory disease by reducing dust in the mine atmosphere. The Secretary maintains that, by adopting a 2.0 standard, Congress recognized that exposures above that level can lead to respiratory illness.

In Consol, the Commission determined that the "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." 8 FMSHRC at 895 (emphasis in original). It further determined that Congress intended the 2.0 mg/m^3 standard to be the "maximum permissible exposure level" during every working shift. 8 FMSHRC at 897. With these considerations in mind, the Commission adapted the four part S&S test set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) for application to violations of the respirable dust standard. 8 FMSHRC at 897-99. The Commission found that the elements of the S&S test would be the same in all instances where the Secretary proves a violation of section 70.100(a). The Commission concluded "if the Secretary proves that an overexposure to respirable dust in violation of section 70.100(a), based upon designated occupation samples, has occurred, a presumption arises that the third element of the significant and substantial test -- a reasonable likelihood that the health hazard contributed to will result in an illness -- has been established." 8 FMSHRC at 899. The Commission reached this conclusion because "the development of respirable dust induced disease is insidious, furtive and incapable of precise prediction," and Congress expressed a "strong concern" that all respiratory illnesses in mines be eliminated. 8 FMSHRC at 898-99. With respect to the fourth element of the S&S test, the Commission concluded that "there is a reasonable likelihood that illness resulting from overexposure to respirable dust will be of a reasonably serious nature." 8 FMSHRC at 899.

As a consequence, the Commission held that, "when the Secretary proves that a violation of 30 C.F.R. § 70.100(a), based upon excessive designated occupation samples, has occurred, a presumption that the violation is a

significant and substantial violation is appropriate." 8 FMSHRC at 899. The Commission further held that the presumption may be rebutted if the operator establishes that the miners in the designated occupation "were not exposed to the hazard posed by the excessive concentration of respirable dust, e.g., through the use of personal protective equipment." Id.

The United States Court of Appeals for the D.C. Circuit affirmed the Commission's use of this presumption. 824 F.2d at 1084-86. The Court rejected the operator's argument that "Congress intended that some concentration of respirable dust higher than 2.0 mg/m^3 be found before a violation of the respirable dust standard could be designated as significant and substantial." 824 F.2d at 1084-85. Indeed, the Court determined that Congress required operators to "continuously maintain" the concentration of respirable dust at or below 2.0 mg/m^3 "during each shift" rather than "over the long term." 824 F.2d at 1086. Noting that the harmful effect of any one incident of exposure to excessive concentrations of respirable dust is negligible, the Court concluded that, without the presumption, the application of the sanctions set forth in sections 104(d) and (e) of the Act would be precluded because no single violation could ever be designated as significant and substantial. Id.

The legislative history cited by Twentymile, when examined in context, does not support the position that the Consol S&S presumption should not apply to Twentymile's violation of section 70.100(a). The legislative history states that exposures at 2.0 mg/m^3 over a 35 year period would cause at least 2% of miners to develop simple pneumoconiosis. Legis. Hist. at 142, 356 (emphasis added). Congress expressed its desire that working conditions in underground coal mines be sufficiently free of respirable dust to enable miners to work their entire working lives without "incurring any disability from pneumoconiosis or any other occupation-related disease...." 30 U.S.C. § 841(b)(emphasis added).

At the time the 1969 Coal Act was debated, no federal standards existed for respirable coal dust. As passed by the House, H.R. 13950 would have established an exposure limit of 3.0 mg/m^3. Legis. Hist. at 959. The British studies were cited in the House Report to justify this 3.0 limit. This House Report makes clear, however, that the committee expected the Secretary to reduce the exposure limit by regulation:

> The ideal mine environment is a dust-free one. The committee realizes that, given the state of existing technology, this is an unreachable goal. The Committee expects the Secretary ... to prescribe the limit of at least 2.2 mg/m^3 as soon as he deems it attainable, and to prescribe limits below that level in a final attempt to eliminate even simple pneumoconiosis (ILO Category 1) through dust control.

Legis. Hist. at 1048-49.

The Senate rejected a 3.0 mg/m^3 exposure limit because it was concerned that such a limit was "not a good medical standard." Legis. Hist. at 146.

Accordingly, the Senate bill (S. 2917) adopted a 2.0 mg/m^3 standard, to be phased in over three years. Id. The Conference Committee approved the Senate's more stringent 2.0 standard because the committee was not satisfied that a less stringent standard "would protect the health of miners...." Legis. Hist. at 1551 (Statement of Representative Perkins, the chief House conferee). Congress enacted the 2.0 standard into law.

Finally, we reject Twentymile's argument that application of the S&S presumption in this case would ignore the Mine Act's graduated scheme of enforcement. Violations of section 70.100(a) in any degree can contribute to the development of chronic bronchitis, pneumoconiosis and other respiratory illnesses in miners. Consol, 8 FMSHRC at 898-99. The D.C. Circuit in Consol expressly rejected the argument that the presumption adopted by the Commission is invalid because of the Mine Act's graduated scheme of enforcement. 824 F.2d at 1084-85.

For the foregoing reasons, we reaffirm our holding in Consol that any concentration of respirable dust over 2.0 mg/m^3 is presumptively S&S.

B. Motion to Strike

Shortly before oral argument, the Secretary wrote to the Commission requesting that we take judicial notice of a report on coal workers' pneumoconiosis prepared by the National Institute for Occupational Safety and Health of the U.S. Department of Health and Human Services ("NIOSH"). See Oral Arg. Tr. 21-22. Twentymile moved to strike the proffered document. Oral Arg. Tr. 18. For the reasons set forth below, we grant Twentymile's motion.

Section 113(d)(2)(C) of the Mine Act states, in relevant part, that the record on review consists of the "record upon which the decision of the administrative law judge was based...." 30 U.S.C. § 823(d)(2)(C). This provision is consistent with section 113(d)(2)(A)(iii) of the Mine Act, which provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission has held that these provisions "evince the Congress' view that the adjudication process is best served if the administrative law judge is first given the opportunity to admit and examine all the evidence before making his decision." Climax Molybdenum Co., 1 FMSHRC 1499, 1499-1500 (October 1979). These procedures are consistent with "settled principles of administrative and general law limiting the record on review to the record developed before the trier of fact." Union Oil Company of California, 11 FMSHRC 289, 301 (March 1989)(citation omitted).

In addition, the Commission has held that:

> [Judicial] notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. However, such notice cannot extend to the acceptance as fact of

> scientific publications and studies, the truth of whose contents is the subject of reasonable dispute by the opposing parties. See McCormick on Evidence, 3rd Ed. §§ 329, 330 (pp. 923-927, 1028-1032); Fed. R. Evid. 201.

Union Oil, 11 FMSHRC at 300 n.8.

The conclusions of the report and its relevance to this proceeding are disputed by Twentymile. Oral Arg. Tr. 27-28. We conclude that it would be inappropriate for the Commission to take judicial notice of the NIOSH report in this case. Our holding is based solely on the stipulations agreed to by the parties before the judge.

III.

Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 91-636
ZEIGLER COAL COMPANY	:	

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

DECISION

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)("Mine Act"). At issue is whether Zeigler Coal Company ("Zeigler") violated 30 C.F.R. § 75.507[1] by allowing return air to course over non-permissible power connection points outby the last open crosscut and whether the violation was significant and substantial ("S&S"). Administrative Law Judge George A. Koutras concluded that Zeigler violated the standard and that the violation was S&S. 14 FMSHRC 304 (February 1992)(ALJ). For the reasons that follow, we affirm the judge's finding of violation but remand for further consideration of whether the violation was S&S.

I.

Factual and Procedural Background

On May 1, 1991, Inspectors Mark Eslinger and Richard Gates of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an investigation on a petition for modification filed by Zeigler's Murdock Mine, an underground coal mine in Douglas County, Illinois. In the 1st Main West section, the inspectors observed that air that had ventilated the working

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[1] Section 75.507 provides:

> Power connection points. Except where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air.

faces in the No. 1 and 2 entries was leaking past check curtains placed across the No. 3 entry and was flowing outby.

The inspectors observed several golf carts, used for transport, in the No. 3 entry. They concluded that Zeigler had violated section 75.507 because return air was coursing outby the last open crosscut over the golf carts and other non-permissible equipment with power connection points. Accordingly, they cited Zeigler for a violation of section 75.507 and designated the violation S&S.

Before the judge, the Secretary defined return air for purposes of section 75.507 as air that has been used to ventilate any working face or place in a coal-producing section. The judge found that definition reasonable and proper. 14 FMSHRC at 325. He found that the air coursing over the golf carts was return air because it had ventilated working faces. 14 FMSHRC at 324-25. The judge concluded that the Secretary had established a violation of section 75.507. 14 FMSHRC at 325. He also found the violation to be S&S and assessed a civil penalty of $275. 14 FMSHRC at 327, 328.

II.

Disposition of Issues

A. Whether Zeigler violated section 75.507

In order to establish a violation of section 75.507, the Secretary was required to show that non-permissible power connection points outby the last open crosscut were not in intake air. It was undisputed that the carts were not "permissible" equipment, as that term is defined in section 318(i) of the Mine Act, 30 U.S.C. § 878(i), and that the carts contained "power connection points," as that term is used in the standard. It was also undisputed that they were outby the last open crosscut. If the cited non-permissible power connection points were in return air rather than in intake air, Zeigler was in violation of the standard.

Zeigler argues that the air travelling outby the last open crosscut in the No. 3 entry was still intake air, and that the judge erred in finding that it was return air. Zeigler relies on the common definition of return air, which is air that has circulated through the active workings and has passed over the last working place on a section. See Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 919 (1968). Zeigler contends that the judge erred in accepting the Secretary's position that, for the more specific purposes of section 75.507, intake air becomes return air once it has ventilated any working face or place.[2]

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[2] The regulations then in effect did not define return air. See 30 C.F.R. § 75.2 (1991). Return air is defined in the current regulations to be:

> Air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split

(continued...)

We conclude that the Secretary's interpretation of "return air" is a proper construction of section 75.507 that effectuates its essential purpose. Section 75.507 is taken from the interim mandatory safety standard in section 305(d) of the Mine Act, 30 U.S.C. § 865(d), which was carried over from section 305(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("Coal Act"). The Coal Act's legislative history indicates that the concern addressed by the standard was the "ever-present danger of sudden methane buildup in the air current which could be ignited by arcing from the power connections." See S. Rep. No. 411, 91st Cong., 1st Sess. 69 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 195 (1975). The Commission has recognized: "The purpose of [section 75.507] is to prevent methane gas explosions. In the presence of methane gas, a source of ignition, such as arcing from power connections, can cause an explosion." Eastover Mining Co., 4 FMSHRC 123 (February 1982).

Air that passes any working face carries away methane and other contaminants that could present an ignition and explosion hazard if the air is coursed over non-permissible power connection points. The judge found credible Inspector Eslinger's testimony that air sweeping over any working face picks up coal dust, methane, and other mine gases, and that such contaminated air poses a potential explosion hazard if it seeps outby over non-permissible power connection points and equipment. 14 FMSHRC at 324; Tr. 58; Dep. of Eslinger Tr. 19-20 (October 31, 1991). Eslinger emphasized that "the real seriousness here [i]s that the gas in the mine is generally produced in the working places and the gas that could be produced in these working faces could drift outby over [the] ... nonpermissible power points." Tr. 30. The judge also noted that Zeigler's safety director, David Stritzel, said that he would be concerned about air that has ventilated a working face passing over non-permissible power points. 14 FMSHRC at 324; Tr. 98, 102.

Here, some of the air leaking past the No. 3 entry check curtains and coursing over the non-permissible power points had passed over the working

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[2](...continued)

> of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For the purposes of existing § 75.507-1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air.

30 C.F.R. § 75.301 Definitions (1992). These regulations became effective August 16, 1992, 57 Fed. Reg. 20868 (May 15, 1992).

faces of the No. 1 and 2 entries. Thus, for purposes of section 75.507, it is appropriate to regard that air as return air.[3]

Zeigler argues further that the Secretary changed his position as to the meaning of return air for purposes of section 75.507.[4] Zeigler asserts that from 1971 until 1988, MSHA defined return air for purposes of that section as air used to ventilate the last working face in a coal producing section. As early as 1983, however, MSHA had defined return air, for purposes of section 75.507, as air that has ventilated any working face or working place. See IV MSHA, U.S. Dept. of Labor, Coal Mine Inspection Manual: Underground Electrical Inspections 22 (1983). In 1988, MSHA set forth in its Program Policy Manual the definition of return air presented in this proceeding, which is consistent with the earlier 1983 definition. V MSHA, U.S. Dept. of Labor, Program Policy Manual, Part 75, at 55 (1988). In any event, an agency interpretation is not necessarily "carved in stone" and, in general, an agency should "consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron U.S.A., Inc. v. Nat. Resources Def. Council, 467 U.S. 837, 863-64 (1984).

Accordingly, we uphold the Secretary's interpretation of the standard and affirm the judge's finding of violation.

B. Whether the violation was significant and substantial

Zeigler argues that the judge erred in concluding that the violation was S&S. Zeigler asserts that the judge's finding that there was a reasonable likelihood of a serious injury resulting from the violation is based on "mere possibilities" that are insufficient to sustain a finding of reasonable likelihood. PDR at 10.

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

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[3] Return air may have a different meaning for purposes of other standards. A term does not necessarily have the same meaning or serve the same purpose in every statutory or regulatory context. See, e.g., Loc. U. 1261, UMWA v. FMSHRC, 917 F.2d 42, 45 & n.8 (D.C. Cir. 1990).

[4] Zeigler also argues in its supplementary brief that it was not given fair warning of the change in the definition of return air in section 75.507 and that, therefore, its due process rights were violated. Z. Br. at 2-3. Zeigler has not proffered any reason why this argument was not presented to the judge. Under the Mine Act, "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." Section 113(d)(2)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(iii); see also 29 C.F.R. § 2700.70(d).

(April 1981).[5] 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.

The first and second Mathies elements are established. We have concluded that Zeigler violated section 75.507 and it is undisputed that a safety hazard, an ignition that could result in an explosion, was present.

The third element of the Mathies test "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).[6] The Commission has recognized that, when examining whether an explosion or ignition is reasonably likely to occur, it is appropriate to consider whether a "confluence of factors" exists to create such a likelihood. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988); see also Eastern Assoc. Coal Corp., 13 FMSHRC 178, 184 (February 1991).

In addressing the third element, the judge concluded that "it was reasonably likely that an ignition resulting from the presence of nonpermissible electrical power connection points in contaminated return air would result in injuries of a reasonably serious nature." 14 FMSHRC at 327. The judge did not make a finding, however, as to the likelihood of an ignition. The reasonable likelihood of an ignition is the necessary precondition to the reasonable likelihood of an injury. See U.S. Steel Mining, 6 FMSHRC at 1836.

The judge summarized the relevant testimony (14 FMSHRC at 326), but he did not analyze the confluence of factors necessary to establish a reasonable likelihood of an ignition (see 14 FMSHRC at 327). Eslinger testified that people "could drive" a golf cart into a "possible" explosive mixture of gas

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

[6] The Secretary is not required to prove that the hazard contributed to will actually result in an injury causing event. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678 (April 1987).

and ignite the methane. 14 FMSHRC at 326; Tr. 45. Eslinger also expressed concern that methane liberated in working places "could drift" over the golf carts and other non-permissible power points. 14 FMSHRC at 326; Tr. 30. Stritzel conceded "that there is always the possibility of a methane ignition, and that methane may be liberated at higher concentrations." 14 FMSHRC at 327; see Tr. 102-03. Although this testimony is relevant to the reasonable likelihood of an ignition, statements that such events could occur, standing alone, do not support a finding that there was a reasonable likelihood of an ignition. Cf. Eastern Assoc. Coal, 13 FMSHRC at 184-85; Union Oil Co. of California, 11 FMSHRC 289, 298-99 (March 1989). The judge also restated but failed to resolve certain conflicting testimony. Eslinger was concerned that an ignition had occurred in the same area of the mine some two months prior to the citation. 14 FMSHRC at 326; Tr. 27. Stritzel testified that the conditions at the time of the prior ignition were different from those at the time of the inspection. 14 FMSHRC at 326; Tr. 93-94. Accordingly, we remand for further analysis of the third Mathies element.

With regard to the fourth Mathies element, Zeigler contends that the Secretary introduced no evidence to suggest that any resultant injury would be reasonably serious in nature. The citation indicates that four miners would be affected by the violation and that the injury would be fatal. Ex. P-3. Eslinger testified that any potential accident would be fatal. Tr. 28. A methane ignition, by its nature, presents a danger of serious injury to miners. We conclude that substantial evidence supports the judge's conclusion that, if an ignition occurred, any resultant injury would be reasonably serious.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Zeigler violated section 75.507. We vacate his determination that the violation was S&S and remand for further findings and analysis on the existing record consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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

June 22, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 91-32
S & H MINING, INC.	:	

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

DECISION

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)("Mine Act"). The issue before the Commission is whether a violation by S&H Mining, Inc. ("S&H") of 30 C.F.R. § 75.902[1] was "significant and substantial" in nature ("S&S") and was caused by S&H's unwarrantable failure to comply with the safety standard. Commission Administrative Law Judge William Fauver concluded that the violation was S&S and was caused by S&H's unwarrantable failure. 14 FMSHRC 887, 890 (May 1992)(ALJ). We granted S&H's petition for discretionary review of the judge's decision. For the reasons that follow, we affirm.

I.

Factual Background and Procedural History

On May 14, 1990, Inspector Don McDaniel of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected S&H's Mine No. 7, an underground coal mine in Campbell County, Tennessee. McDaniel unintentionally stepped on the cable supplying electricity to the power center of the coal

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[1] 30 C.F.R. § 75.902 provides in part:

> [L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken.... Cable couplers shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors shall be broken last when the coupler is being uncoupled.

feeder, pulling the cable coupler from the power center. McDaniel found that the locking device on the top of the cable coupler had been removed. Wedges had been placed under the coupler in an attempt to hold it in place. McDaniel concluded that, without the locking device, the ground conductor could disconnect prior to the ground check continuity conductor, in violation of section 75.902.

Inspector McDaniel discussed the violation with Dwight Lindsey, who had conducted S&H's preshift examination on the day of the inspection. According to McDaniel, Lindsey acknowledged that he knew, as a result of his preshift examination, that the locking device had been removed. Tr. 9-10, 17, 46. Lindsey also told McDaniel that he (Lindsey) had inserted the wedges under the cable coupler. Tr. 9-10, 17, 46. McDaniel issued a section 104(d)(1) order of withdrawal for S&H's alleged unwarrantable failure to comply with section 75.902 and designated the violation as S&S.

S&H contested the inspector's S&S designation and unwarrantable failure finding and a hearing was held before Judge Fauver. The judge concluded that the violation was S&S. He found that, but for McDaniel's inspection, the coupler would have remained in an unsafe condition for a substantial period. 14 FMSHRC at 890. The judge also found that it was reasonably likely that this condition would result in operation of the feeder without ground fault protection, and that, in wet mining conditions, a miner working in the area would suffer an electric shock. Id. In addition, the judge determined that "continued mining could well result in arcing between the two conductors and could cause a mine fire or burn out the circuit breaker." Id. The judge concluded that the violation was the result of S&H's unwarrantable failure to comply with the standard. He found that Lindsey, knowing that the locking device had been removed, failed to report that condition in his preshift report, and attempted to bypass the safety lock by using wedges. He determined that Lindsey, as S&H's certified examiner, was S&H's agent. Id. The judge concluded that Lindsey's actions demonstrated aggravated conduct beyond ordinary negligence and were imputable to S&H. Id.

II.

Disposition of Issues

A. Whether the violation was significant and substantial

S&H argues that the judge erred in finding that there was a reasonable likelihood of injury as a result of the violation. S&H contends that there was no danger associated with the violation at the time it was discovered because the circuit breaker tripped when the cable coupler was pulled from the power center. S&H argues that the alleged hazards created by the violation were hypothetical and speculative. S&H submits that the judge's finding is not supported by substantial evidence and is contrary to Commission precedent.

The Secretary argues that in determining whether a violation is S&S, the violation must be viewed not only as it was at the time of the citation, but also as it would be if it were to continue unabated. The Secretary argues that the violation would have continued unabated for at least several days

during which it was reasonably likely that an injury would occur. The Secretary contends that the judge's finding of S&S is supported by substantial evidence.

The Commission has determined that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981).[2] 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; (footnote omitted) (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 first and second Mathies elements are established. S&H concedes that it violated section 75.902. The violation created electric shock and fire hazards. With respect to the fourth Mathies element, S&H did not challenge that an injury resulting from the violation would be of a reasonably serious nature.

The third element of the Mathies test, whether there was a reasonable likelihood that the hazard contributed to would result in an injury, is the issue in dispute. The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." See, e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

Inspector McDaniel testified that, because the top locking device was missing, the coupler would drop by its own weight and the ground wire would disengage. The power conductors, however, would not completely disengage because the locking device on the bottom of the coupler was still functioning. Tr. 13-15. He testified that, with the conductors engaged but the ground removed, there was "a high likelihood that someone could be electrocuted." Tr. 18. McDaniel also testified that the ground monitor was not a fail-safe

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

system because a relay could malfunction, disabling the monitor without the operator's knowledge. Based on his experience, McDaniel believed that it was "highly likely" that a relay for the ground monitor would malfunction, if left for any length of time. Tr. 63-64. This position was confirmed by S&H's mine superintendent, Charles White, who testified that S&H has encountered situations where the ground monitor failed to break a circuit despite the fact that the ground wire was not functioning. Tr. 101, 104. McDaniel further testified and the judge found that, if the coupler were to partially detach from the power source while it was energized, arcing between the power conductors could cause a mine fire or burn out the circuit breaker. He characterized the cited condition as a "serious danger." Tr. 46.

S&H's argument that there was no danger associated with the violation because the ground monitor worked correctly during the inspection and the circuit breaker tripped, shutting off the power, does not lead to a contrary result. The Commission has held that an "evaluation of the reasonable likelihood of an injury should be made in terms of continued normal mining operations." U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985) (citation omitted). Inspector McDaniel testified that it was "highly likely" that the ground monitor would fail at some time. Tr. 63-64. He had 16 years experience inspecting ground monitors for electrical systems in mines and the judge credited his testimony. After considering the record, including evidence that detracts from the judge's findings, we conclude that substantial evidence supports the judge's S&S finding.

B. Whether the violation resulted from the operator's unwarrantable failure

S&H argues that the judge erred in crediting McDaniel's testimony concerning Lindsey's knowledge of the violation. S&H contends that Lindsey never told McDaniel that he knew about the cited condition. S&H also argues that the judge erred in imputing Lindsey's knowledge to S&H's management.

The Secretary argues that the judge found McDaniel's testimony credible, and that there is no compelling evidence to overturn the credibility determination. The Secretary further takes the position that knowledge of a preshift examiner can be imputed to the operator.

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

It is undisputed that Lindsey performed the preshift examination on the morning McDaniel found the violation. It is also undisputed that Lindsey did not report the hazardous condition in his preshift report.

Inspector McDaniel testified that Lindsey told him that he had found the locking device missing and had placed wedges under the coupler. Tr. 9-10, 17, 46. McDaniel also saw the wedges. Tr. 9-10, 45-46. Lindsey did not testify at the hearing but the record does contain contrary testimony on this point from S&H President Smith and from Tommy McCoo, Lindsey's supervisor.[3] The judge credited McDaniel. Credibility determinations are within the discretion of the judge who heard the witnesses' testimony and observed their demeanor. BethEnergy Mines, Inc., 14 FMSHRC 1232, 1239 (August 1992) and cases cited. The Commission has held that a judge's credibility determinations cannot be overturned lightly. See, e.g., Ranger Fuel Corp., 12 FMSHRC 363, 374 (March 1990); Smith v. Kem Coal Company, 12 FMSHRC 67, 71-72 (January 1992) and cases cited. The record contains no compelling evidence to support a reversal of the judge's credibility determination.

We reject S&H's assertion that the judge erred in imputing Lindsey's knowledge to S&H. Under Commission case law, a lack of actual knowledge by management does not bar a finding of unwarrantable failure. Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991). Smith conceded that Lindsey was designated by S&H to conduct the preshift examination and that Lindsey was S&H's agent. Lindsey's conduct was therefore properly imputed to S&H. See Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194-98 (February 1991); Mettiki Coal Corporation, 13 FMSHRC 769, 772 (May 1991).

We conclude that substantial evidence supports the judge's conclusion that the actions and knowledge of Lindsey, S&H's preshift examiner, constituted aggravated conduct imputable to S&H. Thus, we affirm the judge's finding that the violation was caused by S&H's unwarrantable failure to comply with the safety standard.

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[3] Smith testified that Lindsey denied telling McDaniel that he knew about the violation. Tr. 76. McCoo confirmed Lindsey's denial to Smith and testified that, although he (McCoo) was in the general area with McDaniel and Lindsey, he did not hear Lindsey make the disputed statement. Tr. 108-11, 114-15.

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that S&H's violation of 30 C.F.R. § 75.902 was significant and substantial and was a result of S&H's unwarrantable failure.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-625
ISLAND CREEK COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, 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)("Mine Act"). On May 4, 1993, Commission Administrative Law Judge Gary Melick issued a Decision Approving Settlement granting a joint settlement motion filed by the Secretary of Labor and Island Creek Coal Company ("Island Creek"). Among the matters settled was Order of Withdrawal No. 3548444 (the "order") issued to Island Creek pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). The parties stated in the motion that Island Creek had agreed to withdraw its contest of the order and pay the $1,800 penalty proposed by the Secretary.

On June 7, 1993, the parties filed with Judge Melick a joint motion to vacate his Decision Approving Settlement of the order. The motion states that the order was included in two civil penalty proceedings, the present case and KENT 92-1032. The parties assert that Island Creek previously agreed to withdraw its contest in this proceeding because it mistakenly believed that it had lost documents important to its defense. During settlement discussions of KENT 92-1032, Island Creek discovered that the subject withdrawal order was also included in that case and that the missing documents were in its files for that case. The parties ask the judge to vacate the Decision Approving Settlement to afford Island Creek an opportunity to contest the order.*

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* In their joint motion, the parties assert incorrectly that the withdrawal order was included in two separate dockets because of a "clerical error on the part of the Review Commission's docketing office." J. Motion to Vacate Dec., at 2. The Department of Labor's Mine Safety and Health Administration determines which citations and orders are included in each civil penalty case and the Commission assigns docket numbers to cases as filed by the Secretary.

The judge's jurisdiction in this proceeding terminated when his Decision Approving Settlement was issued on May 4, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Neither party filed a petition for discretionary review within the 30-day period. Thus, under the Mine Act, the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we deem the joint motion to be a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See Grefco, Inc., 14 FMSHRC 56 (January 1992).

Using Fed. R. Civ. P. 60(b)(1) & (6) for guidance, the Commission has afforded relief from final judgments on the basis of inadvertence, mistake, surprise, excusable neglect, and other reasons justifying relief. 29 C.F.R. § 2700.1(b); see, e.g., Klamath Pacific Corp. 14 FMSHRC 535 (April 1992). The Joint Motion to Vacate suggests that the parties may have settled this proceeding by mistake.

Accordingly, we conclude that this matter should be reopened and remanded in order to afford the parties the opportunity to present their position to the judge, who shall determine whether final relief from the Decision Approving Settlement is warranted.

For the reasons set forth above, we reopen this proceeding, vacate that part of the judge's decision that approved settlement of Order No. 3548444 and remand this matter for further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-964
KIAH CREEK MINING COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, 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)("Mine Act"). On June 1, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Kiah Creek Mining Co. ("Kiah Creek") for failing to answer the proposal for assessment of civil penalty filed by the Secretary of Labor or the judge's March 23, 1993, Order to Show Cause. The judge assessed the civil penalty of $94 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On June 7, 1993, the Commission received a letter addressed to Judge Merlin from Kiah Creek's mine manager, Mike Gipson, requesting reconsideration. Enclosed documents include: (1) a notice of appearance form dated November 27, 1992; (2) a letter dated November 27, 1992, from Gipson to the Commission's executive director, requesting reduction of the proposed civil penalty; (3) a letter dated March 30, 1993, to the Department of Labor's Regional Solicitor's Office in Nashville, in which Gipson refers to the judge's show cause order and encloses a copy of Kiah Creek's notice of appearance; and (4) a return receipt indicating delivery of a document from Kiah Creek to the regional solicitor's office on April 1, 1993.

The judge's jurisdiction over this case terminated when his decision was issued on June 1, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days after its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Kiah Creek's June 7 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 Kiah Creek'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.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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June 23, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-878
COUGAR COAL COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, 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)("Mine Act"). On May 20, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cougar Coal Company, Inc. ("Cougar") for failing to answer the August 28, 1992, notice of proposed civil penalty filed by the Secretary of Labor or the judge's February 22, 1993, Order to Show Cause.[1] The judge assessed the civil penalty of $1,008 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On June 1, 1993, the Commission received a copy of a letter from Cougar dated September 8, 1992, disputing, inter alia, the Secretary's proposed civil penalty. While this letter appears to be an answer to the Secretary's proposal for assessment of civil penalty, it was forwarded to the Commission without explanation or assertion that it had been previously sent to either the Commission or the Secretary of Labor.

The judge's jurisdiction over this case terminated when his decision was issued on May 20, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's Procedural Rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days after its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Cougar'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).

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[1] As noted by the judge in his Order of Default, the file contains a signed return receipt for the Order to Show Cause.

On the basis of the present record, we are unable to evaluate the merits of Cougar'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 consistent with this order.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 1993

PITTSBURG & MIDWAY COAL MINING COMPANY	:	
v.	:	Docket No. SPECIAL 92-02
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Pittsburg & Midway Coal Mining Company ("P&M") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which P&M had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, P&M cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

P&M contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. P&M seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that P&M's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny P&M's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

P&M has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that P&M failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by P&M. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 1993

LONNIE ROSS and CHARLES GILBERT	:	
	:	
v.	:	Docket Nos. KENT 91-76-D
	:	KENT 91-77-D
SHAMROCK COAL COMPANY, INC.	:	

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

DECISION

BY: Holen, Chairman; Doyle and Nelson, Commissioners

In these consolidated discrimination proceedings, brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), Shamrock Coal Company ("Shamrock") has sought review of Administrative Law Judge William Fauver's decisions sustaining Lonnie Ross's and Charles Gilbert's discrimination complaints and awarding them damages. 13 FMSHRC 1475 (September 1991)(ALJ); 14 FMSHRC 229 (January 1992)(ALJ). The issues raised in Shamrock's petition for discretionary review are whether the judge erred in: (1) determining that Shamrock failed to establish an affirmative defense; (2) calculating complainants' gross backpay and interest awards; (3) failing to deduct unemployment compensation from these backpay awards; and (4) awarding reimbursement of tax penalties sustained by complainants as a result of early withdrawal of funds from their profit-sharing accounts.[1] The Commission granted the petition and heard oral argument.

For the reasons set forth below, we affirm the judge's determination that Shamrock failed to establish an affirmative defense. We also summarily affirm his determination of lost wages and his award reimbursing complainants for the tax penalties. We remand for clarification and, if appropriate, recalculation of the judge's interest awards. Finally, we reverse the judge's determination that unemployment compensation should not be deducted from the backpay awards and remand for recalculation of those awards.

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[1] In its brief on review, Shamrock addresses issues other than those raised in its petition for discretionary review. We consider only the issues raised in Shamrock's petition. 30 U.S.C. §§ 823(d)(2)(A)(iii), (B) & (C); 29 C.F.R. § 2700.70(f)(1993).

I.

Factual and Procedural Background

Shamrock operates the Greasy Creek No. 10 mine, an underground coal mine in Kentucky. Ross, Gilbert, and Mike Europa worked on a third shift maintenance crew that prepared a section for coal production on the following shift. Ross was the crew leader.

In carrying out their duties, Ross and Gilbert, who were not certified electricians, regularly performed electrical work without supervision. 13 FMSHRC at 1476. They complained about such work to their crew foremen, without result. 13 FMSHRC at 1477. In 1989, the mine began two ten-hour production shifts, leaving only four hours during non-production time for the maintenance crew to perform work previously requiring eight hours. Id. Ross and Gilbert complained to Foreman Ralph Bowling and to Mine Superintendent Don Smith about having too much work to do in the allotted time and requested assistance. Id. Bowling and Smith did not address their complaints. Id.

On July 18, 1990, before an inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA"), Smith asked Ross to countersign a foreman's name to a preshift report. 13 FMSHRC at 1477. When Ross refused, Smith became angry and signed the foreman's name himself. Id. When Europa was on vacation, Bowling refused Ross and Gilbert's request for a replacement, stating that Ross would have to perform Europa's duties in addition to his own. 13 FMSHRC at 1478.

On July 26, 1990, Ross, Gilbert, and Dwayne Woods, a trainee, were required to move a power center, which involved moving three electrical cables. At approximately 6:00 a.m., Ross and Gilbert still had to move two cables, hook up the power center and connect the cables to make the section ready for the day shift at 7:00 a.m. 13 FMSHRC at 1478. Ross decided to move the cable by using a scoop. Id. Following Ross's orders, Gilbert helped Ross place the cable under the scoop's batteries and positioned the scoop's hydraulic jacks in an attempt to keep the weight of the batteries off the cable. 13 FMSHRC at 1478-79. Gilbert then drove the scoop. 13 FMSHRC at 1479.

Miners on the day shift discovered that one of the cables had been damaged. 13 FMSHRC at 1479. A mechanic quickly repaired the cable and no lost work time resulted. Tr. 630-31. When Smith heard about the incident, he ordered Bowling to determine what had occurred and, if the cables had been moved under scoop batteries, to fire the person responsible. 13 FMSHRC at 1479.

Upon questioning by Bowling on July 31, 1990, Gilbert admitted that he had moved the cables under the scoop batteries. 13 FMSHRC at 1479; Tr. 33-34. Bowling told Gilbert that he was fired. 13 FMSHRC at 1479. After Gilbert reported that Ross had told him to use the scoop batteries, Ross was questioned and stated that he would take the blame. 13 FMSHRC at 1479-80.

Following a private discussion between Smith and Bowling, Ross and Gilbert were given a two-week suspension without pay, instead of termination. 13 FMSHRC at 1480. Ross accepted the two-week suspension, but Gilbert stated that he did not believe that he should be suspended for two weeks and that he was "tired of getting jumped on ... by every boss ... and having to work like a dog and not having time to do [his] job...." 13 FMSHRC at 1480; Tr. 36. Gilbert stated that, if he had accumulated enough time that year to qualify for profit-sharing, the company could fire him. 13 FMSHRC at 1480. It was then determined that Gilbert had accrued enough time, but Bowling told Smith and Gilbert that the company could not fire one without firing the other. Id. Gilbert said that he would accept the two-week suspension because he did not want Ross to lose his job. Id. Smith became angry and told Bowling to fire both of them. 13 FMSHRC at 1480, 1487. Bowling did so. Ross and Gilbert subsequently withdrew the funds from their profit-sharing accounts.

Ross and Gilbert filed discrimination complaints with MSHA, pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), alleging that they had been discriminatorily discharged. MSHA investigated the complaints and determined that no discrimination had occurred. Ross and Gilbert then filed their own complaints with the Commission, pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), and the matter was heard by Judge Fauver.

The judge determined that Ross and Gilbert established prima facie cases of discrimination. 13 FMSHRC at 1487. The judge found that their complaints regarding electrical work and not having enough time or assistance to perform their jobs, Ross's refusal to falsify the preshift examination report, and Gilbert's complaints on July 31 about excessive work pressures, constituted protected activities under the Act. 13 FMSHRC at 1484-86. He also found that Smith had developed an animus towards complainants because of their protected activities. 13 FMSHRC at 1487. The judge determined that their terminations were motivated, at least in part, by their protected activities, and that Shamrock failed to establish an affirmative defense to the complainants' prima facie case. 13 FMSHRC at 1486-88. Accordingly, the judge concluded that they had been discriminated against in violation of the Mine Act. He ordered Ross and Gilbert reinstated and awarded them monetary damages.

II.

Disposition of Issues

A. Affirmative Defense

On review, Shamrock does not challenge the judge's determination that the complainants established a prima facie case of discrimination. Shamrock argues that the judge erred in finding that it had not affirmatively defended and that Ross and Gilbert would have been discharged for their unprotected activity alone, i.e., for moving the cables under the scoop batteries. Shamrock contends that the judge ignored or overlooked evidence that other employees had been terminated for engaging in the same or similar conduct, that Ross and Gilbert had been warned not to place cables under scoop batteries, and that their conduct violated company policy.

The general principles for analyzing a discrimination case under the Mine Act are well settled. A miner alleging discrimination establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18.

Having found that Smith's decision to discharge Ross and Gilbert was "motivationally connected with their substantial protected activities," the judge evaluated whether the complainants would have been discharged, even if they had not engaged in protected activities, for the cable incident alone. He concluded that they would not have been discharged. 13 FMSHRC at 1487-88.

As the Commission noted in Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982), an operator may attempt to prove it would have disciplined a miner for unprotected activity alone by showing prior consistent discipline for similar infractions, the miner's unsatisfactory work record, prior warnings to the miner, and rules or practices prohibiting the conduct at issue. Here, there is no evidence that Shamrock had a consistent practice of disciplining miners for damaging electrical cable. Although one miner had been fired for negligently damaging a cable, another had not. Tr. 155, 252-53, 336. A third miner had been fired only after repeatedly damaging cable. Tr. 334-35. The judge discredited Smith's testimony that he did not know who had damaged the cable when he ordered Bowling to fire whoever was responsible; substantial evidence supports this finding. 13 FMSHRC at 1488; Tr. 146, 204-05, 513-14, 646-47.

As to the miners' work histories, the judge found that Bowling had promoted Ross two weeks before his termination and, at that time, stated that Ross was one of his best workers. 13 FMSHRC at 1477. Bowling testified that at the time of Ross's promotion, he felt that he would rather have Ross than any two other employees. Tr. 439. Ross and Gilbert were considered good employees, and neither had received any written reprimands during the nine years each had been employed by Shamrock. Tr. 249, 286, 315, 439.

Although the judge made no specific findings as to whether Ross and Gilbert had been warned not to move cables under scoop batteries, he found that they both knew that this was not a good or accepted practice. 13 FMSHRC at 1479. The judge also found, however, that Ross had seen foremen move cable under scoop batteries when they were hurried, as Ross and Gilbert were. Id. In addition, the judge found that Gilbert had engaged in the conduct at issue because he was following the orders of his crew leader, Ross, and that there

was no precedent at the mine for suspending or discharging a miner under such circumstances. 13 FMSHRC at 1479, 1488 n.4. Indeed, Smith acknowledged that Shamrock had initially offered Gilbert reinstatement after it learned that Gilbert had been following Ross's orders. Tr. 394.

Thus, contrary to Shamrock's assertions, the judge did not ignore evidence pertinent to Shamrock's affirmative defense. Applying the factors set forth in Bradley, we conclude that substantial evidence supports the judge's finding that Shamrock failed to establish an affirmative defense. Accordingly, we affirm the judge's conclusion that the discharges violated the Mine Act.

B. Gross backpay and interest

Shamrock argues that the judge miscalculated complainants' gross backpay and the interest thereon. Gross backpay is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross backpay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package. See, e.g., Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 142 (February 1982). The judge calculated Ross's and Gilbert's gross backpay by considering their hourly rate of pay, regular and overtime hours they averaged each week, and their usual bonuses. 14 FMSHRC at 229-30. Shamrock has offered no specific explanation of the asserted miscalculations nor has it set forth the basis of the alternative figures that it submits. We decline to overturn the judge's gross backpay determinations on the basis of Shamrock's unsupported assertion. Accordingly, we summarily affirm the judge's determinations of gross backpay.

In Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1504-05 (November 1988), the Commission abandoned use of the adjusted prime rate, originally adopted in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2050-54 (December 1983), and announced that the short-term federal rate applicable to the underpayment of taxes would be used in calculating interest on backpay. The judge did not indicate in his supplemental decision the manner in which he calculated interest on Ross's and Gilbert's backpay awards but, in his decision on the merits, he cited Arkansas-Carbona and instructed the parties to attempt to stipulate the amount of interest due at the "IRS adjusted prime rate for each quarter." 13 FMSHRC at 1489 n.5. We remand the interest awards to the judge for clarification. If the judge applied the short-term federal rate applicable to the underpayment of taxes in accord with Clinchfield, we affirm the interest awards. If not, the judge should recalculate the interest awards.

C. Unemployment Compensation

Shamrock argues that the judge erred as a matter of law in not deducting complainants' unemployment compensation from gross backpay. The Commission recently decided in Clifford Meek v. Essroc Corp., 15 FMSHRC 606, 616-18 (April 1993), that, as a matter of agency policy, unemployment compensation, like interim earnings, should be deducted in determining backpay awards. Accordingly, we remand this matter to the judge so that he may determine

complainants' unemployment compensation benefits and deduct those amounts in determining their backpay awards.

D. Tax Penalties

The judge found that financial constraints resulting from their wrongful discharges caused Ross and Gilbert to withdraw funds from their profit-sharing accounts, and ordered Shamrock to reimburse them for the tax penalties resulting from early withdrawal. 14 FMSHRC at 230. Shamrock argues that the judge erred as a matter of law in so compensating Ross and Gilbert. Whether reimbursement for tax penalties should be included in backpay awards is an issue of first impression before the Commission and one committed to the Commission's discretion. Shamrock has failed, however, to advance any supporting argument upon which the judge's determination should be disturbed. Accordingly, without implying how we might rule on this issue in the future, we affirm the judge's award of tax penalties to Ross and Gilbert.

III.

Conclusion

For the reasons discussed above, we affirm the judge's conclusion that Shamrock failed to establish an affirmative defense. We also summarily affirm the judge's determination of gross backpay and his award of the tax penalties. We remand the interest awards to the judge for clarification and, if appropriate, recalculation. We reverse the judge's determination that unemployment compensation received by Ross and Gilbert should not be deducted when determining their backpay awards and remand for recalculation of the awards.

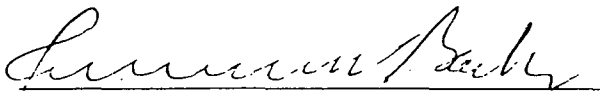
Arlene Holen, Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Backley, concurring in part and dissenting in part:

I concur with the majority's decision on all issues except for the majority's holding regarding unemployment compensation. For the reasons set forth in my dissent in Clifford Meek v. Essroc Corp., 15 FMSHRC 606, 621-26 (April 1993), I would affirm the judge's determination to not deduct unemployment compensation received from the backpay awards.



Richard V. Backley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 29, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 92-776
LYNX COAL COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, 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)("Mine Act"). On May 20, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Lynx Coal Company, Inc. ("Lynx") for failing to answer the August 17, 1992, notice of proposed civil penalty filed by the Secretary of Labor and the judge's Order to Show Cause of February 4, 1993.[1] The judge assessed the civil penalty of $5,500 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On June 7, 1993, the Commission received a copy of a letter from Lynx, dated February 19, 1993, addressed to an attorney in the Office of the Regional Solicitor of the Department of Labor, Nashville, Tennessee. The letter questions the Secretary's proposed civil penalty and may have been intended to answer the Secretary's proposal for assessment of civil penalty. The letter was forwarded to the Commission without explanation.

The judge's jurisdiction over this case terminated when his decision was issued on May 20, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's Procedural Rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days after its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Lynx'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).

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[1] As noted by the judge in his Order of Default, the file contains a signed return receipt for the Order to Show Cause.

On the basis of the present record, we are unable to evaluate the merits of Lynx'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).

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

BETHENERGY MINES, INC.	:	
	:	
v.	:	Docket Nos. PENN 89-277-R
	:	PENN 89-278-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), and raises the question of whether BethEnergy Mines, Inc. ("BethEnergy") violated a notice to provide safeguards applicable to its belt conveyors. The safeguard notice was issued by an authorized representative of the Secretary of Labor pursuant to 30 C.F.R. § 75.1403 and was based upon the safeguard criterion set forth at 30 C.F.R. § 75.1403-5(g).[1] In an earlier decision, BethEnergy Mines, Inc., 14 FMSHRC 17 (January 1992)("BethEnergy I"), the Commission vacated Administrative Law Judge William Fauver's determination that the safeguard was valid as well as his affirmance of the two citations alleging violations of the safeguard, and remanded to the judge for reconsideration pursuant to the principles discussed by the Commission in its opinion and in Southern Ohio Coal Co., 14 FMSHRC 1 (January 1992)("SOCCO II"), one of four

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[1] 30 C.F.R. § 75.1403 has language identical to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

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

30 C.F.R. § 75.1403-5 is entitled "Criteria-Belt conveyors," and section 75.1403-5(g) states, in pertinent part, that a "clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors...."

other safeguard decisions issued the same date.[2]

On remand, Judge Fauver again determined that the safeguard was valid, but found that the Secretary had not established the alleged violations of the safeguard. 14 FMSHRC 894 (May 1992)(ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's vacation of the citations. We affirm the judge's conclusion but on grounds different from those relied upon by the judge.

I.

Factual Background and Procedural History

A. Factual Background

On June 13, 1984, Francis Weir, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a notice to provide safeguards to BethEnergy at its Mine No. 60, an underground coal mine in Pennsylvania. The notice states:

> A clear travelway of at least 24 inches wide was not provided on both sides of the belt conveyor in the longwall section MMUU 031. Starting at the tipple and extending inby for approximately 400 ft. For the first 200 ft. the clearance changed from the left sid[e] back to right and management had the area fenced of[f] and a crossunder had been provided. The second area was approximately 300 ft. inby the tipple was on the left sid[e] and clearance was between 23 inches and 15 inches for approximately 10-15 ft. in two different locations.
>
> This is a notice to provide safeguard that requires at least 24 inches of clear travelway be provided on both sides of all belt conveyor[s] installed after March 30, 1970 at this mine.

Jt. Exh. 3.

On September 7, 1989, some five years later, MSHA Inspector John Mull inspected the Livingston portal in BethEnergy's Eighty-Four Complex, a mine that includes former Mine No. 60. Inspector Mull observed that 24 inches of clearance had not been provided along both sides of the No. 3 and 4 conveyor belts, and issued two citations, alleging violations of Inspector Weir's safeguard notice.

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[2] The other decisions are: Mettiki Coal Corp., 14 FMSHRC 29 (January 1992); Rochester & Pittsburgh Coal Co., 14 FMSHRC 37 (January 1992); and Green River Coal Co., 14 FMSHRC 43 (January 1992).

The citation alleging a violative condition along the No. 3 belt states:

> At least 24 inches of a clear travelway was not provided on both sides of the entire No. 3 belt, as the side not normally walked was obstruct[ed] with rib material, crib, block and other material at numerous locations.

Jt. Exh. 1. The citation alleging a violative condition beside the No. 4 belt states:

> At least 24 inches of a clear travelway was not provided on both sides of the No. 4 belt ... as the side not normally walked was obstruct[ed] with material from the ribs and other material at numerous locations.

Jt. Exh. 2.

The two citations were terminated after miners removed the obstructions along the belt lines over the course of ten shifts. 14 FMSHRC at 896. BethEnergy contested both citations, and the matter was heard by Judge Fauver.

B. Procedural History

In his original decision, Judge Fauver determined that, because the safeguard was based on a published safeguard criterion, it was valid even if it addressed a general rather than a mine-specific hazard and should be interpreted in the same manner as a promulgated mandatory standard. 12 FMSHRC 761, 769 (April 1990)(ALJ). Construing the safeguard broadly, the judge found that the safeguard provided reasonable notice that the walkways beside the conveyor belts should be clear, and he affirmed both citations. 12 FMSHRC at 769-70.

On review, the Commission noted its holding in SOCCO II that the Secretary may properly issue a safeguard that addresses a commonly encountered hazard so long as it is based on a determination by the inspector that the specific hazard exists in the mine. BethEnergy I, 14 FMSHRC at 21-22, citing, SOCCO II, 14 FMSHRC at 15-16. The Commission held that the fact that a safeguard is based on a published safeguard criterion neither affects its validity nor the narrow manner in which it is to be construed. 14 FMSHRC at 22-25. Accordingly, the Commission vacated the judge's determination that the safeguard was valid, and remanded for consideration of whether the safeguard was based on Inspector Weir's determination that the conditions at BethEnergy's Mine No. 60 created a transportation hazard requiring the corrective action prescribed in the safeguard. 14 FMSHRC at 27. If the judge concluded that the safeguard had been validly issued, he was to determine, pursuant to the principles announced in Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985)("SOCCO I"), whether BethEnergy had violated it. 14 FMSHRC at 25, 27-28.

On remand, the judge determined that the safeguard was valid but that the Secretary had not proven that BethEnergy had violated it. 14 FMSHRC at 897, 899-900. Applying a narrow construction of the safeguard as discussed in SOCCO I, 7 FMSHRC at 512, the judge reasoned that a violation of the safeguard exists "only if (1) a travelway between the rib and the conveyor belt has a width below 24 inches or (2) a fence obstructs the travelway." 14 FMSHRC at 899-900 (footnote omitted). He determined that the first condition could be met "by proof that obstructions reduced the safe, usable width of a travelway to below 24 inches." 14 FMSHRC at 900. He concluded that, because Inspector Mull had not measured but had only estimated the clearance along the travelways, the Secretary had failed to prove that obstructions reduced the width of the travelways to less than 24 inches. Id. Accordingly, he vacated the citations. 14 FMSHRC at 901.

II.

Disposition of Issues

The Secretary sought review of "[w]hether the ... judge erred in concluding that the Secretary failed to establish violations of a safeguard notice ... because the inspector failed to measure the distance between the belts and the obstructions...." PDR at 1. We conclude that the judge erred in relying upon the inspector's failure to take measurements as the basis for finding no violation of the safeguard but, nevertheless, affirm in result his vacation of the citations.

In determining whether the Secretary had established a violation of the safeguard notice, the judge imposed upon the Secretary, in effect, a stricter burden of proof than preponderance of evidence, which is the appropriate standard of proof in proceedings before Commission administrative law judges. See, e.g., Kenny Richardson, 3 FMSHRC 8, 12 n.7 (January 1981). Inspector Mull testified that he issued the citations because material was obstructing the travelways beside the conveyor belts and, as a result, 24 inches of clearance had not been provided. Tr. 45, 47. He stated that he had to cross over the No. 4 belt because the rib sloughage beside the belt was too high for him to walk over. Tr. 49-50. Inspector Mull also testified that "the reason [he] didn't measure it [the width of the walkway] was because there were obstructions from the belt structure ... in most cases clear to the rib." Tr. 66. BethEnergy offered no evidence in contradiction of Inspector Mull's testimony that 24 inches of clearance had not been provided. The judge did not question Inspector Mull's general credibility and, in fact, accepted his observed estimates as to the size of the obstructions and the distance between the belt and the floor and the roof. 14 FMSHRC at 895-96; Tr. 49-50, 75-76. Thus, a preponderance of the evidence presented to the judge established the cited lack of clearance.

We conclude, therefore, that substantial evidence does not support the judge's rejection of the Secretary's case on the basis of the inspector's

failure to take measurements.[3] SOCCO I does not require the application of a burden of proof stricter than a preponderance of the evidence in determining whether a safeguard was violated. Rather, SOCCO I requires the Commission and its judges to construe narrowly the terms and intended reach of a safeguard. Accordingly, we reverse the judge's determination that the Secretary failed to prove the cited lack of clearance.

BethEnergy argues that, even assuming the cited lack of clearance, the citations were properly vacated because the obstructions alleged in the citations were not encompassed by the safeguard's prohibitions.[4] We agree.

In SOCCO I, the Commission concluded that a safeguard notice must identify with specificity the nature of the hazard against which it is directed and the conduct required to abate the hazard, and held that "a narrow construction of the terms of the safeguard and its intended reach is required." 7 FMSHRC at 512. The Commission explained that strict construction was necessary in order to balance the unusually broad grant to the Secretary of authority to issue safeguards with the operator's right to notice of the conduct required of him. Id. The Commission concluded that the safeguard, which referred to physical obstructions in a travelway, fallen rock and cement blocks, did not provide the operator with adequate notice that wet

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

[4] Although the Secretary narrowly tailored the issue presented for review, we conclude that BethEnergy is not precluded from interjecting this argument in its response brief, rather than in a cross-petition for review. In Secretary on behalf of Price & Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (August 1990), the Commission determined that:

> the "appellee" may urge in support of the judgment below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review.

12 FMSHRC at 1529 (emphasis in original; citations omitted). The Commission reaffirmed this determination on subsequent review of the judge's decision on remand. Secretary on behalf of Price & Vacha v. Jim Walter Resources, Inc., 14 FMSHRC 1549, 1552 n.2 (September 1992). Here, the appellee does not seek to attack the judge's conclusion that the citations should be vacated or to enlarge its rights under that judgment. Thus, we consider the argument.

ground conditions resulting in an accumulation of water fell within the safeguard's prohibitions. 7 FMSHRC at 513.

In Green River Coal Co., 14 FMSHRC 43, 47 (January 1992), the Commission affirmed the judge's determination that a safeguard, which addressed a hazardous narrowing of a travelway caused by the erection of roof supports near a conveyor belt, did not give the operator adequate notice that it also prohibited the loose rock obstructing a travelway. The Commission explained that "[o]bstructions in travelways caused by the deliberate placement of roof supports differ fundamentally in nature, cause, and remedy from those that occur due to roof falls." Id.

Here, the impediments to travel described in the safeguard differ substantially in nature from the cited obstructions. The lack of clearance described in the safeguard was caused by the operator's erection of a fence across the travelway and by placement of the belt too close to the rib. In contrast, the cited coal sloughage, concrete blocks and cribbing material resulted from unintended accumulations in the travelways. The fence, although erected as a safety measure, impeded travel, and the proximity of the belt to the rib narrowed the passageway. The cited obstructions presented primarily slipping, tripping, and falling hazards. See Tr. 45-46. Unlike abatement for lack of clearance caused by the belt being too close to the rib, abatement of these citations required removal of the coal sloughage, concrete blocks, and crib material. Thus, for the reasons discussed in SOCCO I and Green River, we conclude that the lack of clearance described in Inspector Weir's safeguard did not provide BethEnergy with adequate notice that the safeguard prohibited the cited conditions. Accordingly, we affirm, in result, the judge's vacation of the citations.

III.

Conclusion

For the reasons discussed above, we affirm the judge's vacation of the citations.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

CYPRUS ORCHARD VALLEY COAL CORPORATION	:	
v.	:	Docket No. SPECIAL 92-03
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Cyprus Orchard Valley Coal Corporation ("Cyprus Orchard") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Cyprus Orchard had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Cyprus Orchard cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Cyprus Orchard contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Cyprus Orchard seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Cyprus Orchard's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Cyprus Orchard's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by

the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Cyprus Orchard has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Cyprus Orchard failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Cyprus Orchard. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

CYPRUS EMPIRE CORPORATION	:	
	:	
v.	:	Docket No. SPECIAL 92-04
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Cyprus Empire Corporation ("Cyprus Empire") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Cyprus Empire had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Cyprus Empire cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Cyprus Empire contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Cyprus Empire seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Cyprus Empire's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Cyprus Empire's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC

at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Cyprus Empire has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Cyprus Empire failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Cyprus Empire. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

CONSOLIDATION COAL COMPANY, CONSOL PENNSYLVANIA COAL COMPANY, McELROY COAL COMPANY, and QUARTO MINING COMPANY	:	
v.	:	Docket No. SPECIAL 92-05
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Consolidation Coal Company, Consol Pennsylvania Coal Company, McElroy Coal Company, and Quarto Mining Company ("Petitioners") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Petitioners had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Petitioners cite Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Petitioners contend that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Petitioners seek refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Petitioners' request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Petitioners' motion to

reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Petitioners have invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Petitioners failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Petitioners. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

MONTEREY COAL COMPANY, a division of EXXON COAL USA, INC.	:	
v.	:	Docket No. SPECIAL 92-06
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Monterey Coal Company ("Monterey") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Monterey had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Monterey cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Monterey contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Monterey seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Monterey's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Monterey's motion to reopen and we dismiss this proceeding.

the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Monterey has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Monterey failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Monterey. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

GENERAL CHEMICAL CORPORATION	:	
	:	
v.	:	Docket No. SPECIAL 92-07
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), General Chemical Corporation ("GCC") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which GCC had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, GCC cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

GCC contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. GCC seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that GCC's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny GCC's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C.

§ 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

GCC has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that GCC failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by GCC. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

FMC WYOMING CORPORATION	:	
	:	
v.	:	Docket No. SPECIAL 92-08
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), FMC Wyoming Corporation ("FMC") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which FMC had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, FMC cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

FMC contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. FMC seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that FMC's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny FMC's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C.

§ 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

FMC has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that FMC failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by FMC. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

AKZO SALT, INC.	:	
	:	
v.	:	Docket No. SPECIAL 92-09
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Akzo Salt, Inc. ("Akzo") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Akzo had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Akzo cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Akzo contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Akzo seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Akzo's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Akzo's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C.

§ 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Akzo has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Akzo failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Akzo. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

CYPRUS EMERALD RESOURCES CORPORATION	:	
v.	:	Docket No. SPECIAL 92-10
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Cyprus Emerald Resources Corporation ("Cyprus Emerald") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Cyprus Emerald had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Cyprus Emerald cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Cyprus Emerald contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Cyprus Emerald seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Cyprus Emerald's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Cyprus Emerald's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Cyprus Emerald has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Cyprus Emerald failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Cyprus Emerald. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

MOUNTAIN COAL COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-11
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Mountain Coal Company ("Mountain") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Mountain had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Mountain cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Mountain contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Mountain seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Mountain's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Mountain's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Mountain has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Mountain failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Mountain. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

SOUTHERN OHIO COAL COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-12
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Southern Ohio Coal Company ("SOCCO") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which SOCCO had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, SOCCO cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

SOCCO contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. SOCCO seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that SOCCO's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny SOCCO's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC

at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

SOCCO has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that SOCCO failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by SOCCO. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

WINDSOR COAL COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-13
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Windsor Coal Company ("Windsor") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Windsor had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Windsor cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Windsor contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Windsor seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Windsor's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Windsor's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC

at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Windsor has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Windsor failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Windsor. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

ENERGY WEST MINING COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-14
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Energy West Mining Company ("Energy West") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Energy West had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Energy West cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Energy West contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Energy West seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Energy West's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Energy West's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Energy West has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Enery West failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Energy West. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

CENTRALIA MINING COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-15
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Centralia Mining Company ("Centralia") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Centralia had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Centralia cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Centralia contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Centralia seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Centralia's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Centralia's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC

at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Centralia has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Centralia failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Centralia. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

AMAX COAL COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-16
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Amax Coal Company ("Amax") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Amax had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Amax cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Amax contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Amax seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Amax's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Amax's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C.

