

JUNE 1997

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JUNE 1997

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Secretary of Labor, MSHA on behalf of James Hyles, et al., v. All American Asphalt, Inc., Docket No. WEST 93-336-DM, etc. (Judge Cetti, May 5, 1997)

Secretary of Labor, MSHA on behalf of Lonnie Bowling, et al., v. Mountain Top Trucking Company, Inc., Docket No. KENT 95-604-D, etc. (Judge Feldman, May 19, 1997)

Review was denied in the following case during the month of June:

Secretary of Labor, MSHA, v. Laurel Run Mining Company, Docket No. WEVA 94-347-R, etc. (Judge Feldman, Interlocutory Review of May 28, 1997 Order)



## COMMISSION DECISIONS AND ORDERS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 2, 1997

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

v.

JIM WALTER RESOURCES, INC.

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Docket No. SE 97-140  
A.C. No. 01-01322-04075

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

## ORDER

### BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 12, 1997, the Commission received from Jim Walter Resources, Inc. ("JWR") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 21, the Commission received the Secretary's response, opposing the request.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

JWR asserts that it submitted its request for hearing ("Green Card") 5 days late because the file for this citation was misplaced and not put on the calendar of its attorney. According to JWR, the Green Card was mailed immediately after the misplaced file was located. JWR also contends that the delay in submitting its Green Card was due to the unusually heavy case load of its attorney, which it attributes to a recent influx of citations and orders issued by MSHA and a corporate downsizing. JWR asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(1) and (6).

The Secretary argues that the request should be denied because JWR has failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 3. The Secretary asserts that the justifications offered by JWR for the late filing of its request for hearing are legally insufficient for obtaining relief under Rule 60(b). *Id.* at 3-4. Attached as exhibits to the Secretary's opposition are a signed certified mail return receipt confirming that the proposed penalty assessment was received by JWR on March 17, and a letter from the Chief of MSHA's Civil Penalty Compliance Office, dated April 25, 1997, indicating that JWR's Green Card was mailed on April 21, and received by MSHA on April 24, 1997 — 8 days after the April 16 deadline.


The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). Here, as in *Rocky Hollow*, the operator alleges that the assessment has become final as the result of misplaced documents. *See Rocky Hollow*, 16 FMSHRC at 1931. *See also Eastern Associated Coal Corp.*, 19 FMSHRC 494, 494-95 (March 1997) (substitute mailroom employee failed to refer proposed assessment to legal department); *Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (March 1997) (operator mailed Green Card one week late because it was inadvertently misfiled in its accounts payable file).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).


On the basis of the present record, we are unable to evaluate the merits of JWR's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether JWR has met the criteria for relief under Rule 60(b). If the judge determines that such

relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 2, 1997

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

v.

WESTERN FUELS-UTAH, INC.

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Docket No. WEST 93-298

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

## DECISION

BY: Jordan, Chairman and Riley, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Western Fuels-Utah, Inc. ("Western Fuels") violated 30 C.F.R. § 75.1102 because slippage and sequence switches on a conveyor belt allegedly failed to stop the belt at the time of an incident on August 10, 1992, that resulted in a fire; whether Western Fuels violated 30 C.F.R. § 75.1101-16(a) because sensing devices contained in its dry powder chemical fire suppression system allegedly failed to stop the conveyor drive motor at the time of the August 10 fire; and whether an alleged violation of 30 C.F.R. § 75.1101-14(a) was duplicative of a separate violation of 30 C.F.R. § 75.1101-15(d), both of which involve requirements applicable to dry powder chemical fire suppression systems. Administrative Law Judge August F. Cetti concluded that the Secretary of Labor failed to prove violations of sections 75.1102 and 75.1101-16(a), and vacated the citation alleging a violation of section 75.1101-14(a) on the ground that the alleged violation was duplicative of the section 75.1101-15(d) violation. 17 FMSHRC 891, 895, 896, 899, 901 (June 1995) (ALJ). We granted a petition for discretionary review filed by the Secretary challenging these determinations. For the reasons that follow, we reverse in part, vacate in part, affirm in part, and remand.