§ 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Amax has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Amax failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Amax. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

SUNNYSIDE COAL COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 93-01
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Sunnyside Coal Company ("Sunnyside") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Sunnyside had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Sunnyside cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Sunnyside contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Sunnyside seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Sunnyside's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Sunnyside's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC

at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Sunnyside has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Sunnyside failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Sunnyside. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

WESTMORELAND COAL COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 93-02
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), Westmoreland Coal Company ("Westmoreland") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which Westmoreland had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, Westmoreland cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

Westmoreland contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. Westmoreland seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that Westmoreland's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny Westmoreland's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC

at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C. § 815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

Westmoreland has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that Westmoreland failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by Westmoreland. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 1993

LTV STEEL MINING COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 93-03
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"), LTV Steel Mining Company ("LTV") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which LTV had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, LTV cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

LTV contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. LTV seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that LTV's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny LTV's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C.

§ 815(a), which provides, in part, that an uncontested propose penalty "shall be deemed a final order of the Commission and not subject to eview by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

LTV has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. Id. Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. Id.

Accordingly, for the reasons expressed in JWR, we conclude that LTV failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by LTV. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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MAY 7 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 92-119
	:	A.C. No. 29-00845-03541
	:	York Canyon Surface Mine
v.	:	
	:	Docket No. CENT 92-142
	:	A.C. No. 29-00244-03570
PITTSBURG AND MIDWAY COAL MINING COMPANY-YORK CNYN COMPLEX, Respondent	:	Docket No. CENT 92-143
	:	A.C. No. 29-00244-03572
	:	Docket No. CENT 92-144
	:	A.C. No. 29-00244-03573
	:	Cimarron Mine

DECISION

Appearances: William E. Everheart, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
John W. Paul, Esq., PITTSBURG AND MIDWAY COAL MINING COMPANY, Englewood, Colorado, for Respondent.

Before: Judge Lasher

In these four proceedings the Secretary of Labor (MSHA) seeks assessment of penalties for a total of 12 alleged violations (one each in Dockets CENT 92-119, 143, and 144 and nine in CENT 92-142) pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977).

After the commencement of hearing in Albuquerque, New Mexico, on January 27, 1993, the parties concluded and announced the settlement of 6 of the 12 Citations involved, which accord as reflected below was approved from the bench and is here affirmed. The remaining six Citations (five in Docket No. CENT 92-142 and that involved in CENT 92-143) were litigated. As a result of the settlement at hearing, the Citations involved in Dockets numbered CENT 92-119 and 92-144 (one each) were fully disposed of. After

the hearing, the parties submitted a second (written) settlement disposing of four of the six remaining Citations, Nos. 3244794, 3244795, 3244894, in Docket CENT 92-142, and Citation No. 3243349 in Docket CENT 92-143.

Docket No. CENT 92-119

This docket contains one Citation, No. 3242933, which was settled at the hearing. Pursuant to their agreement, the parties concur that the Citation should be modified to delete the "Significant and Substantial" designation contained in paragraph 10 C thereof and that a penalty of $50 is an appropriate penalty for the violation in view of the modification. Such penalty is here **ASSESSED** and the settlement reached, having been approved from the bench, is here **AFFIRMED**.

Docket No. CENT 92-143

This docket contains one Citation, No. 3243349, which was litigated (T. 132-147). However, subsequent to the hearing, as part of their written settlement agreement, Respondent withdrew its contest to Petitioner's initial penalty assessment and the parties agree that such initial proposed assessment of $119 is appropriate. Accordingly, such penalty is here **ASSESSED**.

Docket No. CENT 92-144

This docket contains one Citation, No. 3243253, which Petitioner moved to vacate at the hearing on the basis of insufficient evidence. That motion was approved, this citation was vacated on the record from the bench (T. 5-6), and such action is here **AFFIRMED**.

Docket No. CENT 92-142

This docket contains nine Citations, four of which were settled before the hearing, three were settled after hearing, and two of which were litigated and will be decided on the merits.

A. Settlement Before Hearing

The four Citations which were settled before hearing (Nos. 3244786, 3244797, 3244883, and 3244955) were done so on identical terms. Thus, Respondent conceded the occurrence of the violations charged, the "Significant and Substantial" designation on each of the four was deleted, and the parties agreed that a penalty of $50 for each was appropriate (T. 6-7). The settlement

thereof was approved from the bench (T. 7-8) and that decision is here **AFFIRMED.**

B. Written Settlement After the Hearing

1. Citation No. 3244794

Pursuant to agreement, the "Significant and Substantial" designation of this violation will be deleted and Respondent will pay a single penalty assessment of $50.00.

2. Citation No. 3244795

The "Significant and Substantial" designation of this Citation will be deleted and Respondent will pay a single penalty assessment of $50.00.

3. Citation No. 3244894

Respondent agrees to pay in full MSHA's original penalty assessment of $119.00.

C. Decision on the Two Litigated Citations

The parties have stipulated as to jurisdiction, penalty assessment factors [1], and that the violations charged in these two Citations did occur (T. 9-18). The issue is whether these two violations were properly classified as "Significant and Substantial." Both parties submitted excellent briefs on this question.

1. Citation No. 3244895 (T. 97-118)

This Citation, issued on January 23, 1992, by MSHA Inspector Anthony Duran during an inspection of this underground coal mine charges:

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[1] Based thereon, I find that Respondent is a large coal mine operator (T. 11) with a history in the general neighborhood--as obtained by documentary evidence and stipulation (T. 15-17)--of 35-45 previous violations in the pertinent two-year period preceding the issuance of the Citations. It is also found that assessment of reasonable penalties will not affect Respondent's ability to continue in business and that the violations were promptly abated in good faith by Respondent after notification thereof. The two violations both resulted from negligence (T. 106, 125). The mandatory assessment factor of gravity will be discussed subsequently.

> An energized [sic] auxiliary fan was so located in the no. 3 entry at the 2nd crosscut outby the last open crosscut that was causing recirculation of the air through a 3-inch vent pipe at the stopping 3rd crosscut outby the last open crosscut into the no. 2 intake air entry and to the working faces of MMU 001-0 5 left section. This was detected by the use of a smoke tube.

The standard cited, 30 C.F.R. § 75.302-4 (Auxiliary fans and tubing), provides in pertinent part:

> In the event that auxiliary fans and tubing are used in lieu of or in conjunction with a line brattice system to provide ventilation of the working face:
>
> (a) The fan shall be of a permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use. [2]

The purpose of the energized auxiliary fan in question was to exhaust air-consisting of oxygen, coal dust, and "possibly" methane--from the working face to the return. However, instead of venting into the return, the power center (discussed in the 2d Citation litigated) had a 3-inch vent pipe (tube) which was blowing air through to the intake and back into the working section (T. 99, 100, 101). [3]

Inspector Duran, using a smoke tube and standing in the intake entry, noted that the air was being pushed back toward him through the 3-inch pipe (T. 101-102). Although he did not take an air sampling to positively establish that coal dust (or methane) was coming through the pipe, his examination of the involved area did not disclose any other reason for the presence of a "mist" of coal dust in the air (T. 103); and he testified that it was blowing back into the section (T. 100, 103-104, 117).

He stated that "you could see coal dust in the air and that you know there's something wrong in there. The coal dust is just suspended in the air or into the working section; it don't go

---

[2] The essence of the standard, as focused by the Citation, is on the location of the fan.

[3] Respondent concedes that some air from the return entry was being recirculated back into the intake entry by leakage through the 3-inch diameter pipe. (See Respondent's Post-hearing Brief, p. 4).

out." (T. 103). It should be noted that this assessment of something being wrong was confirmed by Respondent's safety manager, Michael Kotrich (T. 129) who was not present during the inspection (T. 115).

The Inspector determined that the source of this cloud of coal dust was a three-inch vent tube in the stopping in the third crosscut which was venting "return" air into the "intake" entry (T. 103, 108, 110, 112; see Ex. P-3). Before making this determination he checked the stoppings to see if any were missing or leaking (T. 103). There were no other sources for this float coal dust as coal dust generated at the working face was being ventilated through exhaust tubing via the auxiliary fan into the "return" (T. 109-110, 116-117) and there were no leaks in this exhaust tubing (T. 116).

Respondent's only witness as to this issue was its safety manager Michael J. Kotrich who was not present during the inspection (T. 115). He testified that in his estimation "not a great deal" of dilution of the air volume in the intake could be caused by a three-inch leak and offered other possibilities for the occurrence of the mist observed by the Inspector. This testimony does not rebut the fact that the cloud of coal dust was in the intake near the working face. Nor does it rebut Inspector Duran's testimony that he investigated the source of dust, eliminated other possibilities and determined it had to be the vent tube.

Respondent's cross-examination of Inspector Duran revealed that he did not observe any dust passing through the vent tube (T. 107). However, Inspector Duran testified that you would not be able to see respiratory coal dust venting through a three-inch pipe (T. 117) although you could see it when it became suspended as a mist in the air (T. 107-108, 112, 117).

Inspector Duran testified that the two hazards associated with "return" air being recirculated in the "intake" air are methane and respirable coal dust (T. 101). He testified that the float coal dust being recirculated posed both a respiratory hazard as well as an ignition and/or explosion hazard and that nine miners at the working face were exposed to these hazards (T. 101-102, 105). While he did not detect any methane in the recirculated "return" air when he tested for it (T. 107, 109) he testified that methane is liberated when coal is mined (T. 99-100, 126-127) and that methane poses a fire and/or explosion hazard (T. 123).

Respondent did not contest the underlying violations. Only the "Significant and Substantial" (S&S) designation is in dispute. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission set forth the S&S prerequisites:

> In order to establish that a violation of a mandatory standard is significant and substantial under [Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981)], the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The question is whether there is a "reasonable likelihood" the hazards contributed to by this violation will result in an injury of a reasonably serious nature. "Such a measurement cannot ignore the relevant dynamics of the mining environment or processes" and must be evaluated "in terms of continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). The Commission has emphasized that "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 Co., 6 FMSHRC 1834, 1836 (August 1984). In other words, was "there a reasonable likelihood that the hazard contributed to would come to fruition and cause an injury?" Mountain Coal Company, 9 FMSHRC 1571, 1581 (Sept. 1992).

In discussing analytical processes for determining the "reasonable likelihood" question, in Mountain Coal Company, supra, at pages 1582-1583 the "substantial possibility" test was noted. It is defined in Coal Mac. Incorporated, 9 FMSHRC 1600 (ALJ September 1991) as follows:

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

In Mountain Coal it was indicated that a "remote possibility of the violation's resulting in injury (or disease) is not sufficient." Supra, 1583. However, "to meet the "S&S" requirements, MSHA would not seem to be required to show a "strong" possibility, a probability, or a certainty of a resultant injury.," Supra, 1583.

Convincing evidence shows a "substantial possibility" of injury or disease as a result of this violation of this ventilation standard for the following reasons:

1. The area in the vicinity of the working face where the violation occurred was an active mining area and coal mining was in progress. Nine workers were working in this area (T. 104-105, 112, 115, 126).

2. As a result of the violation, combustible and respiratory coal dust in the "return" was being recirculated into the "intake" resulting in a cloud of coal dust suspended in the intake near the working area (T. 100-104, 108, 110, 112, 117).

3. Numerous ignition sources were present in the working area where the recirculated "return" air was suspended, i.e., the power center, electric cable, power center connection points, and the electrically powered continuous miner machine (T. 103, 104, 116, 123-124).

4. Float coal dust accumulations in active workings pose a serious danger of explosion or fire.

5. The nine miners working in this area were exposed to the hazard of fire and/or explosion caused by a possible ignition or the recirculated float coal dust. Injuries would be disabling or fatal (T. 102, 105).

6. The nine miners working in this area were exposed to the hazard of breathing respirable coal dust. Pneumoconiosis (Black Lung Disease) is a chronic dust disease of the lung arising out of dust exposure in coal mine employment. (See 20 C.F.R. Part 718.201). It is recognized as "one of the most crippling occupational health hazards facing miners."

7. Although the recirculated air tested negative for methane at the time of the inspection, methane is liberated when coal is mined and methane is exhausted into the "return" (T. 126-127). In the perspective of continued normal mining operations, methane release is another possibility which added to coal dust suspension, and considered in conjunction with the potential ignition sources present, increases the likelihood of injury from explosion or fire. See Youghiogheny and Ohio Coal Company, 9 FMSHRC, 673 (April 30, 1987).

It is concluded that there existed a reasonable likelihood that the hazard contributed to by the violation would result in reasonably serious injury or illness and that, the other prerequisites of the Mathies formula having been conceded or clearly shown, this violation is significant and substantial.

As such, it necessarily follows that it is a serious violation. Having considered this factor and the other penalty assessment criteria mandated by the Mine Act set forth above, a penalty of $100 is found appropriate and is here assessed.

2. Citation No. 3244896 (T. 118-132)

This Citation also issued on January 23, 1992, by Inspector Duran and based on the same facts as Citation No. 3244895, charges:

> The energized non-permissible power center located in the 3rd crosscut outby the last open crosscut of the no. 2 intake air entry was not placed in intake air in that a 3-inch pipe vent pipe at the stopping was venting return air over the top of the power center caused by recirculation of the air from an auxiliary fan located in the no. 3 return entry of MMU 001-0 5 left section. This was detected by the use of a smoke tube. A methane test was taken with a permissible methane detector chk .0% at the vent pipe.

The safety standard infracted. C.F.R. § 75.507 (Power connection points), provides insofar as pertinent:

> Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air. [4]

The parties stipulated on the record (T. 119) that the evidence introduced with respect to Citation No. 3244395 can be considered part of the record in connection with Citation No. 3244896. My findings of fact in connection with Citation No. 3244395 are incorporated with respect to this Citation insofar as applicable (T. 121) and except with respect to the hazard involved with this Citation which the parties agree differs from that involved in Citation No. 3244895 (T. 119).

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[4] The thrust of the violation is that the non-permissible power center was not located in intake air. This, in conjunction with the hazard created, are important background for determining the "Significant and Substantial" issue.

It is further found that Citation No. 3244896 was issued a few minutes after Citation No. 3244895 was issued. The reliable, substantive evidence of record established that:

1. Return air was being recirculated through a vent tube over the nonpermissible power center located in the third crosscut near the working face in an intake air entry (Ex. P-3; T. 121).

2. There was no evidence of a malfunction in the power center, cables, or machinery (T. 126, 127).

a. The 7,200-volt power center supplies power to machinery at the working face (T. 121-122).

b. At least seven cables run from it to the working face (T. 121-122).

3. The potential ignition sources present were the power center, its cables, and nonpermissible connection points (T. 122, 123).

4. While there was coal dust suspended in the air, as previously determined, there was no evidence of methane present (T. 124, 125, 126). The Inspector said the absence of methane was "possibly" because the continuous miner was not operating (T. 126). [5]

5. The Inspector described the hazard and resultant injury as follows: "Possible ignition source, respirable dust, smoke from fire in the event the power center caught on fire ...

* * * * *

Lost days work, restricted duty. (T. 124)

6. Equipment in the power center was examined "each shift when it's energized and by a qualified electrician weekly" (T. 128).

CONCLUSION

The hazard created by this violation is confined to that which is created by the location of the power center. In terms of the Mathies formula, the violation has been conceded, and there is no question that this violation would result in an injury. Although the Inspector at one point stated his opinion,

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[5] Respondent's Safety Manager indicated he has never detected methane at the working faces in excess of "applicable" standards (T. 129).

that there was a "probability" (T. 127) that something could happen if there were a malfunction, the totality of his testimony reveals that (a) there was no malfunction and (b) there existed only a remote possibility of a malfunction occurring and the hazard coming to fruition. Thus, he testified, "There could be a failure at the power center, there could (be a) failure at the cable, at the connecting points." (Emphasis added). (T. 123).

Speculation of an event that "could" occur falls short of showing that the illness or injury is "reasonably likely" to happen. See Union Oil Co. of California, 11 FMSHRC 289 (Mar. 31, 1989).

The Inspector not only did not identify any malfunction of the equipment specified in the standard, but that such malfunction might occur in the future was speculative. The evaluation of reasonable likelihood of risk must be made in terms of continued normal mining operations, and based on the particular facts surrounding the violation.

It is concluded that the Secretary did not carry the burden of proof in establishing the "reasonable likelihood that the hazard contributed to will result in an injury." This violation is not found to be significant and substantial. It is found to be moderately serious. Accordingly, Citation No. 3244896 will be modified to delete the "S&S" designation, and a penalty of $50 is **ASSESSED.**

ORDER

1. Citation No. 3243253 in Docket No. CENT 92-144 is **VACATED.**

2. The following Citations in the dockets indicated are **MODIFIED** to delete the "Significant and Substantial" designations thereon:

Citation No.	Docket Number
3242933	CENT 92-119
3244786	CENT 92-142
3244797	CENT 92-142
3244883	CENT 92-142
3244955	CENT 92-142
3244794	CENT 92-142
3244795	CENT 92-142
3244896	CENT 92-142

3. The following penalties are **ASSESSED**.

Citation No.	Docket Number	Penalty
3242933	CENT 92-119	$ 50.00
3243349	CENT 92-143	$119.00
3244786	CENT 92-142	$ 50.00
3244797	CENT 92-142	$ 50.00
3244883	CENT 92-142	$ 50.00
3244955	CENT 92-142	$ 50.00
3244794	CENT 92-142	$ 50.00
3244795	CENT 92-142	$ 50.00
3244894	CENT 92-142	$119.00
3244895	CENT 92-142	$100.00
3244896	CENT 92-142	$ 50.00

4. Respondent, if it has not previously done so, **SHALL PAY** the Secretary of Labor within 30 days from the date hereof the total sum of $738.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 2 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-399-M-A A. C. No. 21-00820-05700-R
v.	:	Minntac Plant
USX CORPORATION, MINNESOTA ORE OPERATIONS, Respondent	:	

ORDER PARTIALLY VACATING ORDER OF DISMISSAL
ORDER AMENDING DECISION APPROVING PENALTY
ORDER TO REFUND

Before: Judge Merlin

On November 19, 1992, the operator filed a motion to withdraw its contest of those violations contained in Docket No. LAKE 92-399-M which were designated non-significant and substantial. On January 5, 1993, an order was issued removing the non-significant and substantial violations from LAKE 92-399-M and placing them in a newly created docket, LAKE 92-399-M-A. On the same day, a decision approving penalty was issued in LAKE 92-399-M-A approving the proposed penalties, dismissing the matter and directing the operator to pay the proposed penalties. On April 28, 1993, Administrative Law Judge Feldman issued a decision approving settlements for sixteen cases involving this operator including Docket No. LAKE 92-399-M.

On May 14, 1993, the operator filed a motion to reopen this proceeding. The operator advised that in its motion to withdraw it had requested that its contest be withdrawn for all the non-significant and substantial violations in LAKE 92-399-M except Citation No. 3892662. The operator also stated that it paid the $5,767 assessment in LAKE 92-399-M-A which included the $800 penalty for Citation No. 3892662.

In addition, Citation No. 3892662 was included in the April 28 settlement decision issued by Judge Feldman. The proposed penalty for this violation was reduced from $800 to $311 which was included in the total assessments the operator was ordered to pay by Judge Feldman. The operator states that it has paid this assessment.

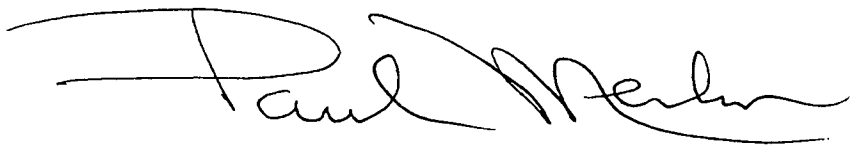
A review of the file shows that the operator did request that this citation not be dismissed. However, due to a clerical

error the citation was included in the January 5 order of removal and replacement as well as in the decision approving penalty and order of dismissal. I conclude partial relief from the decision approving penalty and order of dismissal is warranted. 29 C.F.R. § 2700.65(c). Therefore, the January 5 decision approving penalty should be amended to reflect the amount due without Citation No. 3892662 and the order of dismissal should be vacated with respect to this violation. The approval of the settlement by Judge Feldman for Citation No. 3892662 will stand because that violation would have been properly before him when his decision was issued were it not for the clerical error, noted above. In light of the foregoing, I find that in this case the operator overpaid MSHA $800 for Citation No. 3892662 and that amount should be refunded to the operator.

Accordingly, it is **ORDERED** that the January 5 order of dismissal issued with respect to Citation No. 3892662 in LAKE 92-399-M-A be **VACATED.**

It is further **ORDERED** that the January 5 decision approving penalty issued for LAKE 92-399-M-A be amended to reflect the correct penalty amount of $4,967.

It is further **ORDERED** that the operator's overpayment of $800 for LAKE 92-399-M-A be **REFUNDED** to the operator.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 2 1993

JERRY IKE HARLESS TOWING INCORPORATED, HARLESS, INC., Contestants	:	CONTEST PROCEEDING
v.	:	Docket No. CENT 92-276-RM
	:	Citation No. 3896905; 5/19/92
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Harless Inc.
	:	Mine ID 16-01238

DECISION

Appearances: Jerry Ike Harless, Lake Charles, Louisiana, Michael E. Roach, Esq., on the brief, for the Contestants; Robert Goldberg, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a Notice of Contest filed pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815. A hearing was conducted on January 29, 1993, in Lake Charles, Louisiana, at which Jerry Ike Harless (Harless), the Chief Executive Officer (CEO) of Jerry Ike Harless Towing, Inc. (Harless Towing), and Harless, Inc., represented the contestant.[1] Harless stipulated

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[1] Harless Towing, which is involved with the dredging of sand, and Harless, Inc., which sells sand, gravel and limestone, will be referred to collectively as the contestant. Although the subject citation in this matter was issued to Harless, Inc., it is apparent that the issuing inspector was not familiar with the distinction between the two corporate entities. The inspector's confusion is understandable in view of Harless' failure to file any identity reports with MSHA distinguishing the corporations. Moreover, Harless' May 27, 1992, complaint seeking injunctive relief and his July 20, 1992, Notice of Contest in this proceeding were filed on behalf of both Harless Towing and Harless, Inc. (Gov. Ex. 2). Finally, Chief Administrative Law Judge Merlin's September 4, 1992, Order of Assignment in this proceeding notes both corporations. Accordingly, at trial, I concluded that although Harless, Inc., was cited as the operator in the subject citation, MSHA's jurisdiction over Harless Towing is also an appropriate issue for disposition in this proceeding. (Tr. 141-143). Consequently, Counsel's posthearing assertion in

on the record to my jurisdiction to hear this matter (Tr. 20). However, his stipulation concerning my authority was not an admission that either corporation is engaged in mining. After the trial, Harless retained Michael E. Roach as legal counsel. On April 15, 1993, Roach filed a simultaneous motion to appear and motion requesting an extension of time to file posthearing briefs which was granted by Order dated April 19, 1993. The parties filed proposed findings and conclusions on May 10, 1993.

As detailed below, Harless Towing dredges sand from the Calcasieu River. The sand is then transported by barge to a dock location at Harless, Inc., where it is off-loaded, stock-piled and sold (Tr. 115). This contest proceeding concerns the validity of Citation No. 3896905 that was issued to Harless on May 19, 1992, for violation of 30 C.F.R. § 56.1000, as a result of his failure to notify the Mine Safety and Health Administration (MSHA) of his commencement of mining operations.[2] The basic issue for determination is whether the activities of Harless Towing and/or Harless, Inc., are subject to the jurisdiction of the Mine Act.

PRELIMINARY FINDINGS OF FACT

As indicated above, Jerry Ike Harless is the CEO of Harless Towing and Harless, Inc., which are closely held corporations incorporated in the State of Louisiana. His daughters, Jeri Green and Barbara Southerland, respectively, are the President and Vice President of both corporations. Harless' wife, Mildred Whitney Harless, is the Secretary of both companies.

Harless Towing has been extracting sand from the riverbed of the Calcasieu River four to six months each year for the last 30 years. The Calcasieu River is a navigable waterway which flows into the Gulf of Mexico. Harless Towing, pursuant

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fn. 1 (continued)
his proposed findings that Harless Towing is not a party in this matter is without merit.

[2] Section 56.1000 provides:

"The owner, operator, or person in charge of any metal or nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent."

This notification is essential to the orderly administration and enforcement of the Mine Act.

to a United States Corps of Army Engineers permit, extracts approximately 20,000 to 25,000 tons of sand per year. The extracted material does not contain any coal.

Harless Towing employs between four and eight individuals in its sand dredging operation. During non-dredging months these employees work at Harless, Inc., performing such duties as truck driving, loading and stockpiling. Harless Towing uses a vessel, the "D/B Betsy," with dredging machinery situated thereupon and several barges in tow. The dredge hydraulically suctions sand and sediment from the river bottom, along with river water. The dredged material is then pumped through a system of piping, wherein an initial separation process takes place separating the sand from the bulkier material. The piping then directs the sand and sediment onto a barge called the screen barge. There, the material is pumped through a 1/4 inch mesh screen where remaining debris is removed. From the screen barge the sand and water are pumped through a chute or flume to another barge, called the heart barge. On the heart barge, the sand is further processed to separate sand from the remaining water.

The sand screening process continues during the period the sand is conveyed by tug on the heart barge to one of two of Harless, Inc.'s, off-loading terminals where cranes, owned and operated by Harless, Inc., remove and stockpile the sand. The tugboat operation is regulated by the United States Coast Guard. Harless, Inc.'s main terminal is located at Bayou D'Inde Street, approximately 20 miles down river from the dredging site.

Harless, Inc., sells the sand to individual and corporate customers who are large industrial concerns such as Occidental Petroleum, Citgo Petroleum, Olin and Gulf States Utilities. The sand is used in a variety of ways including industrial use, building foundations, golf course sand traps and sand boxes. In addition to river sand, Harless, Inc., also stockpiles and sells limestone aggregate, gravel, mason sand and concrete sand. The limestone comes from Kentucky and Missouri by barge and the gravel is hauled from various quarries north of Lake Charles. Sometimes the gravel is delivered and sometimes Harless, Inc., hauls the gravel by truck.

On May 12, 1992, MSHA Inspectors John Ramirez and Steve Montgomery arrived on the Bayou D'Inde premises of Harless, Inc., where they met Harless and his daughter, Barbara Southerland. They identified themselves and explained the legal identity reporting requirements for mine operators contained in Section 56.1000. Harless and Southerland questioned whether they were subject to the Mine Act's jurisdiction. Ramirez left the Legal Identity Report (MSHA Form 2000-7) with them for completion and obtained permission to inspect Harless Towing's dredging operation located upstream. Ramirez and Montgomery drove to the dredging site where they inspected the dredge, including

all moving components on the engine, such as shafts and pulleys. They also checked handrails and looked at the first aid kit and fire extinguishers. They did not find any violations and concluded that the dredging site "was a clean operation." (Tr. 53).

Ramirez and Montgomery returned to the Harless, Inc., site on May 13, 1992, at which time Harless and Southerland refused to complete the Legal Identity Report because they believed that they were not engaged in mining. No additional action was taken by Ramirez in order to provide Harless with the opportunity to consult an attorney. Ramirez returned on May 19, 1992, at which time Harless again refused to complete the mine registration process. Consequently, Ramirez issued Citation No. 3896905 for a violation of Section 56.1000 based upon Harless' failure to notify MSHA before commencing sand dredging operations.

On May 22, 1992, Harless challenged MSHA's jurisdiction by seeking injunctive relief in the United States District Court for the Western District of Louisiana. Thereafter, Citation No. 3896905 was modified on June 1, 1992, to extend indefinitely the termination date to allow Harless to pursue the injunction. On July 15, 1992, The Honorable Edward F. Hunter dismissed Harless' request for relief with the stipulation that he be provided with the opportunity to pursue relief through the Mine Act's administrative process. This brings us to the case at bar.

FURTHER FINDINGS AND CONCLUSIONS

Commerce Issue

As a threshold matter, regardless of whether Harless is engaged in mining, he argues that his companies are exempt from the jurisdiction of the Mine Act because they are not engaged in interstate commerce. The following discussion formalizes my bench decision that both corporate entities are engaged in interstate commerce as contemplated by the Act (Tr. 22-23). Section 4 of the Mine Act, 30 U.S.C. § 803, provides:

> Each coal or other mine, the product of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act (emphasis added).

In Cobblestone, Ltd., 10 FMSHRC 731, 733 (June 1988), Judge Cetti, citing Brennan v. OSHRC, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d 78, 83 (10th Cir. 1975); Polish National Alliance v. NLRB, 322 U.S. 643 (1944); and Godwin v. OSHRC, 540 F.2d 1013 (9th Cir. 1976), noted that

the phrase "which affect commerce" in Section 4 of the Mine Act is consistent with Congress' intent to exercise its full constitutional authority under the commerce clause.[3]

Turning to the facts of this case, Harless Towing operates a vessel under the jurisdiction of the U.S. Coast Guard in the navigable waters of the Calcasieu River in order to dredge and transport sand under permit issued by the U.S. Corps of Army Engineers. These operational activities alone, without addressing the issue of the ultimate destination of the extracted sand, affect commerce and give rise to Federal jurisdiction. Therefore, Harless Towing is clearly engaged in the requisite activities that subject it to the jurisdiction of Section 4 of the Mine Act.

Harless, Inc., sells the dredged sand it acquires from Harless Towing to multi-national and national corporations such as Occidental Petroleum, Citgo Petroleum, Olin, Gulf States Utilities and Pittsburgh Plate Glass Company. Harless testified that the sand is delivered to customers by truck. It is used to manufacture glass. Its uses also include fill under roadways and use as a construction material in foundations (Tr. 21-23). It is obvious that the trucking of the sand and its use to support highways, alone, affect commerce. Moreover, the interstate activities of its customers, e.g., Gulf States Utilities, provide a basis for concluding that the sand sold by Harless, Inc., enters or affects commerce. Thus, Harless, Inc.'s business activities also satisfy the commerce criteria in Section 4 of the Act.[4]

Mining Issue

Having determined the companies are engaged in commerce, the remaining issue is whether they are mine operators under the Act. Section 3(h)(1) of the Act defines, in pertinent part, "coal or other mine" as:

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[3] "Commerce" is defined in Section 3(b) of the Mine Act, 30 U.S.C. § 802(b) as:

"Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof."

[4] Harless' testimony relied upon in his posthearing brief that, "Our sand -- I want to say 100 percent -- I will say 99 percent is sold right here in Calcasieu Parish", is not dispositive (Tr. 21). The local sale of a product does not establish that the product does not ultimately enter or affect commerce.

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities (emphasis added).
> 30 U.S.C. § 802(h)(1).

In an attempt to escape from the above statutory definition, Harless asserts that sand is not a mineral. In the alternative, he contends that the dredging of sand from a river bottom is extraction of minerals in liquid form. The assertion that sand, which is composed of quartz and other silica, is a non-mineral is frivolous (Tr. 86). Harless' remaining contention that the dredging of sand from a riverbed is the extraction of a mineral in liquid form is equally uninspiring.[5] In this regard, the United States Court of Appeals has held that the operation of removing sand and gravel from their natural deposits is mining under Section 3(h)(1) of the Act. In fact, the Court concluded that the operation of preparing sand by separating water and other debris gives rise to Mine Act jurisdiction even if

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[5] The contestant's posthearing brief also cites the Louisiana Civil Code to support its contention that it is not engaged in mining. Notwithstanding the fact that the Louisiana Civil Code is preempted by the Mine Act, the provisions of this state statute have nothing to do with the mine industry. What is on point are Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, (3d Cir. 1979) cert. denied, 444 U.S. 1015 (1980) and Fleniken's Sand and Gravel, Inc., 10 FMSHRC 1509 (November 1988). At my request, copies of these cases were provided to Harless by counsel for the Secretary. (Letter dated February 9, 1993, from Robert A. Goldberg, Esq., to Jerry Ike Harless). These decisions were sent to Harless to facilitate his compliance with my on-the-record statement ordering the parties to compare these cases to the current case in their posthearing briefs See Tr. 152). The contestant's brief, however, fails to address these cases.

the extraction process is not performed by the operator. See Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d at 591-592.[6]

Consistent with Stoudt's Ferry, MSHA routinely oversees sand and gravel dredging operations. See, e.g., Louisa Sand and Gravel Company, Inc., 11 FMSHRC 1820, 1823 (September 1989); Fleniken's Sand and Gravel, Inc., 10 FMSHRC at 1509. Thus, it is evident that Harless Towing's extraction and preparation of sand through its filtering process are activities covered by Section 3(h)(1) of the Mine Act. Therefore, Harless Towing's contest of its obligation to complete the required Legal Identity Report as required by Section 56.1000 of the regulations must be dismissed.

Regarding Harless, Inc.'s status under the Act, it is clear that the primary objective of this company is the commercial sale of river sand extracted by Harless Towing, and the sale of gravel and limestone that it purchases from suppliers. The sales activities associated with these products also requires their off-loading, stockpiling and delivery. In order to determine if these activities should be construed as the "work of preparing minerals" under Section 3(h)(1) of the Act, it is important to determine if the subject activities are normally performed by the operator.[7] Although the work of preparing minerals can include activities such as loading and storage, it is the nature of the operations that is dispositive of the jurisdictional issue. See Oliver M. Elam, Jr., Company, 4 FMSHRC 5 (January 1982). In this case, the performance of these functions is associated with sales rather than extraction and preparation. Clearly, Harless, Inc.'s commercial endeavors with respect to its gravel and limestone sales do not subject it to the Mine Act. Similarly, its storage and sale of sand should not provide Mine Act jurisdiction solely because it acquired the sand from Harless Towing, a distinct corporate entity with identical ownership. Consequently, Harless, Inc.'s contest concerning its responsibility to

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[6] Although the sediment prepared by Stoudt's Ferry included a burnable product "akin" to coal, the Court stated that the sand and gravel preparation, alone, subjected the operator to the Act's jurisdiction as a mineral preparation facility. Stoudt's Ferry, 602 F.2d at 592.

[7] The Mine Act defines preparation of coal but does not address the meaning of the preparation of "other minerals." Section 3(i) of the Mine Act, 30 U.S.C. § 802(i), defines the "work of preparing coal" as:

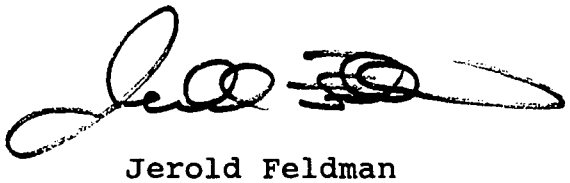
"[T]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine (emphasis added).

register pursuant to Section 56.1000 of the regulations is granted.

As a final matter, at trial I noted that Harless' willingness to abide by MSHA's reporting requirements if he did not prevail in this proceeding would be a factor in considering the appropriate civil penalty that should be assessed. I also noted that Harless' completion of the Legal Identity Report form would not prejudice his right to further appeal (Tr. 153-154). There is no justification for delaying implementation of this decision in view of Stoudt's Ferry and the absence of any irreparable harm to Harless Towing, particularly in view of the lack of any violations detected by Ramirez. Finally, permitting any further delay in registration would deny the employees of Harless Towing the protection provided under the Mine Act.

ORDER

Accordingly, Citation No. 3896905 **IS AFFIRMED** with respect to Jerry Ike Harless Towing, Inc., and the subject contest **IS DISMISSED**. Jerry Ike Harless Towing, Inc., **IS ORDERED** to file the requisite Legal Identity Report (MSHA Form 2000-7) in accordance with Section 56.1000 of the regulations within 21 days of the date of this decision. The contest of Harless Inc., **IS GRANTED** and Citation No. 3896905, as it applies to Harless, Inc., **IS VACATED.**[8]



Jerold Feldman
Administrative Law Judge

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[8] This decision, in effect, permits modification of Citation No. 3896905 to include Harless Towing as well as Harless, Inc., as the alleged operator. Harless is estopped from objecting to this modification since it was his failure to identify Harless Towing as the corporation involved in dredging activities that necessitates this action. Any other approach would permit an operator to conceal its identity from an inspector and then assert that a citation for failure to register as a mine operator is defective because the operator was not properly cited. Moreover, Harless can not claim that he has been surprised or otherwise prejudiced by this modification. (See fn. 1, supra).

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JUN 3 1993

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

DECISION

Appearances: Anne T. Knauff, 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

This case is before me for consideration 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 case was heard in Prestonsburg, Kentucky, on April 14, 1993. Dale Mullins, the respondent's Vice President, represented the respondent in this matter and testified in its behalf. The Secretary, represented by counsel, called Mine Safety and Health Administration (MSHA) Inspector Donald Milburn as his only witness. At the hearing, the parties stipulated to my jurisdiction in this matter and to the pertinent facts associated with the civil penalty criteria contained in Section 110(i) of the Act. At the conclusion of the hearing, the parties elected to make closing statements in lieu of filing posthearing briefs. After the closing presentations, I issued a bench ruling which is formalized in this decision.

This proceeding concerns 104(d)(1) Citation No. 3809162, which was issued to the respondent by 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 to be rock dusted within 40 feet of all working faces.[2] At trial, 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 is whether these violations occurred as a result of the respondent's unwarrantable failure.

The essential facts are not in dispute and can be briefly summarized. On the morning of June 17, 1991, Milburn arrived at the respondent's No. 6 Mine in order to perform a routine inspection. Prior to performing the inspection, Milburn participated in a pre-inspection conference with Tony Mullins, the mine superintendent and nephew of Dale Mullins, and Stoney Mullins, the business partner and brother of Dale Mullins. At this conference, Milburn examined the pre-shift examination log which contained the examiner's remarks concerning coal dust accumulations in the No. 2 Section with an additional notation that rock dust application was behind in the section in the No. 1 through No. 6 entries. Milburn's contemporaneous notes reflect that both Tony Mullins and Stoney Mullins told him that they were behind in cleaning and rock dusting the section because the scoop was out of service since the Friday shift (See Government Ex. 1). Milburn proceeded to inspect the No. 2 Section where he confirmed loose coal, coal dust and float dust accumulations ranging from three to six inches in depth starting at the No. 2 belt conveyor feeder and continuing inby for a distance of approximately 180 feet in the first through sixth entries. Milburn determined the depth of the accumulations by using a folded wooden ruler. Milburn described these accumulations as black in color with no evidence of significant rock dust content (Tr.98).

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[1]Section 75.400 provides as follows:

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

[2]Section 75.403, 30 C.F.R. § 75.403, contains the standard for application of rock dust. This regulation requires that the combined content of coal and rock dust must contain at least 65 percent incombustible content in intake and neutral entries, and, at least 80 percent incombustible content in return entries. Milburn took three samples which confirmed the cited violation. The lab results of the samples reflected only 29 percent and 55 percent incombustible material in an intake and neutral entry, respectively, and only 35 percent incombustible material in a return entry. (Tr.110-113).

Milburn testified that the shift began at 7:00 a.m. Therefore, he considered the violation to be of three hours duration, although he indicated that it may have existed since the previous Friday when the scoop went out of service (Tr. 24). Milburn stated that he observed that the section scoop was being charged. He also testified that there was no other scoop available that could be used as an alternative means of cleaning the accumulations (Tr.93-94)[3]

Milburn opined that the notation concerning the accumulations in the pre-shift examiner's book was a significant, if not determining, factor in his conclusion that the respondent's conduct constituted an unwarrantable failure. In this regard, Milburn stated that the respondent's conduct would not constitute an unwarrantable failure if the accumulations existed but were not noted in the pre-shift log (See Tr.100-108). As noted below in my bench decision, contrary to Milburn's opinion, an appropriate notation acknowledging coal dust accumulations in the pre-shift examination book is a mitigating factor in assessing the degree of negligence provided that the notation is not ignored. Consequently, I issued the following bench decision, with non-substantive edits, removing inspector Milburn's unwarrantable failure findings from the citations in issue.

> I wish to note, for the record, that Mr. Mullins has stipulated to the occurrence of the violations, and, to the significant and substantial nature of these violations. Therefore, the outstanding issue to be resolved is whether these violations were the result of the respondent's unwarrantable failure.
>
> Unwarrantable failure is a term that is used to connote gross negligence. The Commission's leading cases which distinguish unwarrantable failure (gross negligence) from ordinary negligence are Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In essence, these cases state that ordinary negligence is manifested by inadvertence, thoughtlessness or inattention, whereas unwarrantable failure is conduct that is not justifiable, or, conduct that is inexcusable. Therefore, a finding of unwarrantable failure requires evidence of a disregard or an indifference to a hazardous condition.

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[3] Mullins pointed out that, given the length of involvement in each entry (180-feet), cleaning the accumulations by manual shoveling was not feasible. (Tr.87-89).

I wish to distinguish this case from my recent decision in Consolidation Coal Company, 15 FMSHRC 263 (February 1993) where I affirmed an unwarrantable failure finding for coal dust accumulations in a preparation plant facility. In that case, the accumulations were determined to have existed for approximately three weeks. These accumulations were on motors and inside electrical boxes. Moreover, the operator took no action to remove the accumulations despite complaints by the safety committee. Finally, the condition was not noted in the pre-shift examination book.

Turning to the facts of this case, we have accumulations of three hours duration. We also have a notation in the pre-shift examination book which insulates, to a certain degree, the operator from an unwarrantable failure charge because it shows a recognition of the hazard created by the accumulations. Having noted the accumulations in the examination book, if the operator proceeds to ignore the accumulations, such conduct would constitute an unwarrantable failure. However, in this case, Milburn was informed that the scoop was out of service during the pre-inspection conference. Milburn's subsequent inspection confirmed that the scoop was out of order. Moreover, Milburn testified that he did not know of any alternative scoops that could be used to clean the working section.

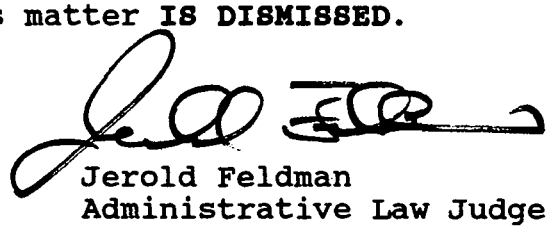
Thus, the issue of unwarrantable failure must be viewed in the context of whether there are any mitigating circumstances. The accumulations were duly noted. These accumulations were only three hours old when cited by the inspector. The scoop was inoperative with no alternative means of cleaning up the accumulations. The scoop was being charged so as to place it in operation. Under these circumstances, viewing the evidence in its entirety, there is no adequate basis for concluding that there was inexcusable neglect on the part of the respondent. Although I have concluded that the respondent's conduct was not indicative of an unwarrantable failure, I do not wish to minimize the seriousness of this violation. The respondent's continued operation, three hours after the condition was noted in the examination book, contributes to the serious gravity of the underlying violation and is relevant to the issue of the appropriate civil penalty to be assessed. I am, therefore, reducing the degree of negligence associated with Citation No. 3809162 from high to moderate. Thus, this citation is modified from

a 104(d)(1) citation to a 104(a) citation. Given the serious gravity of this violation, I am assessing a $600 civil penalty.

With respect to remaining 104(d) Order No. 3809164 for failure to rock dust, I find, consistent with the respondent's stipulation, that the violation was significant and substantial in nature. As rock dusting is an alternative method of neutralizing combustible accumulations that are not removed with a scoop, I find it difficult to conclude that this violation occurred as a result of an unwarrantable failure. Milburn testified that it would serve no purpose to rock dust accumulations that were going to be cleaned. The respondent intended to clean the area, rather than rock dust, as soon as the scoop was placed in service. Under such circumstances, an unwarrantable failure has not been established. Therefore, I am modifying Order No. 3809164 to 104(a) citation and I am assessing a $400 civil penalty for this violation. The total penalty in this matter is $1000, which the respondent is ordered to pay within 30 days of the date of my written decision, and, upon payment of that sum this matter will be dismissed.

ORDER

ACCORDINGLY, IT IS ORDERED that the unwarrantable failure findings with respect to Citation Nos. 3809162 and 3809164 **SHALL BE DELETED** and that these citations **ARE MODIFIED AND AFFIRMED** consistent with the above bench ruling. The respondent **IS ORDERED** to pay a total civil penalty of $1000 within 30 days of the date of this decision, and, upon receipt of payment, this matter **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

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

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

vmy

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 7 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-341-M A.C. No. 41-01225-05510 A DSI
v.	:	Alexander Sand Pit
GLENN BURWICK, Employed by BURWICK CONSTRUCTION COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This case is before me upon a petition for assessment of a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty of $400.00 within 30 days of this decision. Upon such payment this case is dismissed.

William Fauver
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203 (Certified Mail)

Mr. Glenn Burwick, Burwick Oilfield Services, Inc., Drawer P, Bronte, TX 76933 (Certified Mail)

/fcca

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JUN 7 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-309 A.C. No. 33-01157-04012
v.	:	Powhatan No. 4 Mine
QUARTO MINING COMPANY, Respondent	:	

DECISION

Appearances: Kenneth Walton, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, OH, for Petitioner;
Daniel E. Rogers, Esq., Pittsburgh, PA, for Respondent.

Before: Judge Fauver

Petitioner seeks a civil penalty for an alleged a safety violation 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 Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates a coal mine known as Powhatan #4 Mine, which produces coal for sale or use in or substantially affecting interstate commerce.

2. On March 5, 1992, Federal Mine Inspector James Jeffers observed a Caterpillar 988 front-end loader in the supply yard of the mine. The machine was idling, being warmed up for use. Inspector Jeffers asked the equipment operator, Steve Kurko, to demonstrate the steering.

3. When the steering wheel was turned far right, it locked in position, forcing the operator to rise from his seat and forcibly use both hands and his weight to turn the wheel back. Once the lock was broken by forceful turning, the steering wheel would spin very fast, causing a potential loss of control of the

vehicle. Kurko stated to Jeffers that the condition was intermittent and that he had reported it to shop Foreman Ron Adams.

4. Adams had been aware of the problem as far back as October, 1991, when it was discovered that the steering jacks were leaking and, after the jacks were repacked, it was discovered that the steering problem was still not corrected. Adams did not take the machine out of service.

5. The loader was used in several locations throughout the plant. Shortly after Jeffers' issuance of the citation at issue, the loader was tagged out and repaired.

DISCUSSION WITH FURTHER FINDINGS

The standard cited by the inspector, 30 C.F.R. § 77.1606(c), provides that:

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

The front-end loader had an obvious safety defect in that the steering was malfunctioning. When turned to the right, it was subject to locking, and the driver would be forced to rise from the seat to brace himself against the wheel and use all the force he could muster to brake the lock on the steering. Once that occurred, the wheel would spin very fast toward center before the operator could regain control of the vehicle. The fact that the problem occurred unexpectedly and intermittently heightened the potential for an injury because the operator could not anticipate when the steering problem would occur. The fact that it was observed only in a standing position did not alter the fact that this was an unexplained, uncorrected and potentially very serious safety defect. It presented a serious risk of occurring in motion as well as in a standing position.

Any new operator of the machine would be faced with a latent, unknown defect. Respondent, through Adams and others, knew that the steering was malfunctioning and that their efforts to address the problem were unsuccessful. The failure to correct the steering defect or take the loader out of service constituted negligence of a high degree. Respondent apparently made no independent assessment of whether the malfunction was a hazard but instead relied upon its equipment operators. More was required once the foreman knew the steering was defective. The steering defect presented a hazard to the equipment operator, to foot traffic and to other vehicle drivers in the areas where the loader operated. Individuals on foot and other vehicle drivers were not likely to know of the defect in the steering system. The risk of failure to control the loader when someone was in the path of the loader was significant and substantial.

I therefore find that the violation could significantly and substantially contribute to the cause and effect of a mine safety

hazard and that there was a reasonable likelihood that the hazard would contribute to or result in a serious injury.

I also find that there was an unwarrantable failure to comply with the cited standard. Respondent knew of the defect for several months before the inspection, but failed to correct the defect or remove the loader from service. This shows a serious lack of due care, more than ordinary negligence, and justifies the inspector's finding that there was an unwarrantable failure to comply with the standard.

Considering the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of $800.00 is appropriate.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated 30 C.F.R. § 77.1606(c) as alleged in Citation No. 3332171.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3332171 is AFFIRMED.

2. Respondent shall pay a civil penalty of $800.00 within 30 days of this Decision.

William Fauver
Administrative Law Judge

Distribution:

Kenneth Walton, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Daniel E. Rogers, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

/fcca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUN 7 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-1008
	:	A.C. No. 46-02208-03595
v.	:	
	:	Docket No. WEVA 92-1096
MARTIN SALES & PROCESSING, Respondent	:	A.C. No. 46-02208-03597 R
	:	Docket No. WEVA 92-1097
	:	A.C. No. 46-02208-03598 R
	:	Docket No. WEVA 92-1108
	:	A.C. No. 46-02208-03599 R
	:	Mine No. 1

SUMMARY DEFAULT DECISIONS

Before: Judge Koutras

Statement of the Proceedings

On March 29, 1993, I issued Summary Default Decisions in these proceedings finding the respondent in default for failing to respond to certain discovery requests made by the petitioner and for failing to respond to my February 25, 1993, Order to Show Cause affording the respondent an opportunity to explain why it had not answered the discovery requests, why it had not complied with my previous orders directing it to respond to those requests, and why it should not be defaulted for its failure to respond, 15 FMSHRC 559 (March 1993).

The respondent, through counsel, appealed my default decisions, and on April 22, 1993, the Commission vacated my default decisions and remanded the matters to me for further proceedings consistent with its remand order. Thereafter, on April 28, 1993, I issued a remand order affording the respondent an opportunity to explain the circumstances under which it believed it timely responded to my February 25, 1993, show cause order, why it believed it fully responded to the petitioner's discovery requests, and to explain why it introduced a defense to some of the contested citation for the first time in its appeal to the Commission and had not done so in its answers filed in these proceedings. The respondent was afforded twenty (20) days within which to file its responses to my remand order, and was

advised that its failure to respond would again subject it to a possible default. Copies of the Postal Service certified mailing receipts reflect that respondent's counsel received my remand order on May 3, 1993, and that the respondent's president received it on May 1, 1993.

Discussion

The respondent failed to file any substantive response to my remand order of April 28, 1993. Instead of responding and availing itself of an opportunity to explain its position in compliance with the Commission's April 22, 1993, order vacating my default decisions, the respondent's counsel, J. Thomas Hardin, filed a motion to withdraw as counsel for the respondent and a request that the respondent be permitted additional time in which to obtain additional counsel.

On May 4, 1993, pursuant to Commission Rule 3(d), 29 C.F.R. § 2700.3(d), I issued an order denying Mr. Hardin's motion to withdraw as counsel for the respondent in these proceedings. Mr. Hardin was reminded of his obligation and duty to remain as counsel for the respondent and to continue his representation until the Commission's remand order of April 22, 1993, was satisfied. Mr. Hardin was specifically advised of my expectation that he comply with my remand order of April 28, 1993, and the respondent was again cautioned that its failure to respond would again result in a possible default. Copies of the Postal Service certified mailing receipts reflect that Mr. Hardin received my order denying his motion to withdraw on May 8, 1993, and that the respondent's president received a copy on May 7, 1993. As of this date, no further responses have been received from the respondent or Mr. Hardin.

Conclusion

After careful review and consideration of the entire record in these proceedings, including the matters discussed in my remand order of April 28, 1993, and my order of May 4, 1993, denying counsel Hardin's motion to withdraw from these proceedings, copies of which are attached and incorporated herein by reference, I cannot conclude that the respondent has presented any additional facts or circumstances mitigating its failure to timely respond to the petitioner's discovery requests, or my previously issued orders in these proceedings. In my view, the respondent has had ample opportunity to present its position in response to the Commission's remand of April 22, 1993, but it has failed to timely respond as directed by my remand order of April 28, 1993. Under the circumstances, I again find the respondent IN DEFAULT, and my previous Summary Default Decisions of March 29, 1993, reported at 15 FMSHRC 559 (March 1993), are reinstated and reaffirmed.

ORDER

Summary judgment is again entered in favor of the petitioner, and the respondent IS ORDERED to immediately pay to the petitioner (MSHA), the proposed civil penalty assessments of $32,166, for the fifty-one (51), violations in question. The individual citations and assessments amounts are enumerated in my prior summary decision at 15 FMSHRC 561-563 (March 1993).

George A. Koutras
Administrative Law Judge

Attachments

Distribution:

Carol B. Feinberg, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

J. Thomas Hardin, Esq., Hardin Law Offices, Main Street, P.O. Box 1416, Inez, KY 41224 (Certified Mail)

Winford Davis, President, Martin Sales & Processing, P.O. Box 728, Kermit, WV 25674 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 04 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1008
Petitioner	:	A.C. No. 46-02208-03595
v.	:	
	:	Docket No. WEVA 92-1096
MARTIN SALES & PROCESSING,	:	A.C. No. 46-02208-03597 R
Respondent	:	
	:	Docket No. WEVA 92-1097
	:	A.C. No. 46-02208-03598 R
	:	
	:	Docket No. WEVA 92-1108
	:	A.C. No. 46-02208-03599 R
	:	
	:	Mine No. 1

ORDER DENYING MOTION TO WITHDRAW AS COUNSEL FOR THE RESPONDENT

Statement of the Proceedings

On March 29, 1993, I defaulted the respondent because of its failure to fully respond to the petitioner's discovery requests, and its failure to comply with my order compelling it to respond, and my show-cause order of February 25, 1993. On April 8, 1993, the respondent's counsel, J. Thomas Hardin, Inez, Kentucky, filed a Motion to Alter, Vacate or Amend my default decisions claiming that he had timely filed a response to my show-cause order and that the respondent should not have been defaulted.

On April 22, 1993, the Commission vacated my default decisions and remanded the cases to me for further proceedings consistent with its remand order. In compliance with that order, I issued an Order on Remand on April 28, 1993, affording the respondent twenty (20) days to explain why it believes it timely complied with my previous orders and why it believes that it should not have been defaulted. The respondent was also afforded an opportunity to explain why it had not previously raised an issue in defense of certain contested citations raised for the first time with the Commission as part of its motion to set aside my default decisions. The respondent was advised that its failure to timely respond to my Order on Remand will again subject it to possible default.

The respondent's counsel, J. Thomas Hardin, has now filed a motion seeking permission to withdraw as counsel for the respondent and requesting that the respondent be permitted thirty (30) days in which to obtain additional counsel.

Discussion

Commission Rule 3(d), 29 C.F.R. § 2700.3(d), which became effective May 3, 1993, provides as follows:

> (d) Withdrawal of appearance. Any representative of a party desiring to withdraw his appearance shall file a motion with the Commission or Judge. The motion to withdraw may, in the discretion of the Commission or Judge, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party.

Mr. Hardin states no reasons for his request to withdraw as counsel for the respondent. In my view, the granting of the motion would not only unduly delay these matters, but more importantly, it will prejudice the respondent's rights. Mr. Hardin filed the motion which resulted in the Commission's remand, and he made certain representations to the Commission in support of his motion to set aside my default decisions. The Commission was unable to evaluate the merits of Mr. Hardin's assertion that he timely responded to my show cause order, and it remanded the cases to afford him an opportunity to present his explanation and position to me for a determination as to whether or not defaults are warranted. Since the burden is now on the respondent to respond to my remand order, with the possibility of another default if it does not respond, and since only Mr. Hardin knows all of the circumstances under which he claimed he timely responded to my order, he has an obligation and duty to remain as counsel and to continue his representation of the respondent until the Commission's remand order is satisfied. Newly retained counsel who was not involved in the discovery requests, and who was not the recipient of my prior orders, would not in my view, serve the best interests of the respondent in attempting to reconstruct what transpired during the time it was represented by Mr. Hardin.

ORDER

In view of the foregoing, Mr. Hardin's request to withdraw as the respondent's representative in these proceedings **IS DENIED.** I expect Mr. Hardin to comply with my recently issued

Order on Remand and to timely file a response on behalf of the respondent.

George A. Koutras
Administrative Law Judge

Distribution:

Carol B. Feinberg, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Room 516, Arlington, VA 22203 (Certified Mail)

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APR 28 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-1008
	:	A.C. No. 46-02208-03595
v.	:	
	:	Docket No. WEVA 92-1096
MARTIN SALES & PROCESSING, Respondent	:	A.C. No. 46-02208-03597 R
	:	
	:	Docket No. WEVA 92-1097
	:	A.C. No. 46-02208-03598 R
	:	
	:	Docket No. WEVA 92-1108
	:	A.C. No. 46-02208-03599 R
	:	
	:	Mine No. 1

ORDER ON REMAND

Statement of the Proceedings

On March 29, 1993, I entered summary default decisions in these matters pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, because of the respondent's failure to respond to a previously issued show-cause order and its failure to respond to the petitioner's legitimate discovery requests. On appeal of my default decisions, the Commission remanded the matters to me on April 21, 1993, for further proceedings consistent with its remand order.

Background

The record reflects that the petitioner initiated discovery in Docket No. WEVA 92-1008, in August, 1992, and subsequently sought information concerning the respondent's assertion that it was financial unable to pay the proposed civil penalty assessments. The other dockets were subsequently added to the trial docket and all of the cases were consolidated for hearing on February 10, 1993, but were subsequently rescheduled for March 19, 1993, at the request of the respondent. On January 5, 1993, I issued an order in Docket No. WEVA 92-1008, compelling the respondent to respond to the petitioner's discovery requests, including certain requests for documents and financial information to support the respondent's claim that it was unable to pay the proposed penalties. The order informed the respondent that its failure to respond within ten days could result in a summary default disposition of the case.

On January 13, 1993, I held a prehearing telephone conference with counsel for the parties, and they informed me that they were discussing possible settlements, but that they were contingent on the respondent producing reliable financial information supporting its claim that it was unable to pay the proposed civil penalty assessments. Respondent's counsel assured me at that time that he was compiling the information in response to the petitioner's discovery request.

On February 25, 1993, I issued an Order to Show Cause directing the respondent to reply within ten (10) days as to why it should not be held in default because of its failure to respond to the petitioner's discovery requests concerning its asserted financial inability to pay the penalty assessments, and its failure to comply with my previous January 5, 1993, Order compelling it to provide the requested information. The respondent **FAILED TO RESPOND** to my February 25, 1993, show-cause order. The only response of record with respect to the petitioner's discovery requests for financial information, is a letter dated January 24, 1993, addressed to the petitioner's counsel from the respondent's counsel attaching certain financial information from the respondent's bank and an itemized list of its outstanding debts as of January 29, 1993. A copy of that correspondence was not submitted to me by the respondent. However, by letter dated March 10, 1993, petitioner's counsel furnished me with a copy, and she noted that while the letter is dated January 24, 1993, it was not received in her office until March 5, 1993. The letter in question states as follows:

> Pursuant to our previous discussions, I have enclosed a copy of financial information from my client's bank, Bank of Mingo. Additionally, as your are aware, my client is no longer operating the mine. As a result of this idle status of the mine, my client has no income to pay any debts at this time.
>
> If additional information is required regarding the ability of my client to pay, please contact me at your convenience.

In his motion filed with the Commission to vacate my default decisions, the respondent's counsel states that he filed a timely response to my show-cause order of February 25, 1993. In support of this claim, he attached a copy of his January 24, 1993, letter and attachment addressed to the petitioner's counsel. Under the circumstances, counsel's suggestion that he filed any response with me is inaccurate. Further, as shown b the "date stamp" on the copy of the letter submitted by the petitioner's counsel, the January 24, 1993, letter was not received by her until March 5, 1993, and there is no explanation for the delay.

In its remand Order, the Commission states that the respondent "asserts that it had timely filed a response, dated March 8, 1993, to the judge's show cause order". I have reviewed the respondent's Motion to Alter, Vacate or Amend my default decisions, and the only statement I find with respect to any filing of any response to my order is a statement by respondent's counsel that "A copy of the response which was timely filed is attached hereto". The attachments referred to consist of a Response to Show Cause Order, and copies of the previously mentioned letter of January 24, 1993, to the petitioner's counsel from the respondent's counsel.

The Response to Show Cause Order submitted by the respondent as proof of its compliance reflects that it was served on the petitioner's counsel by placing it in the mail on March 6, 1993. The Certificate of Service attesting to this mailing does not reflect that the response was also served on me. Indeed, my office has no record of any response ever being filed or received by me, and respondent's counsel has produced no evidence that his response was ever mailed to me, nor has he filed any explanation as to why he has not followed the instructions of Chief Judge Merlin when he initially assigned these cases to me that all future communications were to be filed with me. In short, nowhere in the record do I find any evidence that the respondent's replies to any of my orders were ever filed with me prior to the issuance of my summary default decisions. Although a copy of the January 24, 1993, letter was furnished me by the petitioner's counsel on March 11, 1993, she pointed out that the letter and attachments did not answer the bulk of her discovery requests. With regard to the Response to Show Cause which the respondent's counsel suggests was timely served on me, the fact is that it was seen by me for the first time when I received the respondent's motion to vacate my summary default decisions on April 8, 1993, after the issuance of the decisions.

I also take note of the fact that in his motion to vacate, respondent's counsel, **FOR THE FIRST TIME**, asserts that the May 2, 1991, citations which were included in my default judgment "have been abated by the District Director in light of the fact the inspection performed on March 2, 1991, was considered a reopening inspection, and no citations were to have been issued". A review of the answers filed by counsel reflects that he never advanced this defense in his initial answers filed in all of these proceedings, and there is no explanation for his failure to do so.

ORDER

In view of the Commission's remand, and its belief that the respondent "may have attempted to respond to the judge's show cause order", I will afford the respondent an opportunity to explain the circumstances under which it believes it timely

responded to my Order to Show Cause of February 25, 1993, and why it believes that it has fully responded to the petitioner's discovery requests concerning its claim that it is unable to pay any civil penalty assessments in these cases. I note in passing that the cases cited by the Commission holding that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default" involved small pro se mine operators. In the instant proceedings, the respondent is represented by an attorney and member of the bar who I assume understands the procedures to be followed in cases brought before the Commission and its trial judges, particularly with respect to the filing of responses to a presiding judge's orders.

The respondent **IS AFFORDED** twenty (20) days from the date of this order to submit an explanation to me in writing as to why it believes that it timely complied with my previous orders and why it believes that it should not have been defaulted. The respondent shall also provide me with an explanation as to why it did not previously raise the defense that the May 2, 1991, citations may have been "abated" by MSHA's district director. If this is true, the respondent **IS ORDERED** to include in its response copies of any vacated or "abated" citations issued by MSHA. Failure of the respondent to timely respond to this Order on Remand will again subject it to a possible default.

George A. Koutras
Administrative Law Judge

Distribution:

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/ml

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JUN 9 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 92-604-M
	:	A.C. No. 15-00056-05528
v.	:	
	:	Docket No. KENT 92-770-M
ADAMS STONE CORPORATION, Respondent	:	A.C. No. 15-00056-05529
	:	

DECISIONS

Appearances: Joseph B. Luckett, Esq. U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for the Petitioner;
David H. Adams, Esq., Pikeville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for six (6) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely contests and answers and hearings were held in Pikeville, Kentucky. The parties filed posthearing arguments which I have considered in the adjudication of these matters.

Issues

The issues presented in these proceedings include (1) whether or not the respondent violated the cited mandatory safety regulations; (2) whether the violations were significant and substantial (S&S); (3) whether the violations were the result of the respondent's unwarrantable failure to comply with the cited safety regulations; and (4) the civil penalties to be assessed for the violations taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory provisions

1. The Federal Mine Safety and health Act of 1977, 30 U.S.C. § 820(a).

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

3. MSHA's mandatory safety standards found at Title 56, Code of Federal Regulations, sections 56.6305, 56.6313, 56.6320, 56.15005, and 56.18009.

4. Commission Rules, 29 C.F.R., Part 2700.

Discussion

The testimony and evidence adduced in these proceedings establishes that an accident occurred at the respondent's quarry site on January 21, 1992, when Assistant Quarry Superintendent Terry Cantrell was injured and suffered permanently disabling injuries when he fell approximately 25 to 30 feet from the top of a primary crusher to the ground below. Mr. Cantrell was not wearing a safety belt or using a safety line and he was not tied off or otherwise secured against falling. Following this event, and upon receipt of a telephone message reporting the injury, MSHA Inspector Richard L. Jones went to the quarry on January 22, 1992, for the purpose of conducting an investigation and inspection. Mr. Jones issued several notices of violations, beginning with a section 104(d)(1) citation, followed by five section 104(d)(1) orders. The citation and orders are as follows:

Section 104(d)(1) "S&S" Citation No. 3883607, January 22, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.15005, and the cited condition or practice states as follows (Exhibit G-1):

> A lost time injury resulted from the fall of an employee from the top of the primary crusher on 1-21-92. No safety belt or line was being used as Terry Cantrell, assistant superintendent, was attempting to clear the top of the crusher of scrap iron and attached crane rigging in order to remove the top of the crusher. He fell to the ground approximately 30 feet below but not before striking the crusher support iron and pier. One safety belt but no safety line was in the area and was not being used. This is an unwarrantable failure. (See 104(d)(1) Order 3883608).

Section 104(d)(1), "S&S" Order No. 3883608, January 22, 1992, cites an alleged violation of mandatory safety standard

30 C.F.R § 56.15005, and the cited condition or practice states as follows (Exhibit G-2):

> Two employees were observed working on the primary crusher approximately 25 feet above ground level while not tied off with safety belts and lines. There was no work platform from which to work as it had been moved to facilitate the removal of the top of the crusher for repairs. Only one safety belt and no lines were in the area and were not being used. This is an unwarrantable failure (See 104(d)(1) Citation 3883607). Employees were withdrawn from the area and ordered not to resume work until proper safety lines/belts are made available, and an MSHA inspector could observe the corrective measures taken and this order is terminated.

Section 104(d)(1) "S&S" Order No. 3883609, January 22, 1992, as amended, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.18009, and the cited condition or practice states as follows (Exhibit G-3):

> Six employees were working in the area of the primary crusher dismantling it for repair without a person on the mine property designated in charge. Their regular supervisor Terry Cantrell, Assistant Superintendent, had been injured on the job 1-21-92, and had not returned to work. (See 104(d)(1) Citation 3883608, 104(d)(1) Order 3883608). The person with overall authority and responsibility, Stuart Adams, President, was also not on mine property. This is an unwarrantable failure. The employees were withdrawn from the work area and ordered not to resume work until a person was designated by the operator as in charge and an MSHA inspector could observe the corrective action taken and the order terminated.

Section 104(d)(1) "S&S" Citation No. 3883610, as amended, issued on January 23, 1992, cites an alleged violation of 30 C.F.R. § 56.6313, and the cited condition or practice states as follows (Exhibit G-4):

> Two large limestone boulders were observed in the quarry area that had been drilled and charged with explosives (dynamite, detonating cord and primer) the area was neither attended, barricaded and posted nor flagged to prevent unauthorized entry. The condition has existed since day shift 1-16-92, at which time the blaster was laid off (Section 104(d)(1) order 3883611). The operator was aware that this condition existed. This is an unwarrantable failure. Employees were ordered to remain clear of the area a safe distance except those necessary to abate the hazard, guards were

posted at each entry to restrict access until an MSHA inspector can observe corrective action taken and this order terminated.

Section 104(d)(1) non-"S&S" Order No. 3883611, January 23, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.6320, and the cited condition or practice states as follows (Exhibit G-5):

> Two large limestone boulders were observed in the quarry that had been drilled and charged with explosives. These charges were loaded on day shift 1-16-92, thus exceeding the 72 hour time limit between charge and blast times. No prior approval for this condition was granted by MSHA. The operator was aware of this condition. This is an unwarrantable failure. (See 104(d)(1) Order 3883610). Employees were ordered to remain clear of the area except those necessary to abate the hazard, guards posted at each entry to restrict access until an MSHA inspector can observe the corrective action taken and this order terminated.

Section 104(d)(1) "S&S" Order No. 3883612, January 23, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R § 56.6305, and the cited condition or practice states as follows (Exhibit G-6):

> Unused explosive materials (1000 ft. roll of detonating cord) were not moved to a protected area or magazine within a reasonable time after charging boulders in the quarry for secondary blasting. The detonating cord had been left unattended and exposed in the quarry area since day shift 1-16-92, the date the blaster was laid off. The operator was aware of this condition. This is an unwarrantable failure. (see 104(d)(1) orders 3883610 and 3883611). Employees were ordered to remain clear of the area except those necessary to abate the hazard, secure the area, and until an MSHA inspector can observe action taken and this order terminated.

Petitioner's Testimony and Evidence

MSHA Inspector Richard L. Jones testified as to his background and mining experience and he stated that after MSHA received a telephone message reporting an injury at the respondent's quarry on January 21, 1992, he went to the site the next morning to conduct an investigation and inspection. He stated that a crew was dismantling the primary crusher and that assistant superintendent Terry Cantrell was injured when he fell from the top of the crusher approximately 25 to 30 feet to the ground below. Mr. Jones stated that Mr. Cantrell had jumped to the top of the crusher from a catwalk to remove some "tramp

metal" from the crusher and to attach rigging to the crusher top so that it could be removed by a crane. Mr. Jones explained that Mr. Cantrell threw the metal material off the top of the crusher and then fell off. Several crew members who were present informed Mr. Jones that Mr. Cantrell was not using a safety belt or line (Tr. 8-13).

Mr. Jones stated that the crusher was mounted on twenty-two foot high pillars and that the crusher itself was another four or five feet high. He believed that there was a danger of falling from the top of the crusher and he cited a violation of section 56.15005 because Mr. Cantrell was not wearing a safety belt or safety line and was not tied off to prevent his falling off the crusher. Mr. Jones stated that Mr. Cantrell received severe head injuries, lost the use of his left eye, and has not returned to work (Tr. 16).

Mr. Jones stated that he based his "high negligence" finding on the fact that Mr. Cantrell was the assistant superintendent and knew that it was unsafe, knew about the regulatory safety belt or line requirement, and engaged in an unsafe act (Tr. 15).

Mr. Jones stated that he based his "S&S" finding on the fact that employees could be injured if the "work practice" of not using safety belts or lines where there was a danger of falling continued (Tr. 16).

Mr. Jones stated that he issued the section 104(d)(1) unwarrantable failure citation because in his capacity as the assistant mine superintendent, Mr. Cantrell was an agent of management and knew that he was engaging in an unsafe act and that his failure to use a safety belt or line was a violation of the cited regulation and resulted in an injury. Mr. Jones confirmed that the violation was abated and that he terminated the citation after quarry operator Stuart Adams provided new safety belts and instructed his employees in their use (Tr. 17-18).

On cross-examination, Mr. Jones confirmed that he determined that Mr. Cantrell was not wearing a safety belt after speaking with the crew who were dismantling the crusher, including crane operator Carl Stumbo. Mr. Jones stated that Mr. Cantrell was in charge of the work crew, and that after he was injured no one was officially in charge. However, Mr. Jones confirmed that Mr. Stumbo assumed control of the situation after the accident and that he and the rest of the crew were highly trained and experienced personnel who had completed all of their training. He confirmed that apart from the dismantling of the crusher, which was "a special operation", the quarry was not in operation (Tr. 21-28).

Mr. Jones confirmed that he did not speak to Mr. Cantrell, and only assumed that he was aware of the safety belt requirement found in the cited standard. Mr. Jones also confirmed that he did not determine whether or not the respondent had any safety belt and safety line rules in place, and he did not know whether the respondent made it "a practice" not to use safety belts or lines where there was a danger of falling. Mr. Jones stated that his visit to the quarry was his first one and he was not aware that the respondent had ever been cited previously for violations of section 56.15005. He confirmed that he found a safety belt in the area of the crusher during his investigation, but that it was in poor condition and would probably not fit around anyone (Tr. 31-36).

With regard to Order No. 3883608, Mr. Jones stated that while he was conducting his inspection on January 22, 1992, he observed two employees working at the top of the same crusher from which Mr. Cantrell fell the day before. Mr. Jones stated that the two men were not using safety belts or safety lines and that they were "perched" at the top of the crusher with one foot on top of a one-inch bolt which was sticking out of the side of the crusher. The men were using cutting torches to cut metal from the crusher and they were within "arm's length" of each other (Tr. 40-42).

Mr. Jones stated that no one was supervising the work of the two individuals in question, and he believed that there was a danger of falling because they were standing on a bolt at the side of the crusher and were using their cutting torches to cut metal away from the crusher. Since there was no one supervising the work, Mr. Jones instructed the men to come down off the crusher and he informed them about the hazard and determined that they were not wearing safety belts or lines. Mr. Jones asked all of the six men present about the whereabouts of any belts or safety lines, and none could be found in the area (Tr. 43-46).

Mr. Jones explained his gravity finding, and he believed that the violation was significant and substantial because it was highly likely that a serious injury or fatality would result if the employees were to continue to work at the top of the crusher without using safety belts or safety lines (Tr. 47).

Mr. Jones believed that the violation resulted from a high degree of negligence because Mr. Cantrell had been seriously injured the day before and one would expect mine management to take steps to insure against another accident.

Mr. Jones stated that he issued the section 104(d)(1) unwarrantable failure order because he was informed by the scale man that he had spoken with quarry operator Stuart Adams after Mr. Cantrell's accident and that Mr. Adams was aware of the fact that Mr. Cantrell had been injured. Mr. Jones confirmed that he

terminated the order on January 23, 1992, after Mr. Adams brought new safety belts and lines to the quarry and instructed the employees to use them (Tr. 48-49).

With regard to Order No. 3883609, Inspector Jones testified that he issued the violation after determining that Mr. Cantrell had not returned to work and that six men continued to work on the crusher with no one designated to be in charge of the crew. Mr. Jones stated that section 56.18009, requires a mine operator to designate a competent person to be in charge at the mine site in the event of an emergency. Mr. Jones stated that none of the six individuals who were present and working on the crusher informed him that anyone was in charge, and although crane operator Carl Stumbo may have worked as a foreman and been in charge at the site in the past, Mr. Stumbo told him that he was not in charge of the work which was taking place on January 22, 1992. Mr. Jones confirmed that he would not have issued the violation if Mr. Stumbo had told him that he was designated to be in charge (Tr. 57-61).

Mr. Jones stated that he issued the section 104(d)(1) unwarrantable failure order because he concluded that since Mr. Stuart Adams saw fit to designate Mr. Cantrell as the person in charge of the work site on January 21, 1992, before his accident, Mr. Adams should have designated someone to take Mr. Cantrell's place and to be in charge in the event of another emergency situation at the mine after the accident. Mr. Jones confirmed that at the time Mr. Cantrell was injured Mr. Stumbo and the other men did what they could to take care of Mr. Cantrell and that they acted properly to tend to him. Mr. Jones confirmed that he terminated the order on January 23, 1992, after Mr. Adams returned to the site to take charge and designated a chain of command of individuals to be in charge in the event of an emergency (Tr. 62-63).

Mr. Jones stated that following his accident investigation and inspection on January 22, 1992, he met with Mr. Adams and discussed the citation and orders with him. He stated that Mr. Adams informed him that he had other matters to attend to and could not accompany him. Mr. Adams designated Fred Bartley to accompany Mr. Jones during the inspection which he continued on January 23, 1992 (Tr. 74-75).

Mr. Jones stated that he and Mr. Bartley traveled to the quarry first level, and Mr. Jones observed two large limestone boulders which had been drilled and charged for secondary blasting. Mr. Jones stated that he observed detonating cord leading from the drilled holes which were charged with dynamite boosters, and that a new roll of one-thousand feet of denotating cord was nearby within a couple of feet of the charged boulders. Mr. Jones then went to the scale house with Mr. Bartley and

Mr. Jones telephoned Mr. Stuart Adams and asked him to come to the site. Mr. Jones asked Mr. Stumbo to block off all of the entries leading to the charged boulders (Tr. 76-77).

Mr. Jones stated that he spoke with Mr. Adams when he arrived at the site and that Mr. Adams acknowledged that he knew that the boulders were charged and ready to blast and that the roll of cord was laying out in the open area. Mr. Adams informed Mr. Jones that he had laid off the blaster six days earlier and that there was no competent person at the mine to shoot the boulders. Mr. Adams immediately summoned the blaster to the site, and the blaster confirmed that he had left the boulders in a charged condition. He then proceeded to shoot the charged boulders, and Mr. Jones terminated the citation (Tr. 79).

Mr. Jones confirmed that he issued the section 104(d)(1) Order No. 3883610 (Exhibit P-4), because the area where the charged and primed boulders were located was not barricaded, posted, or flagged in any manner to prevent unauthorized entry (Tr. 80). He based his "high negligence" finding on the fact that "I asked Mr. Adams if he knew this condition existed and he said he did" (Tr. 80).

Mr. Jones stated that he based his gravity finding of "reasonably likely" on the following (Tr. 80):

> * * * *Dynamite, detonating cord and primers were not meant to be left out in the exposed weather. Once you put them together, they are ready to shoot. If they are allowed to lay out in the weather for any length of time, they immediately start to deteriorate and become unstable.

Mr. Jones stated that he observed three state reclamation inspectors pass by the area without knowing about the charged boulders. He further stated that large equipment operates in the area, personal vehicles are parked in the area, and if the explosives became unstable "someone could bump into them with a vehicle or loader, sit there and smoke, or just any number of things. There was a lot of exposure there" (Tr. 81). He stated that the boulders were four-to-four and one-half feet in diameter and were located 30 or 40 yards from the main haul road, and 70 or 80 yards from where the crusher operator booth was located (Tr. 81).

On cross-examination, Mr. Jones conceded that it was possible that the charged boulders were " a couple of hundred yards" from the crusher plant (Tr. 86). However, he confirmed that he cited the hazard because of the possibility that the charge could be set off as people were travelling by the area (Tr. 88). Mr. Jones explained that the dynamite did not require a cap and that the detonating cord is cap sensitive and will set

off the booster which in turn detonates the dynamite. Under certain conditions detonating cord can be set off by a one-pound hammer, and if left out in the open "there is no way you can guarantee that it won't be affected by something" (Tr. 90).

In response to further questions concerning Mr. Adams' prior knowledge of the conditions, Mr. Jones stated as follows (Tr. 89):

> A. I asked him did he realize that these boulders were left there, charged; that the area had not been secured, posted, barricaded; and did he know that the thousand-foot roll of detonation cord was laying out there. He said, "Yes. I laid the man off six days ago. I knew it was like that."
>
> Q. Well, now, did he say that he laid him off six days ago knowing that situation existed or that he laid him off six days ago and he just found out that that situation was existing? There is a big difference there.
>
> A. The question I asked him was, "Do you know that these situations exist?" He said yes. "How long has it been that way"" I laid the man off six days ago. Six days, apparently." That is what I was told.

Mr. Jones confirmed that he issued the section 104(d)(1) Order No. 3883611, because the two charged boulders had been left in that condition for more than 72 hours without being blasted (tr. 91). He based his "high negligence" finding on Mr. Adams' admission that he knew the charged boulders had existed past the 72 hour limit (Tr. 92). Mr. Jones stated that he modified his initial "highly likely" gravity finding to "unlikely" because the fact that a time limit had been exceeded does not, in and of itself, constitute a hazard (Tr. 92). He confirmed that he modified his initial "S&S" finding to "non-S&S" after reconsidering the likelihood of any resulting injury (Tr. 93). He further confirmed that he issued the order under section 104(d)(1) because of Mr. Adams' admission that he knew about the condition (Tr. 94).

Mr. Jones explained why he issued two orders even though the cited conditions were the result of the same occurrence. Mr. Jones confirmed that he would not have issued the orders if he knew that Mr. Adams had no knowledge that the conditions had existed since the blaster was laid off a week earlier. However, Mr. Jones stated that "when I talked to him (Adams) for several minutes at the crusher booth, we talked for a long time about that and I was under the perfect understanding that he knew they were like that since he laid the man off six days ago" (Tr. 100).

Mr. Jones stated that if he had misunderstood Mr. Adams, he would have changed his negligence determination (Tr. 100).

Mr. Jones confirmed that he made some notes concerning the two citations, but did not have them with him at the hearing. He further confirmed that he spoke with the blaster when he returned to shoot the boulders to abate the citations, but he could not recall if he asked the blaster if he informed Mr. Adams that he had charged the boulders before leaving the site on the day he was laid off (Tr. 102). Mr. Jones then stated that the blaster stated that "Mr. Adams told him he was being laid of as of right now and that he was not done with his duties and he said to go home" (Tr. 103). Mr. Jones stated that the blaster did not explain why he was laid off, and that he (Jones) found it odd that a blaster would jeopardize his license and livelihood by not finishing his job (Tr. 103).

Inspector Jones confirmed that he issued section 104(d)(1) Order No. 3883612 (Exhibit P-6), because of the exposed and unattended detonating cord (Tr. 104). He described the roll of cord as a Class A high explosive, and he explained that it is required to be stored in a magazine to protect it from the elements. He stated that a premature explosion of the roll of detonating cord "would produce a terrible explosion, scattered debris, rocks. The concussion from it, itself, would be tremendous" (Tr. 107). He stated that the cord could be detonated by something being dropped on it or a piece of equipment running over it. The cord weighed approximately 10 to 15 pounds and someone could have picked it up and put it in a truck to transport it in an unauthorized manner (Tr. 107). He confirmed that he modified his "highly likely" gravity finding to "reasonably likely" (Tr. 108). He issued the section 104(d)(1) order because "When I asked Mr. Adams did he realize that that was setting out there unattended, he said he did. And it's an unwarrantable failure" (Tr. 109). He explained the explosion potential for a roll of detonating cord (Tr. 111-113).

On cross-examination, Mr. Jones stated that although he is not a highly qualified industry explosives expert, "I have worked with explosives hands-on. I know how they operate. I know what they're capable of". He confirmed that he has also learned about explosives during his MSHA training, but is not a licensed blaster. He worked as part of a surface mine powder crew for three years, and at different times worked on a blasting crew using the same explosive material used by the respondent (Tr. 117).

Respondent's Testimony and Evidence

Stuart H. Adams, President, Adams Stone Corporation, testified that he first learned about the two charged boulders which are the subject of citation no. 3883610, and order

nos. 3883611 and 3883612, on the morning of January 23, 1992 when Inspector Jones was at the quarry conducting his inspection. Mr. Adams stated that the licensed blaster who had prepared the boulders for blasting did not inform him what he had done on January 16, 1992, and Mr. Adams emphatically denied that the blaster informed him that day that the boulders had been drilled and charged.

Mr. Adams stated that the blaster asked to be laid off on January 16, 1992, because of the weather so that he could receive unemployment compensation. Mr. Adams stated that the quarry was not in full production at that time and that the only activity taking place was the dismantling of the primary crusher by five or six employees so that the crusher could be shipped to the manufacturer for repairs. Mr. Adams stated that the quarry was down for a winter "seasonal layoff", and other than a large crane being used to dismantle the crusher, there was no production equipment operating in the area where the charged boulders were located. He stated that the boulders were located at an elevated bench area approximately 600 to 800 feet from the crusher area.

Mr. Adams did not deny that the cited roll of detonating cord was not protected or stored in a magazine, but he indicated that the blaster had not completed the job by fastening the cord to the detonating devices, and that this would be necessary before the blast could be detonated. He confirmed that after the cited boulder conditions were called to his attention by Inspector Jones on January 23, 1992, he called the blaster at his home and he came to the quarry within one hour and detonated the charge, and the citation and orders were then terminated by Mr. Jones.

Mr. Adams confirmed that he told Inspector Jones that he was aware of the cited conditions and that he did so in response to the inspector's question as to whether or not he knew that the boulders had been charged. However, Mr. Adams stated that when be acknowledged that he was aware of this, his response was in the context of his knowledge as of January 23, 1992, when the inspector brought the conditions to his attention. Mr. Adams stated that he was out of town when the accident involving Mr. Cantrell occurred, and he denied that he ever told Inspector Jones that he was aware of the charged boulders on January 16, 1992, when the blaster was laid off and left the quarry. Mr. Adams stated that he was shocked to learn that the blaster had left the site after charging the boulders, and without notifying him what he had done, and Mr. Adams believed that the blaster should probably have been charged with the violations.

On cross-examination, Mr. Adams reiterated that he laid off the blaster on January 16, 1992, because of the weather and at the blaster's request. He confirmed that one of his employees,

either Fred Bartley, Tom Roberts, or Carl Stumbo, first informed him about the two charged boulders on January 23, 1992.

With regard to the citation concerning the absence of a designated person in charge of the quarry on January 22, 1992, the day following the accident, Mr. Adams stated that Mr. Stumbo has served as one of his superintendents for many years, has installed and dismantled a number of crushers over the years, and had "worked the quarry" for many months. Mr. Adams stated that based on Mr. Stumbo's many years of experience, he designated him to operate the crane for the "heavy lift" required to dismantle the crusher. Mr. Adams stated Mr. Stumbo was in charge of the crew on January 23, 1992, but was reluctant to admit this to inspector Jones. Mr. Adams confirmed that Mr. Stumbo was an experienced and trained superintendent.

In response to further questions, Mr. Adams conceded that he designated Mr. Stumbo as the competent person in charge on January 22, or 23, 1992, after he (Adams) went to the quarry site. Mr. Adams confirmed that except for the crusher dismantling work, everything else at the quarry was shut down, and Mr. Adams believed that Mr. Stumbo was in charge. Mr. Adams acknowledged that Mr. Stumbo may not have informed Inspector Jones that he was in charge, and that Mr. Jones may not have had any reason to believe that Mr. Stumbo was in fact in charge.

With regard to the failure of Mr. Cantrell to use a safety belt or line at the time he fell, Mr. Adams acknowledged that this was the case. However, Mr. Adams stated that one or two safety belts were available and stored in the equipment storage room near the crusher area, and that belts were also stored in a storage shop associated with the Adams Coal operation, which was a separate corporation operating at the quarry site. Mr. Adams stated that Mr. Cantrell knew how to use safety belts and lines, and that he had observed him wearing them in the past during his 30 years of employment at the quarry.

Findings and Conclusions

Fact of Violations

Citation No. 3883607

In this instance, the respondent was charged with a violation of mandatory safety 30 C.F.R. § 56.15005, after the inspector determined that Mr. Cantrell was not wearing a safety belt or line when he fell from the top of the crusher while performing work to dismantle the crusher so that it could be shipped for repairs. The cited standard requires that safety belts and lines be worn when persons work where there is a danger of falling. The unrebutted evidence in this case establishes that Mr. Cantrell was working and standing on the top of the

crusher approximately 25 to 30 feet above the ground. He had jumped to the top of the crusher from an adjacent catwalk and he was not tied off with a safety line, nor was he wearing a safety belt. While in the process of removing some material from the top of the crusher and throwing it to the ground below, he fell off and sustained serious injuries.

The respondent does not dispute the fact that Mr. Cantrell was not wearing a safety belt and that he was not tied off while working at the top of the crusher. I conclude and find that Mr. Cantrell, working 25 to 30 feet above ground, at the top of a crusher that was in the process of being dismantled, was in a position or at a location where there was a danger of falling, and that he was required to wear a safety belt or line while performing the work in question. Since it is clear that he was not wearing a safety belt or line, a violation of section 56.15005, has been established by a clear preponderance of the evidence, and the violation IS AFFIRMED.

Order No. 3883608

In this instance the respondent was charged with another violation of the safety belt and line requirements found in section 56.15005, after the inspector observed two employees working on top of the crusher the day following the accident involving Mr. Cantrell. The credible and unrebutted evidence establishes that the two employees were working approximately 25 feet above ground level while standing with one foot on bolts sticking out of the side of the crusher while they were cutting metal with torches. They were not wearing safety belts and lines and were not otherwise tied off to prevent them from falling to the ground below. I conclude and find that the two cited employees were working at a location where there was a danger of falling, and that section 56.15005, required them to wear safety belts or lines while performing work at that location. Since they were not, I further conclude and find that a violation of section 56.15005, has been established by a clear preponderance of the evidence, and the violation IS AFFIRMED.

Order No. 3883609

The respondent here is charged with a violation of mandatory safety standard 30 C.F.R. § 56.18009, which provides as follows: "When persons are working at the mine, a competent person designed by the mine operator shall be in attendance to take charge in case of an emergency". The inspector issued the violation after returning to the work site the day after the accident and observing that six men were continuing the work of dismantling the crusher. None of the working employees informed the inspector that anyone had been designated by management to be in charge. Although the inspector determined that the crane operator, Carl Stumbo, may have been a foreman in charge at the

site in the past, Mr. Stumbo informed him that he was not in charge on January 22, 1992.

The respondent's defense is that Mr. Stumbo was a longtime employee who was trained in safety and repair matters, and that on the day in question, the inspector admitted that Mr. Stumbo "seemed to be in charge, or at least seemed to know what was going on". The respondent's president, Stuart Adams, testified that Mr. Stumbo had served as one of his superintendents in the past and had installed and dismantled a number of crushers. Mr. Adams initially testified that he designated Mr. Stumbo to operate the crane on the day in question, and he claimed that Mr. Stumbo was in charge of the crew. Mr. Adams later conceded that he designated Mr. Stumbo as the competent person in charge only after he went to the quarry site a day or two later. He also conceded that Mr. Stumbo did not step forward to identify himself to the inspector as the designated person in charge, and when asked what he expected of the inspector under those circumstances, Mr. Adams responded "You're absolutely right" (Tr. 138).

The respondent's defense IS REJECTED. I find no credible evidence to support any reasonable conclusion that Mr. Stumbo was in fact designated to be in charge in case of an emergency on the day the citation was issued. Mr. Stumbo was not called to testify, and I find Mr. Adams' testimony to be rather contradictory and equivocal to support any suggestion that Mr. Stumbo was in fact the designated person pursuant to section 57.18009. If Mr. Stumbo was the designated person in charge, I find it rather strange that neither he or his crew was aware it. I conclude and find that the petitioner has established a violation of section 56.18009, by a preponderance of the evidence, and the violation IS AFFIRMED.

Citation No. 3883610, and Order Nos. 3883611 and 3883612

In the course of the hearing, and in its posthearing brief, the respondent took the position that the three cited violations concerning the charged boulders were not justified because they concern a single condition, namely, the two boulders which had been drilled and charged in preparation for blasting. The respondent questions the legality and propriety of issuing three separate violations and orders for one single condition. However, this issue has been raised in the past, and the defense advance by the respondent here has been rejected by the Commission. See: El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981), and the recent decision in Cyprus Tonopah Mining Corp., 15 FMSHRC 367,378 (March 1993), where the Commission stated in relevant part that "although Cyprus' violations may have emanated from the same events, the citations are not duplicative because the two standards impose separate and

distinct duties upon an operator. Accordingly, we affirm the judge's conclusion that the citations are not duplicative".

After careful consideration of the respondent arguments, I conclude and find that the issuance of the three separate violations by the inspector was justified and warranted and did not constitute an unreasonable or arbitrary enforcement action. The credible and unrebutted testimony of the inspector establishes that each of the cited conditions in question constituted separate and distinct conditions which were in violation of the three cited mandatory safety standards. Indeed, the respondent conceded that the cited conditions existed (Tr. 6-7, 104-109), and its defense is based on certain mitigating arguments in connection with the amount of the proposed civil penalty assessments.

With regard to Citation No. 3883610, mandatory safety regulation section 56.6313, requires that all areas in which loading is suspended, or loaded holes are awaiting firing, shall be attended, barricaded and posted, or flagged against unauthorized entry. The credible evidence establishes that at the time the inspector observed the charged boulders, they were loaded and awaiting firing, and the blaster had left the property. Thus, it seems clear that the loading and blasting of the charged holes had been suspended and were awaiting firing, and the inspector found no evidence that the affected area was attended, barricaded and posted, or flagged against unauthorized entry. Under the circumstances, I conclude and find that the petitioner has established a violation of section 56.6313, by a preponderance of the evidence, and IT IS AFFIRMED.

With regard to Order No. 3883611, section 56.6320, of MSHA's mandatory standards provides that all charged holes are to be blasted as soon as possible after charging has been completed. However, the standard further provides that "In no case shall the time elapsing between the completion of charging to the time of blasting exceed 72 hours unless prior approval has been obtained from MSHA". The credible and unrebutted evidence in this case establishes that more than 72 hours passed from the time the boulders were charged on or before January 16, 1992, until they were blasted on January 23, 1992, and MSHA had not granted permission for an extension of time. Under the circumstances, I conclude and find that the petitioner has established a violation of section 56.6320, by a preponderance of the evidence, and the violation IS AFFIRMED.

With regard to Order No. 3883612, section 56.6305, of MSHA's mandatory standards requires that all unused explosive materials be moved to a protected location as soon as practical after loading operations are completed. The credible evidence in this case establishes that the 1,000 foot roll of detonating cord was an explosive material which had not been moved to a protected

location or stored in a magazine, and the respondent presented no credible evidence that it was not practical to move the roll of exposed detonating cord to a protected area before it was found by the inspector. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the violation IS AFFIRMED.

Significant and Substantial Violations

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

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

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Company, 6 FMSHRC 1573, 1574 (July 1984); U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

Citation No. 3883607 and Order No. 3883608

The evidence reflects that Mr. Cantrell fell from the top of the crusher while in the process of throwing some material to the ground below. The two other employees who were observed working at the same location the next day were in the process of cutting metal with torches while in close proximity to each other and with one foot on bolts which protruded from the side of the crusher. They too were not wearing safety belts or lines, and they were not otherwise secured against falling approximately 25 to 30 feet to the ground below. Under the circumstances, I believe that one can reasonably conclude that these individuals were exposed to a falling hazard, and that in the event of a fall they would reasonably likely suffer serious or fatal injuries. Indeed, Mr. Cantrell fell and suffered serious and disabling injuries, and in the context of continuing mining operations, I conclude and find that the two employees who were busy working with cutting torches in their hands while "perched" atop the crusher in rather precarious positions would be exposed to a discreet falling hazard, and if they were to fall, it would be reasonably likely that they would suffer serious or fatal injuries. Under all of these circumstances, I conclude and find that the inspector's "S&S" findings with respect to both of these violations were justified, and they ARE AFFIRMED.

Order No. 3883609

Inspector Jones concluded that the failure of the respondent to designate someone to be in charge of the work crew in case of an emergency was a significant and substantial violation because "the mining industry has been proven to be a dangerous industry. Injuries happen all the time. . . . it has been proven to me that in the event of an emergency, somebody needs to be in charge" (Tr. 62). On the facts of this case, it seems obvious to me that Mr. Jones was influenced by the fact that after Mr. Cantrell was injured, the crew continued working on the very same crusher from which Mr. Cantrell fell without anyone being officially designated to be in charge in the event of any further emergency situation similar to the one involving Mr. Cantrell. Mr. Jones also believed that someone needed to be designated in charge so

that proper decisions could be made, and proper precautions taken in time of an emergency (Tr. 60).

In this case, Mr. Cantrell was the designated person in charge prior to his injury, but after he was injured work continued without anyone being officially designated to be in charge in case of any further emergency. Although crane operator Stumbo assumed control of the situation when Mr. Cantrell was injured, and properly attended to him while awaiting assistance, the failure to designate someone to be in charge when the dismantling work continued in the absence of Mr. Cantrell exposed the employees who continued with the work to the hazard of not having anyone immediately available to take over in the event of an emergency. If someone had been specifically designated to be in charge as the work on dismantling the platform continued, and was held accountable, it is altogether possible that the two employees observed working on top of the crusher without being secured against falling would not have been allowed to continue working under those hazardous conditions, and they presumably would have been instructed by the person in charge to wear safety belts and lines. Under the circumstances, I conclude and find that the inspector's "S&S" finding was justified, and IT IS AFFIRMED.

Citation No. 3883610 and Order No. 3883612

Inspector Jones' credible and unrebutted testimony clearly establishes the hazards associated with leaving charged explosive devices such as dynamite, detonating cord, and primer exposed and unattended to (Tr. 84). While it is true that the mine was not in operation when the inspector found the charged materials, and that the boulders which were primed for blasting were in a remote area, the inspector's unrebutted testimony reflects that equipment and mine personnel, as well as other individuals who had business at the site, would be exposed to hazards resulting from a premature detonation of the charged boulders. The inspector observed three state inspectors pass by the area, and given the fact that there were no barricades to prevent anyone from venturing near the boulders, and the area was not flagged to alert persons of the danger, I believe that in the event of a premature detonation, it would be reasonably likely that anyone in the blast area would suffer injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the inspector's "S&S" findings with respect to both of these citations were warranted and justified, and they ARE AFFIRMED.

Unwarrantable Failure Violation

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided

under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Citation No. 3883607

Inspector Jones testified credibly that he based his unwarrantable failure finding on the fact that Mr. Cantrell was serving as the assistant mine superintendent at the time he was injured because of his failure to wear a safety belt and line. As an agent of management, Mr. Jones believed that Mr. Cantrell knew that what he was doing was an unsafe act, and that he suffered serious injuries because of his own actions (Tr. 17). Mr. Jones later conceded that he did not speak with Mr. Cantrell after he was injured and he simply assumed that as an experienced and trained superintendent, Mr. Cantrell would be expected to know that a safety belt and line were required to be worn and that his working on top of the crusher without wearing a belt and line was an unsafe act (Tr. 31-34).

Mr. Adams did not dispute the fact that Mr. Cantrell was not wearing a safety belt and line when he fell from the crusher. Mr. Adams asserted that belts were available and were stored nearby in two storage rooms, and he produced some new belts and lines after the violation was issued. Further, Mr. Adams believed that Mr. Cantrell knew how to use a belt because he had observed him doing so during his many years of working at the site. Inspector Jones confirmed that the respondent had not previously been cited for any safety belt violations, and he conceded that he did not determine whether the respondent had any established safety rules in place, or that the respondent made it a practice to allow workers to work on high places without wearing a safety belt (Tr. 37-38). Although these factors may be considered by me in mitigating the civil penalty assessment for the violation in question, they may not serve as an absolute defense warranting a dismissal of the violation.

The evidence here establishes that Mr. Cantrell was an experienced and trained management member who had worked for the respondent for thirty years and served in a responsible superintendent's position. It is difficult for me to comprehend what may have prompted Mr. Cantrell to place himself in such a precarious position on top of the crusher without securing himself from falling. While it is most unfortunate that Mr. Cantrell's actions resulted in his serious and disabling injuries, as a member of management, he must nevertheless be held responsible and accountable for his reckless and inexcusable conduct. I conclude and find that Mr. Cantrell's failure to comply with the requirements of the cited standard by failing to wear a safety belt or line while working on top of the crusher where there was a danger of falling constituted sufficient "aggravated conduct" to support the inspector's unwarrantable failure finding. Accordingly, the inspector's finding and the contested citation ARE AFFIRMED.

Order No. 3883608

Inspector Jones testified that he based his section 104(d)(1) unwarrantable failure order on the fact that the individual tending the scale house told him that he had spoken to Mr. Stuart Adams a couple of times about Mr. Cantrell's accident and informed him about what had happened to Mr. Cantrell (Tr. 46). Mr. Jones believed that Mr. Adams was aware of the fact that Mr. Cantrell had fallen off the crusher the day before and that he was aware of the fact that he was not wearing a safety belt. Since the work of dismantling the crusher continued after Mr. Cantrell's accident, Inspector Jones believed that Mr. Adams "could understand the possibility of a man getting injured" if he were not wearing a safety belt or line when the work continued (Tr. 47-48).

The evidence reflects that the respondent had erected a work platform around the crusher, but it was dismantled to facilitate the final removal of the structure. The inspector confirmed that he found one safety belt in the work area, but he did not believe it was usable. He also testified that he looked around the immediate work area and found no other safety belts or lines, and asked the employees about them (Tr. 44). Mr. Adams claimed that safety belts were stored in a storage room near the crusher area, and that additional belts were stored in another storage shop associated with a coal mining operation carried out by the respondent at the site.

I conclude and find that the inspector's unwarrantable failure finding was justified. While it may be true that safety belts and lines were stored in storage rooms, the fact remains that the two cited employees were not wearing them at the time they were observed working at a precarious position on top of the very same crusher from which Mr. Cantrell fell and was seriously injured because he was not wearing a safety belt or line. As the responsible mine operator, Mr. Adams had an obligation and duty to insure that the men who continued to work on the crusher after Mr. Cantrell was injured were wearing safety belts and lines to preclude another serious accident. I conclude and find that Mr. Adams' failure to do so constituted "aggravated conduct" and clearly supports the inspector's order. Accordingly, the inspector's finding and the contested order ARE AFFIRMED.

Order No. 3883609

Inspector Jones testified that since quarry operator Stuart Adams initially found it necessary to designate Mr. Cantrell as the person in charge in the event of an emergency, he should have designated someone to replace Mr. Cantrell as the person in charge after Mr. Cantrell was injured. Since he did not do so, Mr. Jones believed that the unwarrantable failure order was justified (Tr. 62).

The credible and unrebutted testimony of Mr. Adams reflects that he was out of town on the day that Mr. Cantrell was injured, that the quarry was not in a normal production mode, and the only work taking place was the dismantling of the crusher. Mr. Adams stated that he designated Carl Stumbo, an experienced and trained crane operator, who had previously served as one of his superintendents, to operate the crane used to dismantle the crusher. Conceding that he did not formally designate or advertise Mr. Stumbo as the person in charge, Mr. Adams testified credibly that he believed that Mr. Stumbo was in charge, but that Mr. Stumbo was reluctant to admit this to the inspector.

I take note of the fact that section 56.18009, requires the designation of "a competent person" to be in charge in the event of an emergency. A "competent person" is defined in section 56.2, as a person "having abilities and experience that fully qualify him to perform the duty to which he is assigned". I find no evidence to suggest that Mr. Stumbo was not qualified to perform his crane duties, and although I have concluded that Mr. Adams did not specifically designate Mr. Stumbo to be in charge in case of an emergency in violation of section 56.18009, I find his explanation in mitigation of the violation to be plausible and believable.

After careful consideration of all of the evidence presented in support of the disputed order, I conclude and find that the inspector's asserted justification for his unwarrantable failure finding does not support a finding of aggravated conduct on the part of the respondent. In my view, the inspector's testimony reflects the application of a "knew or should have known" standard to support a moderately high degree of negligence, rather than the kind of "aggravated conduct" reflected by the Commission's relevant decisions. Under the circumstances, the inspector's unwarrantable failure finding IS VACATED, and the section 104(d)(1) Order IS MODIFIED to a section 104(a) citation with "S&S" findings.

Citation No. 3883610 and Order Nos. 38833611 and 3883612

The evidence reflects that the blaster who prepared the boulders for blasting was laid off on January 16, 1992, and that when he left the mine site that day the boulders had not been shot, and they remained in that condition until January 23, 1992, when Mr. Jones observed them during his inspection. Mr. Jones testified that Mr. Adams admitted that he knew that the cited conditions existed, and because of these purported admissions, Mr. Jones concluded that the violations were unwarrantable failure violations pursuant to section 104(d)(1) of the Act (Tr. 80, 89, 109).

Mr. Adams testified that he was informed of the existence of the two charged boulders on the morning of January 23, 1992, by

one of his employees while Mr. Jones was at the quarry, and that he immediately called the blaster at his home and instructed him to come to the site and detonate the charged boulders. Mr. Adams confirmed that the blaster left the site on January 16, 1992, when he was laid off at his own request, but Mr. Adams denied that the blaster informed him that day that the boulders had been drilled and charged. Mr. Adams further denied that he admitted to Mr. Jones that he had been aware of the conditions since January 16, 1992. Mr. Adams acknowledged that he answered in the affirmative when Mr. Jones asked him if he were aware of the cited conditions, but he explained that this response was made in the context of his knowledge as of the day of the inspection on January 23, 1992, after he learned of the cited conditions from one of his employees.

The critical issue in support of the unwarrantable failure findings by Inspector Jones is whether or not Mr. Adams had known since January 16, 1992, that the boulders had been drilled and charged and left in that condition by the blaster at the time he was laid off at his own request, or whether Mr. Adams first learned of the conditions on January 23, 1992, as he claims.

The burden of proof with respect to the alleged unwarrantable failure violations lies with the petitioner. Although the citation and orders include a statement that "the operator was aware that this condition existed" as part of the description of the cited conditions, I find no credible evidence to support a conclusion that Mr. Adams knew that the cited conditions existed as of January 16, 1992, when the blaster was laid off. Nor do I find any credible evidence that Mr. Adams laid the blaster off knowing full well that the boulders had been drilled, loaded, and made ready to be blasted, and that he simply allowed them to remain in that condition indefinitely.

The blaster was not called to testify, and there is no indication that he was deposed, or that he was unavailable for the hearing or beyond the reach of a subpoena. Inspector Jones confirmed that he spoke with the balster when he returned to the site on January 23, 1992, in response to Mr. Adams' request, but Mr. Jones could not remember whether he asked the blaster if he had informed Mr. Adams on January 16, 1992, that he had drilled and charged the boulders before he left the quarry site that day. Further, although Mr. Jones confirmed that he made some inspection notes concerning the violations, he did not have them with him during his hearing testimony, and none have been produced.

The respondent's compliance history does not reflect any prior blasting citations, nor does it reflect any prior unwarrantable failure violations. Further, Mr. Adams' testimony that the blaster himself asked to be laid off is not rebutted, and it stands in contrast to the inspector's undocumented

testimony that the blaster told him that Mr. Adams came to the site on January 16, 1992, and told him that he was laying him off "as of right now", and that the blaster simply walked away. When asked whether or not the blaster gave any explanation for Mr. Adams' rather abrupt and unannounced layoff, the inspector stated that the blaster told him that Mr. Adams "did what he pleased" and that his decisions were "final and instant" (Tr. 103).

Having viewed Mr. Adams in the course of the hearing, he impressed me as being rather independent and not too enchanted with the inspector, but he did not impress me as the kind of individual who would deliberately leave himself open to severe sanctions pursuant to section 110(c) of the Act, or to possible criminal action, by knowingly allowing a blaster to walk away from his quarry leaving behind two charged boulders which had been readied for blasting. Mr. Adams also impressed me as a credible individual, and I find his testimony that he first learned about the boulders on January 23, 1992, on the day of the inspection, rather than on January 16, 1992, as suggested by the inspector, to be believable and plausible. I take note of the fact that the boulders were located in a remote area of the quarry, and based on the testimony and evidence adduced in this case it does not appear that Mr. Adams was continuously at the quarry site for any extended periods of time. Under the circumstances, and in the absence of any evidence of aggravated conduct on the part of the respondent, I conclude and find that the petitioner has failed to make a case in support of the unwarrantable failure findings by the inspector. According, his findings in this regard ARE VACATED, and the contested section 104(d)(1), citation and orders ARE MODIFIED to section 104(a) citations.

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

Inspector Jones described the respondent's mining operation as a multi-bench limestone operation which crushes limestone rock in the primary crusher. After the crushing process, the limestone is transported to a conveyor belt to a screen where it is sized in different categories and stockpiled for sale to customers. Mr. Jones stated that the quarry consists of approximately twelve acres. At the time of his inspection there were approximately six employees dismantling the primary crusher so that it could be repaired, six-to-eight employees were working in the shop, and one employee was at the scale house where the stockpiled crushed limestone would be loaded on the customers trucks. He also indicated that at one time the respondent had as many as fifty employees working at the quarry property.

The information provided on the face of MSHA Forms 1000-179, Proposed Assessment, which are part of the pleadings, reflect

that the respondent produced 86,640, tons of crushed limestone annually (Exhibits G-7 and G-8).

Based on all of the available evidence and testimony, I conclude and find that the respondent is a small mine operator, and absent any evidence to the contrary, I further conclude and find that payment of the civil penalty assessments which I have made for the citations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

An MSHA computer print-out reflects that the respondent paid civil penalty assessments of $870, for eighteen (18) section 104(a) citations during the period January 22, 1990, through January 21, 1992. Twelve (12) of the citations are "single penalty" non-"S&S" citations, and there are no prior violations for any of the mandatory safety standards cited in these proceedings. Under all of these circumstances, I cannot conclude that the respondent's compliance record warrants any additional increases in the civil penalty assessments that I have made for the violations which have been affirmed.

Good Faith Compliance

The evidence adduced in these proceedings reflects that all of the violations were timely abated by the respondent in good faith.

Gravity

With the exception of non-"S&S" Citation No. 3883611, and based on my findings and conclusions affirming the inspector's "S&S" findings with respect to the remaining violations, I conclude and find that those violations were all serious.

Negligence

I conclude and find that the two unwarrantable failure violations (Citation No. 3883607 and No. 3883608), were the result of a high degree of negligence. Taking into account the fact that the Act imposes a high degree of care on a mine operator to insure compliance with all mandatory safety standards, I conclude and find that the remaining violations all resulted from the respondent's failure to exercise reasonable care amounting to a moderately high degree of negligence.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the

following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

Citation/Order No.	Date	30 C.F.R. Section	Assessment
3883607	1/22/92	56.15005	$1,600
3883608	1/22/92	56.15005	$1,000
3883609	1/22/92	56.18009	$225
3883610	1/23/92	56.6313	$275
3883611	1/23/92	56.6320	$75
3882612	1/23/92	56.6305	$250

ORDER

The respondent IS ORDERED to pay the civil penalty assessments enumerated above within thirty (30) days of the date of these decisions and order. Payment is to be made to the petitioner (MSHA), and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 9 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-429
Petitioner	:	A.C. No. 15-16685-03510
v.	:	
	:	Docket No. KENT 90-430
RAMBLIN COAL COMPANY, INC.,	:	A.C. No. 15-16685-03511
Respondent	:	
	:	No. 8 Mine

ORDER OF DISMISSAL

The Secretary has moved to dismiss the part of these cases remanded by Order of February 2, 1993, on the ground that the remanded citations are now moot. The civil penalties were recalculated, not contested by the operator, and therefore became a final order of the Commission under 29 C.F.R. § 2700.27.

The decision of June 22, 1992, disposing of the citations not remanded to the Secretary stands.

All citations thus being disposed of, it is ORDERED that the motion to dismiss is GRANTED and these cases are DISMISSED.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUN 15 1993

WYOMING FUEL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 90-112-R
	:	Order No. 2930784; 2/13/90
v.	:	Docket No. WEST 90-113-R
	:	Citation No. 2930785; 2/13/90
	:	Docket No. WEST 90-114-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 3241331; 2/15/90
	:	Docket No. WEST 90-115-R
	:	Citation No. 3241332; 2/16/90
	:	Docket No. WEST 90-116-R
	:	Citation No. 3241333; 2/16/90
	:	Golden Eagle Mine
	:	MSHA Mine I.D. No. 05-02820
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 90-290
	:	A.C. No. 05-02820-03569
v.	:	Golden Eagle
WYOMING FUEL COMPANY, Respondent	:	

DECISION AFTER REMAND

Before: Judge Morris

The Commission remanded the above contest cases to the Judge for reconsideration consistent with the principles set forth in the order of remand, 14 FMSHRC 1282 (1992).

DID WFC SUFFER LEGALLY RECOGNIZABLE PREJUDICE?

A threshold matter is whether WFC would suffer legally recognizable prejudice if Citations Nos. 2930785 and 3241332 were modified as proposed by the Secretary. If the Judge finds prejudice the citations shall remain unmodified and his decision vacating them, on the basis of the inapplicability of § 75.329-1, shall stand. If the Judge does not find legally recognizable prejudice the citations shall be modified to allege violations of

§ 75.316 and the Judge shall conduct such further proceedings as he deems necessary, 14 FMSHRC at 1290.

In a post-remand order, WFC was directed to state facts in detail as to the manner in which it suffered legally recognizable prejudice. (Order, September 4, 1992). WFC's statement filed September 18, 1992, is attached to this decision. The Secretary responded to WFC's statement.

RULING ON LEGALLY RECOGNIZABLE PREJUDICE

On October 16, 1992, the Judge denied the claim of legally recognizable prejudice and held, in part, as follows:

> The original Citations (Nos. 2930785 and 3241332) are set forth, respectively, at 12 FMSHRC 2005 and 12 FMSHRC 2007-2008. The proposed amendments were received in evidence as Exhibits S-1 and S-2. The exhibits were ruled inadmissible at the commencement of the hearing. (Tr. 9-20).

DISCUSSION

The parties agree on the applicable law:

> The grant or denial of a motion for leave to amend is within the sound discretion of the Judge and will be reversed only for an abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S. Ct. 795, 28 L.Ed.2d 77 (1971); Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Rule 15(a), Fed. R. Civ. P., mandates that leave to amend "shall be freely given when justice so required."
>
> In Foman v. Davis, supra, the Supreme Court set forth the guidelines governing motions to amend under Rule 15(a). They are as follows:
>
> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on

the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be freely given. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 371 U.S. at 182, 83 S.Ct. at 230.

See also 3 J. Moore, R. Freer, Moore's Federal Practice, par. 15.08(2), 15-47 to 15-49 (2d Ed. 1991); Cyprus Empire, 12 FMSHRC 911, 916 (May 1990).

In Forman v. Davis the Supreme Court recited several factors to be considered in the denial of an amendment. The citations here only involve the test of whether there was undue prejudice to the opposing party by virtue of allowance of the amendment.

The hearing in these cases commenced on March 13, 1990. On March 9, 1990, Contestant was served, by mail, with the Secretary's modification of the above citations. The modifications sought to change the citations to allege violations of 30 C.F.R. § 75.316 instead of 30 C.F.R. § 75.329-1(a).

FURTHER DISCUSSION

WFC's post-remand statement failed to set forth facts that are persuasive that the operator incurred legally recognizable prejudice if the citations were modified. WFC's statement generally contains conclusions of law.

The mandate of Rule 15(a) is that leave to amend "shall be freely given when justice so requires." Conversely, facts to show recognizable prejudice are required if an amendment is to be denied.

Illustrative of this point is the Third Circuit decision Cornell and Company, Inc., v. Occupational Safety and Health Review Commission, 573 F.2d 820 (1978). In Cornell, nine days before the ALJ hearing and more than four months after the inspection, the Secretary moved to amend the citation and complaint by alleging violations of different regulations. The hearing proceeded as scheduled.

At the conclusion of the hearing on the merits, Cornell was granted additional time to gather evidence but it concluded that the additional time would not remedy the prejudice it suffered in preparing its defense. Therefore it presented no additional evidence.

Specifically, Cornell's factual claim of prejudice was that the testimony of the company's workers was necessary as such testimony related to the stability of the beams where they were working at the precise time of the inspection. The danger of using the belts in accordance with the safety belt standard at that exact time was vital to Cornell's defense.

The Court regarded the workers' testimony as indispensable. The record showed that the modification of the final amendment, more than four months after the inspection, made it impossible for Cornell to locate its witnesses. The workers were transients hired from union halls and Cornell had long since lost contact with them.

On this basis, the Court concluded that: "[t]his inability to secure necessary witnesses caused solely by the delay of the Secretary in seeking the amendment, vitiated Cornell's ability to present its sole affirmative defense." 573 F.2d at 824.

In the case at bar, WFC failed to offer any facts to support its claim of recognizable prejudice, nor was there a claim of prejudice made at the hearing. (Tr. 3-27).

WFC claims the Secretary's amendment modified the facts as well as the regulation

allegedly violated. I disagree. No change of facts occurred. The Secretary alleged that § 75.316 was violated, rather than § 75.329-1(a). (Compare the citations and Exhibits S-1 and S-2).

In support of its position, WFC also relied on Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 971 (6th Cir. 1973) and Conray Datsun, Ltd. v. Nissan Motor Corporation, 506 F. Supp. 1051, 1054 (N.D. I11. 1980).

The cited cases are not persuasive since the Secretary here did not change her theory of the case but only the regulation allegedly violated.

WFC further contends it is further prejudiced because the mine has been sold and, since considerable time has lapsed, any of its witnesses are no longer available. This point fails since WFC has failed to assert any facts of legally recognizable prejudice that such witnesses might reveal if they testified.

WFC further asserts it would be necessary to engage in significant new preparation based on the modifications. This is not the case since, under either standard, the facts appear to be the same. The primary issues involved the validity of the 107(a) orders and whether WFC was required to use seals or Kennedy stoppings.

WFC can hardly claim surprise since the ventilation plan was received in evidence at the hearing. (See Exhibit S-8). Mr. Mitchell, WFC's witness, was also an expert in ventilation.

I agree with WFC there are a "host of potential issues" in a ventilation plan case that would not be involved in a violation of § 75.329. However, the operator fails to point out any of the "hosts" that were not addressed at the hearing or not prepared to be addressed at the hearing.