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<sup>1</sup> Commissioner Verheggen assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.



I.

Factual and Procedural Background

Western Fuels operates the Desperado Mine, an underground coal mine in Rio Blanco County, Colorado. 17 FMSHRC at 892. The mine utilizes a conveyor belt system, consisting of a connected series of belt flights, to carry coal from the longwall face out of the mine. Tr. I 24-25, 34-35, 104-05; Tr. III 70-72; Gov't Ex. M-4.<sup>2</sup> Each belt flight contains a drive roller, which is used to power a 48 inch-wide rubber belt, as well as a takeup carriage and a tail piece. Tr. I 128-29, 132; Tr. II 113-17, 120-21, 144; Resp. Ex. A. In order to avoid a coal pile-up or spill, the belt system contains several devices designed to turn off the belts when any one belt is stalled or stopped. Tr. I 26-27. One such device is a slippage switch that turns off the conveyor belt if there is slack or a break in the belt, or the belt slips for other reasons, such as being wet or overloaded. Tr. I 124-27. A sequence switch is designed to shut down a belt when the belt in front of it has stopped, in order to avoid the continued dumping of coal on the inactive belt. Tr. I 28-29, 64, 121-22.<sup>3</sup> The conveyor belts at the mine were also equipped with dry chemical fire suppression systems designed to sound an alarm and stop the belt in the event of a fire, and to extinguish the fire by spraying it with a chemical powder through nozzles connected to an overhead piping system. Tr. I 131; Tr. II 21-25; Tr. III 17-18.

On August 10, 1992, at about 7:10 p.m. during the evening shift, a fire occurred in the drive unit of the conveyor belt located in the Number 3 East Mains ("EM3") of the Desperado Mine. 17 FMSHRC at 892. The fire was detected when the Conspec computer system at the mine noted a carbon monoxide ("CO") alarm and the activation of the fire suppression system. *Id.* While the fire suppression system activated the fire control system and sounded the alarm, it did not appear to immediately activate a switch to shut down EM3 conveyor belt, which continued to operate for a while longer. *Id.* at 892, 896; Tr. I 33, 45-47, 63, 92, 157-58, 199; Gov't Ex. M-2 at 9-10; Gov't Ex. M-3 at 1. Once the fire was detected, the mine was quickly evacuated with the exception of a few miners who remained to fight the fire with water hoses. 17 FMSHRC at 900; Tr. I 52, 99-101. The fire was brought under control at about 7:34 p.m., and was extinguished by 8:00 p.m. Tr. I 58, 80; Tr. III 144; Gov't Ex. M-3 at 2. No miners were injured as a result of the fire. 17 FMSHRC at 892, 900. The fire was promptly reported by Western Fuels to MSHA, even though it was not considered to be a reportable fire by MSHA inspectors. *Id.* at 892.

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<sup>2</sup> The hearing in this case was conducted on July 26, 27, and 28, 1994. "Tr. I" refers to the transcript of the July 26 hearing; "Tr. II" refers to the transcript of the July 27 hearing; and "Tr. III" refers to the transcript of the July 28 hearing.

<sup>3</sup> The belt flight is also equipped with other safety switches, such as a plugged chute switch and a tension switch, which are not at issue in this proceeding. See Tr. I 122-24, 127-28.

On the following day, August 11, MSHA inspectors Gary Frey and William Vetter went to the Desperado Mine, where they inspected the area of the fire and the equipment at the EM3 belt drive and questioned Western Fuels management about the origin of the fire. 17 FMSHRC at 892; Tr. II 5-10. No citations were issued at the time of this initial inspection. 17 FMSHRC at 892. A week later, on August 18, Frey and Vetter returned to the mine along with MSHA inspector Art Gore. *Id.* at 892, 894; Tr. I 115; Tr. II 26. During this reinspection, Frey and Vetter examined and measured the dry chemical powder fire suppression system for the EM3 belt drive, while Gore checked the electrical circuitry on the belt drive. Tr. II 27. On this occasion, MSHA issued four citations to Western Fuels related to the August 10 fire. 17 FMSHRC at 892. Two of the citations (Citation Nos. 3587226 and 3587227) involved alleged deficiencies in the electrical safety switches designed to stop the EM3 belt drive; the other two (Citation Nos. 3587228 and 3587229) involved the fire suppression system. *Id.* The first two citations were terminated within minutes of their issuance, without any significant changes in the belt drive or fire suppression system. *Id.* at 896; Tr. I 191-92. The MSHA inspectors gave Western Fuels one week, until August 25, to abate the other two citations relating to the fire suppression system. 17 FMSHRC at 900; Tr. II 42.