> In sum, WFC's argument that it was prejudiced is general in nature and gives no specific instance in which it may incur legally recognizable prejudice by having to defend the citations as a violation of the ventilation plan.
>
> I conclude there was no legally recognizable prejudice caused by the proposed modifications.
>
> The parties should be given the opportunity to offer additional evidence in view of the Judge's ruling modifying Citation Nos. 2930785 and 3241332 to an alleged violation of § 75.316.

The Judge's ruling concluded with an order granting the Secretary's motion to modify Citation Nos. 2930785 and 3241332 to allege violations of 30 C.F.R. § 75.316. [1]

Further, the parties were granted 15 days to state whether they desired to present any further evidence to the citations, as modified. Both parties declined to present any further evidence.

CONSOLIDATION WITH WEST 90-290

Subsequently the Secretary moved to consolidate WEST 90-290 (Penalty Proceeding) with WEST 90-112 et al. WFC had no objection and all pending cases were consolidated on November 5, 1992.

Further, post remand briefs were filed by the parties.

VALIDITY OF IMMINENT DANGER ORDERS

In its order of remand the Commission noted that Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated...." 30 U.S.C. § 802(j). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989)("R&P"), the Commission reviewed the precedent analyzing this definition and noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." 11 FMSHRC at 2163 (citations omitted). It

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[1] § 75.316 is entitled "Ventilation system and methane and dust control plan."

noted further that the courts have held 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." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974).

In Utah Power & Light Co., 13 FMSHRC 1617, 1621 (October 1991), the Commission held that there must be some degree of imminence to support a section 107(a) order and noted that the word "imminent" is defined as "ready to take place: near at hand: impending...: hanging threateningly over one's head: menacingly near." 13 FMSHRC at 1621 (citation omitted). The Commission determined that the legislative history of the imminent danger provision supported a conclusion that "the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." Id. Finally, the Commission stated that the inspector must determine whether an imminent danger exists without considering the "percentage of probability that an accident will happen." Id., quoting S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978)("Mine Act Legis. Hist.").

In both R&P and UP&L, the Commission concluded that an inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger. R&P, 11 FMSHRC at 2164; UP&L, 13 FMSHRC at 1627. As the U.S. Court of Appeals for the Seventh Circuit recognized:

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

Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975)(emphasis added); compare Gland Creek Coal Company Va 91-47-R (March 3, 1993).

In applying the imminent danger test, the Commission noted that the appropriate focus is whether the inspector abused his discretion when he issued the imminent danger order.

It is appropriate to consider separately the areas of the mine that were involved in these cases.

Order No. 2930784 alleged an imminent danger existed. The order further closed the Golden Eagle Mine and ordered all personnel underground withdrawn. The order issued by MSHA Inspector D.L. Jordan, reads as follows:

> Methane in excess of 9.9% as approved by a handheld detector at a point at least 12" from the roof face and ribs was present behind a line of 6 Kennedy stoppings that have been constructed across the second south entry at the intersection of the number 14 west main return. This encompass area behind the stoppings six (6) entries wide and 25 crosscuts deep. Bottle samples were collected to substantiate the order. Citation No. 2930785 for a violation of 30 C.F.R. § 75.329(a)(1) accompanies this order at section 8, "Condition or Practice".

Citation No. 2930785, issued under section 104(a) of the Act, followed the order.

A preponderance of the substantial, reliable and probative evidence establishes the following findings of fact and the additional findings set forth in the discussion below.

FINDINGS OF FACT

1. Donald L. Jordan has been an MSHA coal mine inspector for 19 years. (Tr. 37-39). He has 42 years experience in the mining industry. (Tr. 78).

2. His training includes courses in "Methane Detection and Use of Permissible Methane Detector." He also holds mine foreman, assistant mine foreman, fire boss and shot fire certificates for the State of Colorado. (Tr. 39).

3. Mr. Jordan spends about eight weeks a year at the Golden Eagle Mine. (Tr. 40).

4. On February 13, 1990, accompanied by Mark Bayes, an assistant mine foreman, he inspected the west slope area of the underground coal mine. This was an abandoned area of the mine. (Tr. 40).

5. Mr. Jordan identified Order No. 2930784, an imminent danger order issued on the Second South Area of the west slopes. The area, in excess of 2,000 feet, comprises six entries, approximately 25 crosscuts deep. (Tr. 41).

6. After making their initial approach the inspection team found Kennedy stoppings at all six entries. (Tr. 42). [A Kennedy stoppings is shown on Exhibit S-5.]

7. The stoppings are made out of galvanized sheet iron and they direct the ventilation in the mine. Kennedy stoppings are not seals. (Tr. 43).

8. An attempt had been made to seal the stoppings from the outside by applying a limited amount of styrofoam around the roof and ribs. (Tr. 43).

9. Mr. Jordan had studied the ventilation plan and he was aware the stoppings were not on the map. (Tr. 44).

10. The stoppings were an attempt to deflect the air current and seal the area behind them. (Tr. 44).

11. The Kennedy seals could not be accepted because MSHA has no way of knowing what air mixtures are behind the seals. (Tr. 45).

12. At the Golden Eagle Mine there has been a history of unintentional roof falls, numerous ignition sources and rock dust surveys have been way below normal. Also there was excessive liberation of methane gas in the mine. Considering these factors Kennedy stoppings were unacceptable. (Tr. 45).

13. Initially the only methane readings Mr. Jordan was able to take were outside of the stoppings. (Tr. 45). The readings were high enough that he was alarmed because the area was not sealed. There was every possibility that there was an explosive mixture behind the stoppings. (Tr. 46).

14. Mr. Jordan took methane samples at all six entries. (Tr. 46).

15. The methane readings were as follows:

No. 1 entry:	.8 percent
No. 2 entry:	.6 percent
No. 3 entry:	1.5 percent
No. 4 entry:	.7 percent
No. 5 entry:	.6 percent
No. 6 entry:	.8 percent

16. To measure the methane concentration Mr. Jordan used a CSE 102 hand-held digital methane detector. (Tr. 48).

17. These methane levels on the ventilation side created a huge doubt as to what concentrations were behind the stoppings. (Tr. 48).

18. Mr. Jordan then went outby and by telephone contacted Mr. Joe Paplovich, his immediate supervisor. (Tr. 49).

19. Mr. Jordan informed Mr. Paplovich of the discovery and he further sought sampling equipment to determine what was behind the stoppings. (Tr. 50).

20. Mr. Jordan feared there was an explosive mixture behind the seals. (Tr. 50).

21. When he met Messrs. Paplovich, Duran and Feltheger they discovered Mr. Duran had one vacuum bottle suitable for sampling behind the stoppings. (Tr. 50).

22. Mr. Jordan had ordered all power withdrawn from the area before he met Mr. Paplovich. The power source was an energized trolley line. (Tr. 51).

23. The group then returned to the area and Mr. Jordan found a 2.2 methane level. This indicated there was fluctuation and the area was "breathing." (Tr. 52).

24. They then went to the No. 1 entry and withdrew several samples by using an aspirator pump and a bottle. (Tr. 54).

25. The sample, then in a 50 milliliter bottle was later evacuated at the MSHA laboratory located in Mount Hope, West Virginia. (Tr. 55).

26. An analysis report was submitted by the lab. (Tr. 56, Ex. S-6).

27. The numbers of the samples collected were duly recorded. (Tr. 57).

28. After proceeding to the No. 1 entry the group with their three or four methane detectors took samples from the tube during aspiration. There were readings in excess of 9 percent from the tube. (Tr. 62).

29. The readings from all of the hand-held methane monitors were almost the same. (Tr. 62).

30. The subdistrict manager, Mr. Paplovich, and Mr. Jordan concluded the situation was much more serious than they had initially suspected. They jointly agreed to conduct an orderly withdrawal from the mine. Mr. Jordan then orally issued an imminent danger order. (Tr. 62-68).

31. Mr. Jordan believed there was danger in the area at that time. He considered the danger to be imminent because of the history of roof falls and ignition sources in the area which com-

bined with the methane levels discovered behind the stoppings. He also considered the size of the area. It exceeded a depth of 2,000 feet. (Tr. 63, 64).

32. The second south area was immediately off of the No. 14 return entry. The entry leads directly to the mine fan. (Tr. 64).

33. Behind the stoppings are interrupted tracks and trolley lines. Additional matters contributing to an ignition are a belt structure, roof bolts securing roof plates and mats. Also there were mandoors. These are a source of ignition due to roof falls. (Tr. 65).

34. A roof fall can be a source of ignition by striking steel against steel depending on where it falls, and depending on the structure of the roof and its strata. They all enter into a combination of effects. (Tr. 66).

35. In Mr. Jordan's mind there was a definite potential for explosion behind the Kennedy stoppings. (Tr. 66).

36. Given the conditions he described Mr. Jordan had a reasonable belief that an explosion could occur in that area. (Tr. 67).

37. After a certain number of years in a coal mine, seeing the aftermath of what can occur Mr. Jordan stated [the condition] "scares the pants off of you." (Tr. 67).

38. An explosion would propagate beyond the Kennedy stoppings. (Tr. 67).

39. Mr. Jordan was afraid for himself but he was not absolutely certain there was going to be an explosion. (Tr. 69).

40. After they went to the surface they proceeded to the New Elk Mine in order to discuss the course of action to be taken. (Tr. 69).

41. The order remained in effect to evaluate the atmosphere immediately behind the stoppings.

42. The area behind the stoppings was not ventilated nor sealed in any manner at the time of the issuance of the order. (Tr. 70).

43. In an abandoned area not ventilated you expect to see seals or ventilation required by the ventilation plan or by law. (Tr. 70).

44. If there is no ventilation in the area you expect the seals to be constructed as explosion-proof bulkheads. (Tr. 71).

45. Mr. Jordan saw no evidence of ventilation inby the stoppings nor did he see evidence of seals nor any intention of building any seals. (Tr. 72).

46. In Mr. Jordan's opinion the violation was of a significant and substantial nature. The hazard would be the explosion. (Tr. 73).

47. Seals create an atmosphere behind them but normally the atmosphere is above the explosion range for methane. (Tr. 73).

48. At the meeting at the New Elk Mine the subdistrict manager requested a proposal from management but no one wanted to volunteer to attempt to remove any part of the Kennedy stoppings. The slightest spark and the explosive mixture could create an explosion. (Tr. 75).

49. The 107(a) imminent danger order withdrew miners from the entire mine. (Tr. 76).

50. The order was modified to allow construction of the seals in the Second South section of the mine. (Tr. 76).

51. A CSE methane detector is accurate within .1. (Tr. 82).

52. A detector is thrown out of calibration when methane exceeds 9 percent. (Tr. 83, 84).

53. The explosive range of methane is five to fifteen percent. (Tr. 84).

54. Mr. Jordan had not seen a Kennedy stopping installed in Two South or One Right before February 13, 1990. (Tr. 85, 86).

55. On February 13, 1990, in the MSHA office before the inspection, Kennedy stoppings were discussed. (Tr. 86, 87).

56. Mr. Jordan was surprised someone would install Kennedy stoppings in a coal mine. (Tr. 87).

57. Kennedy stoppings could not be allowed because they do not suffice as a explosion-proof bulkhead. (Tr. 88). However, use of such a stopping is not a violation of any regulation but they cannot be used as a seal. (Tr. 92, 93).

58. The area behind the Kennedys could not be ventilated because the mine could not afford the additional ventilation. Also the area was too hazardous to travel. (Tr. 90).

59. It was the presence of the methane behind the stoppings plus the existence of an ignition source behind the stoppings that led Mr. Jordan to his imminent danger finding. (Tr. 97).

60. You would expect to find some methane on the outby side and it wouldn't be a basis to conclude the area was imminently dangerous. (Tr. 98).

61. The track that goes into Two South is continuous up to the stopping. It runs a good distance behind the stopping. (Tr. 101, 102).

62. The sampling tube extends 40 feet inside the Kennedy stopping. When aspirating the tube the methane detector readings were as much as 9 percent. (Tr. 102).

63. The methane concentration could differ at different points away from the end of the sampling tube. (Tr. 104).

64. The span of the entries across Two South is about 600 feet. (Tr. 105).

65. Sample bottle number A-2109 shows a methane concentration of 6.09. This was the only concentration in the explosive range. (Tr. 106-108).

66. Sample No. A-2107 taken at the same location and time shows 1.32 percent methane. (Tr. 106, 107).

67. Sample A-2108 shows methane of 1.67 percent.

68. The bottle sample results were not available the day Mr. Jordan issued the imminent danger order. (Tr. 108).

69. In Mr. Jordan's opinion the results of bottle samples justify the action taken that day. (Tr. 108).

70. In Two South there has been as many as six roof falls. (Tr. 110).

71. Mr. Jordan remembered seeing ignition sources behind the stoppings in Two South. Those were steel three by three mandoors, the belt and track trolleys, trolley hangers, trolley wire, roof bolts and roof plates. (Tr. 110, 111).

72. A roof fall can strike a rail. The roof is made of unconsolidated soapstone and sandstone. (Tr. 112).

73. The ventilation plan says nothing about when seals have to be installed. (Tr. 115).

74. It is an accepted practice to issue a verbal imminent danger order. (Tr. 118).

75. MSHA requested WFC furnish a plan to correct the condition. (Tr. 119).

76. Removing the stoppings might cause an ignition. (Tr. 121). The stoppings would have to be removed to ventilate the area. (Tr. 121).

77. Seals are constructed with tubes so the atmosphere can be sampled behind them. The area behind the seals might contain a higher or lower level of methane. (Tr. 123).

78. In Exhibit S-6, except for sample A-2109, the samples were taken on the exterior side of the seals. (Tr. 124).

79. When Mr. Jordan issued the imminent danger order he believed the area was explosive. He also believed the stoppings were being used as seals. (Tr. 126).

80. The company had made various attempts to ventilate this area but with so many roof falls and obstructions the area became untravelable. (Tr. 126).

81. For an explosion to occur it is necessary to have the explosive mixture as well as an ignition at the same location. (Tr. 130).

82. The Kennedy stoppings were being swept by 37,632 cubic feet of air a minute. (Tr. 133). Mr. Jordan didn't find any appreciable methane outby the Kennedy stoppings. (Tr. 133).

83. In the meeting before the inspection Mr. Jordan believed he was going to take enforcement action of some kind if he found a Kennedy stopping. (Tr. 134).

DISCUSSION

The credible facts establish the expertise of Donald Jordan, an individual with 42 years experience in the mining industry and 19 years as a coal mine inspector. As noted above Mr. Jordan who spends eight weeks a year at the Golden Eagle Mine became alarmed when he found high methane concentrations outside the stoppings in the air course. These methane readings were taken at each of the six entries. (Fact 15).

Mr. Jordan contacted his supervisor and obtained sampling equipment to test behind the Kennedy stoppings. With three or four detectors the members of the group observed methane concentrations in excess of nine percent.

These actions constitute a reasonable investigation. In issuing his order Mr. Jordan basically relied on the methane levels behind the stoppings and his knowledge of ignition sources behind the Kennedy stoppings. These facts are further detailed above in paragraphs 12, 31 and 33. The facts establish Mr. Jordan made a reasonable investigation of the circumstances at hand and the facts support his issuance of the imminent danger order. There is no evidence in this record that Mr. Jordan abused his discretion or authority.

WFC in its supplemental brief contends the Secretary has failed to establish a violation of § 75.316, that is, the Secretary has failed to establish which provision was allegedly violated and that the provision was part of the plan. In the alternative WFC states that if the Secretary clarifies the provision allegedly violated the record demonstrates WFC was complying.

On its face 30 C.F.R. § 75.316 does not require an operator to comply with a ventilation plan. But the Commission has held that "[O]nce the plan is approved and adopted, these provisions are enforceable as mandatory safety standards Jack Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987).

The ventilation plan contains a page entitled "Concrete block explosion proof seals". (Ex. S-8, page 13). Further, MSHA's expert witness William Reitze expressed the view that for areas not being ventilated he would expect to see permanently constructed seals. (Tr. 236-239).

WFC apparently had no difficulty realizing seals had to be installed in Second South in accordance with its plan. Exhibit S-9 shows six triple lines which indicate a seal. Written on the map is the notation "Seals to be constructed when approved. SM 12-29-88." "SM" is WFC representative Steve Matson. It was he who drew the seals on the Company map and initiated it. The map is part of the ventilation plan.

The revised plan was apparently approved on May 10, 1989 (Letter to Rick Callor, Safety Superintendent from MSHA).

WFC contends the plan did not prescribe the timing or steps to be followed in sealing an area nor did any other plan provision. (Tr. 115, 122, 262-263, 272-273, 486). In addition, the plan did not prohibit the use of Kennedy Stoppings as an initial step in the sealing process. (Tr. 321, 386). Therefore, the Secretary has failed to establish which provisions of the plan WFC allegedly violated.

When a regulation is silent as to the period of time required for compliance the Commission has imparted a reasonable

time. Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981), Monterey Coal Co., 5 FMSHRC 1010, 1019 (June 1983).

In this case WFC had at least 10 months to begin sealing the six entries with concrete block explosion proof seals. No such sealing occurred and 10 months is a reasonable time to comply with the ventilation plan.

According to David Huey, WFC's Manager, the company did not have a definite date to install explosion proof seals.

WFC further states that the Kennedy stoppings were in place temporarily as the mine prepared to construct the seals as required by the ventilation plan. (Tr. 652-654, 662-663).

The record is clear that the Kennedy stoppings can be used as a ventilation device but not as a substitute for explosion proof seals. Accordingly, the Secretary is not unilaterally imposing a sealing regime on WFC. Rather, it is requiring the use of Mitchell-Barrett seals as permanent seals. (Tr 298-299, 370, 583-584, Ex. C-6, S-8 at 13-14). There was a reasonable time allowed for installation of the seals and WFC failed to act in that time.

DID SECRETARY PROVE IMMINENT DANGER?

WFC claims Mr. Jordan failed to prove an imminent danger in Second South because his measurements were inadequate. Specifically he "assumed there was an explosive mixture of methane throughout an area 600 feet wide and 2,500 long." (Tr. 105). WFC relies on the testimony of its expert witness Donald Mitchell.

As previously stated I credit the testimony of Mr. Jordan and I find no evidence that he abused his discretion or authority. In particular, Mr. Jordan after eight years inspecting the mine was familiar with it. He found methane concentrations outside the Kennedy stoppings. (See Facts, ¶ 15). He contacted his superior and upon returning he detected a 2.2 methane level. There were readings in excess of 9 percent when the tube was aspirated. Behind the stoppings are numerous ignition sources and Mr. Jordan was afraid for himself. The area of the concentrated methane leads directly to the mine fan.

Given these factors I conclude the inspector properly issued his imminent danger order.

I am not persuaded by Mr. Mitchell's testimony that the inspector's methane measurements were inconclusive. In short, on the conditions Mr. Jordan found, he believed there were explosive mixtures of methane behind the stoppings. Mr. Jordan's testimony

in this respect was supported by Charles W. McGlothlin, Jr., Vice-President and General Manager of the Golden Eagle Mine. Mr. McGlothlin, an experienced miner, testified he personally investigated the facts. (Tr. 533). While he believed there was no ignition source at the Second South he admitted that "if there had been an ignition source at the Second South" then he "would have agreed that there was an imminent danger." (Tr. 551).

IGNITION SOURCES IN SECOND SOUTH

The issues framed by the record relate to the likelihood of a roof fall and whether such a roof fall in Second South would cause an incendive spark.

The Commission has previously declined to rule whether the Secretary may support an imminent danger order by showing that an explosive accumulation of methane is present without proving a specific ignition source, Island Creek Coal Company, ___ FMSHRC ____, VA 91-47-R slip op. 10 (March 3, 1993).

The Commission has continued to follow its ruling in Rochester & Pittsburgh, supra, namely: an inspector must have considerable discretion in issuing imminent danger orders. If R&P is to have any meaning the Secretary need not prove that a specific ignition source existed. Rather, the Secretary need only prove a reasonable likelihood that the source is present. The explosive mixture of methane has been discussed.

In addition, the prime mover of any ignition can be a roof fall. In this case David Huey, WFC's Manager of Operations, located six roof falls on Exhibit C-4. The roof falls were all in Second South inby crosscut 20, and behind the seals. (Tr. 445).

Mr. Jordan further testified that behind the Kennedy stoppings were interrupted tracks and trolley lines. (See portion of Ex. C-4 marked "track end"). In addition, behind the stoppings there were a belt structure, mandoors and roof plates.

The record further evolves into issues of whether the rock in the roof would cause an incendive spark. Some rock, under certain conditions, will cause an incendive spark. Others will not.

Mr. Huey indicated the roof in Second South contained only shale which would not cause an incendive spark. Mr. Huey based his opinion on a lithology. WFC's expert witness Mr. Mitchell also relied on the core samples. Three different lithologies were submitted by WFC. (Ex. C-2, C-10 and C-11).

I am not persuaded by the lithologies. They show an obvious mix of rock of various thickness. Exhibit C-2 (from roof

upwards) shows 10′ siltstone; 2.8′ carbon shale; 8.9′ Maxwell seam; 13.3 shale and 10′ of siltstone sandstone.

Exhibit C-10 shows 54′ shale, 3′ of carbonaceous shale, 5′ Maxwell seam, 1′ shale and 23′ of sandy shale.

Exhibit C-11 shows on drill hole 234 siltstone (unstated amount); 3′ shale; 10.5 of Maxwell seam; .5′ carbonaceous shale; 2′ carbonaceous siltstone and 4′ shale. The GE service hole on Exhibit C-11 shows 8′ Maxwell seam, 33′ mudstone and 10′ sandstone.

I am further unpersuaded by Mr. Huey's testimony. He initially identified the lithographic description in C-2 as accurate. (Tr. 283). But he then repudiated the exhibit stating there was not "ten foot of sandstone." (Tr. 284).

Mr. Mitchell, WFC's expert, also testified that based on the lithology provided by WFC there was no sandstone or other material in the roof that could cause an incendive spark. Both witnesses Huey and Mitchell were contradicted by Exhibit C-2.

I agree with the testimony of MSHA representative Joseph Pavlovich. In reviewing Exhibits C-2, C-10 and C-11 he indicated he would probably have been more afraid than he was [if he had seen the lithologies]. (Tr. 887). He went on to explain that with the varying roof types throughout the mine, there was no way to tell what may have been in the areas behind the stoppings. With the lithologies so different "you could have anything in there." (Tr. 888).

Mr. Jordan recalled seeing ignition sources in Second South. Such sources consisted of 3 by 3 mandoors, belt and track trolleys, trolley hangers and hanging trolley wires, roof bolts, roof plates and mats. Mr. Jordan didn't know of any occasion when they had been removed. An ignition source would be an interaction of a roof fall or roof support fall striking a rail. (Tr. 110).

Mr. Mitchell's testimony sought to rebut the Secretary's evidence. However, I am not persuaded. To a degree his evidence supports Mr. Jordan. For example "we heard testimony regarding mats and steel bolts." (Tr. 618). But according to Mr. Mitchell these have not been demonstrated to present a frictional ignition hazard <u>except</u> under three circumstances. One when the bolt is torn apart ... at the point of breakage you might form incendive sparks. (Tr. 619). Further, if any portion of the bolt is siliconized steel or coated with aluminum and it strikes sandstone on the floor there is a potential for the formation of incendive sparks. (Tr. 619, 620). The latter two circumstances involve aluminum which is not shown to be present in Second South but the initial scenario could occur with a roof fall.

A further source of frictional ignition (and a concern to Mr. Mitchell) was aluminum pop cans. If a can slid across dry rusty steel, the result could be the "possible formation of incendive sparks." (Tr. 624). However, Mr. Mitchell regarded this as highly improbable (due to the accumulation of water).

While Mr. Mitchell's testimony concerned First Right it is relevant to Second South. In sum, the Judge concludes WFC's expert supports the Secretary's position relating to ignition sources.

Mr. Huey marked on Exhibit C-4 the "track end." WFC's manager was in a position to know that the trolley wire was in place and that there was "metal track actually going from the track end to the stopping." (Tr. 403). In sum, there was considerable metal in Second South behind the stoppings.

In his testimony Mr. Mitchell further rejected the potential for friction ignition from sandstone rubbing against sandstone. He based his opinion on the insufficient presence of pezioelectric quartz. (Tr. 926-927, 616, 666, 827, 924, 926). Further, there was an unlikely occurrence of a roof fall past the breakage point. (Tr. 617, 669-670, 771-772, 833, 926-928, 751-752, 966). Finally, there was an absence of high strain on sandstone. (Tr. 934).

The inspector did not rely on a sandstone against sandstone friction ignition. But in any event I credit the contrary testimony of William A. Bruce as well as the Nagy and Kawenski report. (Ex. C-12). The report, a scientific approach deals with "Frictional Ignition of Gas During a Roof Fall." The report states in part that ignition by sandstone on sandstone with a pressure of 50 pounds could easily produce an incendive spark.

Mr. Mitchell, WFC's expert states he initiated the Nagy and Kawenski report but after returning from Indonesia there "were quite a number of problems that we had with this report that we needed to discuss." (Tr. 964). Mr. Mitchell does not agree with the conclusions in the Nagy/Kawenski report. (Tr. 964-965).

I credit the report, supported by Mr. Bruce's testimony, as it is a scientific approach to the frictional ignition of gas. A portion of the report (Ex. C-12) reads as follows:

SUMMARY

> Limited experiments in the laboratory with specimens of mine rock from a Virginia bituminous coal mine indicate that natural gas-air mixtures can be ignited by sparks generated by rubbing friction of sandstone against sandstone, shale against sandstone,

sandstone against (roof-bolt) steel, and shale against steel. Such sparks, generated during a roof fall, may have initiated a recent gas explosion in this Virginia mine, although this cannot be stated with certainty.

No ignitions of gas were produced by sparks or heat generated by impact friction between mine rocks or steel, during tension breaks of roof bolts, or by pull tests of roof bolts through their washers and roof plate. However, this negative result of limited experiments does not preclude the possibility of gas being ignited by these conditions.

The exact mechanism of ignition of gas by frictional sparks is unknown; it has been shown by other investigators that:

1. The visibility of sparks is not a criterion for ignition, as many highly luminous sparks are nonincendive.

2. The ignition frequency increases with impact energy and material hardness.

3. The impinging of sparks on an obstruction increases their incendivity.

4. The gas concentration is a parameter; for methane, a concentration of 6 to 7 percent gas appears to be most easily ignited by frictional sparks.

5. In impact friction (aluminum striking steel) the rustiness of the steel (thermit reaction) and angle of impact are factors. The ignition frequency increases with relative humidity.

6. Among rocks, the quartz-bearing sandstones present the greatest frictional ignition hazard; shale is less dangerous than sandstone; and pyrite inclusions generally increase incendivity.

7. Metal-to-metal contacts generally produce less incendive sparks than metal-to-rock contacts. The reportedly "nonsparking" metals produce incendive sparks under some conditions.

Table 2 of the report involved contact surfaces that produced gas ignition by rubbing friction. This involved a stationary specimen and a rotating specimen at minimum load and minimum speed.

Some of the conclusions stated in the report follow:

> According to these experiments, rubbing friction sparks from the sandstone-sandstone contact were the most incendive. Ignition was obtained with a load as light as 12 pounds (at a velocity of 34 f.p.s.) and at a speed of 12 f.p.s. (at a 50-pound load). A rock would attain a velocity of 12 f.p.s. during a free fall of 2.2 feet. Ignitions were obtained readily by sparks from the shale-sandstone contact and somewhat less easily from sandstone and shale in contact with roof-bolt steel. An overall ignition frequency of 19/119 was obtained for the sandstone-sandstone contact. This is numerically less than the frequencies obtained for the shale-sandstone (21/66) and sandstone-steel (70/315) contacts; however, both the load and speeds were varied, and a greater number of experiments were made with the two sandstones in contact at limiting conditions required for ignition than with the other materials. The overall ignition frequency for the shale-roof bolt contact was 5/35. In these experiments a shower of sparks was visible whether ignition occurred or not. Gas ignition occurred 1 to 30 seconds after contact between the specimens.

One of the conclusions reached in the report was:

> Because of incendive sparks can be produced so readily and with so little expenditure of energy, it is virtually impossible to eliminate them in coal mining. Gas ignitions by this source must be prevented by other measures. One of the most effective measures is adequate ventilation to prevent an accumulation of gas.

WFC further argues that MSHA's actions were inconsistent with a belief in the existence of an imminent danger in Second South.

The Judge originally vacated the Second South Order because of the inspector's actions in permitting 113 miners to construct

permanent seals in close proximity to the Kennedy stoppings and not requiring that the atmosphere to be stabilized.

The Commission in remanding the case ruled the method of abatement is left to the informed discretion of the designated representative of the Secretary. Further some imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to the miners, 14 FMSHRC at 1291.

WFC finally claims that MSHA abused its discretion by leaving the order in effect for 15 days when an imminent danger no longer existed.

As stated above the method of abatement is left to the informed discretion of the designated representative of the Secretary.

SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated as being of an S&S nature "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission further explained.

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

6 FMSHRC at 3-4. See also Austin Power Co. v. Secretary 861 F.2d 99, 104-05 (5th Cir. 1988) aff'g 9 FMSHRC 2015, 2021 (December 1987) (Approving Mathies criteria).

On the basis of the Mathies formulation the record establishes an underlying violation of 30 C.F.R. § 75.316, the ventilation regulation. WFC failed to erect explosion proof seals. A measure of danger, i.e. the possibility of an explosion was contributed to by the violation. There was a reasonable likelihood that the hazard would result in an injury. Finally, an explosion would cause a fatality or a reasonably serious injury.

For the foregoing reasons the S&S allegations should be affirmed.

CIVIL PENALTY

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

The record establishes that the Golden Eagle Mine had 132 hourly employees and 26 salaried employees. It mines approximately 900,000 tons of coal annually. It should be considered a medium size operator.

There is no evidence as to WFC's financial condition. Therefore, in the absence of facts to the contrary I find the payment of penalties will not cause WFC to discontinue its business. Buffalo Mining Co., 21BMA 226 (1973) and Associated Drilling Inc., 31BMA 164 (1974).

There is no evidence of WFC's history of previous violations.

The operator was negligent since it had ten months to erect the explosion proof seals.

The gravity of the violation is high since an explosion could propagate through the mine since Kennedy stoppings are not explosion proof.

WFC demonstrated statutory good faith since it abated the violative condition.

The penalty of $1,000.00 set forth in the order of this decision is appropriate in consideration of the penalty criteria.

ORDER NO. 3241331

This order was issued on February 16, 1990, three days after Mr. Jordan's order in Second South.

The order alleged a condition of imminent danger existed. The order was accompanied by Citation No. 3241332 issued under section 104(a) of the Act.

Order No. 3241331 reads as follows:

> An unknown mixture of methane/air could not be determined at the Kennedy stopping constructed at #1, #2, and #3 entries of 1 - Right due to [sic. the condition] that there was no means of testing or detecting what mixture was behind the stoppings. #1, #2,

and #3 were being ventilated with the use of a line curtain from #7 right return entry of 3d North. When No. 2 entry stopping was not ventilated methane of 10% plus volume percentum was detected 12 inches from the roof and face of the stopping with the use of a permissible hand held methane detector. Bottle samples were collected at leakage areas of the stopping to substantiate the order.

SUMMARY OF SECRETARY'S EVIDENCE
FINDINGS OF FACT

1. Anthony Duran, an MSHA surface inspector, has been employed by MSHA for 13 years. (Tr. 136, 137).

2. He has received training as a coal mine inspector. He is experienced in coal mining. (Tr. 137-139).

3. He spends two quarters of the year at the Golden Eagle Mine. (Tr. 139).

4. On February 13 he was part of the inspection team with Mr. Jordan. (Tr. 140).

5. On February 13 he was called to Second South but took no methane readings. However, he was involved in discussions with regard to the withdrawal order issued on Second South. (Tr. 141).

6. He agreed with Mr. Jordan's opinion that there was an imminent danger in Second South. (Tr. 141).

7. On February 16 he was monitoring the seals being put up in Second South. He went to First Right because he was told they were installing seals at that location. (Tr. 141).

8. At the time Mr. Jordan's order was in effect for the entire mine. (Tr. 141, 142).

9. Mr. Duran was accompanied by Mr. Perko, WFC's safety foreman, Mr. Perko, confirmed that they were erecting the seals in First Right. (Tr. 142).

10. Six men and a foreman were installing seals. (Tr. 143).

11. Mr. Duran initially checked for methane at the Kennedy stoppings. (Tr. 143).

12. The methane was measured with an MX-240 hand-held methane detector. (Tr. 143, Ex. C-1).

13. When measuring for methane inspectors try not to let the monitor exceed 10 percent because such a level can burn it out or knock it out of calibration. (Tr. 144).

14. The Kennedy stoppings were in place at First Right when Mr. Duran arrived. (Tr. 144).

15. The methane readings varied at different locations. (Tr. 145).

16. In Mr. Duran's opinion the methane readings indicated there was an unknown mixture of methane and air behind the stoppings. (Tr. 145).

17. A five percent methane concentration indicated you're getting to the point of an explosive range. He considered there was a possibility of an explosion. (Tr. 146).

18. He thought an explosion was a possibility because a roof fall could have ignited whatever methane was behind the Kennedy stoppings. (Tr. 146, 147).

19. An explosion behind the Kennedy stoppings would propagate into the working area. (Tr. 147).

20. Mr. Duran was unsuccessful in taking an air bottle sample in the No. 3 stoppings.

21. Mr. Perko went in and checked the tubing which was backed up against the Kennedy. Mr. Perko noted a reading of 1.92 percent methane from one corner to the other. This measurement was in an area between the Kennedy and the seal that was being constructed. (Tr. 148).

22. A copper tube was inserted but they could not get an air reading. (Tr. 149).

23. They then went to the No. 2 Kennedy stopping and "popped the bottle" with two samples.

24. He then measured methane at the No. 1 stopping. (Tr. 149, 150).

25. When you pop it the bottle soaks in the methane (or whatever is there), then you cap it with a small plastic wax cap. (Tr. 150).

26. They then went back to No. 3 with two big air bottles and two little ones. (Tr. 150).

27. After the bottle samples were taken Mr. Duran informed Mr. Perko there was an unknown mixture of methane. (Tr. 150).

28. Mr. Duran then issued a 107(a) order because there was a possibility of an imminent danger behind the Kennedys. (Tr. 151).

29. In addition to methane there must also be an ignition source. (Tr. 151, 152).

30. In Mr. Duran's opinion a roof fall could be an ignition source. Some of the roof bolts go through the plate and it causes a spark prior to falling or even when it falls. Steel against steel can cause a spark. (Tr. 152).

31. The First Right is a gassy section. The hazard would be an explosion due to methane. (Tr. 153).

32. First Right was not similar to Second South because in Second South they were able to sample with air bottles; also there was a surveillance tube and a vent pipe was available for samples. (Tr. 154).

33. When Mr. Duran was at First Right there was no means to ascertain what mixture was behind the seals, other than what was leaking from the Kennedys. (Tr. 154).

34. However, he took it for an imminent danger because he didn't know what was behind the Kennedys other than what was on the outby end. (Tr. 154).

35. Mr. Duran was afraid for the safety of all in the area. (Tr. 155).

36. There were defective curtains in front of the stoppings. They allow the return air to sweep the face of the Kennedys.

37. To Mr. Duran's knowledge the area behind the Kennedys was not ventilated. In addition, the erection of the explosion proof seals had not been completed. (Tr. 156).

38. If an imminent danger exists it could cause death or physical harm if mining proceeds and the hazardous condition is not eliminated.

39. Someone could have been seriously injured or killed as the result of an explosion. (Tr. 157).

40. Mr. Duran indicated an explosion was a possibility. (Tr. 157, 158).

41. The imminence of the situation was because Mr. Duran didn't know what the methane mixture was behind the stoppings. (Tr. 158).

42. Mr. Duran then went to surface and he called his supervisor, Rick Phelps. He was then told to write the 107(a) imminent danger order. (Tr. 160). The miners came out from underground.

43. The 107(a) order was terminated after the explosion proof seals were completed. (Tr. 161).

44. After the seals were erected a sample taken with a Rilken. It indicated the methane concentration was 80 percent; this was behind the No. 3 shield. (Tr. 161).

45. Mr. Duran identified the instruction manual for the Model MX-240, Combination Methane and Oxygen Monitor. (Tr. 164, Ex. C-1).

46. Mr. Duran has been trained in the methanometer and it requires calibration. (Tr. 166).

47. When the MX-240 detects methane in the excess of 4 percent it has to be recalibrated. (Tr. 167).

48. Mr. Duran recalibrated his instrument before he went underground on the 16th; he again recalibrated it when he came out. (Tr. 168).

DISCUSSION AND FURTHER FINDINGS OF FACT

The methane readings in connection with Order No. 3241331 are inadequate because the ventilation was disturbed; further, the hand-held methane monitor was not properly recalibrated.

Mr. Duran testified he found methane concentrations of 1.9 to 2 percent at the Kennedy stoppings. At one stopping in close proximity to a small hole, he found an 8 percent concentration. (Tr. 143, 145). He also took six bottle samples. (Ex. S-7).

The uncontradicted testimony of witness Frank Perko, WFC's safety inspector, indicated that Mr. Duran disturbed the ventilation along the Kennedy stoppings then he measured for methane.

The record indicates Mr. Duran knowingly made the disruption. (Tr. 505-509, 515-518).

Specifically, there was line brattice in the First Right area. Each entry had brattice up to the seal. The purpose of the brattice was to ventilate the stoppings. (Tr. 504). Mr. Duran took readings around the partially construed seal. (Tr. 504). After Mr. Duran left the No. 3 entry he went to the No. 2 entry. Mr. Perko followed in two to five minutes. In the No. 2 entry he noticed the brattice had been brought back to the rib line in the main No. 7 entry. (Tr. 505-506). Mr. Duran made

several checks. Mr. Perko mentioned that the brattice should be brought in to continue the ventilation along the stopping. At that time Mr. Duran said "Wait a minute. I want to take some checks without any ventilation in here." The miner holding the brattice said: "One of you is telling me to take it out; one is telling me to bring it back; the other one is telling me to take it back out. I wish someone would make up their mind." Mr. Perko thought it should be ventilated "so we don't create a condition." (Tr. 506, 507).

Mr. Perko also thought Mr. Duran was taking his readings too close to the face. (Tr. 507). [Compare the requirements of 30 C.F.R. § 75.309-2.]

In the No. 1 entry Mr. Duran pulled back the curtain enough to disrupt the ventilation. After taking his readings he put the curtain back up. (Tr. 508, 509).

When he was in the No. 1 entry he said "We'll do it as we did in No. 2." (Tr. 515). When Mr. Perko said we'd better bring the brattice in, Mr. Duran said "No, no, wait a minute. I want to take the readings -- take readings along this stopping without any ventilation." (Tr. 515, 516). He [Mr. Duran] did not explain why he wanted to take readings without ventilation. (Tr. 516).

I find Mr. Perko's testimony to be credible. A company safety foreman accompanying a federal inspector would particularly observe the inspector's activities. Further, Mr. Perko's evidence is uncontroverted.

In support of an explosive mixture the Secretary also offered a laboratory analysis of the air bottles taken by Mr. Duran.

At the hearing the Judge questioned the proof adduced by Exhibit S-7. (Tr. 183). However, Mr. Duran identified sample A5500 as well as Column 6 as "no sample" number. Sample A5500 shows a concentration of 13.76 percent methane and the "no sample" shows a concentration of 1.35 percent.

These readings may be correct but on the present state of the record it is not possible to know how the samples may have been skewed by any disturbed ventilation.

The Commission has previously invalidated a citation because the inspector intentionally skewed the air readings, Freeman United Coal Co., 11 FMSHRC 161, 166 (1989).

Mr. Duran's methane measurements with the hand-held monitor are further suspect. It is uncontroverted that Mr. Duran cali-

brated his monitor when he went into the mine and again when he came out.

On the other hand, the manufacturer's specifications provide for more frequent calibration. The manual states:

> Methane Measuring Range: 0 to 4% methane per Code of Federal Regulations. Title 30, Part 22.7. The instrument must be recalibrated after displaying a methane concentration above 4%. (Ex. C-1 at 4).

There was no expert testimony offered by either party concerning the effect of a failure to recalibrate. However, on the state of the record I give zero weight to any methane concentrations measured by the MX 240 Combination Methane/Oxygen monitor.

The crucial question in connection with Order No. 3241331 is whether the inspector abused his discretion or authority. An abuse of discretion may be broadly defined to include errors of law. See generally Butz v. Glover Livestock Commission Co. 411 U.S. 182, 185-186 (1973); NL Industries, Inc. v. Department of Transportation 901 F.2d 141, 144 (D.C. Cir. 1990). U.S. v. U.S. Currency, in the amount of $103,387.27, 863 F.2d 555, 561 (7th Cir. 1988).

I conclude the disturbance of the ventilation in the mine constituted such an abuse. Further, the inspector's investigation did not sufficiently support the imminent danger order or the citation. The order and the citation should be vacated.

Accordingly, for the reasons stated herein I enter the following:

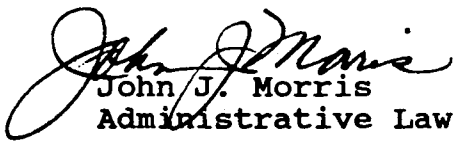
ORDER

1. Order No. 2930784 is **AFFIRMED** and the contest of the order is **DISMISSED.**

2. Citation No. 2930785 is **AFFIRMED** and the contest of the citation is **DISMISSED** and a civil penalty of $1,000.00 is **ASSESSED.**

3. Order No. 3241331 is **VACATED** and the contest of the Order is **SUSTAINED.**

4. Citation No. 3241332 is **VACATED** and the contest of the citation is **SUSTAINED**.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

WYOMING FUEL COMPANY, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	REVIEW AND CONTEST PROCEEDINGS Docket No. WEST 90-112-R Order No. 2930784 Docket No. WEST 90-113-R Citation No. 2930785 Docket No. WEST 90-114-R Order No. 3241331 Docket No. WEST 90-115-R Citation No. 3241332 Docket No. WEST 90-116-R Citation No. 3241333 Golden Eagle Mine

WYOMING FUEL COMPANY'S RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S ORDER AFTER REMAND

On September 4, 1992, Administrative Law Judge John J. Morris issued an Order After Remand in the above-captioned proceedings directing Wyoming Fuel Company ("WFC") to state facts demonstrating what legally recognizable prejudice it may suffer if Citation Nos. 2930785 and 3241332 are modified to allege violations of 30 C.F.R. § 75.316 rather than 30 C.F.R. § 75.329-1(a). Pursuant to Judge Morris's Order, WFC states as follows:

According to the Commission's Decision in this case, if WFC shows that it would suffer "legally recognizable prejudice if Citation Nos. 2930785 and 3241332 were modified as proposed by the Secretary . . . the citations shall remain unmodified and [the

Judge's] holding vacating them . . . shall stand." Wyoming Fuel Co., Docket Nos. WEST 92-112-R et al., slip op. at 9 (Aug. 28, 1992). The Commission suggests that the Judge seek guidance in Rule 15(a) of the Federal Rules of Civil Procedure and case law thereunder. Id.

The Supreme Court has held that although a liberal standard governs a court's discretion in granting leave to a party to amend its pleadings under Rule 15(a), factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment" militate against granting a motion to amend pleadings. Foman v. Davis, 371 U.S. 178, 182 (1962). At issue here is whether the Secretary's efforts to amend Citation Nos. 2930785 and 3241332 would unduly prejudice WFC. Of particular relevance here, courts have found amendments offered under Rule 15(a) unduly prejudicial where the movant substantially changes the theory of his case by the amended pleading, and does so in such a way that would require the opponent to engage in significant new preparation. See, e.g., Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 971 (6th Cir. 1973) ("[T]o put Schwinn through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial"), cert. denied, 416 U.S. 939 (1974); Conroy Datsun Ltd. v. Nissan Motor Corp., 506 F. Supp. 1051, 1054 (N.D. Ill. 1980) (leave to amend should be denied where the amendment would

bring new and separate claims, and would necessitate expensive and time consuming new fact development).[1/]

Factual Background.

WFC was prejudiced by the Secretary's modifications to the citations issued on February 13 and 16, 1990. The prejudice to WFC can best be understood in the context of the events that were occurring during that period.

On February 13, 1990, WFC's Golden Eagle Mine was closed upon the issuance of a § 107(a) order by an MSHA inspector. At the same time the order was issued, a § 104(a) citation alleging a violation of 30 C.F.R. § 75.329-1(a) was also issued. The condition cited as violative of § 75.329-1(a) was, in pari materia, that an area of the Mine was neither sealed nor ventilated. Although no abatement time was specified on the citation, the citation was abated on February 16, 1990.

On February 16, 1990, another § 107(a) order was issued at the Mine accompanied by another § 104(a) citation alleging a violation of 30 C.F.R. § 75.329-1(a). That citation, like the one issued on February 13, 1990, alleged that an area of the Mine was neither sealed nor ventilated in violation of § 75.329-1(a). That citation was abated on February 19, 1990.

In the week that passed between the issuance of the first order[2/] and February 20, 1990, when the Notices of Contest and Motion for Expedited Hearing were filed by WFC, the company and

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1/ See generally 6 Wright, Miller & Kane, Federal Practice and Procedure § 1487 at 623 & n.9 (1990).

2/ Order No. 2930784, issued February 13, 1990, remained in effect until February 28, 1990.

its lawyers expended considerable time and resources in an effort to convince MSHA officials that no violation of § 75.329-1(a) had occurred and to get the Golden Eagle Mine reopened. When it became apparent that local MSHA officials would not reopen the Mine and that litigation would be necessary, WFC counsel began preparing for expedited trial. WFC counsel prepared pleadings, interviewed witnesses, hired an expert, Donald W. Mitchell, travelled to the area of the Mine near Trinidad, Colorado, and prepared exhibits. All of these efforts were aimed at addressing the allegations contained in the § 107(a) orders and the citations alleging violations of § 75.329-1(a).

By February 23, 1990, in anticipation of an expedited hearing, WFC's counsel filed a witness list and an extensive list of exhibits; on that same day WFC's counsel appeared before Judge Lasher and argued the need for an expedited hearing. WFC's motion for an expedited hearing was denied by Judge Lasher. On February 26, 1990, WFC's counsel filed a request that a hearing date be set based on the "forthwith" requirement in § 107(e) of the Mine Act. On February 27, 1990, WFC's counsel recast that request to a Motion for Hearing Schedule and the next day filed a brief in support of that motion. On March 1, 1990, Judge Morris was assigned the cases; on March 2, Judge Morris entered an Order setting a hearing date for March 12, 1990. At the request of Secretary's counsel, that Order was amended on March 5, 1990, to reschedule the hearing for March 13, 1990.

That was the procedural posture of these cases when, on March 6, 1990, the Secretary prepared modifications to both of the

citations alleging violations of § 75.329-1(a), changing altogether both (1) the description of the alleged violation and (2) the regulation allegedly violated. Each of the modified descriptions of the alleged violations read as follows:

> Based upon the fact that the area [2nd South and 1 Right] was not properly sealed and the stopping[s] in use as seals were not constructed as explosion proof seals as required by the approved ventilation system & methane & dust control plan[,] page 17, sketch 13, dated May 10, 1989[,] i.e. specifications as required for explosion proof seals by 12-18-89.

The modifications then changed the regulation allegedly violated (as listed in section 9.C. of MSHA Form 7000-3) to 30 C.F.R. § 75.316.[3/]

These modifications were apparently prepared four working days before trial was set to begin. Moreover, the modifications were not given to WFC but instead were served only by mail and not received by WFC until March 9, 1990, one working day before trial. Affidavit of Rick Callor at ¶ 2 (attached as Exhibit A). By that time, WFC and it counsel had already met with and prepared its witnesses for hearing on the two imminent danger orders, a citation which did not cite any regulation (Citation No. 3241333), and the two citations at issue here alleging violations of § 75.329-1(a). Because it had hoped for an expedited proceeding in late February, WFC had already prepared its exhibits and identified them to the Secretary's counsel, and had already

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3/ Prior to March 9, 1990, the Secretary's inspectors had not alerted WFC to any alleged violations of the Golden Eagle ventilation plan.

presented several written and oral arguments to Judge Lasher regarding expedition of these cases for hearing.

On March 9, however, WFC discovered that it had a weekend and a Monday to prepare for a hearing on two entirely new allegations, never even mentioned during several weeks of intense litigation preparation and negotiation. As a result, WFC counsel was faced with restructuring the company's evidence, changing its witnesses and preparing new ones, redirecting and obtaining a new opinion from its expert and then preparing him for trial on the new issue, and doing the legal research necessary to structure a presentation congruent with the holdings in the many cases at the Commission and in the federal courts dealing with ventilation plan interpretations. WFC's other option -- to start over and ask for a delay of the hearing after fighting hard for an expedited hearing for weeks -- was not acceptable.

WFC had the right to expect that after three weeks of active advocacy on the part of the Secretary's counsel in these cases, the charges (on which all else is based) would have been fixed well before March 9, 1990.

WFC Would Have Been Prejudiced if the Secretary had Been Permitted To Modify the Citation.

The Commission remanded this matter to the presiding Judge "for consideration of whether WFC would suffer legally recognizable prejudice if Citation Nos. 2930785 and 3241332 were modified as proposed by the Secretary." Wyoming Fuel, slip op. at 9. With respect to whether the threat of prejudice is sufficient to preclude allowing the Secretary to switch her charges at the last moment by modifying the citations, Wright & Miller collect

Rule 15(a) cases showing that the courts "consider the position of both parties and the effect the request will have on them . . . [including] the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleadings and the injustice resulting to the party opposing [the amendment]."[4/] Accordingly, WFC suggests that the respective positions of Secretary and WFC be evaluated as of March 9, 1990, when WFC received the modifications.

On March 9, 1990, when the modifications were received by WFC, MSHA's position was as follows:

- The citations charging a violation of § 75.329-1(a) had been issued to WFC three weeks earlier (on February 13 and 16, 1990).

- During the three weeks prior to the issuance of the modifications, the conditions that had occasioned the issuance of the citations had not changed; no new facts had come to light to require or justify the modifications.

- During that three-week period, all concerned were in frequent -- almost daily -- contact as WFC tried to get its mine reopened and, failing that, to obtain an expedited hearing at the Commission.

- During that three-week period, all concerned were focused on the citations and imminent danger orders as issued.

- MSHA knew WFC wanted an expedited hearing and that it was preparing for trial of, inter alia, the § 75.329-1(a) allegations contained in the citations.

- From written pleadings filed by WFC's counsel before the modifications were issued, MSHA was aware of WFC's defenses to the citations

4/ 6 Wright, Miller & Kane, Federal Practice and Procedure § 1487 at 621, 623 & n.7 (1990).

> alleging violations of § 75.329-1(a) and, in fact, knew the witnesses and exhibits WFC intended to offer at trial.

Thus, the position of MSHA when the modifications were issued was that of a fully informed agency which had brought charges against WFC based on its considered and expert view that § 75.329-1(a) had been violated and with knowledge of WFC's position, its defenses, both legal and factual, and the witnesses and exhibits it intended to offer at trial in support of its position. Moreover, MSHA was well aware of the provisions of WFC's ventilation plan and can be presumed to have evaluated the conditions cited by the inspector against WFC's ventilation plan before citing WFC for allegedly violating § 75.329-1(a) or, at the very least, very shortly thereafter. In short, well before March 6, 1990, when MSHA decided to charge WFC with violating the Golden Eagle Mine ventilation plan, the agency was fully aware of and conversant with the plan and how it applied to the conditions in the Mine on February 13 and 16, 1990. See Jordan v. County of Los Angeles, 669 F.2d 1311, 1324 (9th Cir.) ("Where the party seeking amendment knows or should know of the facts upon which the amendment is based but fails to include them in the original complaint, the motion to amend may be denied"), vacated on other grounds, 459 U.S. 810 (1982).

On March 9, 1990, when the modifications were received, WFC's position was as follows:

- WFC had been trying desperately -- over the vociferous objections of MSHA's counsel -- to

obtain an expedited hearing after it filed its Notices of Contest on February 20, 1990.5/

- Anticipating a rapid hearing, WFC conducted its factual investigation, identified and prepared witnesses, retained an expert to testify in its support, and prepared exhibits for trial -- all before the modifications were received.

- On February 23, 1990, almost two weeks before the modifications were received, WFC filed its witness list and description of exhibits and served MSHA's counsel with them.

- In anticipation of trial, WFC's counsel had performed legal research to construct the arguments it intended to present at trial on the § 75.329-1(a) issues.

- After the modifications were issued, WFC was faced with the prospect of having to scrap its § 75.329-1(a) arguments and witnesses, and to restructure its entire case on the citations three days before trial was to begin.

- Such restructuring would have involved dealing with completely new and different factual and legal issues arising in ventilation plan cases. In other words, WFC would have had to start all over again.

- Such restructuring would have been further complicated by the fact that all of WFC's witnesses were located in the Trinidad, Colorado area, a three-hour drive south of Lakewood, where WFC's counsel was located.

Given these circumstances, WFC's counsel decided to reject going to trial on the modifications and argued that they should

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5/ In its effort to obtain an expedited hearing, between February 20, 1990, and March 9, 1990 (when the modifications were received), WFC's counsel had: called ALJs Cetti and Lasher requesting an expedited hearing, filed a motion for an expedited hearing, orally argued for an expedited hearing before Judge Lasher, filed a motion to schedule hearing after Judge Lasher denied the motion for expedited proceedings, supported that motion with a brief, and finally obtained an Order on March 2, 1990, setting the hearing for March 12, 1990 (the hearing actually began on March 13, 1990, at the request of MSHA).

not be permitted because the citations had already been terminated, a position supported at the time by the case law, including rulings of the presiding Judge.

Although the Secretary's counsel argued at trial that the modifications should be permitted inter alia, because the Secretary's proof would be the same whether the charge was for a violations of § 75.329-1(a) or § 75.316, see Wyoming Fuel, slip op. at 4, the relevant focus should be on the effect of the modifications on WFC and its defenses. Genentech, Inc. v. Abbott Laboratories, 127 F.R.D. 529, 530 (N.D. Cal. 1989) ("Of particular concern [in determining whether an amendment is appropriate] is avoiding prejudicial effects upon the nonmoving party"); Southwest Marine, Inc. v. Campbell Indus., 616 F. Supp. 253, 256 (S.D. Cal. 1985) (prejudice to party opposing amendment is the "most important consideration" in determining whether amendment is appropriate), rev'd on other grounds, 796 F.2d 291 (9th Cir. 1986), cert. denied, 484 U.S. 895 (1987). If the modifications had been allowed and the Secretary had been permitted to offer proof of a violation of the mine ventilation plan, a number of new factual and legal issues would have been injected into the proceeding with very little time for WFC to prepare its defenses. Johnson v. Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir. 1986) (issue of prejudice with respect to amendment raising new legal theories that require the gathering and analysis of facts not already considered by the opposing party is particularly relevant "where the amendment is offered shortly before or during trial"); Johnson v. Sales Consultants, Inc., 61 F.R.D. 369, 371 (N.D. Ill.

1973) ("The power of a court to permit amendments to a complaint should not be used to completely change the theory of the case after the case has been submitted to the Court on another theory without some showing of lack of knowledge, mistake or inadvertence or some change of conditions over which that party had no knowledge or control").

In ventilation plan cases, there are a host of potential issues not present in cases involving more specific standards, such as whether the condition cited is covered by a plan provision, whether the cited provision is specific enough to be enforceable, whether other provisions of the plan may have a bearing on the operator's actions in the particular circumstance, and assuming a particular provision applies, what the meaning of the words and phrases in that provision mean in the context of the negotiations that resulted in the plan, common usage in the industry, prior enforcement history connected with a particular provision, and similar aids to construction. See, e.g., Jim Walter Resources, Inc., 9 FMSHRC 903 (1987). Here, had WFC been forced to try a ventilation plan case, it would had to have developed completely different evidence and witnesses, all in one working day.

Simply stated, the time and expense necessary to prepare defenses to a ventilation plan case beginning three days before a trial otherwise complicated by additional issues involving two separate imminent danger orders and a third citation would have prejudiced WFC substantially -- particularly where WFC's only recourse would have been to ask for more time to prepare but where

that request would have been inconsistent with WFC's need for and very substantial efforts to obtain an expedited hearing.

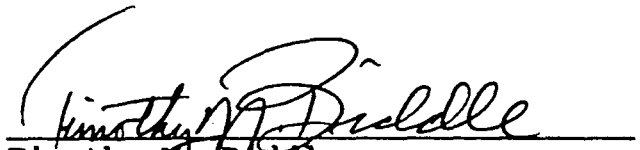
Finally, there is one additional factor bearing on the disposition of this issue of which the presiding Judge should be aware: the Golden Eagle Mine was sold by WFC in May, 1991, to another operator. Most of the management officials who testified at the March, 1990, hearing and who would have had the knowledge necessary to provide testimony about the facts connected with the allegations and the modifications to the citations are no longer working for WFC and the company itself is no longer in the mining business. Moreover, most of those management officials are no longer at the Golden Eagle Mine operated by its new owners and some of them have moved away from the Trinidad area entirely. It would be extremely difficult for WFC to defend the allegations in the modifications under these circumstances.[6/] See, e.g., Bruno v. Cyprus Plateau Mining Corp., 10 FMSHRC 1649, 1652 (Nov. 1988) (ALJ Morris) (untimely discrimination complaint dismissed because, inter alia, "material legal prejudice exists: the individuals [who would have been key witnesses] are no longer with the company"), aff'd, Bruno v. FMSHRC, No. 89-9509 (10th Cir. June 8, 1989).

6/ Of course, we do not suggest that the Secretary is at fault for this turn of events. Nevertheless, we feel compelled to bring it to the Judge's attention to demonstrate that a trial on the Secretary's modifications at this late date is practically impossible.

Conclusion

Considering all these circumstances, both the facts and the law demonstrate that WFC was prejudiced by the modifications served by the Secretary on March 9, 1990. Such prejudice was "legally recognizable" so as to preclude the Secretary's attempt to sustain -- and to force WFC to trial on -- the modifications at issue.

Respectfully submitted,



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Attorneys for Wyoming Fuel Company

Dated: September 17, 1992

EXHIBIT A

STATE OF COLORADO)
) ss.
COUNTY OF LAS ANIMAS)

AFFIDAVIT OF RICK P. CALLOR

RICK P. CALLOR, being duly sworn, deposes and says:

1. During March 1990, I was Safety Director for Wyoming Fuel Company. At that time, I was involved in Wyoming Fuel Company's challenge of two imminent danger orders and three related citations (Order Nos. 2930784 and 3241331; Citation Nos. 2930785, 3241332, and 3241333) in proceedings before the Federal Mine Safety and Health Review Commission.

2. During the early evening hours of March 9, 1990, when I checked the mail in my office, I discovered that I had received that day modifications to Citation Nos. 2930785 and 3241332. The modifications, which were issued by the Mine Safety and Health Administration, were dated March 6, 1990.

3. Citation Nos. 2930785 and 3241332, as originally issued, alleged violations of 30 C.F.R. § 75.329-1(a). In the modifications I received on March 9, 1990, MSHA alleged violations of 30 C.F.R. § 75.316.

Rick P. Callor
Rick P. Callor

Subscribed and sworn to before me this 14th day of September, 1992.

Notary Public Box 759-160 E. Main St-Trinidad, CO 81082

My commission expires 11-8-95.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Wyoming Fuel Company's Response to the Administrative Law Judge's Order After Remand was sent via Federal Express, this 17th day of September, 1992, to the following named person:

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

Thomas A. Stock

Thomas A. Stock

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 16 1993

U.S. STEEL GROUP, MINNESOTA ORE OPERATIONS, Contestant	:	CONTEST PROCEEDINGS Docket No. LAKE 92-247-RM Order No. 4097164; 2/25/92
v.	:	
	:	Docket No. LAKE 92-248-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 4097166; 2/25/92 Docket No. LAKE 92-249-RM Citation No. 4097167; 2/25/92
and	:	
UNITED STEEL WORKERS OF AMERICA, LOCAL 1938, Miners	:	Minntac Plant

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondent;
William M. Tennant, General Attorney, U.S.Steel Pittsburgh, Pennsylvania, for Contestant;
James Ranta, Representative, United Steel Workers of America, Local 1938, for Miners.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq., U.S. Steel Group, Minnesota Ore Operations ("U.S. Steel") contests the validity of an imminent danger order of withdrawal issued pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a), and the citation for a violation of a mandatory safety standard issued in association with the order pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). In addition, U.S. Steel contests the validity of two other section 104(a) citations. The order and the citations were issued at U.S. Steel's Minntac Plant, a taconite processing plant located in St. Louis County, Minnesota, and they involve work done in the vicinity of the plant's primary crusher on the morning of February 25, 1992.

Pursuant to notice the proceeding was heard in Duluth, Minnesota.[1] William M. Tennant represented U.S. Steel and Miguel J. Carmona, represented the Secretary of Labor, Mining Enforcement and Safety Administration ("MESA"). In addition, the United Steelworkers of America, Local 1938 ("Steelworkers"), sought and was granted party status. James Ranta represented the Steelworkers.

With regard to the section 107(a) order/section 104(a) citation, U.S. Steel contests the inspector's allegation that the cited conditions constituted an imminent danger, the inspector's finding that the same conditions constituted a violation of a mandatory safety standard and the inspector's finding that the violation was a significant and substantial contribution to a mine safety hazard ("S&S" violation). With respect to one of the two other section 104(a) citations, U.S. Steel challenges the inspector's finding of a violation and his S&S finding and with respect to the other, U.S. Steel challenges his finding of a violation.

Following the receipt of the transcript, counsels submitted helpful briefs.

DOCKET NO. LAKE 92-247-RM

ORDER/CITATION NO. 4097164, 2/25/92

Order/Citation No. 4097164 charges as follows:

Coarse Crusher - Step 2

> The power was "on", and the step 2 primary crusher hatches were not blocked against inadvertent motions. One employee had been working below the unsecured hatches, suspended in a work basket (with two anchor points), and hoisted through the hatches utilizing a 15-ton capacity P&H bridge type crane. All work at the No. 2 Course Crusher shall be halted until persons are protected from hazardous motion.

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[1] Due to an industrial accident in the area, the hearing had to be suddenly and unexpectedly adjourned and reconvened at a location outside the city. Had it not been for the diligence and cooperation of all involved -- counsels, the representative of miners, the witnesses, and the reporter -- this would not have been possible and the hearing would not have been completed within the time originally allotted.

Resp.'s Exh. 1. The order/citation further alleges that the condition constituted an S&S violation on 30 C.F.R. § 56.14105.[2]

THE SECRETARY'S WITNESSES

Arthur Toscano

Arthur J. Toscano, a metal and nonmetal Mine Safety and Health ("MSHA") inspector since 1975, stated that on February 25, 1992, he went to the Minntac Plant to conduct an inspection as part of an ongoing inspection by MSHA of the entire facility. The inspection was in the morning, and during the inspection Toscano was accompanied by miners' representative Tim Kangas and by U.S. Steel safety engineer Robert Tomassoni. Tr. 15-16.

Toscano arrived at the mine at approximately 8:00 a.m. Following an opening conference with Kangas and Tomassoni, during which the group discussed what they would do during the course of the day, the inspection party drove to the crusher building. While on their way to the crusher site, Toscano testified that he advised Tomassoni that he, Toscano, had received an MSHA policy memorandum dealing with the hoisting of men in work baskets and that "if [he] saw a man in a basket that didn't meet MSHA's requirements, that [he] would issue a citation." Tr. 18.

The inspection party arrived at the crusher building at approximately 9:40 a.m. As they entered the building Toscano observed David Tacchio, a certified electrician, suspended in a work basket. Tr. 19, 72-73. The basket was hanging from an overhead traveling bridge-type crane. According to Toscano, Tomassoni asked if Toscano wanted to inspect the basket and Toscano said that he did. Tr. 19. Tomassoni shouting instructions to the crane operator who brought the work basket to the plant floor. Id. Toscano testified that at this time his sole concern was with the nature of the basket's cable connections. Tr. 42.

Toscano testified that Tocchio unhooked his safety line and left the basket. Tr. 44. Toscano was sure that while Tocchio was in the basket he had on all of his personal safety equipment, including a safety belt and line. Tr. 44. However, because the basket had two cable connections rather than four, Toscano told Tomassoni that he would issue a citation for a violation. He

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[2] Section 56.14105 requires in pertinent part that:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off and the machinery or equipment has been blocked against hazardous motion.

stated that he understood the MSHA policy memorandum and an applicable mandatory safety standard (he did not specify which) to require four connections. Tr. 20.[3]

Toscano then spoke with Tocchio and the crane operator about their training and the job they were about to do. They explained to Toscano that they were in the process of preparing the crusher for some electrical repair work. Tocchio also stated that prior to Toscano arriving that morning, he already had done some preliminary work inside the crusher. Tr. 23, see also Tr. 26.

Toscano testified that as he looked over the railing into the crusher he noticed that two doors covering the crusher (the "hatch doors") were open. (They were in a verticle position rather than lying in a horizontal position across the crusher opening. Tr. 21.) The hatch doors were constructed of steel plate, were approximately 12 feet by 15 feet in size and weighed several tons each. Tr. 27, 29. Toscano stated that when closed, the doors fitted together tightly.

Toscano also stated that the doors were opened and closed by an electric winch that let out and retrieved wire ropes attached to the doors by eyelets. Tr.28. The purpose of the doors was to keep dust and noise from reaching the upper floors of the crusher building. Tr. 55.

Upon further investigation Toscano discovered that the doors were not de-energized or physically blocked against unintentional motion.[4] Tr. 25-26. Toscano stated, "the electrical control circuit was in the on or energized position and there was no physical means of blocking those vertical hatch doors from unintentionally being lowered in the work area." Id. To physically block the hatch doors, U.S. Steel personnel usually pinned each door with a steel bar. The bar kept the doors in an upright position if the cables were activated for some reason or if they failed.

Toscano did not know why the bars were missing. Tr. 26-27. He feared that if someone were purposefully or accidentally to activate the winch's start/stop buttons (and Toscano stated that he noticed miners work gloves, a broom and other materials used by miners within inches of the start/stop

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[3] The following day Toscano spoke with his supervisor and was advised that two connections were acceptable to MSHA. Toscano told Tomassoni about the error and did not issue a citation for two cable connections. Tr. 20-21.

[4] However, Toscano determined that the crusher was locked out and that everything else that should have been blocked against motion was blocked. Tr. 42.

buttons) nothing would have prevented the hatch doors from moving down into a closed position. Tr. 29. Toscano agreed, however, that the start/stop buttons were probably spring loaded and that if they were working properly they would only have activated the winch so long as whatever contacted them remained in touch to keep them engaged. Toscano was asked whether the buttons could have stuck and he stated that if they were just touched they probably would not have stuck. They would have had to be "smashed." Tr. 50. He also stated that he had not inspected the buttons. Id., 67.

Toscano believed that he advised Tomassoni that he was issuing a imminent danger order of withdrawal and that there would be no work done in the area until the doors were de-energized and until they were physically blocked. (Toscano did not recall exactly what he told Tomassoni and the others who were with Tomassoni when he issued the order, but whatever he said, he did not actually write the order of withdrawal until later in the afternoon. Id.) Tr. 46.

Toscano testified that when he first observed Tocchio, Tocchio was suspended about four or five feet above the floor and was being moved toward the crusher cavity. Tr. 40-41. To reach the work area Tocchio would have had to be lowered through the upraised, unblocked, energized hatch doors. Tr. 30, 57.

After the order was issued, Tomassoni promptly ordered that corrective measures be taken and the order was terminated when U.S. Steel personnel placed steel bars through the eyelets blocking all unintentional motion on the hatch doors and when they also de-energized and electrically locked out the doors. Tr. 38.

Toscano stated that after the order was issued he determined that when preliminary work had been done on the crusher earlier in the shift, the crew doing the work, including Tocchio had gained access to the crusher by using man-doors at and below the floor level of the work station from which he had observed Tocchio being lowered. Tr. 45. They had not, as first he had supposed, gone down in the basket. To reflect the fact that the order/citation was issued prior to Tocchio actually having been lowered past the doors, Toscano modified the order in part as follows:

> One employee had been assigned repair work below the unsecured hatches and was observed suspended in a work basket (with two anchor points.) He was in the process of being hoisted through the opening created by the vertical hatches, which were <u>not</u> de-energized and were <u>not</u> blocked against

> hazardous motion, utilizing a P&H-type overhead crane.

Resp. Exh. 1 at 2 (emphasis in original).

Toscano described the imminent danger that he believed existed:

> [T]here was a very . . . likely occurrence of an energized motor being started up, sometimes accidentally, and beginning a downward motion of these doors . . . the cables [of the basket] could get tangled in the closing action of the doors, you could bounce the man around . . . If [the doors] made it all the way down to the closed position, [the doors] could . . . crimp . . . kink . . . or . . . cut . . . [the] wire rope[s] to drop the basket with the man in it.

Tr. 29-30. Later Toscano expanded upon what he believed the imminent danger to be:

> [T]he worst scenario in my mind would be if an eyelet or a connection anywhere around the support cables failed, it would cause a gravity dropping or slamming motion . . . [I]f someone just touched the button . . . [i]t would just be enough to cause high stress points on the support cables in an eyelet on the door and if the eyelets failed or the rope broke or a coupling . . . it would be a slam.

Tr. 59.[5] He also stated that even though Tocchio wore a safety line, he could have been jostled and thrown from the basket and if he did not have the right length of line Tocchio could have fallen head first into the crusher. Tr. 34, 59.[6] Moreover, if either of the doors had hit the basket, they could have crushed portions of the basket and caused a fatal injury. Tr. 33.

Toscano stated his understanding of the concept of imminent danger:

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[5] Toscano testified that he had inspected the hoisting ropes and found nothing wrong with them. He did not inspect the electrical system that powered the opening and closing of the hatch doors. Tr. 67.

[6] Toscano stated that Tocchio's safety line was approximately three feet long. Tr. 43. He did not recall how Tocchio had secured the line. Tr. 44.

> [S]ection 107(a) provides for . . . [an inspector] to withdraw people from an area [in] which he feels a person could be hurt . . . if nothing is done and everything remains the same and a job is allowed to continue, [and] an inspector feels that there's a good likelihood that somebody is, going to get seriously hurt and that's when I exercise . . . authority under section 107(a).

Tr. 32-33.

Toscano was shown a company document entitled Safe Job Procedure. Resp. Exh. 4.[7] Toscano was of the opinion that it stated safety procedures required when repair work, such as that done on February 25, was performed on the crusher. Toscano interpreted safety procedure 7.b., which states "[l]ock out overhead doors over crusher cavity," to mandate that the hatch doors be de-energized. Tr. 37.

According to Toscano, U.S. Steel's failure to de-energize the doors and to pin them so they could not move prior to miners working on, around and under them, in addition to creating an imminent danger, also constituted a violation of section 56.14105. Tr. 33. With regard to the "hazardous motion" against which the standard is to guard, Toscano stated that he had seen the doors close and he estimated they took approximately 20 seconds for them to do so. Tr. 47. If they struck the basket or its supporting wires they could cause serious or even fatal injuries. Id., 38.

He also believed it highly likely that such an accident would occur. Because the doors were not de-energized they could start closing if the stop/start buttons were pushed accidentally or on purpose. Tr. 29, 38. Or, they could start down if an electric short ran through their control circuit. Id.

DAVID TOCCHIO

Tocchio testified under subpoena. He stated that on February 25, he had been assigned to change a broken conduit underneath the crusher. Tr. 73. When Tocchio first saw Toscano and the inspection party he was suspended in the basket about four feet off of the floor. Tocchio explained that the basket had to be lifted from the floor of the work station, over a

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[7] The document sets forth safety procedures to be followed by the electronic repair department at the Minntac Plant. It states that it is for the following job: "052 Crusher Mantal Position Trouble Shoot and Calibrate -- Step I & II." Resp. Exh. 4.

railing, swung out over the crusher and lowered through the hatch doors into the crusher and that when Tomassoni stopped the procedure the basket had just started to move toward the hatch doors. Tr. 75. Had it not been stopped, it would have taken approximately 20 to 30 seconds for him to be lowered through the hatch doors. Tr. 75-76.

Once inside the crusher Tocchio would not have left the basket, but rather would have worked from it. Tr. 77. Before Tocchio could change the conduit he had to clean rock from the crusher. Normally, such work was done by maintenance personnel and that was why he never had any training in safe job procedures for being lowered into the crusher through the hatch doors. Tr. 77.

However, he was aware that pins were used to block the hatch doors because he had done a job one other time requiring him to be lowered through the doors and he had been told about the pins and had put them in place. Tr. 82. In addition, the doors had been de-energized and locked out. Tr. 79. He did not know why the pins had not been installed this time, except that "[m]aintenance just normally did it." Tr. 82, see also Tr. 78. He did not check to see if the pins were in place before he got into the basket. He observed, "It's not a very good excuse I guess." Tr. 83.

U.S. STEEL'S WITNESS

ROBERT TOMASSONI

Robert Tomassoni, safety engineer for U.S. Steel, was the company's sole witness. (Tomassoni testified that he has been the company's safety engineer for approximately one year. Tr. 144.) Tomassoni stated that upon entering the crusher building he saw Tocchio who was in the process of getting into he basket and was putting on his safety belt. Tr. 87. Tomassoni saw also that the basket only had two cable connections and he asked if Toscano would cite that as a violation? According to Tomassoni, Toscano said he would and Tomassoni immediately signaled for Tocchio and the basket to be returned to the work station. As Tomassoni remembered it, Tocchio had gotten only three or four feet above the floor. The basket had been ascending vertically and Tomassoni did not believe that it had yet moved laterally toward the crusher. Tr. 88.

Tomassoni called his supervisor to report what had happened and when the call was concluded Toscano asked to see the pin locations and the electrical disconnect for the hoist mechanism for the doors. Tr. 90.

After Toscano found out that the pins were not in place and the hoist mechanism was not de-energized or locked out, Tomassoni

was made aware that U.S. Steel would receive a citation for a violation of a mandatory standard. He stated that he was not made aware that an imminent danger order of withdrawal would be issued and, as best he could recall, he did not know that an order had been issued until an hour or two after the inspection party had observed the conditions. Tr. 93-94. In addition, even though the order/citation on its face stated that it was terminated at 10:40 a.m., 45 minutes after it was issued, Tomassoni did not recall Toscano telling him about the termination. Tr. 94.

In any event, Tomassoni did not believe that the cited conditions constituted an imminent danger. In his opinion, it was highly improbable that someone would . . . push the buttons or the cables would break." Tr. 95.

Tomassoni testified that there are two spring-activated buttons for the doors -- one to raise them and one to lower them. After the order/citation had been issued the buttons were tested and found in good working condition. As described by Tomassoni, the buttons have a chrome safety guard over their tops so that they can not be activated by being leaned on or by being struck from above. Tr. 95-96.

Tomassoni stated that it takes thirty-one seconds to lower the doors to a horizontal position. Tr. 96. One door lowers approximately two to three seconds ahead of the other. If the cables attached to the doors were to break, the doors would come down much quicker, but Tomassoni was not unaware of any cable failures at the plant. Tr. 102-103. If Tocchio had been lowered into the crusher, Tocchio would have been approximately fifteen feet from the control panel for the doors. Tr. 98. Had he wanted to get the attention of someone near the control panel he probably would have had to yell because of the noise in the plant. Tr. 98. (Tomassoni agreed, however, if the doors had fallen, yelling would have done no good. Tr. 103.)

Tomassoni indicated the reason the doors were not pinned, de-energized and locked out was because Tocchio had not made sure it was done.

IMMINENT DANGER

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Commission has noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989) (citations omitted). The Commission

also has noted that the courts have held 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." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. Appl., 491 F.2d 277, 278 (4th Cir. 1974). Finally, the Commission has adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164, quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App. 523 F.2d 25,31 (7th Cir. 1975), see also Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (August 1992).

While the inspector has considerable discretion in determining whether an imminent danger exists, there must be some degree of imminence to support an imminent danger finding, and the Commission also has observed that use of the word imminent means the danger must be "ready to take place[;] near at hand[;] impending . . . [;] hanging threateningly over one's head[;] menacingly near." Utah Power & Light Co., 13 FMSHRC 1617, 1621 (October 1991).

In challenging the validity of the order, U.S. Steel in essence argues the evidence does not establish that if normal mining operations had continued it was reasonably likely that the feared accident would have occurred. U.S. Steel catalogues the reasons why:

> The hoist and ropes had no safety-related problems and the control buttons operated the doors properly. The buttons were spring-loaded and guarded against accidental contact. Tocchio was tied off . . . and could communicate with the other employees if a descending door presented a hazard. Barring a total failure of a cable (which had no observable defect), someone would have had to stand at the control panel in view of Tocchio and depress the button . . . to get the doors to a position where they could create a hazard. Under such circumstances it is inconceivable that Tocchio could have been killed or seriously injured by the conditions cited on February 25, 1992.

U.S. Steel Br. 9.

The Secretary counters that he need not prove that a reasonable likelihood of an accident existed, that the test to be applied is what a reasonable person with the experience and eduction of a qualified MSHA inspector would consider an imminent danger. Sec. Br. 9. Here, according to the Secretary, he has proven that the cited doors were energized and not blocked against motion at the time Tocchio was going to be lowered through the doors with the resulting danger of him being crushed or thrown from the basket. Id.

I believe U.S. Steel has the better part of the argument and that the Secretary has not established the existence of an imminent danger. It is undisputed that the doors were not pinned and that they were not de-energized and locked out. Under U.S. Steel's own safe job procedures these steps should have been taken.[8] Tocchio testified without contradiction that when he had done a similar job in the past, the procedures had been implemented. Tr. 79, 82, see also Tr. 105-106. I conclude from this that without implementation of these safety precautions, a hazard existed to miners working in the vicinity of the doors. Indeed, common sense compels such a conclusion. The descent of a 12 feet by 15 feet steel door or doors onto a work basket or onto hoisting cables attached to the basket clearly would subject any person in the basket to the danger of being jostled and thrown from the basket if not of being crushed outright.

Still, the existence of a hazard alone does not warrant imposition of a withdrawal order pursuant to section 107(a). As noted above the hazard must be imminent, that is there must be a reasonable potential to cause death or serious harm within a short period of time, and I conclude that it is here the Secretary's case fails.

Toscano viewed the start up of the motor controlling the doors as "very likely". Tr. 29. Yet, the circumstances which would have caused this to happen were anything but. Someone would have had to purposefully activate the button controlling the winch, a circumstance that was extremely remote since, as U.S. Steel points out, any person standing at the button would also have a view of a person suspended in the work basket. Or, the button would have had to be activated accidentally by being "smashed", simply touching the button would not have kept the doors in motion. Tr. 50. Toscano offered no convincing

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[8] Tomassoni believed that pinning of the doors was all that was required under U.S. Steel's safety procedures at the time the order was issued. He stated "pinning the doors was satisfactory because the doors are not powered in the down position, it's gravity controlled, gravity descent." Tr. 106. However, Resp. Exh. R-4 indicates the power also should have been turned off and Tocchio's testimony of his past work practice strongly suggests this was in fact the rule.

explanation of how the button could reasonably have been expected to be struck hard, let alone have been "smashed."

Toscano did offer a "worse case" scenario for how the doors could have fallen. In this version of the hazard the cables or the eyelets would have failed. Tr. 59. Yet, once Toscano inspected the cables he found that they were not defective and there is simply no evidence indicating that cable failure was reasonable to anticipate. Further, Tomassoni's testimony that he was unaware of any previous cable failures at the Minntac Plant, was not refuted and suggests that such failures were unheard of since U.S. Steel's safety engineer would certainly have known about them had they occurred. Tr. 103. In addition, no testimony or documentary evidence was offered concerning the eyelets.

Finally, Toscano made a passing reference to the doors starting to close if activated by an electric short in their control circuit. Tr. 38. However, no credible evidence was offered to prove that there was any reasonable likelihood that such a thing could occur and without the doors closing there could have been no reasonable expectation of serious injury or death.

Obviously, almost anything <u>can</u> happen. But the fact that conditions create circumstances in which hazards can occur does not make them imminently dangerous. The Secretary must establish more than the speculative possibility that a miner or miners may be endangered. Because he has not done so, the inspector's finding of an imminent danger must be vacated.

VIOLATION OF SECTION 56.14105

As previously noted, section 56.14105 requires that when repairs or maintenance are performed on machinery or equipment the machinery or equipment shall be blocked against hazardous motion. The doors were not pinned and, as Toscano testified, the motion against which pinning would have guarded was their downward descent. Tr. 47. The motion was hazardous because it could have subjected Tocchio to serious injury or even death. Tr. 33-34.

U.S. Steel argues that this is not a violation of the cited standard because the crusher was the machinery being repaired, not the doors. U.S. Steel Br. 13-14. U.S. Steel observes that the crusher was locked out and de-energized. I reject this argument and find that the violation existed as charged. The doors, while not part of the mechanism that did the actual crushing of the ore at the plant, were an integral part of the crusher unit. They covered the crusher mechanism and, as Toscano

explained, were designed to keep the dust and noise produced by the crushing of ore from the upper levels of the plant. Tr. 55. As part of the crusher unit which could cause injury to mine personnel if they descended, the doors should have been blocked against motion.

S&S

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

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

Here I have concluded that a violation of mandatory safety standard section 56.14105 existed as charged. Moreover, the evidence establishes there was a discrete safety hazard contributed to by the violation in that there was a possibility, however remote, the cables or eyelets holding the doors in place could have failed or that the buttons controlling the descent of the doors could have been "smashed" and that the doors could have fallen endangering anyone passing in the work basket. Moreover, any injuries a person in the basket would have suffered from having been struck by the doors or jostled in the basket or thrown from it reasonably could have been expected to be of a serious nature.

As is frequently the case when the Secretary alleges that a violation is S&S, the question is whether the Secretary has established a reasonably likelihood that the hazard would have resulted in an injury? In other words, had normal mining operations continued would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). I conclude the answer is "no."

As I have stated in discussing the nature of the Secretary's imminent danger allegation, in my view the Secretary has established only an extremely remote possibility of an injury causing event. To prove S&S he must do more. There is no evidence regarding the likelihood of cable or eyelet failure or the likelihood of objects smashing the start/stop buttons. (Indeed, the testimony of Tomassoni suggests that such occurrences would be highly unusual. Tr. 103.) Therefore, I conclude that the violation of section 56.14105 was not S&S. Section 107(a) Order/Citation No. 4097164 must be modified to a section 104(a) citation. The inspector's finding of an imminent danger must be vacated and his S&S finding must be deleted.

DOCKET NO. LAKE 92-428-RM

CITATION NO. 4097166, 2/25/92

Citation No. 4097166 charges as follows:

Step 2 - Coarse Crusher

> An employee was observed working below the primary crusher dumping station. A readily visible warning sign or signs were not posted at all approaches, notifying persons above that work was being done below the open, unbarricaded dump station. The hazard to the employee of dumping, dropping or throwing material into the opening, would not be readily obvious to persons working, traveling, or cleaning-up at track level.

Resp. Exh. 2. The citation alleges that the conditions constituted a violation of 30 C.F.R. § 56.20011 and that the alleged violation was S&S.[9]

SECRETARY'S WITNESS

Toscano testified that after the inspection party had completed its observation of the area of the hatch doors, the party entered the area of the primary dump site (also known as the lower crusher area) where the ore cars dump into the crusher. Tr. 108. Toscano stated that from his discussion with Tocchio, he knew that earlier in the shift Tocchio had been working in this area. In addition, Toscano said that Tocchio told him that

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[9] Section 56.20011 requires in pertinent part that "[A]reas where . . . safety hazards exist that are not immediately obvious to employees shall be barricaded or warning signs shall be posted at all approaches."

millwrights also had worked there earlier in the shift. Tr. 110, 130, 135. Toscano feared that given the area where Tocchio and others had been working and where Tocchio would have been required to work had the job gone ahead as planned, train loads of ore could have been dumped on the men or material could have been thrown down upon them because they could not have been seen from the dumping area above.

Toscano observed that there were no signs posted to warn anyone on the upper level that persons were working below. Tr. 109. Nor were there any barricades. Tr. 113. When asked what constituted the violation Toscano replied:

> The violation would be . . . the failure to post at all approaches an appropriate sign describing what protective action would be needed. [T]he person who would be protected would be for instance . . . Tocchio or any other persons working below . . . the main dumping station. The person who would not know . . . Tocchio [was] there is the person who would have to be able to see the sign if he was traveling or working or walking through the area.

Tr. 110. Although Toscano did not see anyone working in the area that he believed should have been posted, he thought that he recalled having seen miners walking through it. Tr. 110-111.

The standard requires where there is not an immediately obvious health or safety hazard existing, the area should be posted or barricaded. Toscano explained that under normal operating procedures, a locomotive would pull ore cars into the dumping station. The cars would be grabbed by a rock dumping mechanism, be rotated and they would each in sequence dump up to 100 tons of ore into the hopper feeding the crusher. The ore would fall 20 to 25 feet to the lower level where Tocchio had been. Tr. 111-112.

Not only would the dumping of the cars endanger anyone working below, but, in Toscano's opinion, it would not be unusual for a miner walking the track to pick up spillage from the cars and "throw it where it [was] going to go anyhow." Tr. 113.

Toscano admitted however that should material fall from above, anyone in the basket would have been provided some protection in that the basket was enclosed on three sides to waist height. Also, the person would have been afforded protection by the basket's overhead canopy. Tr. 123. In addition, a "safety tub" could be lowered around the basket and the tub would have provided additional protection. Tr. 125-127.

Toscano recognized that there were safety lights outside the crusher building that were used to signal the train operator not to enter and dump. Tr. 129-130. There was also a warning light inside that Toscano believed a train operator could probably see. Tr. 136. All rail traffic was controlled by computer from a building separate from the crusher building. Tr. 137.

Toscano stated that he believed it was reasonably likely for someone who was not aware of miners working below to throw something down to the lower level. Tr. 114. He also stated that he knew of an incident in 1977 in which a miner was fatally injured by having rock dumped on him while working in the hopper unbeknownst to the person who dumped the rock. Tr. 114-115. Nonetheless, he agreed that when he observed the pertinent area on February 25, it was clean and there were no ore cars present nor other equipment present (such as a backhoe) capable of dumping material into the crusher. Tr. 118. Moreover, the doors to the crusher building were closed and Toscano stated that ordinarily he would not expect a locomotive to pull loaded cars into the building under those circumstances. Tr. 118-119.

Finally, Toscano stated that the violation was timely abated when the company provided readily visible signs reading "danger, men working below." Tr. 118, 147.

U.S. STEEL'S WITNESS

Tomassoni described the system of rail traffic control at the crusher building. He stated that inside the building there were warning lights at the crusher dump station and also at the site where the train dumped its load. When the lights were "on", they indicate that there is to be "no dumping." Tr. 139. However, he agreed that the placement of the inside lights was such that anyone using an end-loader or moving materials by hand would have had his back to the lights. Tr. 144.

With regard to the outside lights Tomassoni's testimony was conflicting -- although he stated he believed a red light outside on the building indicated "no dumping," he also testified, "We do not look at the outside lights on the building." Id. However, he added that he was unaware of any instances in which loads had been dumped even though the red lights were on. Tr. 144. He also acknowledged that lights burn out and that burned out lights were a problem at the plant. Tr. 145.

Tomassoni did not consider the lack of signs a violation of the cited standard, because the people working in the crusher building were a small, closely knit group and their jobs were coordinated. Further, the area had been cleaned and Tocchio was "well protected" while in the basket. Tr. 141. Moreover, in his opinion, the basket could have been observed from the track level. Tr. 142.

STEELWORKERS' WITNESS

Timothy Kangas testified on behalf of the Steelworkers. Kangas, a millwright at Minntac, is also the acting co-chairman of the union safety committee. He testified that in 1989, he monitored an investigation of an incident when a train pulled into the dump area against a red light and directly over an electrician working from a work basket. Tr. 148-149.

VIOLATION OF SECTION 56.20011

U.S. Steel observes that the standard does not require warning signs in all areas where work is being performed, but only in areas where safety hazards exist that are not immediately obvious to employees and it argues, in effect, that at the time the citation was issued, its employees were aware of the potential hazard to Tocchio. "The employees in the area, i.e., the crane operator, electrician, and attendant, were there to assist Tocchio; it is unreasonable to believe that they would drop material on him." U.S. Steel Br. 15.

I conclude otherwise. While I accept the testimony of Tomassoni that those working in the crusher building were a closely-knit group who knew one another's job assignments, it seems to me that the purpose of the standard is to remind such personnel that one or more of their number who is not always readily observable is in a potentially hazardous area -- people do afterall forget -- as well as to advise other miners coming into the area of the situation existing therein.

Here the presence of miners working below was not immediately obvious. The basket may well have been observable from the track area if one looked, but it would have been suspended below the track level and one would have had to look. Also, any miners working below and not in the basket would have been even less obvious.

Further, there was a potential for injury. Trains could have entered the building and dumped while Tocchio was suspended or others were working below. Even though the doors to the buildings were closed, even though there were warning lights in existence, even though, as discussed infra, Toscano later accepted U.S. Steel's explanation that when he cited the violation the switching system for the rail line to the crusher was in such a position that trains were shunted away from the building, all such added protective features could have failed. Thus, Tocchio and any other of his colleagues working on the crusher were in a hazardous position and warning signs should have been posted. I conclude, therefore, that in failing to post

the warning signs or to barricade the area U.S. Steel violated section 56.20001.[10]

S&S

The violation existed as charged. As I have stated in finding that the violation existed, the warning signs would have served as an ever-present reminder to others that a miner or miners, who were not immediately obvious, were at work in a potentially hazardous area. They would have jogged the memory of not only those on the section who were aware of the presence of such miners but also they would have advised newcomers of the miners' situation. Thus, they would have protected miners from what was in fact a discrete safety hazard, the potential of having material dumped or thrown down upon them. Obviously, if such had happened, any miner struck would have been lucky to have escaped with only serious injuries.

As with consideration of the S&S nature of the previous violation, the critical question is whether the Secretary has established a reasonable likelihood of an event in which there would have been an injury had normal mining operations continued? Again I conclude that the answer is "no."

Continued normal mining operations did not mean the usual movement of trains to the crusher but rather the repair of the crusher. That was the work being undertaken in the crusher building on February 25. When the work was completed, trains would again purposefully enter the building to discharge their loads. However, by that time, the crusher would have been repaired and Tocchio and any others working on it would have left.

Thus, under normal mining operations Tocchio or others repairing the crusher would have been subjected to the likelihood of injury from the dumping of ore only if trains entered the crusher building in spite of the protection afforded by the building's closed doors, warning light system and, most important, by the switches thrown to shunt trains away from the building. See discussion, infra. The chance that these precautions would have been ignored or would have failed is, in

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[10] The essence of U.S. Steel's arguments that it did not violate the standard really go to the question of how likely an accident would been under the circumstances, a question whose answer is essential in resolving the issue of S&S.

my opinion, remote at best.[11] Therefore, I cannot find that on February 25, had normal mining operations continued there would have been a reasonable likelihood of "an event in which there [would have been] an injury." U.S. Steel, 6 FMSHRC at 1836.[12]

For the foregoing reasons I conclude that the violation of section 56.20011 was not S&S. The citation must be modified to delete the inspector's S&S finding.

DOCKET NO. LAKE 92-249-RM

CITATION NO. 4097167, 2/25/92

Citation No. 4097167 charges as follows:

Step 2 - Course Crusher

> An employee was observed performing work on the primary crusher. He was situated below the railroad track level and adjacent to the dump station and feeder. Although a red light was "on" to "block" trains approaching, the employee was not protected from moving or runaway rail equipment with a stop block, detailer or other stopping device.

Resp. Exh. 3. The citation alleges that the conditions constituted a violation of 30 C.F.R. § 56.9302.[13] Although Toscano originally found that the alleged violation was S&S, subsequently he modified the citation to indicate injury was

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[11] The danger of a rail car discharging onto Tocchio and any others working to repair the crusher is the "event in which there [would have been] an injury." U.S. Steel, 6 FMSHRC at 1836. Toscano agreed that the area along the track had been cleaned and there being nothing for backhoes to pick up, nor any backhoes present, it seems unlikely that any danger would have come from that source or from any miner picking up spillage and throwing it into the crusher.

[12] While I was impressed with the testimony of Kangas involving a previous incident at the plant where a train had moved into the dumping area and was preparing to dump not only against the lights but over an electrician in a work basket -- the very thing Toscano feared -- there was no testimony indicating the train also had entered in spite of the crusher building's closed doors and because of a failed railroad switch or switches.

[13] Section 56.9302 states:

> Stopblocks, derail devices, or other devices that protect against moving or runaway rail equipment shall be installed whenever necessary to protect persons.

unlikely and to delete the S&S designation. He based the modification upon the fact that:

> Additional information indicated that at the time of this citation, [a] track switch was thrown to direct tract movements away from he Step 2 Crusher. The switch and . . . track were in view of the mine traffic controller, who had 2-way radio communication with mine trains.

Id. at 2.

SECRETARY'S WITNESS

Toscano testified that continuing the inspection of the same general area that Tocchio had been assigned to work, he walked up the track, in the direction from which loaded trains would have come, and he asked if any derailer or other device to prevent unauthorized entry of trains into the area was present? When none was found, Toscano told Tomassoni that the company was in violation of section 56.9302. Tr. 152-153.

Toscano stated that Tocchio would have been exposed to any runaway train or rail car entering the area. Toscano believed a stopblock or derailer should have been placed far enough from the dumping area so that any runaway would derail before it entered the area. Tr. 153. No trains were traveling the track at the time Toscano issued the citation. Id.

Later in the day Kangas told Toscano that he thought the company had a safe job procedure requiring the installation of a derailer. Tr. 156.

Approximately three or four days later Toscano stated he conferred with Tomassoni and Kangas about the citation. Tomassoni emphasized the existence of the warning light system used to prevent trains from entering the building and from dumping. Also, Tomassoni showed Toscano the computerized control center that directed rail traffic and switches at the plant. It was then brought to Toscano's attention that on the morning of February 25, 1992, the switching system had been activated to prevent trail traffic from entering the building. Toscano therefore changed his assessment of the likelihood of injury due to the violation from reasonably likely to unlikely and he deleted the S&S finding. Tr. 156-157.

However, Toscano did not agree with Tomassoni that the lights and the computerized control system were the equivalent of a stopblock or a derailer and he refused to vacate the citation. Toscano rejected Tomassoni's connection because in his experience and for various reasons (ice, rain, moisture), switches have been

known to fail so that the person operating the control system will think they have been thrown when, in fact, they have not. Tr. 158. On the other hand a stopblock or derailer "is a physical means when other systems fail to make sure that approaching equipment does not get into a danger zone." Id.

Toscano stated that the violation was abated when a derailer was installed. Tr. 159-160.

U.S. STEEL'S WITNESS

Tomassoni described rail traffic control at the Minntac Plant as being under the direction of a clerk and a control supervisor. It is the control supervisor's job to direct all rail traffic hauling ore to the crushers for processing. Tr. 166. This is done in part through computers logging the direction of locomotives and switches. Because information regarding all switches that are thrown is stored in the computer's memory, Tomassoni was able to determine that on the day the subject citation was issued switches had been in such a position that all rail traffic would have been turned away from the crusher building. Tr. 168. Thus, he was sure that no rail traffic had been routed to the crusher building on February 25. Moreover, Tomassoni stated that the control supervisor had been advised early on February 25 that the No. 2 Crusher was "down" that day. For these reasons, Tomassoni did not believe that U.S. Steel had violated section 56.9302. Tomassoni admitted however that a company safe job procedure in effect when the citation was issued required a derail device. Tr. 170, 173, see also Resp. Exh. 4 at 2.

VIOLATION OF SECTION 56.9302

There is no dispute a device that could stop or derail a moving or runaway train or rail car was not in place on the track leading to the No. 2 Crusher dump area. The question is whether, given the circumstances at issue, such a device was, in the words of the regulation, "necessary to protect persons?" I conclude that it was.

As Toscano noted, Tocchio was working that day in the area of the primary crusher. The testimony also makes clear that other miners occasionally worked and traveled the area. These people needed protection from moving or runaway trains or rail cars, and I agree with Toscano that the computerized traffic control system and switch monitoring system at the plant, while lessening the chances of miners being injured by such vehicles, did not obviate the need to comply with the standard. Toscano put it well, the required devices are "a . . . means when other systems fail to make sure that approaching equipment does not get into a danger zone." Tr. 157.

Toscano's testimony that the switches could malfunction due to ice, rain or humidity was not refuted. Further, the warning light system, while it hopefully would have alerted a locomotive operator not to enter the crusher building, obviously would have had no effect on a runaway train or rail-car. In addition, the control supervisor could have forgotten the crusher was "down" or could have been unaware that a failed switch had not responded as the system indicated. All of which may be why the need for such a device was not recognized by government regulation alone but was also required by U.S. Steel's own safety procedures, as Tomassoni candidly admitted.

Therefore, I find that in failing to have installed a stopblock, derail device or other device on the track leading to the No. 2 Crusher dump area, U.S. Steel violated section 56.9302.

FINDINGS AND CONCLUSIONS

Based on the forgoing it is concluded that Order/Citation No. 4097164, 2/25/92, properly sets forth a violation of section 56.14105 but fails to validly state a condition or practice constituting an imminent danger and fails validly to state that the violation was S&S. It also is concluded that Citation No. 4097166, 2/25/92, properly sets forth a violation of section 56.20011 but fails validly to state that the violation was S&S. Finally, it is concluded that Citation No. 4097167, 2/25/92, properly sets forth a violation of section 56.9302.

ORDER

The findings of imminent danger and S&S made in connection with Order/Citation No. 4097164 are VACATED. The Secretary is ordered to MODIFY the Order/Citation to a citation issued pursuant to section 104(a) of the Act.

Citation No. 4097166 is AFFIRMED. The S&S finding made in connection with the citation is vacated. The Secretary is ORDERED to modify the citation accordingly.

Citation No. 4097167 is AFFIRMED.

David F. Barbour

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 16 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 92-648 A. C. No. 36-06440-03512
v.	:	
THE HARRIMAN COAL CORPORATION, Respondent	:	Penag/Goodspring No. 1 Mine East & West

DECISION

Appearances: Richard W. Rosenblitt, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Mr. Herbert Trovinger, Brockton, Pennsylvania, for Respondent.

Before: Judge Maurer

This proceeding was filed by the Secretary of Labor, under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess civil penalties against the Harriman Coal Corporation (Harriman).

Pursuant to notice, this matter was heard on January 22, 1993, in Reading, Pennsylvania. Both parties appeared, introduced evidence and made oral argument on the record, which I have considered in making this decision.

With regard to the history of previous violations by Harriman, I find the number of violations in the 2 years previous to the inspection at issue to be few and that the size of Harriman can be considered small. Furthermore, in the absence of any specific evidence to the contrary, I find that the proposed penalties, if they are assessed in that approximate amount, will not affect the ability of Harriman to continue in business.

Citation No. 3079894

The inspector alleged in the citation that:

> The Caterpillar Excavator, Model 245, Serial No. 84X620 being used to move overburden at the mine site was not provided with handrails along and around the walkways or platforms on each side of the machine.

30 C.F.R. § 77.409(b) provides that:

> Shovels and draglines shall be equipped with handrails along and around all walkways and platforms.

Inspector Harold J. Smith, a mine inspector employed by MSHA for approximately 4 years, had occasion to issue the above citation on September 25, 1991. He testified that the subject Caterpillar Model 245 Excavator, which could be described as a shovel, was not provided with an adequate and proper handrail along the outer edge of the walkways or platforms on either side of the machinery. He considered this to be a violation because the mandatory standard found at 30 C.F.R. § 77.409(b) specifically requires that shovels be so equipped.

Harriman does not dispute these facts, but for their defense cite the fact that the manufacturer, Caterpillar, has not seen fit to install these handrails on the outer side of the walkway, but rather has put handholds on the inner side of the walkway. Harriman believes this is sufficient to comply with the cited mandatory standard.

I disagree. There is no handrail provided to prevent a worker from slipping and falling off the equipment, and this is what is specifically required by the standard. The pertinent language recites that handrails will be "along and around" all walkways and platforms. I read this to require the handrails to be on the outer side of the walkways. I also find that the violation is "S&S" because in inclement weather conditions, such as rain, sleet or snow, it is reasonably likely that a worker would slip and fall off this equipment and sustain a serious injury.

I accordingly affirm Citation No. 3079894 as an "S&S" violation and find that a civil penalty of $50 is appropriate, considering the statutory criteria contained in section 110(i) of the Act and the evidence adduced in this record.

Citation No. 3079895

The inspector issued this citation on September 25, 1991, for an alleged violation of 30 C.F.R. § 77.410 for the following condition:

> The Ford truck, Model 8000, used by the mechanic at the mine site is not equipped with an automatic warning device which shall give an alarm when such equipment is put in reverse.

30 C.F.R. § 77.410(a)(1) provides that:

> (a) Mobile equipment such as front-end loaders, forklifts, tractors, 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.

Respondent stipulates that the truck was being operated on mine property on the day in question without a back-up alarm, that a back-up alarm is required on the truck, and it therefore was a violation of the cited standard. (Tr. 62-64) I could not agree more, and I also find that violation to be "S&S", and serious because of the obvious danger of an inattentive person standing or walking behind the vehicle being run over.

Taking into account the seriousness of the violation as well as the other statutory factors contained in section 110(i) of the Act, I conclude and find that a civil penalty of $100 is appropriate for the violation found herein.

ORDER

Based upon the above findings of fact and conclusions of law, **IT IS ORDERED** that:

1. Citation Nos. 3079894 and 3079895 **ARE AFFIRMED.**

2. Respondent, Harriman Coal Corporation, shall pay to the Secretary of Labor a civil penalty in the sum of $150 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 21 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. LAKE 93-52-M
	:	A.C. No. 21-00828-05591
v.	:	Fairlane Plant
	:	
OGLEBAY NORTON TACONITE COMPANY, Respondent	:	Docket No. LAKE 93-53-M
	:	A.C. No. 21-00200-05572
	:	
	:	Docket No. LAKE 93-54-M
	:	A.C. No. 21-00200-05573
	:	
	:	Docket No. LAKE 93-55-M
	:	A.C. No. 21-00200-05574
	:	
	:	Thunderbird Mine

DECISION APPROVING SETTLEMENT

ORDER TO PAY

These cases are before me due to Judge Melick's illness.

The parties have now filed an amended settlement motion. The motion explains that the 53 citations in these cases all were issued during the same inspection for failure to report mine site injuries which were reportable under Part 50 of the regulations. In forty-five instances, the injured miner had not reported the injury while on the mine property, but sought treatment later from a physician or chiropractor and the injury did not result in lost time. The clerical staff of the operator failed to recognize the information on the forms sent to the mine as injuries reportable to MSHA. In light of the foregoing, the parties represent that these violations were not intentional and that, therefore, negligence was less than originally thought. The amended settlement motion also sets forth information regarding the six criteria of section 110(i) of the Act. A penalty of $200 is recommended for each of these violations which I find is appropriate under the Act in light of the finding of reduced negligence which I accept.

The parties further represent that in eight citations the operator should clearly have recognized the fact that the injuries which occurred were reportable under Part 50 because the injuries resulted in lost time. The parties recommend

settlements in the amount of $400 for each of these violations. This was the amount of the Secretary's original assessment. I conclude that these settlements are consistent with the standards of section 110(i) of the Act. Finally, I am persuaded that the total amount of penalties assessed herein will have the deterrent effect anticipated by the Act. In this connection I note the assurances given me by operator's counsel in a conference telephone call on May 28, 1993, that the operator now understands its responsibilities under the Act and is presently complying with the reporting requirements.

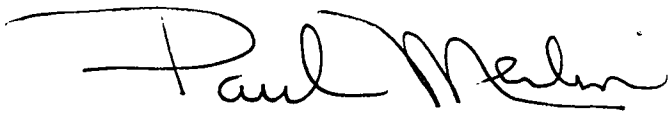
ACCORDINGLY, it is **ORDERED** that the recommended settlements be Approved.

It is further **ORDERED** that in Docket No. LAKE 93-52-M, the operator, within 30 days from the date of this order, pay $3,400.

It is further **ORDERED** that in Docket No. LAKE 93-53-M, the operator, within 30 days from the date of this order, pay $4,600.

It is further **ORDERED** that in Docket No. LAKE 93-54-M, the operator, within 30 days from the date of this order, pay $4,000.

It is further **ORDERED** that in Docket No. LAKE 93-53-M, the operator, within 30 days from the date of this order, pay $200.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

June 21, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-168 A.C. No. 05-00301-03764
v.	:	
MID-CONTINENT RESOURCES INC., Respondent	:	Dutch Creek Mine

AMENDED DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Glenwood Springs, Colorado, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

1. Respondent was issued five orders herein pursuant to the Federal Mine Safety and Health Act of 1977 as follows:

Citation/Order Number	Date	30 C.F.R. Regulation
3410800	May 01, 1990	§ 75.400
3410363	May 02, 1990	§ 75.316
3410351	May 29, 1990	§ 75.499
3410391	June 19, 1990	§ 75.316
3411019	June 27, 1990	§ 75.1704

2. However, one of the orders, Order No. 3410351, is the subject matter of a discretionary review now pending before the Federal Mine Safety and Health Review Commission in Docket Nos. WEST 91-594 and WEST 91-626. Order No. 3410351 was erroneously included in the decision for partial settlement as well as the order of the Commission entered thereon.

3. Order No. 3410800 was reassessed and settled in Docket No. WEST 92-717, therefore, it should be deleted from this civil penalty proceeding.

4. Respondent has previously agreed to reduce the proposed penalties of the remaining orders by 40 percent based on Respondent's ability to pay.

5. Accordingly, Petitioner has previously agreed to amend the proposed penalties as follows. Such amendment is to be effective upon the approval of this settlement agreement by the Federal Mine Safety and Health Review Commission.

Order No.	Proposed Penalty	Amended Proposed Penalty
3410363	$1,000.00	$ 600.00
3410391	1,100.00	660.00
3411019	1,600.00	960.00
	$3,700.00	$2,220.00

In support of their motion, the parties submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. Order No. 3410351 was erroneously included in the motion for settlement as well as in the Order of the Commission entered thereon and said Order is deleted from this amended decision.

2. Order No. 3410800 was reassessed and settled in WEST 92-717. Accordingly, it is deleted from this penalty proceeding.

3. Citation Nos. 3580363, 3410391, and 3411019, and the amended proposed penalties are **AFFIRMED**.

4. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties be assessed against the Respondent in the amount of $2,200.00 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy case.

5. The undersigned Judge retains jurisdiction of this case and related cases not otherwise disposed of by the settlement herein.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUN 21 1993

ENERGY WEST MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 92-216-R
v.	:	Citation No. 3583185; 12/26/91
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine
	:	Mine I.D. 42-00121
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 92-421
	:	A.C. No. 42-00121-03763
v.	:	Deer Creek Mine
	:	
ENERGY WEST MINING COMPANY, Respondent	:	

DECISION

Before: Judge Lasher

This matter arises upon the filing by Energy West of a Motion for Summary Decision seeking to vacate Citation No. 3583185 issued by Inspector Robert L. Baker which alleges the following condition or practice was a violation of 30 C.F.R. § 75.316.

> The approved ventilation, methane, and dust control plan was not being complied with in the 6th Right longwall section as the plan requires 30,000 CFM of air to reach the intake end of the longwall face, the air reading was 22,680 CFM reaching the intake end of the longwall. The crew had been withdrawn to the headgate before my arrival on the section.

Both parties have agreed that summary decision is appropriate in this matter and following Energy West's motion, the Secretary filed a cross motion for summary decision and Energy West filed a response thereto.

In summary, Energy West contends (1) that the Citation should be vacated because the Secretary cannot prove that the Mine's Section 75.316 Ventilation Plan was violated when less that 30,000 CFM of air was supplied to a longwall face during an idle shift, (2) that the regulations in effect at the time, Section 75.301 et seq. (1991), required certain minimums (3000 CFM or 9000 CFM) at each working face unless otherwise specified in the ventilation plan, and (3) that while at Deer Creek its Ventilation Plan did specify otherwise for longwalls during mining, and required 30,000 CFM on the "water spray diagram" pages thereof which described the dust controls and practices required for the operation of each longwall MMU, the context makes clear that the 30,000 CFM requirement can only reasonably be construed to apply during coal producing operations, (a) because such high volume of air could only be needed for methane or dust control when the longwall is operating, producing dust and potentially producing methane [1]; and (b) because that page of the Plan entitled "Water Spray Diagram," also contains requirements for the number of sprays that must be operating and the number of gallons per minute ("GPM") of water they must be spraying to keep down the dust generated by longwall operations--and no one contends that the water sprayers need to be operating during idle shifts. See Energy West's Motion and Attachment B and Exhibit 1 thereto. Thus Energy West maintains it only makes sense to construe the 30,000 CFM standard, like the water spray standards, to apply to coal production periods, not to idle shifts.

Energy West explains that other references in the plan show that the increased air quantity was only required during mining and that Section XVII of the Ventilation Plan is clear that the Plan's ventilation quantities during the period of longwall setup and extraction need not be followed. Exhibit 1 to Attachment B, Energy West's Motion. Energy West also maintains that it was its intent in the Ventilation Plan to require 30,000 CFM only during mining, not during idle periods when dust is not being generated and methane is not potentially being released by the use of the longwall, referring to Attachment B of its Motion.

Alternatively, Energy West contends that even if the scope of the 30,000 CFM provision were deemed not limited to operating longwalls, the plan would be ambiguous and unenforceable under

---

[1] The Deer Creek Mine is virtually methane free. Only trace quantities of methane have ever been detected at this Mine.

Commission precedents governing the interpretation and enforcement of such plans.

In a "Statement of Facts" contained in its motion, Energy WEST sets forth a list of 14 facts as to which it believed there was not genuine dispute. The Secretary, however, does not concur in items numbered 9 and 10, 13 and 14 therein. Thus the Secretary denies the contention of paragraph 9 of the Statement of Facts that "it (Energy West) intended [emphasis supplied] the air quantity requirement of 30,000 CFM ... to apply only during periods of coal production," and the allegation stated in paragraph 10 that "Energy West has consistently interpreted the 30,000 CFM requirement to apply only during periods of coal production." The Secretary states that theses statement as well as the arguments propounded at paragraphs 13 and 14, all of which are based upon the Affidavit submitted by Energy West's Director of Health and Safety, Dave Lauriski, cannot be adopted by the Secretary."

The Secretary does accept Energy West's Facts numbered 1-8 and 11-12 and this is reflected in the "Findings" which follow. The parties agree that if the Citation should be affirmed, then the $20 penalty proposed in Docket No. WEST 92-421 would be appropriate.

FINDINGS

Based on the facts set forth and agreed to in the motions, the following findings of fact are made:

1. Energy West Mining Company owns and operates the Deer Creek Mine in Emery County, Utah.

2. The Deer Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Act").

3. The presiding Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the Act.

4. The Citation was issued on December 26, 1991, by Inspector Robert Baker, alleging that Energy West violated 30 C.F.R. § 75.316 by failing to comply with the approved ventilation, methane, and dust control plan at the 6th right longwall section insofar as the Plan allegedly required 30,000 cubic feed per minute ("CFM") of air to reach the intake end of the longwall face. The Citation was terminated on December 30, 1991.

5. The applicable standards for measuring Energy West's compliance with 30 C.F.R. § 75.315 are set forth in the Ventilation System and Methane and Dust Control Plan (October 2, 1989) ("Plan") prepared by Energy West (then known as Utah Power and Light Company, Mining Division), and initially approved by the

Mine Safety and Health Administration ("MSHA") on November 1, 1989. MSHA subsequently approved amendments on various dates in 1990 and 1991. See Plan excerpts attached as Exhibit 1 to Affidavit of Dave D. Lauriski, appended as Attachment B to Energy West's motion.

6. The air quantity requirement on which the Citation is based is set forth on the individual water spray schematic for mechanized mining unit ("MMU") No. 051-0 in Part V of the Plan and was approved by MSHA on November 2, 1990.

7. The individual water spray schematic on which the Citation is based states that the "minimum quantity of air reaching the intake end of the longwall face shall be 30,000 CFM." This schematic is the sole basis for the Secretary's Citation alleging that the failure to maintain air velocity at 30,00 CFM constituted a violation of 30 C.F.R. § 75.316.

8. At the time the Citation was issued, the air quantity measured 22,680 CFM at the intake end of the longwall face.

9. At the time the Citation was issued, no coal production was occurring.

10. At the time the Citation was issued, the 6th right longwall was idle.

After consideration of the arguments, evidence presented by the parties and analysis of the supporting affidavits (one each by Energy West and the Secretary), it is concluded that the Secretary's position is meritorious and it is here adopted.

A ventilation plan such as that involved here must be approved by the Secretary and adopted by the mine operator pursuant to Section 75.316 and Section 303(o) of the Mine Act. 30 U.S.C. § 863(o). Once the plan is approved and adopted, its provisions are enforceable as mandatory standards. Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981).

Coal Mine Inspector Robert Baker issued Citation No. 3583185 on December 26, 1991.

The ventilation plan referenced in the Citation clearly and unequivocally states: "The minimum velocity of air reaching the intake end of the longwall face shall be 30,000 CFM." (See Tab A; Ex. 1, Diagram at pg. 4 in Energy West motion).

The plan does not in any manner qualify the requirement of 30,000 CFM. The word "shall" is not ambiguous as explained below.

As previously noted, while the Secretary agrees that at the time the Citation was issued, coal was not being produced since the MMU was being repaired, the Secretary contends that the air quantity must be maintained at 30,000 CFM regardless of whether or not coal is actually being mined at any given moment. Such contention is based on the regulations:

> 30 C.F.R. § 75.301 states in pertinent part that: ... the minimum quantity of air reaching the intake end of a pillar line shall be 9000 cubic feet a minute ... . The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. [Emphasis added].
>
> 30 C.F.R. § 75.301-3(c) states that "When longwall mining is practiced the volume of air shall be measured in the intake entry or entries at the intake end of the longwall face and the longwall shall be constructed as a pillar line."

Thus, the C.F.M. that is required by the District Manager and specified in the approved ventilation plan is to be maintained at the intake end of the pillar line. The word "shall" means at all times, since there is no qualifying language restricting the requirement to when coal is being mined.

30 C.F.R. § 75.301-3(c) requires that longwall faces are to be: "Constructed as a pillar line" for determining air quantity locations. This means that the intake end of the pillar line applies to longwall faces. Since the air quantity must be maintained at all times at the intake end of the pillar line, the 30,000 CFM, in Deer Creek's case, must be maintained at all times. I find no ambiguity in theses requirements.

Also, as stated in the Affidavit of MSHA Supervisory Mining Engineer, William Reitze, the reasons for requiring this air quantity at this location at all times is to ensure that during idle face periods not only is there sufficient air to maintain the face clear of methane and other harmful or noxious gases but that there is an adequate volume of air to ensure that the bleeder system is being provided with sufficient air to control methane and other harmful or noxious gases. He indicates therein that it has always been understood by operators and enforced by MSHA that the quantity of air at the last open crosscut and at the intake end of the pillar line must remain constant at or above the approved ventilation plan quantity, regardless of whether coal is being produced or the MMV is idle. This ration-

ale satisfactorily rebuts any contention that the Secretary's interpretation would result in an absurdity.

In Energy Fuels Coal, Inc., 12 FMSHRC 698 (April 1990) it was held:

> It is a cardinal principle of statutory and regulatory interpretation that words that are technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552, 560 (1932), When the meaning of the language of a statute or regulation must be interpreted according to its terms the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. Old Colony R. Co. v. Commissioner of Internal Revenue, supra; see Emery Mining Corp. v. Secretary of Labor, 783 F.2d 155, 159 (10th Cir. 1986).

The issue presented in this matter, i.e., whether the plan requirements of 30,000 CFM apply only when coal is actually being produced and not during idle periods, has been addressed and decided by the Commission.