When MSHA inspectors returned to the mine on August 26, they found that nothing had been done to abate the two citations involving the fire suppression system, and accordingly issued two failure to abate orders pursuant to Section 104(b) of the Mine Act, 30 U.S.C. § 814(b). 17 FMSHRC at 900; Tr. II 43-45; Tr. III 161-62. Western Fuels abated the two citations later that morning by installing a second dry chemical reservoir on the system, which shortened the length of the piping from each reservoir to the dispensing nozzles to less than fifty feet, and the orders were terminated. 17 FMSHRC at 899, 900; Tr. II 43.

## II.

### Slippage and Sequence Switch Violation (Citation No. 3587226)

#### A. Judge's Decision

The judge vacated Citation No. 3587226, concluding that a preponderance of the probative evidence failed to establish that the EM3 belt conveyor at the Desperado Mine was not "equipped with slippage and sequence switches," as required by section 75.1102.<sup>4</sup> 17 FMSHRC at 895. The judge interpreted section 75.1102 as requiring only that the conveyor be "equipped" with the necessary switches, and therefore concluded that a temporary malfunction of the switches would not violate this standard. *Id.* He analogized this situation to an automobile that

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<sup>4</sup> Section 75.1102, which restates the language of the first sentence of section 311(g) of the Mine Act, 30 U.S.C. § 871(g), provides that:

Underground belt conveyors shall be equipped with slippage and sequence switches.

would be considered to be “equipped” with a transmission even if its transmission “were to suddenly not function properly for a short period of time.” *Id.* The judge explained that “if the promulgators of the regulation intended to make the sudden unexpected malfunction of the required equipment a citable offense, they would have worded the regulation differently so that a person of reasonable prudence on reading the regulation would have known of that intent.” *Id.*

Based on this interpretation of section 75.1102, the judge concluded that the Secretary had failed to establish a violation, relying upon undisputed evidence that sequence and slippage switches designed to perform the required function had been installed in the conveyor belt flight; that the switches had been inspected and found to be working properly three days before the August 10, 1992 fire; and that they were still functional two years later, at the time of the hearing, without any subsequent repair or alteration. *Id.* at 894-95. The judge also noted that MSHA inspector Gore did not examine the switches during the August 18 inspection, but instead relied upon a computer printout of questionable reliability in concluding that the switches did not function properly at the time of the fire. *Id.* at 894.

## B. Disposition

The Secretary contends that the judge erred in finding that Western Fuels did not violate section 75.1102 merely because the EM3 conveyor belt was equipped with slippage and sequence switches. S. Br. at 7-12. The Secretary asserts that the judge’s interpretation of that standard as only requiring that a conveyor belt be “equipped” with the specified switches, even if they are not functioning properly, is unreasonable and contrary to the purposes of that standard and the Mine Act. *Id.* at 11-12. The Secretary contends that the judge should have instead deferred to her interpretation of section 75.1102 requiring that a conveyor belt be equipped with slippage and sequence switches that function properly, since that interpretation is consistent with the language and purpose of the statute, and entitled to deference as the interpretation by the agency charged with the administration of the Mine Act. *Id.* at 7-10.

Western Fuels contends that the judge properly vacated this citation because the Secretary failed to meet her burden of proving a violation of section 75.1102 by establishing conclusively that the switches were not functioning at the time of the August 10 fire. W.F. Br. at 2-8. Western Fuels argues that the Secretary has improperly attempted to rely on the mere occurrence of a fire on August 10 to support an inference that the switches did not work properly on that occasion. *Id.* at 6-8. Western Fuels also contends that the Secretary has attempted to convert a factual dispute about whether the switches functioned properly on August 10 into an issue of statutory interpretation. *Id.* at 9-10.