In Mid-Continent Coal and Coke, 3 FMSHRC 2502, 2504 (Nov. 1981), the Federal Mine Safety and Health Review Commission held:

> The parties do not dispute that the requirements of a duly adopted ventilation plan are generally enforceable under the Act. Zeigler Coal Company, 4 IBMA 30, aff'd 536 F.2d 398, 409 (D.C. Cir.) (April 22, 1976). Here, the area cited was a working face, the continuous miner had just backed away form the face to allow the crosscut to be cleaned up and ventilation reestablished for further cutting in the production of coal. A temporary halt in cutting, mining, or loading to permit other mining activities in preparation for further mining and production does not interrupt the ventilation requirements of 30 C.F.R. § 75.316. To hold otherwise would allow unsafe conditions, as in this instance, to escape sanction unless the operator were caught in the act of cutting, mining, or loading. The Judge's finding of violation is affirmed. [Emphasis supplied].

Commission Judges have uniformly adopted the reasoning of Mid-Continent Coal and Coke, supra.

In Consolidation Coal Company, 3 FMSHRC 2207 (September 1981), Judge Gary Melick affirmed a violation of Section 75.316 for the failure by the operator to ventilate an entry with a line curtain. Although the evidence established that the certain had been in place 2.5 hours prior to the issuance of the Citation, but had been taken down for some unexplained reason, the Judge

found that the absence of the curtain at the time the Citation was issued was still a violation.

In Windsor Power House Coal Company, 2 FMSHRC 671 (March 1980) (Commission review denied April 21, 1980), Judge Melick affirmed a violation of Section 75.316 because of the operator's failure to maintain adequate ventilation oat a working face as required by its ventilation plan. Even though the evidence showed that mining was temporarily halted in the cited area because of a mechanical breakdown, it was held that the absence of the required ventilation constituted a violation.

In Co-op Mining Company, 5 FMSHRC 2004 (November 1983), Judge Virgil Vail affirmed a violation of Section 75.316, because of an operator's failure to install a line curtain as required by its ventilation plan. Although Judge Vail considered the fact that the curtain may have been down for only a short time due to possible rib sloughage, he found that such an unusual occurrence was no defense. Citing Zeigler Coal Co., 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976), and Consolidation Coal Co., supra, the Judge found that when an operator departs from his ventilation plan, a violation of Section 75.316 is established.

In Consolidation Coal Co.m, 8 FMSHRC 612 (April 1986), Judge John J. Morris affirmed a violation of Section 75.316, because of the operator's failure to maintain the proper air velocity at a face, as required by its ventilation plan, even though the air reaching the face may have been interrupted for no more than 30 seconds because of a ventilation curtain being pushed against a rib by a shuttle car trailing cable.

In Western States Coal Corp., in a decision that preceded the Commission's Mid-Continent Coal and Coke holding, Judge George Koutras found:

> **Failure by an operator to comply with any provision of its ventilation plan constitutes a violation of the provisions of 30 C.F. R. § 75.316. Peabody Coal Company, 8 IBMA 121 (1977); Valley Camp Coal Company, 3 IBMA 176 (1974); Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). The fact that coal was not being cut or loaded at the precise moment that the Inspector arrived on the scene and observed that the line curtain had not been advanced as required is immaterial, and respondent's proposed interpretation of the standard cited is rejected.**

Western States Coal Corp. 1 FMSHRC 2059, 2061 - 1st unnumbered FMSHRC Bluebook at page 24 (March 1979).

Since the minimum quantity of air reaching the intake end of the longwall face was less than 30,000 CRFM as required by the Approved Ventilation Plan, the contest lacks merit and the subject citation is **AFFIRMED.**

ORDER

1. Docket No. WEST 92-216-R is **DISMISSED.**

2. In related Penalty Docket No. WEST 92-421 the penalty of $20 stipulated to by the parties in the premises is here **ASSESSED** for Citation No. 3583185 and Respondent **SHALL PAY** the same **TO THE SECRETARY OF LABOR** within 30 days from the date of issue of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 21 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-1194
	:	A.C. No. 46-01455-03928 R
v.	:	
	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

PARTIAL DECISION

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

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for thirteen (13) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and in response to a prehearing order the parties informed me that they proposed to settle eleven (11) of the alleged violations. During a subsequent prehearing conference, the parties presented arguments in support of their proposed settlements, and they were tentatively approved by me pending disposition of the two remaining alleged violations which the parties were unable to settle. The citations, initial assessments, and the settlement amounts are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3716253	9/9/91	75.1105	$20	$20
3716194	9/11/91	75.1403-8(d)	$227	$227
3716047	10/11/91	75.1403-9(c)	$276	$276
3716050	10/11/91	75.220	$276	$276

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3716051	10/11/91	75.202(a)	$206	$206
3716052	10/11/91	75.1403	$227	$206
3716121	10/16/91	75.313	$276	$276
3716122	10/17/91	75.1403-9(a)	$227	$227
3315900	10/23/91	75.314	$413	$248
3716127	10/25/91	75.400	$276	$166
3716128	10/25/91	75.1100-3	$276	$166

Discussion

In support of the proposed settlements, the parties presented information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, in the course of two prehearing conferences, the parties discussed the circumstances surrounding the issuances of the contested citations, and their proposed settlement dispositions. The respondent agreed to pay the full amount of the proposed civil penalty assessments for eight (8) of the citations and to accept the citations as issued. With respect to Citation Nos. 3315900, 3716127, and 371628, the petitioner's counsel agreed to delete the "S&S" designations on the ground that the evidence at trial would not support those findings, and the respondent agreed to pay the modified civil penalty assessments for those citations in settlement of the violations.

With regard to the two remaining citations in this proceeding (Citation Nos. 3716124 and 3716254), the parties were unable to reach a settlement, and the matters were consolidated for hearing with several other cases heard in Morgantown, West Virginia, on June 15, 1993. In the course of the hearings, the parties informed me that after further discussions and negotiations, they proposed to settle Citation No. 3716124, and they were afforded an opportunity to present supporting arguments on the record.

Section 104(a) "S&S" Citation No. 3716124, concerns an alleged violation of mandatory safety standard 30 C.F.R. § 75.604(b), issued by MSHA Inspector Lynn Workley on October 25, 1991, for an improperly made splice in a shuttle car trailing cable. The petitioner's counsel stated that after further consultation with the inspector, who was present in the courtroom, the inspector agreed that the location of the splice made it unlikely that anyone would come in contact with it, and that under the circumstances, if the matter were to proceed to trial, the petitioner did not believe that the evidence would support the inspector's "S&S" finding. I take note of the fact that the splice was redone and properly insulated and sealed within 15 minutes after the inspector issued the citation. The initial proposed penalty assessment for the violation was $276, and the parties proposed to settle the matter by deleting the "S&S"

finding, and the respondent agreed to pay a penalty assessment of $166, for the violation and modified citation.

Findings and Conclusions

After careful consideration of the pleadings, arguments, and submissions in support of the proposed settlement, and pursuant to the requirements of Commission Rule 31, 29 C.F.R. § 2700.31, the proposed settlement was approved from the bench, and my decision is herein reaffirmed. In addition, my previous tentative decisions approving the settlements with respect to the aforementioned eleven (11) citations are likewise finalized and reaffirmed.

With respect to section 104(a) Citation No. 3176254, issued on September 9, 1991, citing an alleged violation of 30 C.F.R. § 75.1105, the parties jointly moved that this citation be consolidated with three similar citations issued by the same inspector and which are pending for trial before Judge William Fauver in Docket No. WEVA 92-1193. In support of their oral motion, the parties confirmed that all of these contested section 75.1105 alleged violations involve identical factual and legal issues and that in the interest of judicial efficiency they should all be adjudicated by one judge. The motion was granted.

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the settlement amounts shown above in satisfaction of each of the contested citations in question. Payment is to be made to the petitioner (MSHA) within thirty (30) days of the date of this partial decision and order. Further administrative action will be taken to transfer the remaining Citation No. 3716254, to Judge Fauver, and the parties will be further notified when this is done.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 22 1993

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

DECISION ON REMAND

Appearances: Robert J. Tscholl, Esq., Canton, OH, for Complainant;
John C. Ross, Esq., and Monty Donohew, Esq., Canton, OH, for Respondent.

Before: Judge Fauver

On April 27, 1993, the Commission affirmed the judge's decision except for the failure to deduct Meek's unemployment compensation from backpay. It remanded for "further findings on the amount of unemployment compensation Meek received during the backpay period" with direction to deduct the sum from Meek's backpay award.

After remand, the parties moved the judge for various forms of relief, with a number of contested issues. A hearing was held at Cleveland, Ohio on June 9, 1993.

The issues were simplified and narrowed to the following, all other issues raised by the parties being withdrawn or abandoned:

1. Does the judge have jurisdiction to award the miscellaneous expenses specified in Paragraph 2 of Exhibit C-1 (Mr. Tscholl's letter to Mr. Ross, dated May 13, 1993)? If so, are the expenses reasonable?

2. Does the judge have jurisdiction to update the backpay award and award of an attorney fee and litigation costs incurred since March 2, 1992? If so, are the sums presented in Exhibit C-1 accurate and reasonable?

3. Should the judge grant Respondent's oral motion to stay his reinstatement and backpay orders pending any appeal to the courts?

After evidence was taken and before oral argument on the above issues, the judge issued a bench provisional order expressing the intention of his reinstatement and backpay orders as to two points, giving an opportunity to the parties to raise any objection or disagreement with the provisional order. With minor editing, these points are:

> 1. Respondent's liability for backpay, interest, an attorney fee and litigation costs will continue to accrue until Respondent, in writing, offers Complainant reinstatement in compliance with the reinstatement order of December 24, 1991, and either (A) Complainant accepts reinstatement and goes to work or (B) Complainant rejects the offer or within a reasonable period (which the judge would deem to be five business days) after receiving the offer, Complainant fails to accept the offer. Until either event (A) or (B) occurs, Respondent shall continue to be liable for backpay, interest, a reasonable attorney fee, and litigation costs incurred after March 2, 1992, as well as the initial award of backpay, interest, an attorney fee and litigation costs up to March 2, 1992.
>
> 2. The intention of the judge's backpay award of March 31, 1992, is that Complainant shall receive all of such award without reduction for any attorney fee (e.g. a contingency fee); and that the only attorney fee allowable in this case will be the attorney fee awarded by the judge.

The parties indicated they had no objection to the above interpretation of the judge's reinstatement and backpay orders. Recognizing this, Respondent moved to stay the orders pending any appeal to the courts.

DISPOSITION OF THE ISSUES

1. A judge's jurisdiction on remand is limited to the issues specifically remanded by the Commission. See generally Hermann v. Brownell, 274 F.2d 842, 843 (9th Cir.), cert. denied, 364 U.S. 821 (1960); Secretary on behalf of Mullins v. Consolidation Coal Co., 4 FMSHRC 1622, 1624, n.2 (1982); and Boswell v. National Cement Company, 15 FMSHRC___ (June 7, 1993).

Here, the Commission has directed the judge to determine the amount of unemployment compensation Complainant received in the backpay period and to deduct that sum from the backpay award. The judge's Final Order of March 31, 1992, awarded $24,000.00 in backpay and interest for the period from February 27, 1990, through March 2, 1992, and an attorney fee and litigation costs of $17,065.80 for the same period. The order then provided that liability for backpay, interest, an attorney fee and litigation costs incurred after March 2, 1992, would continue to accrue until conclusion of the case including any appeals.

I conclude that my jurisdiction on remand is limited to finding and deducting the unemployment compensation received in the period for the initial backpay award (i.e., from February 27, 1990, through March 2, 1992). The evidence indicates that Meek received $6,942.00 in unemployment compensation during this period. His net backpay with interest through March 2, 1992, is therefore $17,058.00 ($24,000.00 less $6,942.00).

As to damages incurred after March 2, 1992, I observe that the Commission affirmed the judge's decision in all respects other than the unemployment compensation point, including the provision that:

> Respondent's liability for back pay, interest and an attorney fee and litigation costs after March 2, 1992, shall continue to accrue until this case including any appeals is concluded. [Judge's Final Order, March 31, 1992.]

Respondent states that it intends to appeal for judicial review of the Commission's decision. There is therefore no necessity at this time to make findings on damages incurred after March 2, 1992. If the case is appealed, any final order on damages would have to be updated after the appeal. If there is no appeal, Complainant may seek a court injunction to enforce the judge's reinstatement order and order for monetary relief as final orders of the Commission. In such an action, it may be expected that the court will remand the case to the Commission for findings as to the final amounts of backpay, interest, a reasonable attorney fee and litigation costs due to Complainant. In either case, any final computation of backpay incurred after March 2, 1992, will be subject to deduction for unemployment compensation in accordance with the Commission's ruling.

2. Section 106(c) of the Act provides that "The commencement of a [judicial review] proceeding ... shall not, unless specifically ordered by the court, operate as a stay of the order or decision of the Commission ...." I find that the question of a stay of the judge's reinstatement order and order for monetary relief should be addressed to the court in the event of an appeal, and that no adequate showing has been made for a stay by this judge.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Final Order dated March 31, 1992, is AMENDED to change the backpay award at p. 2, to read: "Backpay and Interest --- $17,058.00 (after deducting $6,942.00 for unemployment compensation received in this period)" and to change the total award to read "$34,123.80" instead of "$41,065.80" for the period up to March 2, 1992. In all other respects, the Final Order is unchanged.

2. Complainant's motion to find at this time the amounts of backpay, interest, an attorney fee and litigation costs incurred after March 2, 1992, is DENIED.

3. Respondent's motion to stay the judge's reinstatement order and order for monetary relief is DENIED.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 92-895
	:	A. C. No. 36-00840-03845
v.	:	
	:	Mine No. 33
BETHENERGY MINES, INC., Respondent	:	

DECISION

Appearances: Pamela W. McKee, Esq., U.S. Department of Labor Office of the Solicitor, Arlington, Virginia for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a petition for assessment of civil penalty filed by the Secretary (Petitioner) alleging a violation by the operator of 30 C.F.R. § 75.316. Subsequent to notice, a hearing was held in Johnstown, Pennsylvania on March 10, and 11, 1993. At the hearing, John A. Kuzar, Gerald A. Krosunger and Gene Ray testified for Petitioner. Robert L. Price, Edward J. Fedorko, Stephen Horvath, and John M. Gallick testified for Respondent.

On May 11, 1993, Respondent filed its Brief. Petitioner's Brief was filed May 13, 1993. On May 19, 1993, Petitioner filed a Reply Brief.

Findings of Fact and Discussion

1. In May 1992, the 10 Left (LT) Longwall Section at Respondent's Cambria Slope Mine No. 33, consisted of a return, an intake, and a belt entry. The intake entry was between the return and belt entries.

2. Four carbon monoxide sensors were situated in the belt entry to provide early warning, by way of a visual and auditory alarm, of carbon monoxide (CO) in the atmosphere (indicating flaming or combustion). One was placed 100 feet outby the drive at the head

of the belt. The second sensor was situated 1,000 feet inby. The third sensor was 1,000 inby the second. The fourth sensor was 100 feet outby the tail of the belt.

3. According to the Guidelines for the Installation and Maintenance of a Mine Wide Carbon Monoxide Detection System at Cambria Slope Mine No. 33C BethEnergy Mines Inc., (MSA, Dan System), ("Ventilation Plan"), it is required that the CO sensors emit a visible and audible "warning" alarm when exposed to carbon monoxide at a level more than 10 parts per million ("PPM"), above the ambient[1] but less than 15 PPM. An "unannounced" alarm is required to be emitted when the sensor is exposed to carbon monoxide at a level of 15 PPM or more, and the source is unknown. This alarm results in the activation of the fire defense and evacuation plan.

4. In actual practice, the carbon monoxide sensors at issue were set to provide a "warning" at 4 PPM and an "alarm" at 7 PPM. The presence of carbon monoxide at these levels is evidence of a smoldering, flameless, combustion.

5. The Ventilation Plan requires that "Air velocity along the belt will be no less than 50 FPM."

6. On May 16, 1992, John A. Kuzar an MSHA inspector-supervisor, and Gene Ray, an MSHA inspector, inspected the intake entry of the 10 (LT) longwall section at the subject mine. An air reading at the mouth of the intake entry indicated a velocity above 50 feet per minute ("FPM"). An air reading taken at the overcast of the mouth of the entry in question on May 19, 1992 indicated a velocity of 107 FPM. The section had extended only a few hundred feet on May 19, 1992, and the inspectors were concerned that air velocity would decrease as the entry lengthened. According to Kuzar, the mine foreman, Edward J. Fedorko, "...was informed that there could be a problem maintaining the 50 velocity on the belt if someone opens doors or knocks one of their checks down on the track. He agreed. I put him on notice that they would have to watch the amount of air because ten left could be warranting without fire protection." (sic) (Tr. 55)

According to Fedorko, it was his recollection that the discussions with Kuzar on May 19, regarding ventilation, related to the latter's concern about the use of check curtains. However, Fedorko did not explicitly rebut or contradict the testimony of Kuzar that he (Fedorko) was informed by Kuzar of the need to pay attention to the velocity of the air in the belt entry. Nor did Stephen Horvath, the mine superintendent, who was

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[1]The ambient, considered as the normal background carbon monoxide present in the atmosphere, was set at "0".

present on May 19, when Kuzar spoke to Fedorko, specifically contradict Kuzar's testimony. I therefore accept Kuzar's version of the conversation he had with Fedorko and Horvath on May 19, 1992.

7. On July 6, 1992, at the end of the day shift, Horvath was informed by the foreman of the day shift that the air velocity in the belt entry, 10 LT, was more than 50 FPM, but was less than normal. Horvath assigned Tom Corber, the shift foreman of the next shift, to check the beltline and "make sure everything was the way it was supposed to be." (Tr. 252) (sic). According to Horvath, Corber advised him that readings that he took at "several" locations indicated air velocity in the 70's, and that independent readings taken by the Section foreman indicated an air reading of 77 FPM. (Tr. 252)

8. Examinations of air velocity in the belt entry on the day and night shifts on July 6, on all three shifts July 7-8, and on the midnight shift, July 9, all indicated velocities in excess of 50 FPM.

9. On July 9, 1992, Kuzar inspected the 10 LT longwall section at the subject mine along with Gerald A. Krosunger, an MSHA inspector.[2] At about 9:30 a.m. Kuzar took 5 traverse smoke tube tests of the air movement in the belt entry 100 feet outby station 7920, which indicated air velocity of 26.54 feet per minute.[3] An order was issued under Section 104(d)(2) of the Act, alleging a violation of 30 C.F.R. § 75.316.

10. About 40 minutes after the Order was issued, Horvath and Fedorko traveled from other areas of the mine to the 10 Left section. Along the way, Fedorko made a minor adjustment in a check curtain that was installed in the track entry. This adjustment did not affect the ventilation in the belt entry in the 10 left section. Once Fedorko entered the 10 left belt entry, he took an anemometer reading near the mouth of the section between survey stations 7778 and 7785. The reading indicated a velocity of 80 FPM. As he walked up towards the section, he took four or five more readings along the belt, and they were all between 70 and 80 FPM. When he arrived at the tailpiece and met with Kuzar and Krosunger, he took a reading that indicated a velocity of 68-70 FPM.

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[2]On July 9, 1992, Krosunger had not yet received his certification as an authorized representative of the Secretary.

[3]In taking the smoke tube test, Kuzar and Krosunger stood 10 feet apart, and timed the flow of smoke between them. An order was issued alleging a violation of the Ventilation Plan.

11. Approximately 1 1/2 hours after the order in question was issued by Kuzar, Horvath took an anemometer reading of 67 FPM at the location where Kuzar had taken the initial smoke tube tests. Kuzar then took smoke tube tests which indicated an air velocity of 53 FPM and the order was terminated.

Discussion and Additional Findings of Fact

I. Violation of the Ventilation Plan

It is the position of Respondent, that Petitioner has not met his burden of proof in establishing that a violation occurred herein i.e., that the air velocity was less than 50 FPM. Respondent argues, in essence, that readings taken by Fedorko after the order in question was issued, and all prior readings indicated air velocities more than 50 FPM, including one taken a few hours prior to the issuance of the order. Respondent also argues that the smoke tube readings may have been inaccurate. In this connection, Respondent cites the fact that Kuzar utilized a 10 percent correction factor, which reduced the figure arrived at by results of the smoke tube tests by 10 percent, whereas Horvath testified that he has never utilized such a correction factor. Respondent also argues, on the basis of responses given by Krosunger on cross-examination, that in performing the smoke tube test, at the time of the arrival of the smoke Kuzar had to simultaneously observe the smoke, and the face of his watch. Respondent also points to the disparity between the smoke tube test results indicating an air velocity of 53 FPM which formed the basis of the termination of the Order at issue, and the anemometer readings, on two different types of anemometers, of 66 and 67 FPM. I do not find Respondent's arguments to be persuasive for the reasons that follow.

The Ventilation Plan requires that air velocity in the area in question be at a minimum 50 FPM. Five smoke tube tests taken by Kuzar indicated a velocity of only 26.54 FPM which, even adding on to this figure the 10 percent that had been reduced by Kuzar as a correction factor, results in a velocity of 26.89 FPM which is significantly less than the required 50 FPM. Anemometer readings taken before and after those taken by Kuzar indicated an adequate velocity of air, and there was a disparity between the smoke tube tests and anemometer test results at the time of termination. However, I place most significance on the fact that there were no anemometer tests taken at the same time, at the same place as those smoke tube tests taken by Kuzar which indicated a velocity less than 50 FPM. Hence, there are no anemometer results, or other physical evidence which directly contradict the results obtained by the smoke tube tests taken by

Kuzar.[4] I find that the smoke tube tests taken by Kuzar establish that at about 9:00 a.m., July 9, the air velocity in the belt entry at the site of the tests was significantly less than 50 FPM. Hence, I conclude that Respondent did violate its Ventilation Plan, and hence a violation 30 C.F.R. § 75.316 occurred as alleged in the order at issue.

II. Significant and Substantial

In analyzing whether the facts herein establish that the violation was significant and substantial, I take note of the recent decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood

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[4]I reject, as mere conjecture, Respondent's argument that the smoke tube tests readings may have been inaccurate, as mere conjecture. Respondent argues that Kuzar had to simultaneously observe smoke and his watch face. This conclusion is not based on any portion of Kuzar's testimony, but on responses given by Krosunger on cross-examination. In this connection, Krosunger, who at the time of the testing stood 10 feet from Kuzar, testified as follows on cross-examination: "Q. Okay. So he said to you now and then you release the smoke? A. Correct. Q. And then the smoke would travel down to Mr. Kuzar? A. Correct. Q. And he would look at his watch to see how long it took the smoke to travel? A. Correct. Q. And he would do that --- or he did that by watching a smoke cloud and simultaneously looking at his watch? A. Correct." (Tr. 159) I find this testimony insufficient to impeach the test results obtained by Kuzar.

> that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986)." (Southern Ohio, supra at 916-917).

Hence, as elaborated upon by U.S. Steel, supra, in order to establish the third element set forth in Mathies supra, it must be established that there was a reasonable likelihood of the occurrence of an injury producing event, i.e., in this case a fire. (Petitioner's Post Hearing Brief, p.15) Petitioner concedes that at the time of the violation there was "no evidence of fire potential". Petitioner argues that the situation must be viewed in terms of continued mining operations, and refers to the testimony of the inspectors which Petitioner summarizes as follows: "During the normal course of mining, the possibility of hot rollers, coal spills, and problems with electrical components, the belt drive, or the starter box all contributed to the reasonable possibility of a fire, which would go undetected for a longer period because of the reduced air velocity." (Emphasis added) (Petitioner's Brief P.6) Certainly the fire producing conditions referred to by the inspectors could have occurred in the normal course of mining, but the record does not establish that these conditions were reasonably likely to have occurred. To the contrary, I take cognizance of the existence of the following conditions within the framework of which it must be considered whether a fire was reasonably likely to have occurred: the lack of any accumulation of combustible materials along the belt; the effect of the height of the belt and the reduction in potential for friction between the belt or a belt roller and an accumulation of combustible materials; the belt slip switches were in good working order, reducing the potential for frictional heating of the belt; the belt sequence switches were in good working order, reducing the potential for an accumulation of coal because of malfunction of an outby belt; the belt was in good alignment on July 9, reducing the likelihood of spills or frictional rubbing of the belt; there were no electrical defects along the belt; there were no defective rollers along the belt; the conveyor belt was fire resistant; and the lack of any history

of reportable belt fires at the subject mine.

Within the framework of this record, I conclude that it has not been established that there was a reasonable likelihood of the occurrence of a fire herein. Accordingly the third element of Mathies supra, has not been established. Thus, I conclude that it has not been proven that the violation herein was significant and substantial.

III. Unwarrantable failure

According to Petitioner, the violation herein resulted from Respondent's unwarrantable failure. In this connection, Petitioner argues that on May 19, 1992, Kuzar had put Respondent on notice of his concern that there could be problems with the air velocity in 10 left; that management was aware that the air velocity was marginal; that when Horvath was informed on July 6, 1992 that there was a "surge" in the air velocity he should thereby have become aware that there were velocity problems in 10 left; and that Respondent had failed to ensure that velocity readings were taken toward the tail where the readings would most accurately reflect the velocity along the entire belt entry. For the reasons that follow I reject Petitioner's arguments.

In Emery Mining Corp, 9 FMSHRC 1997, 2004 (December 1987), it was determined by the Commission that unwarrantable failure is aggravated conduct which constitutes more than ordinary negligence. Management was made aware by Kuzar on May 19, that there could be problems with the air velocity on the 10 Left Section. However, there is insufficient evidence that the specific violative condition herein i.e., air velocity below 50 FPM at approximately 9:30 a.m. on July 9, was the result of Respondent's aggravated conduct. There is no evidence in the record as to the cause of the decrease in the air velocity observed by Kuzar. Nor is there any evidence that the decrease in the air velocity below the requirement of the Ventilation Plan had existed for any significant period of time. To the contrary, testing of the air velocity on July 6, on all three shifts July 7 and 8, and during the pre-shift examination between approximately 3:30 a.m. and 4:30 a.m. on July 9, all indicated air velocities in excess of 50 FPM.[5] Further, according to Horvath, whose testimony I found credible on this point based on observations of his demeanor, when he had informed Kuzar on July 10 that he knew the air was marginal, he meant to refer to an incident that had occurred on July 6, 1992. On that date, he was advised by the foreman at the end of the day shift that there was a surge in the air velocity, and that although the air velocity was more than 50 FPM, it was less than normal. It is significant to note that

[5]The pre-shift examination of air velocity was made 100 feet outby the tail.

upon receipt of this information, Horvath assigned the shift foreman of the next shift to check the belt entry, and the latter reported that air velocity readings were in excess of 50 FPM.

Within the framework of the evidentiary record as set forth above, I conclude that it has not been established that the violation herein resulted from any aggravated conduct on the part of Respondent. Hence, I conclude that the violation herein did not result from any unwarrantable failure on the part of Respondent.

IV. Penalty

In analyzing the gravity of the violation herein, I find that in the event of a fire, or if smoke is present, time is of the essence in warning miners to escape, these hazards. In this connection, I note that carbon monoxide in a stream of air, as a result of a fire or smoke, would travel to the first sensor in the belt entry in 2 minutes if the air velocity is 50 FPM. In contrast, if the air velocity is only 26 FPM, it would take approximately 4 minutes for the air stream to reach the sensor. However, it was the testimony of John M. Gallick, who was Respondent's Director of Safety at the dates in question, that, in essence, in the event of a fire producing CO, the relative amount of CO that would be found in a quantity of air (expressed as PPM) is related to the velocity of the air. The lower the velocity of the stream of air, the greater would be its concentration of CO. Accordingly, he opined that a warning sensor set at 4 PPM[6] would detect CO in an air stream moving at 25 FPM at about the same time as a sensor set at 10 PPM[7]. I accept this testimony since it was not contradicted or impeached.

I find Respondent's negligence herein to have been mitigated by the factors discussed above, III infra.

Considering all the above, and taking into account the remaining factors set forth in Section 110(i) of the Act, as stipulated to by the parties on the record at the commencement of the hearing on March 10, 1993, I find that a penalty of $200 is appropriate for the violation found herein.

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[6]Respondent's actual sensor setting for a warning alarm.

[7]The Plan's requirement for a warning alarm.

ORDER

It is ORDERED that Respondent pay a civil penalty of $200 within 30 days of this decision. It is further ORDERED that Order No. 2689541 be amended to a Section 104(a) citation to reflect the fact that the violation cited therein was not as a result of Respondent's unwarrantable failure, and was not significant and substantial.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 92-1075 A. C. No. 46-01977-03737R
v.	:	
	:	VC No. 12-A Mine
VALLEY CAMP COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging a violation by Valley Camp Coal Company, (Respondent) of 30 C.F.R. § 75.316. Pursuant to notice, the case was heard in Charleston, West Virginia, on April 20, 1993. At the hearing, Sonny A. Davenport, testified for Petitioner, and Richard Waugh, and Harold L. Proctor, testified for Respondent.

Subsequent to the hearing, on June 1, 1993, Petitioner filed a Brief, and Respondent filed an Argument in Support of Findings of Fact and Conclusions of Law. Respondent's Reply was received on June 7, 1993, and Petitioner's Reply Brief was received on June 11, 1993.

Findings of Fact and Discussion

I. Violation of 30 C.F.R. § 316

On April 24, 1990, Sonny A. Davenport, an MSHA inspector, inspected Respondent's No. 12-A Mine. He observed that in the One Right Section, between entries 2 and 3, there were no stoppings in the first two crosscuts outby the face. He also observed that there were only check curtains in the 3rd and 4th crosscuts outby the face. He issued a Section 104(d)(2) order alleging a violation of 30 C.F.R. § 75.316. Section 75.316 supra, in essence, requires a mine operator to comply with its ventilation plan. That plan, as pertinent, provides as follows:

"Permanent stoppings shall be erected between the intake and return air courses and shall be maintained to and including the third connecting crosscut outby the faces of entries ... ." (Government Exhibit No. 3, p.3) Respondent has conceded the violation, and I find based on the testimony of Davenport, that Respondent herein did violate Section 316, supra.

II. Unwarrantable Failure

According to the uncontradicted testimony of Davenport, when he examined the return entry at approximately 9:00 a.m. on April 24, there were permanent stoppings only up to the 5th crosscut outby the face, and there were no permanent stoppings in the 4th and 3rd crosscuts outby the face, in violation of the ventilation plan. Thus, Respondent initially had been in violation of the ventilation plan when the present 2nd crosscut outby the face was initially cut through, as the record does not establish that there were permanent stoppings installed in the 3rd crosscut outby the face (the present 4th crosscut outby the face)as required by the ventilation plan. The record does not contain the testimony of any persons having personal knowledge as to the amount of time that elapsed between when Respondent was first in violation of the ventilation plan, and when the violative conditions were observed and cited by Davenport.[1] Nor is there any documentary evidence on this point.

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[1]According to Respondent's Safety Director, Richard Waugh, it takes approximately an hour to cut a 30 foot break or crosscut between two entries, and its takes approximately an hour and a-half to cut an advance into the face, which is a 45 foot cut. There is no evidence in the record as to the actual mining sequence that took place i.e., the number of cuts taken between the time the violative condition initially occurred, and the state of development of the section as observed by Davenport on April 24. According to Harold L. Proctor, who was the foreman of the day shift at the time in question, a sequence of mining straight across all six entries, as depicted in numerical order on Government Exhibit No. 4, was the sequence that was used "most of the time". (Tr.120) Considering the number of cuts in this sequence, and the lack of coal production during the mid-night shifts, it would have taken approximately 26 hours for mining to have progressed from the time the crosscut creating the violative condition was cut through, until the state of development was in place as observed by Davenport. However, according to Proctor, Respondent also utilized other sequences "a lot" (sic) (Tr.121) in which only three entries were advanced at a time. Under this sequence approximately 18 1/2 hours would have elapsed between the time the violative condition was created, and the extent of the development of the section that was observed by Davenport.

The Preshift Mine Examiner's Report for the area in question for April 23, 1990, indicates that an examination was made between 2:00 p.m. and 2:30 p.m. but there is no notation that stoppings were needed. However, the Preshift Mining Examiner's Report for April 24, 1990, for the area in question indicates an examination between 4:00 p.m. and 4:30 p.m., and notes as follows: "need stopping intake and return". The Preshift Miner Examiner's Report for April 23, 1990, indicates an examination of the area in question between 9:30 p.m. and 10:30 p.m., and contains the following notation: "need stoppings intake and return".

There is insufficient evidence in the record that Respondent had taken timely action to correct the violative conditions. According to Davenport, when he made his inspection on April 24, no one was working on constructing the stoppings, and he did not observe any stacks of blocks or construction materials. Richard Waugh, Respondent's Safety Director, who was present with Davenport, did not indicate that he observed any work being performed on the construction of stoppings. However, he indicated that Harold Proctor, the day shift foreman, had informed him on April 24, after Davenport issued the order in question, that when the crew had first arrived on the section that day, he (Proctor) had assigned two men to get blocks for the stoppings. However, Proctor testified that he did not remember talking to Waugh, nor did he remember anything about the construction of stoppings on the morning in question. Nor did he recall telling two men on the crew to get blocks for stoppings.

In essence, Respondent argues that it fully heeded all the notations in the Preshift Mine Examiner's Report, and did all the requisite work with the exception of the construction of the stoppings in the return entries. However, no evidence was adduced by personnel having personal knowledge as to why Respondent had not installed permanent stoppings as required by the ventilation plan in a timely fashion i.e., no evidence was presented to mitigate its negligent action in this regard. In this connection, I find that the record establishes that: (1) Respondent initially violated its plan when it cut through the present second crosscut outby the face without constructing a permanent stopping in the third crosscut outby the face (the present 4th crosscut outby); (2) Respondent continued mining until, when observed by Davenport on 9:00 a.m. April 24, the face had advanced, and an additional crosscut had been cut; and (3) when observed by Davenport, Respondent was in violation of having no permanent stoppings at both the 3rd and 4th crosscuts outby the face.

Within the framework of the above evidence, I conclude that the degree of Respondent's negligence herein was more than

ordinary, and constituted aggravated conduct.[2] (See, Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)).

III. Penalty

Although the gravity of the violation herein was low considering the fact that there was no methane present, and the air velocity was more than adequate, the violation resulted from Respondent's high degree of negligence as set forth above (II, infra). Taking this factor into account, as well as the other statutory factors set forth in Section 110(i) of the Act, as stipulated to by the parties at the hearing, I conclude that a penalty of $500 is appropriate for the violation found herein.

ORDER

It is hereby **ORDERED** that the Order issued by the inspector be affirmed as written. It is further **ORDERED** that Respondent shall, within 30 days of this decision, pay $500 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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[2]Davenport indicated that in his view unwarrantable failure means "knew or should have known" (Tr.54). It thus appears that he did not use the proper test, as set forth by the Commission in Emery, supra, in concluding that Respondent's negligence herein constituted an unwarrantable failure. I find however, based upon a de novo analysis of the record, that the evidence before me establishes an unwarrantable failure, as defined in Emery supra, on the part of Respondent.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 92-124-M
	:	A.C. No. 18-00035-05508
v.	:	
	:	Medford Quarry
GENSTAR STONE PRODUCTS CO., Respondent	:	

DECISION

Appearances: Gayle Green, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Kevin Sniffen, Esq., Genstar Stone Products Company, Hunt Valley, Maryland, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a)of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $168 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.14131(a), which requires seat belts to be provided and worn in haulage trucks. The respondent filed a timely contest and answer conceding the fact that the cited truck operator was not wearing the seat belt, but contesting the inspector's finding that the violation was "significant and substantial" (S&S). A hearing was held in York, Pennsylvania, and the parties filed posthearing briefs which I have considered in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the cited standard as alleged in the proposal for assessment of civil penalty, (2) whether the violation was "significant and substantial", and (3) the appropriate civil penalty that should be assessed based on the criteria found in section 110(i) of the Act. Additional issues

raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. 30 C.F.R. § 56.14131(a).

4. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties filed the following prehearing stipulations:

1. Medford Quarry is owned and operated by the respondent.

2. Medford Quarry is subect to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act").

3. The presiding Administrative Law Judge has jurisdiction over the proceeding pursuant to § 105 of the Act.

4. The citation and termination were properly served by a duly authorized representative of the Secretary upon an agent of the respondent at the date, time, and place stated therein and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.

6. The alleged violation was abated in a timely manner.

7. The violation of 30 C.F.R. § 56.14131(a), occurred as described in Citation No. 3869428, issued March 24, 1992. The parties do not agree, however, with respect to the Inspector's assessment of the gravity and negligence of the violation.

8. The computer printout reflecting the respondent's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and health Administration.

With regard to the proposed stipulations concerning the Quarry production, Nos. 8 and 9, the respondent's counsel stated that the total annual production of the Medford Quarry is

approximately 600,000 to 700,000, tons per year, rather than the 65,630, stipulated amount previously submitted by the parties, and that the total company production is greater than the 1.8 million production figure submitted by the parties (Tr. 7).

Discussion

The contested section 104(a) "S&S" Citation No. 3869428, issued by MSHA Inspector Elwood S. Frederick, on March 24, 1992, citing an alleged violation of mandatory safety standard 30 C.F.R. § 56.14131(a), states as follows:

> The operator of the stock truck company No. 603 was not wearing his seat belt. This truck was being operated in and around the plant area hauling material to stockpiles.

Petitioner's Testimony and Evidence

MSHA Inspector Elwood S. Frederick confirmed that he issued the citation in question in the course of a regular inspection at the respondent's quarry site on March 24, 1992, and that he was accompanied by the mine superintendent. Mr. Frederick stated that while with the superintendent in his pickup truck in the bin area he noticed that the cited truck that had just dumped a load of crushed stone material was proceeding down the slight grade from the stockpile with the truck bed in the air. The driver was lowering the bed as he was traveling down the road. Mr. Frederick stated that he waited until the truck pulled into the bin area, and as it was pulling in under the bin he walked toward the truck and motioned the driver to open the door because he wanted to speak with him about traveling with the truck bed in the air. When the driver opened the door Mr. Frederick observed that the seat belt was hanging down between the door and the seat. When he asked the driver about it, the driver informed him that he unhooked the seat belt when Mr. Frederick motioned to him and that the belt fell down. Mr. Frederick stated that he observed that the driver had both hands on the steering wheel as he was pulling into the bin area and he informed the driver that he was issuing a citation for not wearing his seat belt and told him that he was not to travel around the plant with the truck bed in the air (Tr. 14-16).

Mr. Frederick stated that the superintendent informed him that his people are instructed not to travel with truck beds raised in the air (Tr. 17). Mr. Frederick did not believe that the driver had just unhooked his seat belt after he motioned to him because he observed the driver with both hands on the wheel and that the driver "had to be pretty fast to unbuckle that" (Tr. 18). Mr. Frederick stated that "the road was fairly wide and in fairly decent shape", and that the cited truck was

traveling approximately ten miles an hour and one other truck was also hauling material (Tr. 20-21).

Mr. Frederick stated that he considered the violation to be significant and substantial because the truck bed was raised and the driver was coming down a slight grade. With the bed in the air, the center of gravity of the truck changed and it could upset very easily. Mr. Frederick was aware of documented accidents where trucks have hit potholes and overturned, or a driver applies his brakes to avoid another truck and loses control of the vehicle (Tr. 22). Mr. Frederick did not cite the truck for having the bed raised, but in hindsight, stated that "I should have issued an imminent danger order" (Tr. 24).

Mr. Frederick stated that traveling with the truck bed raised was not a good safety practice, and MSHA requires that the bed be down to the horizontal position after a driver dumps a load at the stockpile and leaves the area. He also alluded to several hazards associated with stockpiles, and confirmed that the stockpile in question was well-maintained (Tr. 25-29). He confirmed that he based his "S&S" finding on the raised bed of the truck changing the center of gravity of the truck, and not because of any stockpile conditions. He also indicated that there was one other vehicle in the area, and that if the driver hit a pothole or something in the road, "he has more likelihood of upsetting that truck" (Tr. 30). He also believed that by allowing the driver to continue to operate the truck with the bed in the air "it's reasonably likely if nothing's ever done that there will be an accident". The failure to wear a seat belt would contribute to the severity of an accident if one were to occur, and he was aware of accident reports where a driver not wearing a seat belt was propelled about his cab and was killed after striking his head. He believed that a driver with his seat belt fastened "stands a greater chance of not coming out with serious injury or fatality than he does if he's not wearing a seat belt" (Tr. 31-33).

Mr. Frederick stated that he based his "moderate" negligence finding on the fact that the respondent "does a good job", and had a seat belt policy which it enforced, including disciplinary action against its employees (Tr. 34, 37). Mr. Frederick stated that if the truck bed were not raised, he would not consider the failure to wear a seat belt to be "S&S" because the truck would have been stable with the bed down (Tr. 42). The violation was abated the same day it was issued after he instructed the truck driver to hook up his belt and the driver was disciplined by the respondent (Tr. 44).

On cross-examination, Mr. Frederick confirmed that he was familiar with MSHA's policy guidelines concerning "S&S" violations, and the requirement that any "S&S" finding should be consistent with the information recorded in his notes and

evaluation of all of the facts. He confirmed that the citation and his notes do not mention that the raised truck bed was the basis for his "S&S" finding (Tr. 47). He stated that the fact that the bed was raised was significant, but that " a lot of things we don't put in our notes", and he conceded that "to a certain degree", he did not comply with MSHA policy in this regard (Tr. 48).

Mr. Frederick confirmed that when he issued the citation, the stockpile was in good shape and the road was smooth and well-maintained "to a degree", and the truck was traveling on a slight incline at a safe speed (Tr. 52). He reiterated that he based his "S&S" finding on the fact that the truck bed was in the air, thereby changing the center of gravity of the truck, and the presence of other vehicles in the area (Tr. 57). The raised truck bed was a contributing factor to his "S&S" finding, and the failure to wear a seat belt contributed to the severity of any accident (Tr. 57-59). Mr. Frederick confirmed that he has issued seat belt violations which he did not consider were "S&S" violations (Tr. 63-64).

In response to further questions, Mr. Frederick confirmed that the truck driver in question was beginning to lower his truck bed as he drove away from the stockpile, and it was down when he pulled into the bin area (Tr. 67-68). He confirmed that the respondent had established "rules of the road and traffic patterns" for its vehicles (Tr. 71). He confirmed that the other truck that he previously referred to was not in close proximity to the truck that he cited, but it was possible for both trucks to pass each other in opposite directions on the roadway (Tr. 71). Mr. Frederick also explained the dumping of material at the stockpile, and he conceded that he had no knowledge as to whether the driver was wearing his seat belt while operating at the stockpile area (Tr. 75-77). Mr. Frederick was not aware of any prior seat belt violations at the respondent's quarry (Tr. 81).

Respondent's Testimony and Evidence

Gene Larrick, quarry superintendent, confirmed that he was with Inspector Frederick at the time the citation was issued. Mr. Larrick confirmed that he observed the truck leaving the stockpile with the truck bed up, but he did not observe the driver without his belt on. Mr. Larrick also confirmed that the driver was disciplined for driving with his truck bed raised and for the seat belt violation (Tr. 90). He confirmed that the respondent has a policy that drivers not leave dumping areas with their truck beds raised, and that he and his supervisors periodically check to see that employees wear their seat belts. He stated that the respondent has a mandatory policy requiring the wearing of seat belts at all times on equipment without rollover protection (Tr. 91). He also confirmed that the

respondent has a Job Safety Analysis (JSA) for employees covering safety procedures at dumping areas and that seat belt training is provided to employees (Tr. 91-92).

Mr. Larrick stated that he remained in his pickup truck in the bin area while Mr. Frederick went to the truck to speak to the driver, and that Mr. Frederick returned and told him that the driver did not have his seatbelt on. Mr. Larrick confirmed that he did not speak to the driver himself, and that Mr. Frederick served the citation on him at the end of his inspection review. Mr. Larrick stated that he spoke to the driver at a later time and the driver told him that he had his seat belt on (Tr. 100). Mr. Larrick confirmed that the driver received a written warning for "a combination of the bed up and not wearing the seat belt" (Tr. 105). Mr. Larrick stated that he used the inspector's observation to support the warning given to the driver for not wearing a seat belt (Tr. 106).

On cross-examination, Mr. Larrick agreed that driving a truck with the bed raised is a poor safety practice and against company policy. The policy is based on safety considerations (Tr. 107-108). Since he did not accompany the inspector when he approached the truck to speak with the driver, Mr. Larrick could not give an opinion as to whether or not the driver had just disconnected his seat belt at that time (Tr. 109). Mr. Larrick agreed that a raised truck bed could cause a problem with the truck's center of gravity under certain conditions. Insofar as the truck striking a pothole and becoming unstable is concerned, Mr. Larrick stated that one would have to define a "pothole" and stated "yes, it could happen. Anything can happen" (Tr. 110-111)

Jeff Carrey, respondent's safety supervisor, explained the respondent's training policy with respect to safety and seat belts (Tr. 112-114). He confirmed that he was familiar with the citation issued by Mr. Frederick in this case and that he participated in the closing inspection conference and discussed the citation with the inspector (Tr. 115). He stated that he was told at these meetings that "it was being written as "S and S" because the program policy manual indicated that they had to write it "S and S" and that the inspector's "hands were tied" because of the policy. The raised truck bed was discussed as a separate issue (Tr. 115).

On cross-examination, Mr. Carrey confirmed that he was aware of MSHA's program policy concerning seat belts and whether it should be an "S&S" violation, and he stated that "I see a lot of MSHA inspectors, and their interpretation to me has been that the seat belt violation is always an "S&S" violation (Tr. 119). He confirmed that his understanding of the policy language is that "under most circumstances", such a violation is "S and S" (Tr. 119).

Mr. Carrey confirmed that the truck driver who was warned took the matter no further (Tr. 120). He also confirmed that the driver had previously been disciplined for leaving work early, and that he had been involved in past accidents when he collided with two county trucks (Tr. 128-129). Mr. Carrey further confirmed that the quarry had never been previously cited for any seat belt violations (Tr. 129).

Inspector Frederick was recalled by the presiding judge, and he reiterated how he determined that the truck driver in question was not wearing his seat belt. Mr. Frederick stated that the driver told him that he had his seat belt on, and Mr. Frederick stated that he informed the driver that "the indications to me as an inspector, you did not" (Tr. 123). Mr. Frederick stated that the driver was not sitting on the seat belt, that it was hanging down between the door and the seat, and he explained further as follows at (Tr. 125):

> A. Well, I based everything on the fact that when he opened the door that I seen the seat belt hanging down. Now, if it was laying up on his lap, it's very possible that he could have unhooked it and it was unhooked laying on his lap. But with the belt hanging down between the seat and the door it was an indicator to me that he did not have it on. He was not getting out of the truck. He was still sitting in the seat of the truck.

Roger McClintock, MSHA Special Investigator, was called as a rebuttal witness by the petitioner. He explained his duties and confirmed that he was familiar with MSHA's enforcement policies. He stated that he has also served as an MSHA inspector and training specialist, and he explained that the seat belt policy is only a "guideline" for an inspector to use when evaluating a seat belt violation. Mr. McClintock explained his understanding of why Inspector Frederick found the violation to be "S&S", and he indicated that if an accident occurs without the driver wearing a seat belt, "the severity of that accident is going to be much greater" (Tr. 135). He agreed with Mr. Frederick's "S&S" finding because "he knew the operator did not have his seat belt on . . . and he suspected that he came off the . . .possibly came off the pile with the bed in the air and with the machine in an unstable, you know, condition" (Tr. 138).

On cross-examination, Mr. McClintock confirmed that he was aware of the definition of "significant and substantial", and in his opinion, although the failure to wear a seat belt may not cause an accident, it can affect an accident (Tr. 139). Mr. McClintock further confirmed that there has to be a reasonable likelihood of an accident and not just a remote possibility. He confirmed that he was not present at the time

the citation was issued and could not attest to the prevailing conditions
(Tr. 142).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory standard 30 C.F.R. § 56.14131(a), which states that "Seat belts shall be provided and worn in haulage trucks". In support of the violation, the petitioner points out that in its answer filed in this case the respondent stated that it "does not dispute the fact that the operator of the stock truck was not wearing his seat belt". The petitioner also relies on the inspector's testimony that when the driver opened the truck cab, he observed that the seat belt was hanging down between the door and the seat, and that when the driver was pulling his truck into the bin area just prior to stopping and opening his door, both of his hands were on the steering wheel. The petitioner concludes that the clear inference from the time sequence of these observations by the inspector is that the driver was not wearing his seatbelt while driving the truck.

The petitioner asserts that the only indication of record that the facts were not as stated above is the signed statement of the truck driver, Mr. Francis Dorsey (Exhibit R-1). The statement, which is dated March 9, 1993, reads in relevant part as follows:

> . . . .The safety inspector Gene Larrick was setting in Gene's truck talking about 50 Ft. away. The inspector got out was (sic) coming toward my truck being (sic) loaded. I open my door starte (sic) out to meet (sic) because in our J S A no one should walk under bins when plant (sic) in operator (sic). He pointed and yelled get back in and close door. I did not put my seat back (sic) on. Its Genstar's rule that everyone must wear seat belts when driving truck and etc.

The petitioner maintains that Mr. Dorsey's statement is mere hearsay and is entitled to little, if any, weight. In addition to the fact that the statement was not given under oath, the petitioner asserts that it is also ambiguous and unclear. As an example, the petitioner states that it is unclear who Mr. Dorsey was referring to in the phrase "he pointed and yelled get back in" or what the statement "I did not put my seat back on" means. Under the circumstances, the petitioner concludes that Mr. Dorsey's statement is highly unreliable evidence, and that it contradicts the other evidence in the record. The petitioner

points out that neither the inspector, nor superintendent Larrick, who waited in his truck while the inspector and Mr. Dorsey talked, reported seeing Mr. Dorsey make any attempt to get out of the truck.

The petitioner concludes that Mr. Dorsey's statement cannot overcome the sworn testimony of the inspector, which was subject to cross examination, as to what happened. Further, given the fact that Mr. Dorsey was disciplined for not wearing his seat belt, the petitioner concludes that even the respondent believed the inspector's conclusion that Mr. Dorsey was not wearing his seat belt, and did not believe Mr. Dorsey's story.

Relying on Mr. Dorsey's statement, the respondent maintains that Mr. Dorsey was wearing his seatbelt at the time of the alleged violation. The respondent asserts that Mr. Dorsey's explanation is logically supported by the facts presented, and it relies on Mr. Dorsey's contention that he was attempting to get out of the truck when the inspector motioned for him to open the door of the truck, and concludes that it was then that Mr. Dorsey most likely unbuckled his seatbelt. Since the seatbelt was between the door and the seat, the respondent believes that the belt was buckled and then fell off Mr. Dorsey's lap when he unbuckled it, as opposed to not having been worn at all and found on the seat under him.

The respondent points out that the inspector admitted that he did not actually see Mr. Dorsey operating the truck without wearing his seatbelt, and simply observed that the belt fell out of the truck when Mr. Dorsey opened the door. Under the circumstances, the respondent concludes that the inspector relied on circumstantial evidence that Mr. Dorsey was not wearing his seatbelt. Acknowledging the fact that it is almost impossible to catch a driver "in the act" of not wearing his seatbelt, the respondent contends that the inspector ignored persuasive and convincing evidence that Mr. Dorsey had his seatbelt on and unbuckled it to open the door when the inspector approached his truck, as he was trained to do under the respondent's policy and common practice. The respondent believes that Mr. Dorsey's story is the more credible and logical explanation of the facts and refutes the circumstantial evidence presented by the petitioner. Finally, the respondent asserts that Mr. Dorsey contested the violation and the reprimand he received "by writing and meeting with MSHA (the MSHA inspector and his supervisor) and Genstar's representatives to discuss the alleged violation".

In its answer filed on October 8, 1992, the respondent stated as follows: "Genstar does not dispute the fact that the operator of the stock truck was not wearing his seat belt".

Further, the record reflects that on February 18, 1993, the petitioner's counsel submitted prehearing stipulations agreed to by the parties, and included therein is stipulation No. 7, which states as follows:

> The violation of 30 C.F.R. § 56.14131(a), occurred as described in Citation No. 3869428, issued March 24, 1992. The parties do not agree, however, with respect to the inspector's assessment of the gravity and negligence of the violation.

I take note of the fact that at the time the stipulations were submitted the parties reserved the right to amend or supplement their prehearing statements following further trial preparation and within a reasonable time before the hearing. However, during opening statements at the hearing, the previously filed stipulations were reviewed by the parties, and except for a minor disagreement concerning the respondent's production, respondent's counsel agreed with the remaining stipulations, including Stipulation No. 7, quoted above (Tr. 6-8). Further, at the close of the petitioner's case, the respondent's counsel agreed that there was no dispute as to the fact of violation (Tr. 82). However, he then proceeded to rely on Mr. Dorsey's statement in support of his motion for summary judgement, and argued that the statement establishes that Mr. Dorsey unbuckled his seat belt when he got out of his truck, or was exiting the vehicle, "the inference being that he was wearing his belt up to that point" (Tr. 83). The motion for summary judgement was denied (Tr. 85), and counsel's alternative motion for judgement on the ground that the evidence did not support the inspector's "S&S" finding was taken under advisement, and counsel proceeded with his defense (Tr. 87-88).

Mr. Dorsey was not called to testify in this proceeding, nor was he deposed by either party. Insofar as his unsworn statement is concerned, I find it lacking in reliability and somewhat confusing and I have given it little weight. Although the respondent's counsel suggested that the statement was prepared and witnessed by Mr. Larrick, when asked if this was true, Mr. Larrick responded "it was just prepared and then I did read the statement" (Tr. 92). Further, although Mr. Larrick confirmed that he questioned Mr. Dorsey after the citation was issued and stated that Mr. Dorsey told him that he did have his seat belt on, I take note of the fact that Mr. Dorsey's statement is dated March 9, 1993, more than a year after the issuance of the citation.

Mr. Larrick testified that he remained in his own pickup truck while the inspector approached Mr. Dorsey's truck, and although Mr. Larrick stated that most drivers will get out of their trucks and come to his truck when he is in the bin area, he did not state that this was case with Mr. Dorsey. Indeed,

Mr. Larrick doubted that Mr. Dorsey knew that Mr. Frederick was an inspector when he approached his truck, and he indicated that Mr. Dorsey initially opened the door as the inspector approached his truck, and then closed it again (Tr. 94).

Inspector Frederick testified that as he approached Mr. Dorsey's truck, he motioned for him to open his door because he wanted to discuss his travelling with the truck bed in the air. When the door was opened, Mr. Frederick noticed the seat belt hanging down between the door and the seat, and he stated that Mr. Dorsey told him that he had just unhooked it after Mr. Frederick had motioned to him (Tr. 15-16). However, Mr. Frederick obviously did not believe him since he issued the citation, and he did so because he observed that Mr. Dorsey had both hands on the steering wheel as he pulled into the bin area and did not believe that he had time to unhook his belt as he claimed (Tr. 16, 18).

Mr. Larrick testified that Mr. Dorsey was disciplined for having his truck bed up as well as not having his seat belt on (Tr. 105). Mr. Larrick confirmed that he did not personally see the seat belt when Mr. Dorsey opened the truck door for the inspector and that he could not state an opinion as to whether or not Mr. Dorsey had just disconnected his seat belt before opening the door. Mr. Larrick further confirmed that he relied on the inspector's observations to support the disciplinary action taken against Mr. Dorsey (Tr. 106).

The respondent's assertion that Mr. Dorsey contested the violation and the company's disciplinary action taken against him suggests that Mr. Dorsey formally appealed his reprimand and therefore lends credence to his claim that he was wearing his seat belt. I reject any such conclusion. The respondent's safety supervisor, Jeff Carrey, explained that in addition to the inspection closing conference, Mr. Dorsey sent a letter to MSHA, and met with the inspector and his supervisor, to state his position and disagreement with the inspector's finding that he did not have his seat belt on (Tr. 114). However, Mr. Carrey confirmed that since no company official observed the incident regarding the seat belt citation, the respondent agreed with the inspector and gave Mr. Dorsey a warning, and the matter went no further within the company (Tr. 120-121). Mr. Larrick confirmed that Mr. Dorsey has been involved in other "incidents" with the truck other than seat belts, including collisions with two county trucks (Tr. 128-219).

After careful review of all of the testimony and evidence adduced in this proceeding, and apart from any admissions and stipulations made by the respondent with respect to the violation, I conclude and find that the petitioner has established through a preponderance of all of the credible evidence and testimony, albeit circumstantial, that Mr. Dorsey

was not wearing his seat belt when he drove his truck into the bin area after departing from the stockpile area on the day in question. I further conclude and find that the failure by Mr. Dorsey to wear his seat belt constitutes a violation of the cited section 56.14131(a), and the violation issued by the inspector IS AFFIRMED.

Significant and Substantial Violations

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

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

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, 3 FMSHRC at 825; U.S. Steel Mining Company, 6 FMSRC 1573, 1574 (July 1984); U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8, (January 1986).

The Petitioner's Argument

The petitioner maintains that the violation was significant and substantial (S&S). In support of its position, the petitioner asserts that the record reflects the existence of a discrete safety hazard, or a measure of danger to safety, contributed to by the violation. The petitioner argues that there was extensive testimony concerning the safety effects of not wearing seat belts in haulage truck accidents, and it cites Inspector Frederick's testimony concerning accident reports that he had studied and reviewed showing injuries and fatalities resulting from the failure to wear seat belts, and establishing that a person secured in a seat belt stands a greater chance of avoiding serious injury or death in an accident. The inspector alluded to operators being propelled around inside their truck cab or being ejected from the truck and either sustaining serious injuries on impact from the fall or being struck or run over by the truck itself. The petitioner also cites the testimony of Supervisory Special Investigator McClintock concerning his review of numerous haulage truck accidents, both fatal and non-fatal, which the petitioner believes establishes that the failure to wear seat belts constitutes a discrete safety hazard that contributes to a measure of danger to safety because it contributes to the severity of an injury suffered in an accident, and can mean the difference between severely disabling injuries and minor injuries.

The petitioner further argues that the facts presented in this case support a conclusion that there was a reasonable likelihood that the hazard contributed to by the violation would result in a reasonably serious injury from a haulage truck accident, and that it was reasonably likely that such an accident, and resulting injury, would occur. In support of this conclusion, the petitioner asserts that a truck travelling with its bed in the air causes the center of gravity of the truck to shift, and it becomes less stable and easily subject to upset. The petitioner points out that the respondent admitted that travelling with the bed up is an unsafe practice that affects the stability of the vehicle, that it is against company policy, and that employees have been instructed not to do it.

The petitioner maintains that the practice of traveling with the truck bed raised itself makes it more likely that a haulage accident will occur, and that other factors observed by the inspector, in combination with the raised bed, made an accident reasonable likely. These "other factors" included two-directional traffic on the same road going to the stockpile, another haul truck operating in the same area and at the same time hauling from the bins to the stockpile, a slightly graded roadway, and the existence of a stockpile which is made of material that is not compacted and is affected by weather conditions. The petitioner asserts that all of these factors contributed to the inspector's assessment that an accident was reasonably likely, and that any injury received as a result of the accident would be reasonably serious.

The petitioner denies the respondent's contention that Inspector Frederick based his "S&S" findings on MSHA's June 27, 1990, Program Policy Letter regarding the wearing of seat belts, and his belief that the policy required all seat belt violations to be cited as "S&S", rather than on the facts and conditions that he observed at the time the citation was issued. The petitioner points out that the policy letter does not state that all seat belt violations are "S&S", and merely states that the failure to provide, maintain, or wear seat belts is a serious safety hazard and under most circumstances should be a significant and substantial violation. The petitioner agrees that the appropriateness of an "S&S" designation depends on the facts and circumstances observed at the time a citation is issued, and it maintains that the inspector's testimony establishes that he relied on all of the aforementioned conditions he observed. The petitioner also points out that Inspector Frederick has issued non-"S&S" seat belt citations in the past and confirmed that he would not have designated the contested citation as "S&S" if the conditions had been different.

Commenting on three cases cited by the respondent's counsel in the course of the hearing in which seat belt violations were found not to be "S&S", the petitioner points out that in two of those cases, the inspectors did not cite the violations as "S&S" (Island Construction Co., Inc., 11 FMSHRC 877 (April 1990); Brown Brothers Sand Co., 12 FMSHRC 877 (April 1990). In Brown Brothers, the petitioner states that the violation was not "S&S" because the loader was being operated in a level area and there were no facts that would make it likely that it would strike other equipment or roll over. In the third case, Bennett Trucking Co. and B & S Trucking Company, 12 FMSHRC 1038 (May 1990), the petitioner points out that the cited regulation, section 77.1710(i), applied only to vehicles where there was a danger of overturning, which was not established in that case, whereas the language of the cited seat belt regulation in the instant case is mandatory for all haulage trucks. Further, as previously discussed, the petitioner states that there were a

combination of factors, the most important one being the fact that the truck was travelling with its bed raised, in itself an unsafe practice against company policy, that made it reasonably likely that an accident would occur. Under the circumstances, the petitioner concludes that the cases relied on by the respondent do not lend support to its position that the violation should not have been cited as "S&S".

The Respondent's Argument

Citing the Commission's National Gypsum Company decision, supra, and MSHA's policy manual guidelines for determining "S&S" violations, the respondent maintains that it must be shown that there was a reasonable likelihood of a serious accident, based on the surrounding facts of the case, before the contested violation can be designated as "S&S". The respondent asserts that an objective standard of reasonable likelihood requires that the probability of a serious accident resulting from a violation be more than just remote or speculative. On the facts of this case, the respondent concludes that there did not exist a reasonable likelihood that a hazard or accident would have occurred on the day in question.

The respondent further argues that MSHA's policy manual states that before designating a violation as "S&S", a serious injury must be "reasonably likely" to occur if the violation is not abated. Citing Bennett Trucking Company, 12 FMSHRC 1038 (May 1990), the respondent maintains that the petitioner must first establish the danger of the truck overturning before a seatbelt violation could be designated as "S&S". The respondent submits that MSHA's policy, and the case law, require that such danger be reasonably likely, not just possible, and that the inspector supported this position by admitting that he had first determined that an accident was reasonably likely from the truck's bed being in the air before stating that the seatbelt violation would only then contribute to the severity of any injuries.

The respondent contends that the evidence in this case does not support the inspector's application of the "reasonable likelihood" standard. In order for the inspector to have properly determined that the violation was "S&S", the respondent believes that he would have been required to find that there existed the "reasonable likelihood" that the truck would have overturned simply from having its bed being lowered as it pulled away from a stable stockpile. The respondent asserts that there was no evidence of any other unsafe conditions that could have contributed to a potential accident, and that without the presence of other factors, such as an unstable stockpile, or a roadway pot hole, the probability of the truck overturning is speculative at best, much less reasonably likely to have occurred.

The respondent concludes that the petitioner offered no other evidence to support the inspector's "S&S" finding other than references to irrelevant cases and studies which involved factors not present in the instant case.

The respondent emphasizes the fact that there has never been an instances at its quarry where a truck has overturned from lowering its bed while safely proceeding down a slight grade, and that the inspector could not recall of any instances in his experience where this has occurred without some other unsafe force or factor involved.

The respondent points out that MSHA's policy manual dealing with "S&S" violations provides that an inspector shall include all of the factors relevant to his evaluation of a violation as "S&S" in his inspection notes. Although the inspector claimed at the hearing that he based his "S&S" finding on the fact that the truck bed was up, and that he tries to include pertinent information in his notes "right there on the spot", the respondent points out that he made no mention of the truck bed being up in the air in his notes or in the citation. The respondent contends that the inspector gave little weight to the raised truck bed when he designated the violation as "S&S". In support of this conclusion, the respondent relies on the absence of this information in the inspector's notes, and his statement at the closing conference that his hands were tied because of MSHA's seatbelt policy. The respondent submits that the raised truck bed only became a significant factor once it decided to challenge the seatbelt policy.

Finally, the respondent maintains that on the basis of its dealings with MSHA, it believes that the inspectors are overzealously assessing all alleged seatbelt violations as "S&S" pursuant to its policy statement, irrespective of mitigating circumstances. Even assuming the existence of mitigating circumstances, the respondent still believes that MSHA's policy does not state the proper standard by which "S&S" violations should be judged as required by its own policy that requires an inspector to find that there is a "reasonable likelihood" of an injury or illness in order to designate the violation as "S&S", and not just a remote possibility of an accident, or the presumption of an "S&S" violation based on the policy manual. The respondent concludes that the inspector in this case improperly applied MSHA's policy, as well as the case law, in finding that the violation was "S&S".

I conclude and find that whether or not Inspector Frederick relied on MSHA's policy manual as the basis for his "S&S" finding is not particularly critical. The Commission has held that such policy instructions "are not officially promulgated and do not prescribe rules of law binding upon an agency" (Commission). Old Ben Coal Company, 2 FMSHRC 2806, 2809 (October 1980). However,

since the policy manual guidelines and instructions are intended to provide instructions and assistance to inspectors as they go about their daily inspection duties, and are relied on by the industry so that it may be aware of MSHA's interpretations and applications as a means of staying in compliance, I would expect an inspector to follow the policy. In this case, the inspector conceded that he failed to follow the policy with respect to noting and documenting each essential factor that prompted him to make his "S&S" finding.

Although I find some merit in the respondent's suggestion that MSHA's policy guidelines with respect to seat belt violations provide a ready formula for an inspector to conclude that all such violations are per se "S&S", I cannot conclude that the inspector in this case made a per se finding of "S&S" based solely on such a policy. However, I do take note of the fact that the policy instructions which state that "the failure to wear seat belts is a serious hazard and under most circumstances should be a significant and substantial violation"; that "all citations issued for failure to wear seat belts should be reviewed for special assessment", e.g., violations cited as contributing to serious injury or fatality, or violations evaluated as having extraordinarily high gravity (highly likely and fatal); and that "without mitigating circumstances, the gravity evaluation of reasonably likely or highly likely, and fatal would usually be justified" (without identifying examples of mitigating circumstances), are rather suggestive and do provide convenient and expedient ingredients for an inspector to conclude that all seat belt violations are per se "S&S", without considering all of the prevailing conditions mandated by the case law to support such a finding.

At the heart of the petitioner's case is its contention that the raised truck bed, in combination with other factors, such as two-directional traffic of the roadway, another truck hauling from the bins to the stockpile, a slightly graded roadway, and a stockpile made of material that is not compacted and is affected by weather conditions, support the inspector's belief that an accident was reasonably likely. However, as indicated by the discussion which follows below, the testimony of the inspector himself does not support the petitioner's suggestions that these "other factors" made it reasonably likely that an accident would have occurred. Having viewed the inspector in the course of the hearing, and having carefully reviewed his testimony, I find it to be rather contradictory, equivocal, and lacking in credible support for his asserted reasons for his "S&S" finding.

Inspector Frederick initially testified that he based his "S&S" finding on the fact that the truck driver was travelling down a slightly graded roadway with his truck bed in a raised position, and the inspector believed that the truck could easily upset because its center of gravity would shift with the bed in

the air (Tr. 22, 45). Although the inspector suggested that this was an imminently dangerous situation, he did not issue an imminent danger order or otherwise cite the raised truck bed condition (Tr. 24). The inspector later testified that the raised truck bed "was one of the contributing factors", rather than "the direct cause" for his "S&S" finding (Tr. 57). He also stated that any determination as to the type of citation he would issue would depend on "the conditions at the time that the violation is cited", and that MSHA's seat belt policy statement "is only a guidance, it's not a set forth enforcement tool" (Tr. 64).

Inspector Frederick testified that the roadway was "fairly wide and in fairly decent shape" (Tr. 19). Although Mr. Frederick relied on several accident reports concerning incidents at other mining operations where truck drivers hit potholes and lost control of their vehicles, causing an overturn, or encountered other vehicles on a roadway and lost control after hitting their brakes (Tr. 22), there is no evidence that any of these conditions ever existed at the respondent's mine or at the time of the inspection. Indeed, while testifying that he also relied on a general "history" of poorly maintained stockpiles and trucks encountering overhead wires, the inspector conceded that these conditions were different and distinguishable from those presented in this case (Tr. 64-65). With regard to the accident reports mentioned by special investigator McClintock, there is no evidence that any of the conditions that may have been present during those events were present in the instant case, and Mr. McClintock confirmed that he was not present when the citation was issued by Inspector Frederick,and Mr. McClintock could not attest to the conditions that prevailed at that time (Tr. 142).

There is no evidence in this case to establish that the raised bed of the truck in question in fact changed its center of gravity or affected its stability. Although the respondent conceded that driving with the truck bed up was an unsafe practice and against company policy, superintendent Larrick testified that whether or not the truck's center of gravity could be affected would depend on certain conditions. The evidence establishes that the driver was lowering the truck bed as he departed the stockpile area at a low rate of speed and there is no evidence that he travelled for any substantial distance with the bed completely in the air. Under the circumstances, I cannot conclude that in the normal course of mining activities the driver would have driven the truck with the truck bed continuously in a raised position. Indeed, the evidence establishes that when the truck reached the bin area, the truck bed was completely down, and the inspector conceded that with the bed down the truck would have been stable and he would not have considered the fact that the driver did not have his seat belt fastened to be an "S&S" violation (Tr. 41-42).

Inspector Frederick confirmed that the driver "wasn't really travelling fast", and he estimated the speed of the truck at 8 to 10 miles an hour as it left the slight incline away from the stockpile area. The inspector also confirmed that the driver did not travel the entire distance of 150 to 200 feet from the stockpile area to the bin area with his truck bed raised, and that he was lowering the bed as he left the stockpile area (Tr. 68). The inspector further confirmed that the respondent had established "rules of the road", passing routes, and a right-hand traffic pattern in place (Tr. 70). Although he alluded to other vehicle traffic on the roadway in question, he could not recall any traffic in close proximity to the cited truck at the time of his inspection (Tr. 71).

The inspector conceded that he did not observe the driver dumping his load at the stockpile, and that he did not know whether he had his belt on or off when he was at the stockpile area prior to pulling the truck into the bin area (Tr. 76-77). The inspector also confirmed that the stockpile area "was well maintained" (Tr. 28) and I find no evidence to support the petitioner's suggestion that the stockpile materials in question were not compacted or otherwise unstable.

In view of the foregoing, and after careful consideration of all of the evidence and testimony adduced in this case, including the arguments advanced by the parties in support of their respective positions, I conclude and find that the petitioner has failed to make a case in support of its contention that the violation cited by the inspector was significant and substantial (S&S). Accordingly, the inspector's "S&S" finding IS VACATED, and the contested citation IS MODIFIED to a non-"S&S" section 104(a) citation.

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

I conclude and find that the respondent is a small-to-medium size operator, and I find nothing to suggest that the payment of the civil penalty assessment for the violation in question will adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated to the admissibility of a computer print-out purportedly containing a record of the respondent's compliance record (Exhibit G-3). However, the document contains no meaningful information. The inspector had no knowledge of the respondent's compliance record and was unaware of any prior seat belt citations issued at the quarry (Tr. 80-81). The petitioner's counsel and MSHA supervisory Inspector McClintock agreed that the document reflects no prior history of violations

for the two-year period preceding the issuance of the contested citation in this case (Tr. 148-150). Under all of these circumstances, and for purposes of a civil penalty assessment for the violation which has been affirmed, I conclude and find that the respondent has no history of prior assessed violations.

Negligence

The inspector found that the violation resulted from a "moderate" degree of negligence on the part of the respondent. He confirmed that the respondent did a good job with its seat belt program and that it held safety meetings, instructed its drivers in the use of seat belts, periodically checked to make sure its employees were in compliance, and disciplined them if they were not (Tr. 34). The inspector testified that the respondent "did a lot of things to protect their employees. They had the seat belt policy, they enforced the seat belt policy, they disciplined the people" (Tr. 37). The inspector indicated that the cited driver "for some reason, I guess, forgot or didn't pay much attention to what was going on and drove with the bed in the air" (Tr. 67-69). Under all of these circumstances, I conclude and find that there was a low degree of negligence on the respondent's part.

Good Faith Compliance

The parties have stipulated that the violation was abated in a timely manner, and the inspector confirmed that it was terminated the same day it was issued. I conclude and find that the respondent demonstrated rapid good faith compliance in taking the appropriate action to abate the cited condition.

Gravity

I conclude and find that on the facts of this case, the violation was non-serious.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $50 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $50, within thirty (30) days of the date of this decision and order. Payment is to be made to the petitioner (MSHA), and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUN 24 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-204 A.C. No. 42-01697-03637
v.	:	Bear Canyon No. 1
C.W. MINING COMPANY Respondent	:	

DECISION

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

Before: Judge Cetti

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1988) ("Mine Act" or "Act"). The Secretary of Labor issued a citation to C.W. Mining Company (C.W. Mining) alleging a violation of 30 C.F.R. § 75.220(a)(1) (1991) [1] for operating a mine without an approved roof control plan.

It is C.W. Mining's contention that there was no violation of 30 C.F.R. § 75.220(a)(1), that the mine's old roof control plan was improperly revoked, that MSHA did not negotiate in good faith, that the mine's old roof control plan was adequate, more suitable and a safer roof control plan than the new current plan, that the current roof control plan was submitted by the operator to the MSHA district manager for approval under protest and for these reasons the citation charging the operator for operating the mine without an approved roof control plan should be vacated.

---

[1] 30 C.F.R. § 75.220(a)(1) (1991), provides as follows:

> 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 if unusual hazards are encountered.

SYNOPSIS

With the safety of the miners, my evaluation of the evidence and the established applicable law in mind, I find on careful review of the record that within the framework of the evidence presented, MSHA has carried its burden of proof on the critical central issues in this case and conclude the violation of 30 C.F.R. § 75.220(a)(1) was established.

STIPULATIONS

At the hearing the parties entered into the following stipulations, which I accept.

1. C.W. Mining Company is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. C.W. Mining Company is the owner and operator of Bear Canyon No. 1 Mine, MSHA I.D. No. 42-01697 an underground coal mine.

3. C.W. Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations and orders were properly served by duly authorized representatives of the Secretary upon agents of C.W. Mining Company on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The proposed penalty will not affect C.W. Mining Company's ability to continue business.

8. C.W. Mining Company is a medium size mine operator with 551,084 tons of production in 1990.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

I

C.W. Mining is the owner and operator of the Bear Canyon No. 1 Mine [2] in Huntington, Utah. The Bear Canyon Mine is an underground coal mine required by the Mine Act to operate under an approved roof control plan. At all times prior to October 23, 1991, the date the citation in question was issued, C.W. Mining operated the Bear Canyon Mine under a roof control plan approved by the Secretary of Labor. In June 1991, when its roof control plan came up for its six-month review as provided by 30 C.F.R. § 75.223(d), [3] MSHA proposed certain revisions of the plan that C.W. Mining found unacceptable. The parties communicated for several months particularly with respect to the two primary differences in the old plan and the new current plan. The two primary differences between the old plan and the new or current approved roof control plan are (1) the distance that the miners can mine before permanent roof bolts are installed and (2) the manner and sequence of the steps taken in pulling (extracting) pillars.

Under the old plan the operator was allowed to advance 120 feet where adequate top coal was available to provide temporary roof support between 120 foot bolting cycles. Only where adverse roof conditions were encountered or where insufficient top coal existed, was the operator required by the old plan to roof bolt every 20 feet and not allow miners inby the last row of roof bolts.

Under the new current plan, top coal irrespective of its thickness and strength cannot be used as temporary roof support and Respondent must be on a 20 foot bolting cycle at all times, regardless of the condition or the amount of the top coal. With respect to extracting pillars under the old plan, roof bolting the splits was not required when adequate top coal was available for support. Under the current plan, all pillar splits are required to be roof bolted, regardless of good or bad roof conditions and the required fender cut sequence is different than the sequence under the old plan. (Tr. 54, 88-89, 531, 601-602, 604).

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[2] This mine is also referred to by its former name the "Coop Mine" in the exhibits and the transcript of testimony.

[3] 30 C.F.R. § 75.223(d) provides:

> (d) The roof control plan for each mine shall be reviewed every six months by an authorized representative of the Secretary. This review shall take into consideration any falls of the roof, face and ribs and the adequacy of the support systems used at the time.

Under the new current plan miners always work under a fully bolted roof. This follows from the fact that C.W. Mining under the current plan is limited to 20 foot cuts with a 20 foot roof bolting cycle. It is undisputed that 20 feet is the maximum distance Respondents' continuous miners is able to travel under remote control.

II

BRIEF PROCEDURAL AND FACTUAL HISTORY OF NEGOTIATIONS LEADING TO APPROVAL OF CURRENT ROOF CONTROL PLAN

In 1988 the regulations concerning roof support in 30 C.F.R., subpart C were revised. Section 30 C.F.R. 75.220(f) as revised mandated that existing roof control plans that conflict with the revised regulations meet the requirements of the revised roof regulations by September 28, 1988. C.W. Mining's president, superintendent and engineering consultant met with District 9 roof control specialist in early January 1989 and the roof control plan was reviewed and revised. This old plan was approved by the district manager on January 26, 1989. Thereafter, the roof control plan was reviewed by MSHA every six months and on each review was found to be adequate until August 9, 1991, when MSHA informed the operator that the roof control plan was inadequate. (Tr. 522-524). This is the same plan that was later rescinded by MSHA on October 23, 1991. The citation in question was issued the same day the plan was revoked when mining operations continued without an approved roof control plan. MSHA gave the operator several extensions to abate the citation to permit uninterrupted production until the citation was abated on November 4, 1991.

Abatement was accomplished by C.W. Mining submitting under protest the current plan which was approved November 4, 1991 by the MSHA district manager.

The sequence of the Bishop type negotiations in this case for a suitable roof control plan can be summarized as follows:

June 29, 1991, C.W. Mining sent to the MSHA District 9 Manager for the six months review its 22 page roof control plan for Bear Canyon #1 Mine last approved March 5, 1990. In the letter transmitting the plan C.W. Mining stated that it did not feel any changes were needed at that time. (Govt. Ex. 2).

August 9, 1991, MSHA sent a five page letter to C.W. Mining stating that on review by MSHA personnel the plan was found to be inadequate. The letter listed 30 "necessary" changes in the pillar section of the roof control plan and 10 "necessary" changes in the development section of the roof control plan. (Govt. Ex. 3). MSHA requested C.W. Mining to submit a new plan

by August 26, 1991 addressing the 40 concerns MSHA set forth in the letter.

August 22, 1991, C.W. Mining sent a letter to MSHA stating that the roof control systems set forth in the plan submitted for review had been used at the mine for 30 years and there had been no uncontrolled roof falls during that time. C.W. Mining once again asked that the submitted plan be approved with no change. The letter did not otherwise respond to the 40 concerns MSHA listed in its letter of August 9, 1991.

September 9, 1991, MSHA sent a second letter to MSHA (Govt. Ex. 6) requesting that C.W. Mining respond to and comply with MSHA's letter of August 9, 1991. This letter also informed C.W. Mining that if an acceptable plan was not received by the due date, September 30, 1991, that the plan may be rescinded and that any further mining activity would result in the issuance of a citation charging a violation of 30 C.F.R. § 75.220.

It is the Secretary's contention that as of September 9, 1991, all the requirements of the Bishop decision were fulfilled. MSHA nevertheless agreed to extend the deadline so that a face-to-face discussion could be held with C.W. Mining concerning the reasons that the roof control plan had to be revised. The due date was extended to September 24, 1991.

On September 24, 1991, a face-to-face meeting of mine management and MSHA was held in Price, Utah. Present at the meeting in Price included the following:

Bill Stoddard - President of C.W. Mining
Ken Defa - Superintendent of Bear Canyon No. 1 Mine
Jerry Taylor - MSHA District Engineering Coordinator (Acting District Manager
William Ponceroff - MSHA District Roof Control Supervisor
Tony Gabossi - MSHA Acting Subdistrict Manager
Bill Ledford - MSHA Field Office Supervisor

At the meeting the need for full roof bolting was discussed in detail as well as other requested changes addressed in MSHA's second disapproval letter dated September 9, 1991.

On October 4, 1991, the district manager sent a follow-up letter to C.W. Mining recapping the discussion and agreement reached at the September 24, 1991, face-to-face meeting. The letter concludes as follows:

> During a phone conversation with William Ponceroff, District Roof Control Supervisor, on September 30, 1991, Mr. Bill Stoddard,

> President, C.W. Mining Co., agreed to submit an acceptable plan within two weeks. It is agreeable to extend the deadline for the submittal of an acceptable roof control plan to October 11, 1991.
>
> As discussed in the meeting held on September 24, 1991, deadlines for ending the review process have been extended too many times. C.W. Mining Co. must make the necessary revisions and submit an acceptable roof control plan by October 11, 1991, or the currently approved roof control plan will be rescinded. Any further mining activities without an approved plan would be a violation of 30 CFR 75.220.
>
> Be advised that the requirements for the Bishop decision and Program Policy Letter No. P89-V3 (copy attached) have been fulfilled. C.W. Mining Co. must have an acceptable roof control plan ready for submittal in order to prevent loss of production. The company may then contest the provisions of the roof control plan on the basis of a technical citation.
>
> If you have any questions. please contact this office at (303) 231-5462.
>
> Sincerely,
>
> /s/ William A. Holgate

October 12, 1991, C.W. Mining submitted a "new revised" roof control plan (Govt. Ex. 12) which MSHA found unacceptable and rejected.

October 22, 1991, MSHA faxed to C.W. Mining 16 reasons why it found the "new revised" roof control plan unacceptable. (Govt. Ex. 13). The hard copy of the same date, October 22, 1991, in addition to specifying the reason the plan was unacceptable again recapped the history of negotiation and concluded as follows:

> This requested revision is necessary to formulate a plan suitable to the present conditions and mining systems at the mine, and to ensure the health and safety of the miners when future mining occurs. Since all negotiations concerning the development of an acceptable roof control plan, in accordance

> with 30 CFR 75.220, remain at an impasse, the currently approved roof control plan is rescinded. Any further mining activities without an approved plan is a violation of 30 CFR 75.220.
>
> If you have any questions, please contact this office at (303) 231-5462.

On October 23, 1991, the date that the old roof plan was revoked and the citation issued for violation of 30 C.F.R. § 75.220, C.W. Mining submitted another revised roof control plan that was similar to the current approved plan. In its transmitted letter, C.W. Mining stated as follows:

> Under protest we do agree to the enclosed plan as dictated by your office. We still believe the original roof control plan is just as safe, and in pillar extraction your system is less safe because it puts our people in the pillar splits where they are exposed to sloughing ribs and possible injury while bolting. It also forces us to extract more than one pillar at a time and will cause the pillars to load up and be more apt to cause out bursts.
>
> We also feel more comfortable with the pillar extraction sequence we have used for over 30 yrs. with no serious accidents or injures (sic) related to roof problems. We found it works better and has proven to be safer than other systems we have tried, including the system Mr. Ponceroff is forcing us to use.

In rebuttal to the C.W. Mining claim that MSHA dictated the new plan, counsel for the Secretary points to Mr. Ponceroff's testimony at the hearing as follows:

> We did not dictate this plan. We approve plans, we don't say what goes in them. As long as they comply with statutory provisions and good mining principle as determined by the district and the representative of techs and the mining industry as a whole in relation to site specific instances in that mine, we approve them. [TR 95]

On October 29, 1991, the Mine Superintendent, Ken Defa, after a telephone conversation with Mr. Ponceroff, MSHA Supervisory Roof Control Specialist, sent MSHA revised plans concern-

ing the pillar extraction sequence that Mr. Ponceroff had requested. (Govt. Ex. 16).

October 30, 1991, the District Manager sent the mine operator, Mr. Stoddard, six detailed specific reasons the submitted roof control plan remained unacceptable. In response to the District Manager's letter, C.W. Mining that same day (October 30, 1991), faxed the six revisions to the plan that were specifically requested by the District Manager. (Govt. Ex. 19).

November 4, 1991, the MSHA District Manager approved the revised C.W. Mining roof control plan.

November 25, 1991, the District Manager corrected an inadvertent error on page 15 of the approved plan and reissued a new copy of the entire approved plan consisting of 18 pages. The approved plan included the disputed 20 foot roof bolting cycle and the new disputed pillar extraction procedure and fender cut sequence. (Govt. Ex. 35-A).

III

DISCUSSION AND FINDINGS

Preliminarily it should be noted that in Dole, 870 F.2d 662 at 667 the court stated, "[t]he specific contents of any individual mine [roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager." In Peabody Cole Company, 15 FMSHRC 389 (March 1993) the Commission held that "both the Secretary and the operator are required to enter into good faith discussions and consultation over mine plans." The Commission in Peabody, supra, further explained this process and quoted their decision in Carlson County, 7 FMSHRC 137 as follows:

> The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation

before the Commission. 7 FMSHRC at 1371 (citation omitted)(emphasis added).

Section 302(a) of the Mine Act mandates each operator to carry out on a continuing basis a program to improve the roof control system of each mine as follows:

> Sec. 302. (a) Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form within sixty days after the operative date of this title. The plan shall show the type of support and spacing approved by the Secretary. (Emphasis added).

30 U.S.C. § 862(a)

Upon review of the exhibits referenced above, the testimony of the witnesses and the records as a whole I find that both the operator and the Secretary negotiated in good faith and for a reasonable period of time over their legitimate differences. Nevertheless, the parties were unable to resolve their differences. Consequently, in order to continue production after revocation of the old plan the operator under protest submitted the revised current approved plan.

Although the operator and the Secretary in an attempt to resolve their legitimate differences negotiated in good faith and for a reasonable period of time, they remained at odds. In Dole supra the Court of Appeals at page 669 footnote 10 [4] states that

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[4] Dole supra at footnote 10. We note that while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977),

while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan.

IV

MSHA'S REASONS FOR REVOCATION OF OLD PLAN

The reasons why the MSHA District Manager revoked the old roof control plan are summarized by MSHA in its Post-Hearing Brief, page 6 and 7, as follows:

> The roof control plan was revoked for several reasons:
>
> 1. Under the old plan, men were allowed to work and travel under unsupported roof. Mining experience has shown that traveling under unsupported roof is the most hazardous conduct in mining. Roof falls are the largest cause of fatalities in underground mines today. Statistics show that persons are killed by going under unsupported roof. [TR 34-37; 126-127].
>
> 2. Under the old plan, C.W. Mining was only required to bolt when it believed that it was necessary, yet it is too difficult to know when it might be necessary to fully bolt. The transitional areas between good roof and bad roof can only be determined under the old plan by human judgment. Offset in the roof observed by Mr. Ponceroff indicates that the company was not successful in determining when the conditions were bad. They must be aware of the conditions, before someone goes under them, not after. The only way to avoid that is to fully bolt. [TR 40-44; 83-84].
>
> 3. Transitional areas between good roof and bad roof can only be determined under the old plan, by human judgment and the violation history at this mine shows that numerous citations and orders existed for failure to follow the roof control plan. Also preshift, and on shift violations were issued for failure to properly examine the mine roof, and an imminent danger order for a bad roof has been issued at this mine, further indi-

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U.S.Code Cong.&Admin. News 1977, p.3425.

cating the unwillingness of the operator to keep the roof in good condition.

4. The operator maintained that 1 to 3 feet of top coal was the primary roof support at this mine. However, roof bolts were being installed systematically throughout all development sections. Hence the mine has agreed that the roof is bad in many locations.

5. Conditions of the mine observed by inspectors, District 9 specialists and MSHA technical support indicate that it is an extremely unsafe practice for the miners to work under roof that is not supported, since it is uncertain what a miner may encounter. All sections of the roof must be bolted before anyone goes under the roof.

6. History of Violations - roof falls at this mine. (Exhibit Nos. 1 and 4).

7. C.W. Mining had a particularized history of violations of its own Roof Control Plan. (Exhibit 25).

Based upon all of the information provided by the on site inspectors, the visits made by Technology Center experts, the history of this mine and the newly revised roof control regulations, Mr. Ponceroff recommended that changes be made in the old roof control plan. Those changes primarily related to a system of full-bolting. That is a system where the area is bolted before any miner is required to work or travel under the roof. The result of the recommendation was that C.W. Mining would be limited to 20 foot cuts with its continuous miner, since that is the distance that the equipment can travel under remote control. Under the old system, the miner operator could go under the roof in areas just cut, without supporting, and could develop a distance of more than 100 feet. Under the new plan with full bolting, the distance is reduced to 20 feet.

* * * * *

The Commission has taken note of the fact that mine roofs are inherently dangerous and

that even a good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 (July 1982), Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986).

V

Respondent presented considerable evidence to support its contention that its old roof control plan last approved by the District Manager on March 5, 1990, was adequate and appropriate for the particular conditions at the mine and therefore should not have been revoked. Respondent presented the testimony not only of its officials and employees but also the testimony of three federal coal mine inspectors to this effect. These MSHA coal mine inspectors were quite familiar with the particular conditions at the mine. Their testimony supports Respondent's contention that in most areas of the mine top coal was of adequate thickness and strength to be used as temporary roof support for the 120 foot cuts and bolting cycles used under the old plan. Evidence was also presented that a 20 foot full roof bolting cycle was used by C.W. Mining under the old plan when adverse roof conditions were encountered. The mine inspectors called by Respondent also testified that the pillar extraction procedure under the old roof control plan was safe and even safer than the pillar extraction procedure under the current approved roof control plan.

VI

Respondent's expert witness Dr. Krishma Sinha, a geological engineer, based upon the tests he performed and his computer analysis of the results he obtained, testified that there was no added safety benefit in requiring roof bolts to be installed in 20 foot cycles over 120 foot cycles. Dr. Sinha's testimony was not persuasive. He did not take or supervise the taking of samples used in his analysis. He did not know who took the samples or even what part of the mine from where the samples were allegedly taken. (Tr. 993). He took neither tensile nor sheer strength tests. (Tr. 995). He assumed the material to be homogeneous. (Tr. 999). Mr. Ropchan the mining engineer employed by the MSHA Technology Center testified this assumption was a fatal miscalculation. Mr. Ropchan stated that Mr. Sinha's computer analysis failed to consider the joints and fractures of the coal. (Tr. 996-998, 1091).

The Secretary in support of his position presented the testimony of M. Terry Hoch, the mining engineer who heads the Roof Control Division of the MSHA Safety and Health Technology Center

in Pittsburg (Tr. 381, Govt. Ex. 27); Jerry Davidson, a geologist employed by the MSHA Safety and Health Technology Center and David Ropchan, a mining engineer for the MSHA Safety and Health Technology Center since 1971. (Tr. 315). All of these experts visited the mine in question and made visual observations of the mine conditions.

David Ropchan testified that the method of pillar extraction used under the old plan was more dangerous than pillar extraction under the current plan since the old plan opened up more ground and thus exposed the miners to more unsupported roof. He stated that stress on the roof increases with the square of the span of the roof and when the roof span increases, tensil stress is greatly increased. (Tr. 1088-1089).

Jerry Davidson, the MSHA geologist, testified he did not consider pillar extraction under the old plan a safe way to extract pillars "because under the old plan a lot of ground (is) opened up" and practically no ground support was installed. Thus under the old plan the continuous miner operator, his helper and the shuttle car operator and possibly the section foreman would be exposed to a greater hazard of roof falls than under the current plan which involves "opening up" less ground.

Mr. Hoch who heads the MSHA Technology Roof Control Division testified that District 9, where the mine in question is located, was the only district that still has a roof control plan that permitted miners to travel under an unsupported coal roof or a roof supported only by head (top) coal. (Tr. 393-394). He explained that a coal roof cannot be a sole means of support because as a material, it is inconsistent, it is jointed, has cleats and, most importantly, can and will fall. (Tr. 448-449).

Mr. Hoch stated that the primary thrust of the 1988 revised roof control regulations was to "incorporate new technologies so that miners would not be required to work or travel in areas where roof was not supported. He stated that head or top coal can "mask" roof problems so you can't see hazards such as joints and fractures. He also stated that coal left on the roof can enhance the resistance to absorption of humidity increasing the dangers of roof falls.

Based on the testimony of the experts from the Safety and Health Technology Center and the undisputed fact that the operator was encountering changing adverse roof conditions in the mine that all parties agree required a 20 foot roof bolting cycle, I find that the new current roof control plan is suitable for the mine in question and is mine specific. It is not necessary or appropriate in this case to reach the question of whether the use of top coal alone to support the roof is proscribed by the present roof control regulations.

Respondent argues that its witness should be credited since its witnesses were more familiar over a longer period of time with the particular conditions at the mine and spent more time observing the mine in operation rather than MSHA's witnesses who were less familiar with the mine and who spent less time observing and examining the conditions of the mine. The Commission in Cyprus Tonopah Mining Corp., 15 FMSHRC 367 at 372 (March 1993) quotes from its earlier decision Asarco, Inc., 14 FMSHRC 941, at 949 (June 1992) as follows:

The Commission has recognized that:

> [e]xpert witnesses testify to offer their scientific opinions on technical matters to the trier of fact. If the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert's opinion.

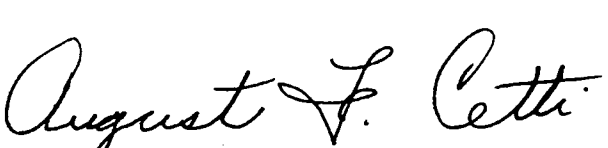
Based upon their superior credentials I credit the opinion of the Secretary's Safety and Health Technology Center experts. Based upon their testimony and the undisputed fact that there were changing adverse roof conditions in the mine that required full roof bolting on 20 foot cycles, I find that the old roof plan was no longer suitable to the conditions of the mine in question and was properly revoked. On the same basis I also find the current approved roof control plan is suitable to the conditions of the Bear Canyon No. 1 Mine as contemplated by 30 C.F.R. § 75.220(a)(1) and section 302(a) of the Mine Act.

Consistent with the above findings and conclusions I find the violation of 30 C.F.R. § 75.220(a)(1) as charged in the citation was established. The violation is technical nature. Consequently the $20 penalty MSHA proposes is appropriate.

ORDER

1. Citation No. 3582718 and the MSHA proposed $20 penalty are affirmed.

2. Respondent shall pay a civil penalty of $20 to the Secretary of Labor within 30 days of this decision and upon receipt of payment, this proceeding is dismissed.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 25 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-625
Petitioner	:	A.C. No. 15-03178-03713
v.	:	
	:	Ohio No. 11 Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

This case is before me upon remand by order of the Commission dated June 23, 1993. Pursuant to said remand, upon the joint request of the parties and for demonstrated good cause, the Decision Approving Settlement in this case dated May 4, 1993, is hereby vacated and this case is dismissed.

Gary Melick
Administrative Law Judge

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JUN 25 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RONNY BOSWELL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 93-48-DM
	:	MSHA Case No. SE MD-92-05
v.	:	
	:	Ragland Plant
NATIONAL CEMENT COMPANY, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esquire, Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant; Thomas F. Campbell, Esquire, Lange, Simpson, Robinson and Somerville, Birmingham, Alabama, for Respondent

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Ronny Boswell pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," alleging that National Cement Company, Inc. (National Cement) issued Mr. Boswell a three day suspension in violation of Section 105(c)(1) of the Act.[1]

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[1] Section 105(c)(1) of the Act provides as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be

More particularly it is alleged that Mr. Boswell's suspension was the result of certain activities protected by the Act, namely:

* * *

(a) During the course of the work shift on or about December 27, 1991, Complainant made a daily inspection of loader no. 950 and noted that the lights were 'faulty' and further noted under remarks: total disregard by the company to keep mobile equipment in proper working order may lead to damage to equipment are [sic] possible harm to employees.

(b) On or before December 27, 1991, Complainant's supervisor questioned him regarding the information complainant had entered on the daily inspection report.

(c) Complainant was then instructed to shut down the 950 loader for the rest of the night and to commence operating a different piece of equipment, a 540 loader.

(d) Complainant did as he was instructed and operated the 540 loader until the odor of anti-freeze affected his ability to operate the loader.

(e) Upon notifying his supervisor of the condition in the 540 loader, complainant was instructed to resume his work duties by operating the 950 loader which had previously been shut down by the supervisor.

(f) Complainant informed his supervisor that it would be a violation of the company's safety procedures and requirements as well as federal regulations if the 950 loader was placed back in service without correcting the safety defects for which it had been shut down by management.

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fn. 1 (continued)
instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

(g) A safety review was eventually requested by complainant.

(h) The safety director for the company was summoned to the area and the lighting defects ultimately corrected. Complainant then proceeded to operate the 950 loader for the remainder of the shift.

The Commission has long held that a miner seeking to establish a prima facia case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Circuit 1981); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (1981). The operator may rebut the prima facia case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity. If an operator cannot rebut the prima facia case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 842 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical tests under National Labor Relations Act.

Ronny Boswell has been an employee of National Cement for 18 years and has been a payloader operator since 1990. The Ragland Plant where he had been working operates 3 shifts, 24 hours a day and Boswell rotates on all three shifts. On December 27, 1991, Boswell was to work the night shift on the 950 Payloader. According to Boswell, following company safety procedures, before starting the equipment, the operator must complete a daily inspection report. This safety inspection report is then given to the foreman near the beginning of the shift.

On December 27, Boswell wrote on the daily inspection report for the 950 Payloader that the lights were "faulty" and noted in the remarks column "total disregard by the company to keep mobile equipment in proper working order may lead to damage to equipment are [sic] possible harm to employee" (Government Exhibit No. 1). Boswell had similarly

reported the lights as being "faulty" and noted a bent left lower headlight bracket on reports dated December 15, 16, 17, 19, 24 and 26, 1991 (Government Exhibit No. 2). Boswell explained that there are actually two pairs of lights on the front of the 950 Payloader, one factory installed pair 7 feet above ground and an additional pair on the upper cab 12 feet above ground and explained that his reports related only to the upper lights.

After filing his report on December 27, Boswell returned to the 950 loader and resumed working at the "clay house" where ample overhead lighting existed and obviated the need for any lights on the payloader. Around 12:00 or 12:30 that night substitute foreman Rudy Hall approached inquiring about the daily inspection report. Boswell acknowledges that he never refused to operate the 950 Payloader because of inadequate lighting and never told Hall that the loader was unsafe. Indeed, Boswell has always maintained that the loader was not unsafe to operate and presented no hazard. Following this discussion Hall nevertheless told Boswell "shut it down and get on the 540 loader -- turn the ignition off and let it sit where it [is]."

According to Boswell, the 540 Payloader was 7 years older than the 950 and after operating it for 20 to 25 minutes antifreeze fumes "got to me." He told Foreman Hall that he could not operate the 540 loader because he "couldn't breathe." Hall accommodated Boswell's difficulty with the 540 loader and told him to return to the 950 loader. Boswell then refused telling Hall that "it's in the company safety book that you can't start it up until the problem is fixed." Boswell maintains that he had the "company safety requirements" in his possession at the time and maintains that he was referring to paragraph (g) on page 4 of a document entitled "National Cement Company Safety Procedures and Requirements" (Government Exhibit No. 3). The cited provision states as follows:

> Report and, if possible, repair any defects found. Do not use machine with uncorrected safety defects which present a hazard. If the loader is unsafe and removed from service, tag it to prohibit further use until repairs are completed.

Boswell also maintains, although it is not clear he raised this contention with Hall at the time, that he understood from Federal regulations in his possession that he was also prohibited by those regulations from resuming operation of the 950 loader. In particular, he cited the provisions of 30 C.F.R. § 57.14100(c) which provide as follows:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.[2]

According to Boswell, Hall became "very upset" when he continued to refuse to start the 950. Boswell states that Hall then asked him what he was to do and Boswell responded "I'm not going to start the 950 loader back up to get your ass out of a crack." Hall made further inquiry as to what it would take to resolve the impasse and Boswell made it clear that he was not refusing to operate the loader because it had been shut down for safety reasons but only that it could not be restarted without violating Federal regulations and company rules.

Boswell then asked for a "safety review" -- apparently a procedure wherein union representatives review an employee safety complaint for possible further action. According to Boswell, Hall would not call the union safety representative but subsequently Cedrick Phillips, the company safety director, reported to the plant, examined the loader and had the brackets straightened. The light was replaced by Boswell himself. Boswell then restarted the 950 Payloader and operated it for the remainder of his shift. The above recitation of facts taken from the testimony of Boswell is uncontradicted. Rudy Hall was present at trial but was never called as a witness.

On January 13, 1992, Boswell attended a meeting at which he was given a disciplinary action report and was notified of his three-day suspension (Government Exhibit No. 6). Boswell acknowledges that although a number of reasons for his suspension were cited in the "disciplinary action report" (and mine manager Remy Demont later testified that he also considered prior oral and written warnings in Boswell's personnel file) he conceded and understood that the disciplinary action related only to events that occurred on December 27.

Within this framework of undisputed evidence it is clear that Boswell has established a prima facia case that he engaged in protected activities by (1) reporting in the daily equipment

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[2] On cross examination Boswell acknowledged that the 950 loader had never in fact been "tagged out" nor "taken out of service and placed in a designated area posted for that purpose."

inspection report for the 950 Payloader on December 27, 1991, and on at least nine other prior occasions, that its lights were "faulty" and (2) in complaining about and refusing to operate the 540 loader on the evening of December 27, 1991, because of the complaints regarding antifreeze leakage and fumes causing difficulty in breathing. I further find that the disciplinary action taken against Boswell was motivated at least in part by the latter protected activity. Plant Manager Remy Demont, who made the decision to suspend Boswell, in fact testified that the suspension was based in part upon Boswell's refusal to operate the 540 Payloader.

It may also reasonably be inferred because of its close relationship to his later refusal to operate the 950 loader on the evening of December 27, 1991, that Demont also was motivated at least in part in suspending Boswell based on his complaints in the daily inspection reports noted above. Under the circumstances the Secretary has established a prima facia case of discrimination under Section 105(c) of the Act in proving that indeed, Boswell engaged in protected activities and his suspension was motivated in part by those activities. Pasula, supra; Robinette, supra.

I find, however, that National Cement has affirmatively defended against that prima facia case by proving that it would have taken the adverse action in any event on the basis of Boswell's unprotected activity alone, i.e., his subsequent insubordination in refusing to operate the 950 Payloader for reasons not related to any safety or health hazard. Pasula, supra; Robinette, supra. In this regard I find credible the testimony of Plant Manager Demont that the triggering event for Boswell's discharge was in fact this insubordination in refusing to operate the 950 Payloader. Demont further explained that Boswell's demand for a "safety committee review" while admitting there was no safety hazard on the 950 loader was the specific causative grounds for his suspension. The critical issue to be determined then is whether Boswell's refusal to operate the 950 Payloader on the evening of December 27, 1991, was a protected work refusal.

A miner has the right under Section 105(c) of the Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. Pasula, 663 F.2d at 1216 n. 6, 1219; Miller v. Consolidation Coal Co., 687 F.2d 194, 195 (7th Cir. 1982). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993. A good faith belief "simply means a honest belief that a hazard exists." Robinette, at 810. The purpose of this requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id.

Since Boswell acknowledges that he did not refuse to operate the 950 loader because of any hazard, this work refusal is clearly not protected. The Secretary nevertheless argues that a miner has a right to refuse to work if the miner has a good faith, reasonable belief that he would, by continuing to work, violate a mandatory safety standard. In this regard, the Secretary maintains that to operate the 950 loader once it had been removed from service pursuant to 30 C.F.R. § 57.14100(c) would constitute a violation of that standard.

Even assuming, arguendo, that the Secretary's legal theory is correct in this regard, the credible evidence in this case does not demonstrate that the 950 Payloader had ever been removed from service pursuant to that mandatory standard. It was admittedly never "tagged out" nor "taken out of service and placed in a designated area posted for that purpose" as would be required under the standard and there is no evidence that it was ever cited by the Secretary. Moreover, Boswell himself at all times insists that the lighting problems on the 950 Payloader did not create any hazard. Under the circumstances the Secretary is disingenuous in claiming on behalf of Boswell that the 950 Payloader was in a hazardous condition and was taken out of service under the cited standard. In summary, I cannot find that Boswell has met his burden of proving that he entertained a good faith and reasonable belief that to operate the 950 loader would have been hazardous or that it would have violated the cited mandatory standard. Thus, in any event, his complaint herein must fail.

ORDER

Discrimination Proceeding Docket No. SE 93-48-DM is **DISMISSED.**

Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 28 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 92-818
	:	A. C. No. 15-14074-03614
v.	:	
	:	Martwick Underground
PEABODY COAL COMPANY, Respondent	:	
	:	Docket No. KENT 92-869
	:	A. C. No. 15-02705-03754
	:	
	:	Docket No. KENT 92-986
	:	A. C. No. 15-02705-03763
	:	
	:	Camp No. 2 Mine

DECISION

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

Before: Judge Maurer

In these three proceedings, the Secretary seeks to impose civil penalties on the respondent, Peabody Coal Company (Peabody) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for three alleged violations of the mandatory standard found at 30 C.F.R. § 75.316. The respondent filed timely answers contesting the alleged violations and these cases were in due course docketed for hearing. Pursuant to notice, an evidentiary hearing was held in Owensboro, Kentucky, on March 9, 1993.

Subsequent to that hearing, the parties filed a written joint motion to approve their proposed settlement with regard to Docket Nos. KENT 92-869 and KENT 92-986. In Docket No. KENT 92-869, the parties propose to reduce the assessed civil penalty from $2900 to $2600 and in KENT 92-986, no reduction of the assessed $5000 penalty is proposed. Based on the representations of the parties, I conclude that the proffered settlement is appropriate under the criteria contained in section 110(i) of the Mine Act and it is approved. The financial terms of this

settlement agreement will be factored into my order at the end of this decision. There remains for my decision on the merits, a single section 104(a) citation: Citation No. 3552659, contained in Docket No. KENT 92-818. I make the following decision.

DISCUSSION AND FINDINGS

Citation No. 3552659, issued pursuant to section 104(a) of the Mine Act, alleges a violation of the mandatory standard at 30 C.F.R. § 75.316 and charges as follows:

> The methane and dust control plan was not being followed in that the air behind the curtain in No. 3 entry was 4000 cfm while the wet bed scrubber was off.

Mine Safety and Health Administration (MSHA) Inspector George Newlin issued the citation at bar on May 28, 1992, during a respiratory dust survey. In a nutshell, the inspector felt that the company was operating in violation of its approved ventilation plan because the plan calls for 5000 cubic feet of air at the end of the line curtain while the miner is cutting coal and when he took his air reading, he only found 4000 cubic feet of air moving. Specifically, the plan provides in relevant part: "A minimum of 5000 cfm of air shall be delivered to the inby end of the line brattice before the scrubber is started and shall be maintained until the cut has been completed."

The overriding issue in this case then is whether or not the miner operator cut out a load of coal just before the inspector took his air reading. Because if he did not, then everyone agrees, there is no violation. That seems simple enough, but there is a complicating feature present in the case. From where the inspector was positioned in the crosscut waiting for the miner to start cutting before he took his air reading, he could not see the continuous miner machine in the No. 3 entry. Therefore, the inspector did not see the miner operator cut coal, nor did he see any coal being loaded into the shuttle car, but he believes that he heard the miner cut into the coal and he then went into the entry to take his reading. Peabody's evidence is to the contrary, i.e., they did not start cutting coal until later that morning.

Mr. Geary, a maintenance supervisor at the mine, testified that as part of the federal dust survey, they have to maintain 17 water sprays on the miner with a minimum of 100 psi pressure with the sprays running and, also, in the wet bed scrubber itself, there is one spray that has to also be operating with 100 psi with the wet bed running. In order to check the pressure on these water sprays, you have to unhook a spray or a hose from

the miner and then hook another hose with a pressure gauge teed into it in its place. While this apparatus is installed, you cannot mine coal; but in order to check the water pressure on the sprays, you do have to turn the scrubber on.

After Mr. Geary had checked the water pressure on the sprays, he sent someone to get the inspector to perform his pressure check. When he came over, but before he checked the pressure on the sprays, he checked the air behind the wing curtain and said they did not have enough air to run coal with. The inspector concurs with that chronology of events (Tr. 34).

I find the testimony of Mr. Geary to be most convincing. The pressure-checking apparatus was installed on the miner until after the inspector checked the water pressure, and even the inspector agrees that this was in turn after he took the air check which prompted the citation at bar. At the same time, it is uncontroverted that while the pressure-checking apparatus is installed it is not possible to cut coal. Therefore, the only logical explanation that takes into consideration all the facts is that the inspector's assumption vis-a-vis cutting coal is wrong. The inspector apparently mistook the sound of the scrubber running on the miner for the somewhat similar sound of the miner cutting coal. Although there is testimony on the record that it is possible to tell the difference in sound between the miner setting with its scrubber running and the miner cutting coal, it was also stated that the farther away a person is from the miner, the harder it would be to detect the difference. I believe that is exactly what happened in this instance. Accordingly, Citation No. 3552659 will be vacated.

ORDER

Based upon the above findings of fact and conclusions of law, it **IS ORDERED** that:

1. Citation Nos. 3547038 and 3552661 **ARE AFFIRMED.**

2. Citation No. 3552659 **IS VACATED.**

3. Peabody Coal Company **SHALL PAY** a civil penalty of $7,600 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

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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
June 29, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 91-168 A.C. No. 05-00301-03764
v.	:	
MID-CONTINENT RESOURCES INC., Respondent	:	Dutch Creek Mine

AMENDED DECISION APPROVING PARTIAL SETTLEMENT

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C., Glenwood Springs, Colorado, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for the violation of mandatory regulations promulgated pursuant to the Act.

A hearing in this case and related cases commenced in Glenwood Springs, Colorado, on April 15, 1992. The parties reached a partial amicable settlement and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citations, the original assessments, and the proposed disposition are as follows:

Citation/Order Number	Proposed Penalty	Amended Proposed Penalty
3410363	$1,000.00	$ 600.00
3410391	1,100.00	660.00
3411019	1,600.00	960.00
	$3,700.00	$2,220.00

In support of that motion, the parties submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

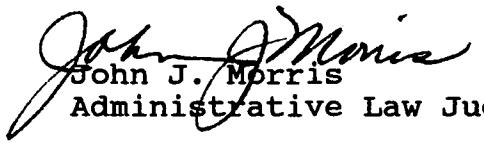
ORDER

1. Citation Nos. 3410363, 3410391, and 3411019 and the amended proposed penalties are **AFFIRMED.**

2. Order No. 3410800 was reassessed and settled in WEST 92-717. Accordingly, it is deleted from this penalty proceeding.

3. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that civil penalties be assessed against the Respondent in the amount of $2,200.00 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy case.

4. The undersigned Judge retains jurisdiction of this case and related cases not otherwise disposed of by the settlement herein.



John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 30 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-992
	:	A.C. No. 46-01453-04013
v.	:	
	:	Docket No. WEVA 92-993
CONSOLIDATION COAL COMPANY, Respondent	:	A.C. No. 46-01453-04014
	:	Docket No. WEVA 92-1042
	:	A.C. No. 46-01453-04020
	:	
	:	Humphrey No. 7 Mine

PARTIAL DECISION PENDING FINAL ORDER

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

STATEMENT OF THE CASE

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act" or "Act"), the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), charges Consolidation Coal Company ("Consol") with violating various safety regulations for underground coal mines, promulgated by the Secretary at Title 30, Part 75 of the Code of Federal Regulations ("C.F.R."). In addition, the Secretary charges that certain of the violations constituted significant and substantial contributions to mine safety hazards ("S&S" violations) and that one was the result of Consol's unwarrantable failure to comply with the cited regulation.

A hearing on the merits was conducted in Morgantown, West Virginia. At the commencement of the hearing, counsels advised me they had agreed to stipulations applicable to all of the violations they would try. Tr. 9. They advised me further they had agreed to settle one of the violations at issue and they requested a stay in the contest of another citation pending the then forthcoming decision of another Commission administrative law judge. They added that they would resolve their differences with respect to the stayed contest based upon that judge's decision. Tr. 13-14. In response, I requested the parties read

their stipulations into the record. I also indicated that I would entertain on the record a motion to approve the settlement and would rule upon the motion in this decision. Finally, I indicated that I would grant the stay. Tr. 13-15.

STIPULATIONS

The parties stipulated 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. This case is under the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judge pursuant to sections 105 and 113 of the Mine Act;
>
> 4. The individual whose signature appears on the citations at issue, Thomas W. May, Sr., was acting in his official capacity as an authorized representative of the Secretary of Labor when each of the citations was issued;
>
> 5. True copies of each of the citations at issue in this case were served on Consol or its agent as required by the Mine Act;
>
> 6. The total proposed penalty for the citations contested by Consol in this case will not affect Consol's ability to continue in business.

See Tr. 9-10.

THE SETTLEMENT

Docket NO. WEVA 92-992

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3108615	2/3/92	77.402	$20	$20

The citation was issued because a Black & Decker hand-held drill did not have controls requiring constant hand or finger

pressure to activate. Rather, the drill was equipped with a lock on its trigger switch. Thus, the drill had a safety device, but not the kind of protective device required by the standard. The inspector found that the violation was not S&S and was due to Consol's moderate negligence. The inspector also indicated it was unlikely the drill operator would have been injured due to the violation. The parties stated that the had agreed that Consol would pay the proposed civil penalty.

Considering the fact that the drill was protected from accidental activation by a safety device and taking account of the inspector's low assessment of gravity and his finding of moderate negligence, as well as the other civil penalty criteria set forth at the close of this decision, I conclude that the proposed settlement is warranted and I approve it. Subsequently, I will order Consol to pay the agreed amount.

THE STAY

DOCKET NO. WEVA 92-992

Citation No.	Date	30 C.F.R. Section	Assessment
3108613	1/28/92	75.1003(c)	$206

Counsel for the Secretary stated the parties' request that the contest of the penalty proposed for this alleged violation be stayed pending a decision by Commission Administrative Law Judge Avram Weisberger. He further stated that the parties expected to resolve their differences regarding this violation based upon that decision. I granted the parties' request.

Judge Weisberger's decision was issued subsequent to the hearing on this matter. Consolidation Coal Co., 15 FMRHRC 436 (March 1993). The parties have yet to advise me that they have resolved their differences. Therefore, at the close of this decision I will order the parties to file their settlement agreement and to move for my approval of said agreement. This decision will not become final until all issues concerning Citation No. 3108613 have been resolved.

CONTESTED CITATIONS AND ORDER

ORDER OF PROCEEDING

I will discuss and decide the contests in the sequence in which the parties chose to try them: Docket No. WEVA 92-993, Docket No. WEVA 92-992 and Docket No. WEVA 92-1042.

DOCKET NO. WEVA 92-993

Section 104(a) Citation No. 3108745, 2/6/92, 30 C.F.R. § 75.305

The citation states:

> The weekly examination for hazardous conditions conducted on 2/3/92 by R. Calonero was not adequate. The examination was of the 12 East return aircourse. There was damage to one stopping and a 1/2 block out of another stopping that was not listed in the record book.

G. Exh. 5. The citation charged that the condition constituted a violation of section 75.305 and that the violation was S&S.[1]

THE TESTIMONY

THOMAS W. MAY

Thomas W. May, an inspector employed by MSHA, was the sole witness for the Secretary. May stated that on February 6, 1992, he arrived at Consol's Humphrey No. 7 Mine at approximately 7:45 a.m. He was at the mine to conduct a regular inspection. Tr. 28-29. Shortly after arriving, May went underground accompanied by Stanley Brozik, Consol's safety supervisor, and by the representative of miners, Sam Woody. Tr. 29. As the inspection party traveled the 12 east return aircourse, May noted two defects in stoppings located between the number three and number four entries.

One of the defects was "a place in the stoppings where half a block had been left out." Tr. 29. (May described the "place" as a hole approximately eight inches square. Id.) May explained that such a hole normally is made to permit the hose from a rock

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[1] 30 C.F.R § 75.305 which was in effect when the subject citation was issued and which subsequently has been revised effective August 16,1992, 57 FR 20914 (March 15, 1992), required in pertinent part, that in addition to preshift and daily examinations, examinations for hazardous conditions be made at least once each week by a certified person designated by the operator at certain specified areas and that if any hazardous condition is found it shall be reported to the operator promptly and that a record of the examinations shall be kept in a book on the surface by the operator and open to inspection by interested persons. Section 75.305 was replaced by 30 C.F.R. § 75.364.

dusting machine to pass through the stopping. After rock dusting has been completed, the hose is withdrawn and the hole is patched. In this case, although the hose was no longer there, no one had repaired the stopping. Tr. 29-30.

Also, May observed another stopping that was being crushed due to "heaving" of the floor. (May described "heaving" as "where the bottom actually goes into an arch. The pressure on the coal pillars shoves down and the bottom in the open entries then comes up." Tr. 31.) May testified that the crushing of the stopping created gaps in the stopping around the frame of its man door and May said he could hear air leaking through the gaps. Tr. 33.

Plastic had been placed over the stopping in what May speculated was an attempt to stop the air from leaking. According to May, this was not successful and the "plastic was flapping [in the leaking air] and making all kinds of noise." Tr. 37. The plastic was on the intake side of the stopping, and May was walking the return side. Nonetheless, May could see the plastic through the holes and could hear it flapping. He believed that Robert Calonero, who had conducted a weekly examination for hazardous conditions on February 3, and who had walked the return entry as part of that examination, likewise could have seen and heard the plastic. Tr. 51-52.

With regard to the hazards presented by the crushed stopping, May noted that the air was leaking from the intake entry into the return entry and he was fearful the leaking air would cause a short-circuit of the ventilation of the working section, which in turn would result in a velocity of air at the face that was inadequate to render harmless and carry away methane and respirable dust. Tr. 34. In addition, the hole in the first stopping would contribute to the recirculation.

May explained that he believed the hole in the first stopping was purposefully cut to allow the hose from the rock dusting machine to pass through the stopping. Although he did not know exactly when this had happened, he had observed a person's footprints on the rock dusted floor of the return entry and he believed that the footprints were made by Calonero when he examined for hazardous conditions on May 3. Tr. 30. May also explained that he believed the second stopping had been subjected to heaving pressures for a long time and that the condition of the stopping had deteriorated progressively until it had reached the stage in which he found it.

Upon returning to the surface, May inspected the book in which the reports of the weekly examination for hazardous conditions were kept. He noted that not only was the examination report for February 3 missing a reference to the condition of the stoppings, but also that there was no reference to the condition in the report of the examination conducted previous to

February 3. Tr. 36-37, 43-44. May found the failure to report the condition of the stoppings to be a violation of section 75.305. Tr. 40.

May also found that the violation was S&S. He stated that the mine liberates methane at the rate of more than one million cubic feet every twenty-four hours. Tr. 40. Had the condition of the stoppings been allowed to continue unabated during normal mining operations, he believed that ventilation in the return entry would have been short circuited to the extent that it was reasonably likely an explosive concentration of methane would have accumulated and an ignition or an explosion ignited by friction from the bits on the continuous mining machine cutting into rock at the face would have occurred. Tr. 41, 62. He explained that without the condition of the stoppings being recorded, the stoppings probably would not have been repaired, and it was reasonably likely that the stopping that was being crushed would have collapsed completely and short-circuited the air. Tr. 62-63. In May's opinion, by recording the condition of the stoppings in the examination book, "the mine foreman can address the situation, get it corrected in a timely manner and eliminate the hazard." Id. (However, May also confirmed that at the time he observed the condition of the stoppings there was 27,450 cfm at the face of the affected section -- three times more than the required minimum and that he had found point-one percent (.1%) methane in the return air, as low a reading as he could obtain using his methane detector. Tr. 57-58, 61-62.)

Further, May believed Consol was negligent in failing to note the condition in the weekly examination book. May testified that the foreman, Earl Hagedorn, had told him that he did not want such conditions put in the book and that he preferred miners write descriptions of conditions needing correction on slips of paper and give him the slips. Tr. 44-45. May told Brozik what Hagedorn had said and Brozik told Hagedorn that the conditions "had to be put in the book." Tr. 45.

May also testified he believed that Calonero should have been aware of his failure to perform an adequate examination on February 3. Tr. 47. May testified that he believed the footprints in the rock dust on the floor of the return entry were Calonero's and were made after the hole for the rock dusting machine's hose had been cut in the stopping. He believed this because the footprints went straight up the entry the way an examiner would have walked, rather than back and forth across it, the way a miner rock dusting the entry would have traveled. Tr. 54-55, 83-84. Moreover, and in May's opinion, the stopping that was being crushed-out had deteriorated gradually and thus should have been readily observable on February 3. Tr.87-88.

When asked by counsel whether the violation cited was for failing to record the condition of the stoppings or for failing to notice the conditions during the weekly examination, May replied, "It would be one and the same . . . If he did not record them, then the only thing that I can assume is that he didn't notice them or did not do his exam properly as the regulation requires." Tr. 48. May added, "He failed to report the stopping damage, so the only thing that you can assume from that was that he was unaware [of the condition of the stoppings] because he wasn't doing the job that was required by section 75.305." Tr. 50.

Finally, May stated that the ventilation plan for the Humphrey No. 7 Mine required the stoppings to be reasonably air tight and that the conditions he found on February 3 violated the plan. Nonetheless, he wrote the citation solely "for the examination." Tr. 56, 61.

ELDON HAGEDORN

Eldon Hagedorn, the mine foreman at Humphrey No. 7 Mine, was the first witness to testify for Consol. Not surprisingly, Hagedorn had a different view of the conversation in which he told May that he wanted conditions requiring correction to be written down and the written reports to be given to him. He stated the practice at the mine was for the shift foremen to advise him of conditions that were not yet hazardous but which had the potential for so becoming. He wanted to be advised of the conditions in order to make certain they were taken care of. Tr. 94-95. He stated that he had never given instructions that hazardous conditions should not be entered in the weekly examination book because, "It would be my job." Tr. 95. Calonero, he added, had not told him about the condition of the subject stoppings nor ever given him a written slip of paper referring to it. Tr. 95-96.

STANLEY BROZIK

Stanley Brozik, safety supervisor at the Humphrey No. 7 Mine, was Consol's last witness. He accompanied May when May issued the citation, and he agreed that the stoppings were basically as described by May. Tr. 100-101. Further, he stated that if the stopping that was being crushed had failed completely there would have been a significant reduction of ventilation at the face. He explained that the intake air would have leaked directly into the return entry at the crushed stopping, robbing the face of ventilation. Tr. 101-102. He noted, however, that had normal mining operations continued at the face, the continuous mining machine was equipped with a methane monitor which would have "knock[ed] the power" long before the methane content of air at the face would have reached an explosive level. Tr. 102. He also noted that the continuous mining machine

operator had to check for methane every twenty minutes and that the section foreman had to check every two hours. Tr. 102-103.

Brozik speculated that the crushed stopping would not have collapsed the next day or the following day. He stated that it might have lasted "over a period of years" but he admitted this was "only . . . speculation." Tr. 106.

THE VIOLATION

Consol is charged with an inadequate weekly examination for hazardous conditions. There is no serious dispute that the stoppings were in the condition described by May. There is likewise no dispute that the condition of the stoppings was not entered in the weekly examination book. Section 75.305 requires hazardous conditions found by the examiner during the course of the weekly examination of a return aircourse to be reported promptly and a record of the examinations to be recorded in a book kept on the surface. As May testified, and as common sense indicates, a main purpose of the recording requirement is to alert miners to the hazardous conditions and to facilitate their correction, an action also required by the regulation.

Because the condition of the stoppings was not recorded, the question is whether the condition was hazardous? I fully credit May's testimony regarding the danger presented by the defective stoppings, and I note that May was not alone in recognizing the hazard. Brozik too agreed that had the second stopping been crushed-out, air reduction at the face would have been significant. I conclude that the condition of the stoppings created the potential for a serious mine accident and I find that the condition was hazardous.

I also conclude that the condition existed on February 3 when the weekly examination was conducted. I am fully persuaded by May's explanation that the footprints he observed in the entry were most likely those of Calonero. Certainly, none of Consol's witnesses offered as plausible an explanation. Moreover, the weight of the evidence establishes that the hole in the first stopping was purposefully made to accommodate the hose of the rock dusting machine. Obviously, the entry had to have been rockdusted before Calonero's footprints could have appeared in the dust. Thus, I infer that the hole existed when Calonero passed it.

With respect to the crushed stopping, May's testimony that such a condition happens over time is persuasive and was not refuted. While the stopping may not have been as badly crushed on February 3 as when May saw it three days later, I conclude that it was nonetheless in a noticeably deteriorated state and its condition should have been recorded.

I therefore agree with May that Consol's failure to record the condition of the subject stoppings in the surface examination book establishes that the weekly examination for hazardous conditions conducted on February 3 was inadequate and that the Secretary has proved a violation of section 75.305.

S&S

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission set forth the four elements of a "significant and substantial" violation. The Commission explained that to find a violation S&S, the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discrete safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. In U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984),the Commission amplified the meaning of the third element of the Mathies test, explaining it "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."

Here, I have found that there indeed was a properly cited violation of section 75.305. Moreover, I agree with May that the failure to adequately inspect for hazardous conditions contributed to a discrete safety hazard -- a failure to fix the stoppings and the resulting danger of inadequate ventilation at the face leading to the buildup of methane and the exposure of miners at the face and on the section to an ignition and explosion hazard. I further agree with May that had there been an ignition and explosion the incident would have resulted in reasonably serious, even fatal, injuries to miners.

The question is whether the Secretary has established a reasonable likelihood that the failure to repair the stoppings would have resulted in an event in which there would have been an injury? I conclude that he has. I note the Commission's admonition that the likelihood of injury must be evaluated in terms of continued normal mining operations, U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984), and further that the operative time frame for determining if a reasonable likelihood of injury exists includes the time the violations would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8,12 (August 1986), U.S. Steel Mining Co. 7 FMSHRC 1125, 1130 (August 1985).

In essence, Brozik agreed with May that had normal mining continued, the stopping that was being crushed would have collapsed and that this would have led to a loss of ventilation at the face. Their fears were warranted in view of the nature of

the pressures to which the stopping was being subjected and in my view establish the reasonable likelihood that face ventilation would have been disrupted and given the gassy nature of the of the mine, that methane would have accumulated to explosive levels. I come to this conclusion because the testimony establishes that the pressure on the stopping was continuous and that the resulting deterioration of the stopping was ongoing. In addition, the area in which the stoppings existed was not inspected on a daily basis and one of the premises of the standard's requirement to record reported hazardous conditions obviously is that the recording will serve as a signal for correction. In short, the failure to adequately comply with section 75.305 on February 3, was causally linked with the condition of the stoppings on February 6, and would have remained so linked had normal mining operations continued.

GRAVITY AND NEGLIGENCE

This was a serious violation. The importance of adequate compliance with the cited regulation was pointed out by May and is implicate in the standard itself. As I have noted, the recording of hazardous conditions can be fundamental to their correction and, in my opinion, is especially important when the hazard relates to something so central to safety as the ventilation of the face in a gassy mine.

The fact that the condition of the stoppings was visually obvious and was not entered in the weekly examination book, in and of itself establishes Consol's negligence. The regulations requires such recording and in failing to comply Consol failed to meet the standard of care required by the regulation.[2]

Section 104(a) Citation No. 3108748, 2/12/92, 30 C.F.R.§ 75.503

The citation states:

> The Joy continuous miner on the 12 East section is not maintained in permissible condition. The continuous miner is in the face of the [No.] 1 entry and there are two headlights that are not securely mounted on the equipment. The headlight[s] are at the roof bolting station opposite the operator. One headlight is loose and the other has one bolt missing.

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[2] I am not persuaded, however, that Hagedorn instructed miners to disregard section 75.305's requirement to record hazardous conditions. He denied it, and as he said, such instructions would have been cause for his dismissal. Moreover, in the context of running a productive mine, Hagedorn's explanation that he wanted to be advised in writing about conditions that were not yet hazardous but that could deteriorate to that level is both pragmatic and plausible.

G. Exh. 6. The citation charges that the condition constituted a violation of section 75.503 and that the violation was S&S.[3]

THE TESTIMONY

THOMAS W. MAY

May testified that on February 12, 1992, he conducted an inspection at the Humphrey No. 7 Mine in the company of Consol safety escort, Robert Smith, and miners' representative, Sam Woody. While visiting the 12 east section, May checked the continuous mining machine to determine whether it was maintained in permissible condition. Tr. 113-114. On the left side of the machine May observed two headlights. Each light had two bolts that attached the light to the frame. The bolts holding one of the headlights to the frame were loose. The other headlight also had a bolt missing and May described its second bolt as "extremely loose." Tr. 115. According to May only "a couple of threads" held the second bolt to the frame. The nut that should have secured the bolt to the frame had fallen off. Tr. 116.

May stated that when he observed the continuous mining machine it was inby the last open crosscut. The machine was energized but was not mining. If it had been mining, the headlights would have been approximately ten feet from the face. Tr. 117. May could not say for certain whether the continuous mining machine had been in use prior to his arrival on the section, but he believed that if it had not been, it was ready to start mining. Tr. 180-181. (May testified that he asked the mining machine operator if he were ready to begin and the operator answered, "Yeah." Tr. 178.) May stated that when he called the condition of the headlights to Smith's attention, Smith summoned a mechanic who replaced the missing bolts and nut and who then tightened the headlights to the frame. Tr. 117.

May was asked his opinion as to whether the condition of the headlights violated a mandatory safety standard? He stated that section 75.503 requires electric face equipment taken into or used inby the last open crosscut to be maintained in permissible

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[3] Section 75.503 states:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

Consol does not challenge the Secretary's contention that the cited continuous mining machine is "electric face equipment."

condition. According to May, "permissible condition" means that such equipment be maintained as approved by MSHA. May stated that the regulations setting forth the standards for approval are found at 30 C.F.R. Part 18. In particular, he noted that section 18.46(b) requires headlights to be protected from damage by guarding. Tr. 119-120, 145-147.[4]

Regarding the hazard presented by the violation, May stated that had the mining machine continued in operation, the vibration of the machine could have caused the headlights to fall from the machine. In fact, in his opinion, the headlight that was missing one bolt altogether and had the nut missing from the other bolt would have fallen during the course of the shift on which the violation was cited. Tr. 123. Further, the other headlight would have continued to loosen during ongoing mining, and it too ultimately would have fallen, although perhaps not during the course of the ongoing shift. Tr. 157.

Had one or both of the lights fallen from the frame they would have pulled their conductors loose, which in turn would have exposed bare, uninsulated wires. If the exposed wires had contacted a person (and May noted the miner installing roof bolts at the face usually worked within one foot of the lights) the person could have been seriously shocked or even electrocuted. Or, had the uninsulated conductors touched one another, they could have sparked and become an ignition source for methane or coal dust at the face. Tr. 124-127. In addition, any arc or spark could have ignited the lubricant used to grease the mining machine's ripper heads. Tr. 157-158. In May's opinion, the situation created by the condition of the headlights was "very dangerous." Tr. 129.

May believed it reasonably likely that a miner would have been shocked had one of the headlights become detached from the machine. He noted that the roof bolter's proximity to the light and the fact that the miner installing the roof bolts would have had his back to the machine while he was working and would have been unable to see the condition of the headlights. Tr. 129-130.

May also believed it "real likely" an instantaneous arc or spark sufficient to ignite methane or coal dust at the face or to ignite the lubricant on the machine would have occurred when a headlight fell from the machine. Tr. 131. May acknowledged that the machine had short circuit protection, however he stated that

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[4] Section 18.46(b) states:

> Headlights shall be mounted to provide illumination where it will be effective. They shall be protected from damage by guarding or location.

power to the machine would not have deactivated necessarily if the conductors touched. Tr. 150-151.

May was of the opinion that Consol management should have been advised of the condition of the headlights through having been told by the continuous mining machine operator or the miner installing roof bolts. Or, management should have known of their condition through the foreman's on-site observation. Tr. 136-140. May emphasized that the condition of one of the lights was visually obvious because due to the missing and loose bolts the light was not "sitting square." Tr. 141. In fact, its out of kilter position had alerted May to check the condition of both headlights. Tr. 144.

ROBERT SMITH

Company safety escort Smith agreed with May that the headlights were loose. Tr. 166. However, he did not recall whether one of the lights was missing a bolt. Tr. 169. Smith stated that the continuous mining machine operator would have checked the headlights before he started to mine. Although the fan was on and the section was ventilated, Smith did not believe mining had actually started when the inspection party arrived on the section. Tr. 170-171. Smith admitted that the party had not arrived on the shift until two hours after the shift had commenced and he acknowledged that this would have been a late time to have begun mining, however, he explained the late start by speculating, "things . . . break down." Tr. 172. Smith reviewed notes he had written after the violation had been cited. They indicated that "the people on the section had not had time yet to make the checks on the miner. At the time of the inspection, the crew had not started mining." Tr. 174. Smith stated that although he did not recall May asking the foreman if he was ready to start mining, it would not have surprised him if May had done so. Tr. 175.

THE VIOLATION

I conclude that May properly cited Consol for a violation of section 75.503. That regulation requires to be in permissible condition all electric face equipment taken into or used inby the last open crosscut. There is no doubt, and I find, that the headlights were loose as described by May. Nor is there any doubt but that the continuous mining machine is electric face equipment and that when it was observed by May it was inby the last open crosscut. Indeed, it had been backed but a little distance away from the face in order to bring it under supported roof. Tr. 179. The question is whether the condition of the lights meant that the continuous mining machine was no longer in permissible condition?

May and counsel for the Secretary believe that the missing and loose bolts and the resulting loose nature of the lights establish they were not adequately protected from damage by guarding or location and thus were not permissible pursuant to section 18.46(b). See Tr. 191. I disagree with this rationale. It seems to me that when section 18.46(b) refers to protection from damage by "guarding or location" it references the design of the equipment, not defects in the implementation of the design. Moreover, as I read the testimony, there is no basis for concluding the "location" of the headlights failed to protect them, and May was clear in his belief that the headlights did not require a guard.

In any event, I need not rule on the adequacy of the Secretary's permissibility theory because there is another well established basis for finding the headlights were not maintained in permissible condition. Section 75.506, 30 C.F.R. § 75.506, sets forth the requirements for permissibility. Section 75.506(a), 30 C.F.R. § 506(a), states that permissibility is dependent upon two criteria: (1) equipment must be built according to Schedule 2G or a modification thereof, and (2) it must be maintained according to schedule 2G or a modification thereof. Schedule 2G contains the substantive prerequisites of permissibility for, among other things, continuous mining machines. Appendix II of Schedule 2G lists various conditions that must be satisfied to retain permissibility, and one of the conditions is that "all bolts, nuts, screws and other means of fastening . . . shall be in place, properly tightened and screwed." Nor should this requirement come as a surprise to either Consol or the Secretary, for it has long been recognized. See Kaiser Steel Corporation, 1 MSHC 1229, 1233 (December 24, 1974).

As I have found, all bolts and nuts on the two lights were not in place and properly tightened. Therefore, the violation existed as charged.

S&S

I conclude that the Secretary also has established the S&S nature of the violation. May was specific in describing the potential hazards presented to miners, both in terms of a shock hazard and in terms of an explosion and fire hazard, and I find that both discrete safety hazards were established by his testimony. It makes sense, given the missing and loose bolts and the vibration of the lights caused by the operation of the continuous mining machine that, as May testified, one of the lights would have fallen during the shift on which the violation was cited, and it makes equal sense that the falling light would have pulled the conductors loose and exposed the bare wires, either touching them to the frame of the machine or to each other. (There was, afterall, nothing to restrain the lights

should they have started to fall from the frame.) The fact that the continuous mining machine had short-circuit protection, while lessening the chances of a shock injury, did not defeat it because, as May testified, such protection could have failed. Moreover, an arc or spark sufficient to serve as an ignition source in the gassy mine would have occurred almost instantaneously upon the conductors contacting the frame or one another and before the short-circuit protection could have "kicked in." Further, May's testimony clearly establishes, the presence in the immediate vicinity of the lights of at least two miners -- the continuous mining machine operator and the miner installing roof bolts -- who would have been subjected to the hazards had mining continued.

In my view, the testimony also establishes the reasonable likelihood that a shock injury or a methane explosion or fire would have occurred. I credit May's statement that he was told mining was about to begin on the section. While Smith's notes indicated there had not yet been time to check the continuous mining machine, the shift was already two hours old and there is no indication that the lights would have been checked and their condition detected and corrected before mining. In addition, while there was no testimony regarding the presence of methane on the section or coal dust or combustible lubricants on the machine when the violation was cited, all could have accumulated as mining progressed during the course of the shift and this is especially so of methane, given the fact that the Humphrey No 7 Mine is a gassy mine. See U.S. Steel Mining Co., 6 FMSHRC 1866,1868-69 (August 1984).

Finally, I credit May's belief that had a miner been shocked or subject to an ignition or explosion, the resulting injuries in all likelihood would have been of a reasonably serious nature. Indeed, had the hazard occurred the continuous mining machine operator and/or the miner installing roof bolts would have been lucky to have been only seriously injured.

GRAVITY AND NEGLIGENCE

This was a serious violation. The magnitude of the injuries that could have been triggered by the violation and the fact that miners on the section were exposed to hazards that were reasonably likely to occur establishes its grave nature.

Moreover, the violation was the result of negligence on Consol's part. As May noted, one of the lights was obviously skewed due to its missing and loose bolts, and this visual clue led May to check both headlights and to detect the violation. When he found that both headlights were loose, miners had been on the section for over two hours. Mining may not have commenced, but there were miners in the immediate vicinity of the continuous mining machine and they were ready to begin mining. Therefore, I

agree with May that the section foreman should have detected the condition and should have had it corrected.

DOCKET NO. WEVA 92-992

Section 104(a) Citation No. 3108607, 1/28/92, 30 C.F.R. § 75.1722(b)

The citation states:

> The guard on the stationery dolly takeup pulley is not guarded for a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. The guard is 33 inches wide and 20 inches high. It is 11 inches from the end of the guard to the pulley. There is another guard that has been removed from this area that is against the coal rib. There has been no shoveling done in the area of the guard that would have constituted removal of the guard when the belt was out of service. This condition is on the 5 Northwest section belt.

G. Exh. 10. The citation charges that the condition constituted a violation of section 75.1722(b) and that the condition was S&S.[5]

THE TESTIMONY

THOMS W. MAY

May testified that on January 28,1992, he conducted an inspection of the Humphrey No. 7 Mine in the company of Smith and Sam Woody, the miners' safety representative. The inspection party proceeded to the Five Northwest Section conveyor belt drive. The drive mechanism powered the conveyor carrying coal from the longwall face. Tr. 235. Upon arriving at the drive May

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[5] Section 1722(b) states:

> Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

saw that the guard over the top of the drive pulley had been removed and placed against the rib. Tr. 206. The pulley itself was stationary, and as May acknowledged, guided the belt but did not drive it. Still, in his view the stationary pulley was part of the belt drive unit and thus was a "conveyor-drive pulley" as that term is used in section 75.1722. Tr. 233-234. As May stated, "You can have pulleys in your drive unit that do not have power going to them." Tr. 234. (He explained that the pulley helped to keep tension on the belt so that the belt would not slip. Without the pulley the conveyor belt drive mechanism could not drive the belt. Tr. 233.)

May described the removed guard as being approximately 4 by 6 feet in size. The guard had been fastened to the belt structure and had hung down over the point where the conveyor belt passed the drive pulley. Tr. 207. In place of this larger guard a smaller guard had been installed, it being about 30 inches wide by 20 inches high. According to May, the smaller guard left a gap of approximately 11 inches between the end of the guard and the pinch point. Tr. 206-207. Further, the rib was about 24 inches from the guard. Tr. 209. The area between the rib and the belt structure was used as a walkway. Tr. 210. Although usually the belt was positioned in the middle of the entry (Tr. 262), in this instance it was off to one side (the right hand side when facing outby) and thus a wider walkway existed on the left side of the belt than on the right side. May agreed that there was screening all along the left side of the belt to prevent access to the belt. Tr. 235-236 and 238. In addition, there were crossovers and crossunders at intervals along the belt to provide access to the narrow side of the belt to those walking the right side and vise versa. Tr. 238. In fact, there was a crossunder just outby the subject belt drive unit. Id. According to May the narrow walkway on the right side (the walkway between the rib and the belt drive pulley guard) was used by preshift examiners on alternate shifts during their examinations of the belt. (In other words, preshift examiners walked both sides of the belt on an alternate basis.) According to May the narrower walkway also was used by miners assigned to clean the belt and by miners who were required to travel to the regulator. Tr. 210-212.

In May's opinion the smaller guard was inadequate because the 11 inch gap would have allowed a miner to reach in and become caught in the pinch point between the belt and the pulley. Tr. 208.

May also testified that the area involved had an "area guard," which purportedly guarded the entire area containing the conveyor belt drive mechanism. The area guard consisted of pieces of screen secured to the belt structure and extending to the right side ribs at both ends of the drive mechanism. One screen was located approximately 10 to 15 feet from the area

where the belt drive pulley guard was in place and the second screen was located at the other end of the belt drive belt mechanism. May could not recall how far that was from the pulley, but estimated that it might have been 200 feet. Tr. 238-241, 250-252. According to May, the screen nearest the pulley was not locked or fastened in any way and to enter the area that had been screened-off all that was necessary was to push the screen back. Tr. 214. May could not recall whether there were any warning signs on or near the screen. Tr. 215.

May had first seen this area guard during an inspection on January 15. Smith was with him then and Smith told May that MSHA had accepted area guards as satisfactory to guard the entire area they enclosed. Tr. 213. May had never observed area guarding before and he advised Smith that he would discuss it with his supervisor and fellow inspectors. Tr. 213. May went back to his office (the MSHA office located in Fairmont, West Virginia) where he was advised that when the Humphrey No. 7 Mine had been transferred for inspection purposes to the Fairmont office from the Morgantown, West Virginia MSHA office in April 1991, another MSHA inspector, one of the first from the Fairmont office to inspect the mine, had told mine management that area guarding was not acceptable to MSHA and that although the area guarding could be left in place the individual drive pulleys also would have to be guarded to meet the requirements of section 75.1722(b). Tr. 217. (May testified that he did not know what MSHA policy was with respect to area guarding when the mine had been inspected out of the Morgantown office. Tr. 245.)

On January 27, a meeting was conducted involving various officials from mine management, including Smith, Brozik, and mine foreman Eldon Hagedorn. MSHA officials involved including May and Fairmont MSHA office supervisor, Cecil Branham. Union representatives also participated. Tr. 219. Area guarding was among the subjects discussed. May believed that prior to the January 27 meeting Branham had already told Brozik in a telephone conversation that MSHA would not accept area guarding as complying with section 75.1722 and, according to May, Branham reiterated this position at the January 27 meeting. May testified that Branham stated that he would accompany May to the mine to see for himself whether Consol was complying with the guarding regulations by guarding the actual pulleys rather than the area around the pulleys. Tr. 220.

May was shown and identified the section from MSHA's Program Policy Manual ("PPM") that relates to section 1722. G. Exh 11.[6]

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[6] The PPM states in pertinent part:

75.1722 Mechanical Equipment Guards

(continued...)

Citing to item 4 of the policy, May stated: "The guard that was installed that day was not of adequate size to prevent anyone from reaching in or slipping, tripping and falling in, and their arm from coming in contact with this pinch point." Tr. 221. May rejected the idea that the screens between the belt structure and rib met the requirements of the standard. He noted that section 75.1722 "doesn't say anything about area guarding" and he observed that the screen nearest the pulley was not secured to prevent anyone from walking through it. Tr. 222-224.

May explained that in order for an individual to have had his or her hand go through the guard opening and be caught in the pulley's pinch point, the person would have had to fall or slip to come in contact with the point, or would have had to reach purposefully through the opening. Injuries likely to have resulted from such an accident ranged from dismemberment to death. Tr. 225-226.

May believed it was reasonably likely that a miner would have been caught in the pinch point due to the inadequate guard. This was because the area between the rib and the guard was narrow and thus miners who had to travel past the guard when conducting required inspections were in close proximity to the pinch point. Tr. 227. (May stated that miners had to travel and examine the right side of the belt in order to check for belt spillage and accumulations of coal dust. Tr. 253.) May testified that from his discussions with miners who worked on the belt he was sure that the area inside the screens was traveled by preshift examiners. Tr. 229. In addition, May testified the miners had told him that they were required to enter the area to shovel coal spillage from underneath the belt. Tr. 242-243. (As May remembered it, Smith had been present during these conversations. However, May later stated that he could have been

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[6](...continued)
Guards installed to prevent contact with moving parts of machinery shall:

1. Be of substantial construction;

2. Be of such construction that openings in the guard are too small to admit a person's hand;

3. Be firmly bolted or otherwise installed in a stationary position; and

4. Be of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body from contacting the moving parts while such equipment is in motion.

G. Exh 11.

mistaken in believing Smith was there. Tr. 272.) In addition, May believed that miners were assigned to "sweep or drag" the narrow side of the belt to mix the coal dust with rock dust. Tr. 253.

Because of normal sloughage from the belt, coal would be on the floor of the walkway in the vicinity of the pulley which would make slipping and tripping likely. Tr. 227. In May's view the coal on the floor would have made it "very easy" for miners to slip. Tr. 228.

In addition, miners frequently would have had to enter the guarded area to pull debris off the belt, and the gap in the guard would have made it tempting for them to do this without first shutting down the belt. Tr. 228. Had the regular guard (the guard May observed sitting against the rib) been in place, miners could not have gained access to the pinch point either inadvertently or purposefully. Tr. 242.

With regard to Consol's negligence in allowing the violation to exist, May stated that the inadequate guard was attached on the midnight shift (the prior shift). May was not certain whether the larger guard had been taken off before or after the preshift examination for the shift on which he observed the condition had been completed, but in either event the violation should have been observed. If the larger, adequate guard had been removed prior to the preshift examination, the preshift examiner should have noted the remaining inadequate guard. If not, the section foreman should have observed it. Tr. 230-231. (May maintained that because miners were working in the vicinity of the drive pulley, the section foreman "would have had to have walked right past [the inadequate guard]." Tr. 231.)

STANLEY BROZIK

Brozik described how the entire left side (the wide side) of the belt drive area was guarded by screening. Tr. 255-256. (Once outside the drive area the rest of the belt was not guarded.) He further explained the history of guarding at the mine -- how in the face of repeated guarding violations he had asked two MSHA supervisors, including Branham, if he could cure the problem by putting gates at the front end of the drive mechanism and at the stationary pulley and how he also proposed bolting "on and off" switches for the belt on each side of the belt at the crossovers and crossunders nearest the mechanism, as well as installing signs at both ends of the drive mechanism saying "do not enter while belt is running." Tr. 257-258. Brozik indicated that MSHA officials in Morgantown approved this arrangement.

According to Brozik, area guarding had been employed first at Humphrey No. 7 Mine at some time during the mid to late 1980s.

Tr. 258, 260. (Brozik could not recall the exact year.) However, in 1991, when inspection of the mine was transferred to Fairmont, Consol was advised that its prior arrangements were no longer acceptable and that the pulleys themselves would have to be guarded. Tr. 258. At that point, guards were put on the pulleys. Nonetheless, the area guards were left in place. Id.

Brozik also stated that after the January 27 meeting, in which Consol was told that area guarding was not acceptable, he had advised someone, he believed it was Hagedorn, that he wanted to make certain the pulleys were guarded. The large guard that May found against the rib was the result of this instruction. Tr. 259. As to why the smaller guard had been installed, Brozik simply stated, "someone though that [the larger guard] was inadequate so they put a smaller one there." Tr. 259. The condition was corrected by welding the larger guard over the smaller guard. Tr. 260-261.

With regard to the hazard presented by the supposedly inadequate guard, Brozik stated that he never had been informed that anyone was ever in the area of the pulleys while the belt was running and that he never had observed a miner in that position. Tr. 260, 265. Brozik agreed that it was a practice at the mine for examiners to walk both sides of the belt. The belt was not shut off when they conducted their inspections. Tr. 262-263. However, if the belt was running and an examiner came to an area guard, the examiner would not go inside the guard but would cross at the crossover or crossunder. Tr. 264-265. Brozik emphasized that it was Consol's policy that no person go inside the area guards while the belt was running. Tr. 263-265.

ROBERT SMITH

Smith, who accompanied May, testified that the screens used as area guards had signs hung on them stating "Do Not Enter When Belt Is Running", or words to that effect. Tr. 268. Smith did not believe that the guard May found inadequate could have been circumvented easily. Tr. 269. Nor did Smith believe the situation posed a reasonably likely chance of injury because no person "should have been . . . inside the area guard." Tr. 270.

THE VIOLATION

Section 75.1722(b) requires guards at conveyor-drive pulleys sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Consol argues that the pulley involved was a takeup pulley, a type of pulley not mentioned in subsection (b) and one that, according to Consol, does not come within the regulation. Tr. 284. The Secretary's position is that the conveyor drive would not have worked without the pulley and therefore "the stationary dolly take-up pulley was a conveyor drive pulley." Tr. 278. In my

view the subject pulley was a "conveyor-drive pulley" and thus came within the scope of the regulation.

A "drive pulley" is defined as a "pulley or drum driven through gearing by some source of power and which, through contact friction, drives a conveyor belt." U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 354. A "takeup pulley" is defined as "[a]n idler pulley so mounted that its position is adjustable to accommodate changes in the length of the belt as may be necessary to maintain proper belt tension." Id. at 1118. The subject pulley does not seem to fit squarely within either definition in that it was not driven by a source of power but rather turned as the belt passed over it and was not adjustable but rather was stationary, although it did serve to keep tension on the belt. Tr. 233-234.

It cannot be expected that those who write safety and health regulations can specifically incorporate every technological variation into a regulation. Nor can it be expected that every objective situation faced by an inspector will fit neatly within the wording of a pertinent regulation. Thus, when faced with a hybrid situation such as this, the inspector must take into account the words of the standard, keep its intent in mind and apply a rule of reason.

Here, it seems to me that May did just that. Under a reasonable interpretation of section 75.1722(b) the standard is broad enough to incorporate the subject pulley. As May noted, the pulley, while not having power going to it to drive the belt, was nonetheless a part of the drive unit. Tr. 234. The belt drive would not have operated correctly without it. I conclude therefore that in that broad yet reasonable sense the pulley was a conveyor-drive pulley, and as such it was required to be guarded to prevent a person from reaching behind and becoming caught between the belt and the pulley.

Consol does not dispute that the 11 inch gap upon which May based the citation existed as described by May. However, it maintains that area guarding prevented persons from going into the vicinity of the pulley and thus that persons could not become caught between the pulley and the belt despite the presence of the gap.

The regulation requires the pulleys to be guarded. While the area guards were sufficient to restrict access to the area adjacent to the pulley drive mechanism, they did not guard the cited specific pulley. Much as the use of chains to rail off access to walkways and travelways over moving machine parts and the presence of signs to warn against entry cannot, in my view, be regarded as compliance with the guarding regulations for surface metal and nonmetal mines -- Overland Sand & Gravel Co., 14 FMSHRC 1337, 1342, (August 1992), see also P P M, Vol V

at 55(a) (6/18/91) -- so here the area guards fail to conform to what the regulation requires.[7] Rather than excuse the violation, the presence of the area guards and warning signs may mitigate the potential gravity of the violation and impact whether it is of a S&S nature.

Because the 11 inch gap was sufficiently large for a person's hand and/or arm to enter and become caught between the belt and pulley, I find that the violation existed as charged.

S&S

There are, in my opinion, several factors that warrant deletion of the inspector's S&S finding. I agree with Consol that the evidence does not establish a reasonable likelihood of a miner having a hand and/or arm caught between the pulley and the belt. In the first place, the testimony does not establish that it was a practice for miners to work or to travel immediately adjacent to the pulley while the belt was running. Although the belt was inspected from the walkway adjacent to the pulley and while miners might occasionally have had to clean up the walkway or clean up under the belt next to the pulley, there was no confirmation that any of these activities regularly occurred while the belt was running. May was told by an unidentified miner that miners had worked adjacent to the pulley while the belt was in operation, and I do not doubt the conversation took place and that, in fact, such occasionally happened, but I also do not doubt that Consol had a strict policy of barring access to the area of the belt drive while the belt was operating. The presence of the warning signs, whose existence I credit, and the presence of the area guards, corroborate the testimony of Brozik and Smith that such was the case. I also find credible Brozik's testimony that he had never been told about miners being in the area of the pulleys while the belt was running and never had seen them in that position and I conclude from this that it was rare indeed when such an incident occurred.

Moreover, while it would have been possible for a miner to ignore the policy and to walk through the screens used as area guards and to have traveled or worked adjacent to the subject pulley, there was no testimony that the floor next to the pulley was slippery or uneven or that coal spillage from the belt habitually littered the walkway floor next to the pulley and I conclude from this that if a slipping or tripping hazard existed, it was infrequent.

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[7] I note parenthetically that even had I held that area guarding could satisfy the regulation's mandate, the testimony of May that the screening had not been secured to the rib and could have been easily walked through would have lead me to the conclusion that the guarding was inadequate.

Further, even if a miner had slipped or tripped and fallen toward the pulley while the belt was running, the miner's hand and/or arm would have had to be positioned so that the guard that was in place was missed and the gap was "hit," and it should be recalled that although the guard was inadequate, it covered a good deal more space than the gap. I therefore conclude that the Secretary did not establish a reasonable likelihood that the failure to adequately guard the pulley would have resulted in a miner's hand or arm becoming caught in the pulley's pinch point, and I find that the violation was not S&S.

GRAVITY AND NEGLIGENCE

In assessing the gravity of the violation, both the potential hazard to the safety of miners and the probability of such hazard occurring must be analyzed. Clearly, the potential hazard was grave, a severe injury, even dismemberment could have been expected. However, such an accident was decidedly less than likely given the presence of the signs, the area guarding, Consol's policy of barring entry to the subject area while the belt was running and the presence of the pulley guard, inadequate though it was. I conclude, therefore, that although the potential injuries resulting from the violation were extremely serious, the likelihood of them occurring was so remote as to make this a non-serious violation.

I also conclude that Consol was negligent in allowing the violation to exist. The presence of the inadequate guard was visually obvious, especially so given the fact that the larger, adequate guard was leaning against the rib and, in effect, drawing attention to the condition of the pulley it no longer guarded. May's testimony that the inadequate guard was attached on the midnight shift was not refuted. Nor was his observation that the inadequate guard should have been observed either by the preshift examiner or the foreman supervising miners working in the area of the belt drive. Thus, Consol knew or should have known of the violation.

WEVA 92-1042

Section 104(d)(2)Order No. 3108651, 3/17/92/, 30 C.F.R. § 75.303

The order states:

> The preshift examination record on the 12 East, 13 East and 14 East section does not contain all areas that are required to be examine[d]. The following conditions were found: 12 East preshift record: 03-16-92, day shift, no record of the section track inby the mouth to the section. 03-16-92, afternoon shift, no

record of the section track inby the mouth to the section. 03-17-92, midnight shift, no record of the section track inby the mouth.

13 East preshift record: 03-16-92, midnight shift, no record of the belt line from 40 block to the tailpiece at 70 block. 03-16-92 midnight shift, no record of the section track. 03-16-92 afternoon shift, no record of the section track. 03-16-92 afternoon shift, no record of the section belt from 41 block to the track at 70 block.

14 East preshift record: The preshift of the 7 North belt is maintained in this record book. 03-16-92, day shift and afternoon shift, no record of the 7 North belt from 13 East to the [car] loading point. This is 6,600 feet as measured on the mine map.

The preshift examination records at this mine have been cited several times for no record of examined areas that are required, therefore the operator's negligence is high. The records have also been countersigned by the mine foreman. If these conditions were allowed to exist and the required examinations were not made, a condition would exist that would cause a lost workdays or restricted duty accident. I believe that this is unlikely because I assume that this is only record keeping, but the operator can not verify by the records that the examinations were made.

Conferences with Robert Smith, Mr. Smith agrees with the gravity but disagrees with the action and the negligence because old habits are hard to break.

G. Exh. 15. The order charges a violation of section 75.303 and that the condition was the result of Consol's unwarrantable failure to comply with the standard.[8]

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[8] Section 75.303 requires in pertinent part:

(a) Within 3 hours immediately proceeding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator shall examine

(continued...)

THE TESTIMONY

THOMAS W. MAY

May testified that he went to Humphrey No. 7 Mine on March 17, 1992 to conduct a regular inspection. One of the first things he did after arriving at the mine was to examine the preshift examination records. Tr. 297. The records were kept in the foreman's office, and it was there that May reviewed them. With May at the time were Smith and Janet Todd, a representative of miners. May testified that upon reviewing the records he found several areas of the mine that were required to be examined and for which there were no records of a preshift examination having been performed. Tr. 298. May therefore issued the order in question for Consol's failure to record the examinations. Tr. 299. (There is no question but that Consol performed the required examinations. As May stated, "[A]ll of the areas had been covered but just not recorded." Tr. 311.)

May explained that section 75.303 requires the examiner to report the results of the examination to a designated person on the surface and that this usually is done by calling out the reports on the mine telephone. The reports are then recorded and the mine examiner must countersign the reports when he comes out of the mine to make sure that what he has reported has been recorded accurately. Tr. 300, 302.

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[8](...continued)

> such workings and any other underground area of the mine designated by the Secretary or his authorized representative.

The regulation goes on to require the examination of every working section, other specified areas and the conducting of tests for gases and air velocity at designated places. The examiner is also required to examine for other hazards and violations of the mandatory safety and health standards. The regulation concludes:

> Upon completing his examination, such mine examiner shall report the results of his examination to persons authorized by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine . . . and the record shall be open for inspection by interested persons.

May was asked what he believed to be the purpose of the reporting and recording requirements? He replied that the results of the examination have "to be called out so that the oncoming shift knows that the mine is safe so they can enter the underground area of the mine to go to work" and that recording the results of all areas examined is required so that the oncoming shift and mine management will be aware of any hazardous conditions they will encounter. Tr. 301. He described the recording requirement as "very important" because it assures that "problems are addressed and taken care of immediately." Id., see also Tr. 310-311.

According to May, the problem was that Consol was not recording that areas specified in section 75.303 had been inspected and found safe, but rather was recording that larger sections of the mine that included the specific areas had been found safe and it was doing so by writing the phrase "section safe." Tr. 303-304. May maintained that writing the phrase "section safe" to indicate preshift examiners had detected no hazards did not comply with the recording requirements because the regulation itself does not refer to the examination of a "section" but rather to various parts of working areas -- "working sections," and specific areas within the working sections, as well as "belt conveyors on which coal is carried," etc. Tr. 323-328, 333, 335-336. May objected to the "second safe" approach to compliance not only because it did not conform to the wording of section 75.303 but also because preshift examinations of all of the specified areas might not be done by the same person and the miner countersigning "section safe" might not know for certain that no hazardous conditions had been detected in the specified areas. May stated that Humphrey No. 7 Mine was the only mine he had inspected where preshift examinations were recorded using the phrase "section safe."

May maintained that this was not a new problem at the mine and he identified two citations that he had issued previously, on January 23, 1992 and February 18, 1992 (G. Exhs. 18 and 17), for the same violation. Tr. 306-308. May claimed when he issued the January and February citations he had spoken with Smith about the company's failure to specifically record the results of the preshift examinations but did not get any explanation from Smith about why the practice existed. Tr. 306. In addition, he had at least three conversations with various examiners prior to issuing the order in which he explained the inadequacy of recording "section safe." Tr. 258-9. Nonetheless, he believed that Smith had tired to instruct mine foremen in order to ensure the preshift examinations were properly recorded. Tr. 309.

May believed that the violations of January and February were the result of Consol's "moderate negligence." However, due to the number of unrecorded areas that he found on March 17, the fact that the recording deficiencies existed for all three of

that day's preshift examinations and due to his previous efforts to have the practice eliminated, May reached the conclusion that the failure to properly record the preshift examinations of March 17 was the result of Consol's unwarrantable failure to comply with the cited standard. Tr. 310. May testified that he was offered no explanation for the existence of the violation other than that Smith told him, "[O]ld habits are hard to break." Tr. 313.

STANLEY BROZIK

Stanley Brozik testified that when the word "section" was used at the mine, it was generally understood to mean the area from the mouth all the way to the working face and that this area included the belt and the track. Tr. 339-340. Brozik maintained that state examiners had accepted the "section safe" designation as adequate. Tr. 340.

ELDON HAGEDORN

Hagedorn testified that he first assumed foreman's duties at the mine in 1969 and that in 1976 he was appointed mine manager, a position he has since held. During all of this time, the word "section" has meant the area "from the mouth of the section where you get the supply track to the face." Whenever Hagedorn saw the term "section safe" recorded it meant to him "that [the] section from the mouth and all the faces . . . belts, track, wire, were safe." Tr. 353.

THE VIOLATION

I conclude that the violation existed as charged. The regulation requires that "the results of [th]e examination" be reported and that the "results of [the] examination" be recorded. The required "examination" is described in detail in the regulation, both with respect to the observations and tests that should be made during the examination and with resect to the areas where they should be made.

I agree with May that a purpose of recording the results of the preshift examination is to appraise the oncoming shift of hazards and violations they may encounter so that they may correct the conditions and so that they may avoid the hazards before they can be corrected. Clearly, another purpose is to apprise "interested persons", e.g., state and federal inspectors and representatives of miners, of the same information, information that may alert such persons to compliance problems at the mine.

May's view that the standard requires the recording of the results of the examinations of the areas it specifies and his collateral view that a blanket recording of "section safe" is not

acceptable are, in my opinion, reasonable interpretations of the recording requirement set forth in section 75.303(a) in that they further the purposes of the requirement. His logic that a person reviewing a blanket recording -- even a person familiar with the interpretation of the word "section" at the mine -- would not always be able to determine for certain whether the required examinations had been conducted seems irrefutable, and the lack of certain knowledge that required examinations had been conducted would mean the person would likewise lack certain knowledge of possible hazards to correct and/or to avoid. I find therefore that Consol failed to record the results of preshift examinations as stated in Order No. 3108651 and in so doing violated section 75.303(a).

GRAVITY

This was not a serious violation. It bears repeating that although the preshift examinations were not properly recorded, they were conducted. Moreover, although use of the phrase "section safe" would not convey with certainty that the specified areas had in fact been inspected and found safe, it is clear from the testimony of Brozik and Hagedorn that the phrase was common parlance at the mine and might also at times accurately indicate that the "section" had been examined and that the area from the mouth of the section to its face was hazard free.

As I have found, this does not excuse Consol's failure properly to record the preshift examinations, but it does lessen the likelihood of injury or illness as a result of the violation.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Whether the violation was the result of the "unwarrantable failure" of Consol to comply with the section 75.303(a) depends upon whether it was the result of aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987). See also, Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). In Emery the Commission compared ordinary negligence (conduct that is inadvertent, thoughtless, or inattentive) with conduct that is not justifiable or inexcusable.

I cannot find that the failure of Consol to properly record the cited preshift examinations of March 17 was the result of unjustifiable or inexcusable conduct. While I fully credit May's testimony that following issuance of the January and February citations he discussed with Smith the way to properly record the examinations, I am also struck by the fact that May believed that Smith, by instructing the appropriate foremen, had tried to ensure that the examinations were recorded correctly. Tr. 309.

In addition, although I credit May's testimony that on at least three occasions he discussed with Consol foremen the way in which to properly record the examinations, I note as well Brozik's testimony that state inspectors had accepted the "safe section" designation as adequate. From all that appears on the face of this record, I conclude that it was not until May raised the issue in January that Consol became aware that the way in which it had been recording the results of preshift examinations was not acceptable to MSHA.

Further, I credit May's testimony that Smith explained the violation with the statement that "old habits are hard to break" and it appears to me that Smith's observation was right on the money. Tr. 313. Consol personnel were used to employing the "section safe" method of recording the results of its preshift examinations. Smith was trying to bring the practice into compliance with the regulation. This proved difficult, not because those recording the results were inexcusably negligent, but because they were in the habit of doing it the "old way" and through inadvertence or inattention continued in the habit. I would add that I do not find this surprising due to the fact that the violation was not serious and thus did not signal an immediately urgent need to comply. Tr. 313.

Given the conclusion that Consol's failure was the result of inattention or inadvertence, I find that Consol was negligent in allowing the violation to exist but not guilty of an unwarrantable failure to comply. Thus, the section 104(d)(2) order must be modified to a section 104(a) citation, and the inspector's designation of "high" negligence must be modified to one of "moderate" negligence.

OTHER CIVIL PENALTY CRITERIA

As revealed by the proposed assessment forms contained in each docket, the Humphrey No. 7 Mine is a large mine and Consol is a large operator.

The parties have stipulated that the penalties proposed will not affect Consol's ability to continue in business. Because of this and because of the fact that Consol is a large operator, I find that any penalties I assess for the subject violations will likewise have no affect upon Consol's ability to continue in business.

In each instance where a violation has been found Consol demonstrated its good faith in abating the violations.

The history of previous violations contained in the MSHA Office of Assessments print-out reveals that in the 24 months prior to the date of the first violation in this case a total of 750 violations were cited at the Humphrey No. 7 Mine, of these

there were 7 violations of section 75.305, 23 violations of section 75.503, 2 violations of section 75.1722(b), and 15 violations of 75.303. While the other violations do not have a history warranting an increase in penalties that might otherwise be assessed, I conclude that the history of previous violations of section 75.503 is such that the penalty should be moderately increased.

CIVIL PENALTY ASSESSMENTS FOR CONTESTED VIOLATIONS

DOCKET NO. WEVA 92-992

Section 104(a) Citation No. 3108607, 1/30/92, 30 C.F.R. § 75.1722(b)

The Secretary has proposed a civil penalty of $206. As I have found, this was a non-serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator and taking into account the other civil penalty criteria, I conclude that a civil penalty of $250 is appropriate.

DOCKET NO. WEVA 92-993

Section 104(a) Citation 3108745, 2/6/92, 30 C.F.R. § 75.305

The Secretary has proposed a civil penalty of $206. As I have found, this was a serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator and taking into account the other civil penalty criteria, I conclude a civil penalty of $400 is appropriate.

Section 104(a) Citation No. 3108748, 2/12/92, 30 C.F.R. § 75.503

The Secretary has proposed a civil penalty of $206. As I have found, this was a serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator, that its history of previous violations of the cited standards warrants a moderate increase in the civil penalty that should otherwise be assessed and taking into account the other civil penalty criteria, I conclude that a civil penalty of $500 is appropriate.

DOCKET NO. WEVA 92-1042

Section 104(d)(2) Order No. 3108651, 3/17/92, 30 C.F.R. § 75.303

The Secretary has proposed a civil penalty of $1,200. As I have found, this was a non-serious violation and Consol was negligent in allowing the violation to exist. Noting especially that Consol is a large operator and taking into account the other

civil penalty criteria, I conclude that a civil penalty of $250 is appropriate.

ORDER

Consol is ORDERED to pay a civil penalty in the approved settlement amount shown above in satisfaction of the violation in question: Citation No. 3108615, 2/3/92, § 77.402 (Docket No. WEVA 92-992). Further, Consol is ORDERED to pay civil penalties in the assessed amounts shown above in satisfaction of the contested violations in questions.

The Secretary is ORDERED to modify section 104(a) Citation No. 318607 by deleting the inspector's S&S designation. The Secretary is ORDERED to modify Section 104(d)(2) Order 3108651 to a section 104(a) citation and to delete the inspector's finding of "high" negligence and to substitute a finding of "moderate" negligence.

The parties are ORDERED to advise me within ten (10) days of the date of this decision of their settlement agreement with regard to Citation No. 3108613, 1/28/92, 30 C.F.R. §75.1003(c) (Docket No. WEVA 92-992) in light of Judge Weisberger's decision in Consolidation Coal Co., 15 FMSHRC 436 (March 1993), and to move for my approval of same.

I retain jurisdiction in this matter until all issues with respect to Citation No. 3108613 have been resolved. Until such time, my decision in this matter is not final. Payment of approved and assessed civil penalties and modification of the citation and order are held in abeyance pending a final dispositive order.

David F. Barbour
Administrative Law Judge
(703) 756-5232

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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

MAY 25 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF PERRY PODDEY, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEVA 93-287-D
	:	MORG CD 93-01
v.	:	
	:	Coal Bank No. 12 Mine
TANGLEWOOD ENERGY, INC., Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Amchan

On April 30, 1993, the Secretary of Labor filed an application for temporary reinstatement, pursuant to section 105(c) of the Federal Mine Safety and Health Act, 30 U.S.C. section 815(c), on behalf of Perry Poddey, a miner. The application alleged that Mr. Poddey had been discharged by respondent on January 6, 1993 in retaliation for engaging in protected safety activity. Attached to the application was the affidavit of Lawrence M. Beeman, Chief of MSHA's Office of Technical Compliance and Investigation Division, and the miner's complaint. Mr. Beeman's affidavit indicates that Mr. Poddey had talked to MSHA Inspector Ken Tenney on November 3, 1992 and January 5, 1993 about a defective parking brake on the scoop he operated . MSHA citations were issued to Respondent on both those dates regarding the parking brake.

Mr. Beeman's affidavit also indicates that the miner discussed the malfunctioning parking brake with his foreman in November and December, 1992, and on January 4, 1993. Mr. Beeman also found that Respondent admitted that Mr. Poddey reported the defective parking brake to his foreman on January 4, 1993. He further found that Mr. Poddey's foreman, Jeff Simmons had threatened to discharge the miner following the issuance of the citation of November 3, 1992, and that Mr. Poddey was in fact discharged the day after the second citation. The miner's complaint alleges that on the day he was fired he had a telephone conversation with General Mine Foreman Randy Key, who blamed him for the citation just issued to Respondent regarding the parking brake.

Pursuant to the Commission's Rules of Procedure, 29 C.F.R. 2700.45(c), Respondent had ten days from the date of receipt of the Secretary's application for temporary reinstatement to request a hearing on the application. As the application was received by the Commission on May 3, 1993, Respondent had until May 18, 1993, to request a hearing, taking into account the five days allowed to respond to documents served by mail, 29 C.F.R. 2700.8.

On May 14, 1993, Respondent requested a hearing which was scheduled for May 25 and 26, 1993, in Elkins, West Virginia. Subsequently on May 21, Respondent withdrew its hearing request. The parties filed a stipulation in which the Applicant agreed to file his complaint by May 28, 1993, and initiate discovery by June 11, 1993. The parties have also agreed, with qualifications, to the scheduling of the hearing on the discrimination complaint in August 1993.

Commission Rule 45(c), 29 C.F.R. 2700.45(c), provides that if no hearing is requested on an application for temporary reinstatement, the judge shall review the application and immediately issue an order of temporary reinstatement if the judge determines that the complaint was not frivolously brought. Having reviewed the application, I conclude that the complaint was not frivolously brought and order that Respondent reinstate Mr. Poddey to the position from which he was discharged on or about January 6, 1993, or to an equivalent position, at the same rate of pay, and with the same or equivalent duties. The application indicates that Mr. Poddey engaged in activity protected by the Mine Act in complaining about the defective parking brake to his foreman and to MSHA. The application also indicates that Respondent was aware of the protected activity and displayed animus towards the miner as a result of that activity. The timing of the discharge, one day after Respondent was cited for a condition about which the miner complained, creates an inference that Mr. Poddey would not have been discharged but for his protected activity.

The application before me provides ample evidence to suggest that Mr. Poddey was discharged in violation of Section 105(c) of the Mine Act. Secretary on behalf of Robinette v. United States Coal Company, 3 FMSHRC 803 (April 1981). Although the Secretary may not necessarily prevail at a trial on the merits of the discrimination complaint, he has met his burden of proving that the complaint was not frivolously brought. Given the fact that I would have ordered reinstatement on May 18, 1993, had no hearing request been filed, I will order reinstatement effective that date in view of the fact that Respondent's hearing request has been withdrawn. The Applicant

should not suffer any loss of pay by virtue of the fact that Respondent requested a hearing on the application for temporary reinstatement and then had second thoughts.

ORDER

Respondent is hereby ordered to reinstate Perry Poddey to the position from which he was discharged on January 6, 1993, or to an equivalent position, at the same rate of pay, and with the same or equivalent duties, effective May 18, 1993.

Arthur J. Amchan
Administrative Law Judge
703-756-4572

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 11 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-802-M A. C. No. 45-02961-05553
v.	:	
ASAMERA MINERAL (US), INC., Respondent	:	Cannon Mine

ORDER DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for the assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement of the one violation involved in this case. The settlement seeks a reduction in the penalty amount from the originally assessed amount of $100 to $50.

A review of the file discloses that the citation was issued on the ground that the operator allegedly altered an accident scene before MSHA could investigate. MSHA issued a special assessment for the violation, although the narrative findings of the special assessment represents that the violation was not serious. The settlement motion asserts in part that the special assessment was not warranted and states further that negligence and gravity are reduced to a level where a single assessment of $50 is appropriate.

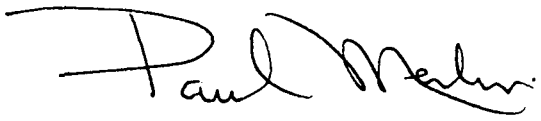
The settlement motion is inadequate because it provides no reasons to support the 50% reduction in what was already a very modest penalty assessment. None of the circumstances under which the accident scene was altered are described. And there is no discussion of the effect of the alteration of the accident scene. As a general matter, alteration by the operator of a accident scene prior to investigation would seem to me to be a serious matter involving some degree of fault by the operator. In this connection, I note that the inspector on the citation found that negligence was high, but that the narrative statement appears to find only ordinary negligence, although the finding of high negligence is not specifically contradicted. The settlement motion does not discuss negligence beyond stating that the finding of negligence is supportable. High negligence is, of course not consistent with a penalty of $50.

The amounts involved in this case are not significant, but the principles are. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). The Commission has the duty to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the parties' motion, I cannot conclude that the recommended penalty reduction is warranted and that the suggested amount is consistent with the factors mandated in section 110(i). The parties must provide explicit reasons for the action they recommend.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the parties submit additional information to support their motion for settlement. Otherwise this case will be assigned and set for hearing.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 11 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-105-M A. C. No. 45-02961-05557
v.	:	
ASAMERA MINERAL (US), INC., Respondent	:	Cannon Mine

ORDER DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is before me upon a petition for the assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement of the one violation involved in this case. The parties seek approval of a reduction in the penalty amount from $157 to $20.

A review of the file shows that the citation in this case was issued for an alleged violation of 30 C.F.R. § 50.10 because the operator failed to notify MSHA as soon as possible of an ignition of methane. The citation as modified was designated significant and substantial and the operator's negligence was characterized as moderate. The parties offer absolutely no reasons to support the reduction they seek. More importantly, they provide no basis for me to approve their suggested penalty under the six criteria set forth in section 110 (i) of the Act. 30 U.S.C. § 820(i).

The failure to report a methane ignition may well be serious. At the very least, the parties must explain why it is not. In addition, the findings of significant and substantial and of moderate negligence are inconsistent with a $20 penalty which I note is even less that what is now the Secretary's single penalty assessment.

The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. § 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the Commission's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A settlement

motion, such as the one filed in this case, is insufficient to allow the Commission to discharge its responsibilities under the Act, particularly where the suggested penalty amount is so very low.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED.**

It is further **ORDERED** that within 30 days of the date of this order the parties submit additional information to support their motion for settlement. Otherwise this case will be assigned and set for hearing.

Paul Merlin
Chief Administrative Law Judge

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