### 1. Statutory Interpretation

The parties disagree over the appropriate interpretation of the word “equipped” in section 75.1102. Because section 75.1102 restates the language contained in the first sentence of section 311(g) of the Mine Act, the proper construction of that term presents a question of statutory

interpretation. The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question in issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute’s text and legislative history, may be employed to determine whether “Congress had an intention on the precise question at issue,” which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a “*Chevron I*” analysis. *Id.*; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994).<sup>5</sup>

We conclude that the language of section 311(g) embodied in section 75.1102 is plain on its face and requires that a conveyor belt be “equipped” with *functional* slippage and sequence switches. The Supreme Court has indicated that “[i]n determining the scope of a statute, we look first to its language, . . . giving the ‘words used’ their ‘ordinary meaning.’” *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981) and *Richards v. United States*, 369 U.S. 1, 9 (1962)). The term “equip” is most generally defined to mean “to provide with what is necessary, useful, or appropriate[.]” *Webster’s Third New International Dictionary (Unabridged)* 768 (1986). It is also defined as “to make ready or competent for service or action or against a need[.]” *Id.* Similarly, the term is defined in *Black’s Law Dictionary* as follows: “To furnish for service or against a need or exigency; to fit out; to supply with whatever is necessary to efficient action in any way.” *Black’s Law Dictionary* 537 (6th ed. 1990). These definitions all contain a functional component, indicating that the term “equipped” means that the item provided will be adequate to achieve the intended purpose. Therefore, a functional interpretation, requiring that belts be equipped with slippage and sequence switches that work, is consistent with the plain meaning of the pertinent statutory language.

This interpretation is also consistent with the relevant legislative history and the underlying purpose of the Mine Act — which is to provide safe working conditions for miners. Certainly, a belt conveyor “equipped” with slippage and sequence switches that do not function properly will not provide required safety protection for miners, and may indeed result in further danger to miners if the switches fail to stop the belt as intended.

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<sup>5</sup> If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a “*Chevron II*” analysis, is required to determine whether an agency’s interpretation of a statute is a reasonable one. See *Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal Co.*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.



The legislative history of this statutorily-based requirement further supports this reading of section 75.1102. The language of section 311(g) of the Mine Act reiterated in this regulation was carried over without change from section 311(g) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), 30 U.S.C. § 871(g) (1976). The Senate Report on the Coal Act reveals Congress' recognition of the importance of slippage and sequence switches on underground belt conveyors, stating that this section "provides for equipment to stop a belt if slippage occurs, since slippage can overheat the belt and cause a fire." S. Rep. No. 411, 91st Cong. 1st Sess. 78 (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 204 (1975). The Senate Report further explains that "[a] slippage switch is designed to stop the belt drive if the conveyor belt begins slipping and sequence switches stop the conveyor belts in by the belt that initially began slipping." *Id.* Thus, the express purpose of the requirement for safety switches, as set forth in section 75.1102 and section 311(g) of the Mine Act, is to stop the conveyor belt in the event of a problem and thereby prevent the type of belt-related fire that occurred at the Desperado Mine on August 10. Clearly, a conveyor belt "equipped" with safety switches that fail to perform their intended function of stopping the belt in appropriate circumstances will not accomplish the result sought by Congress in adopting this safety requirement.

Accordingly, we conclude, based upon the plain language of the statute, as well as the applicable legislative history and the underlying purpose and structure of the Mine Act, that Congress intended to require that conveyor belts be equipped with functioning slippage and sequence switches.<sup>6</sup> Accordingly, the judge erred by not adhering to this language, and we reverse his determination that section 75.1102 does not require that conveyor belt slippage and sequence switches accomplish their intended function of stopping the belt in appropriate circumstances.

## 2. Remand

There is conflicting evidence in the record concerning whether or not the slippage and sequence switches on the EM3 conveyor belt functioned properly on August 10. The most persuasive evidence that these switches did not function properly is evidence indicating the motor on the EM3 belt continued running well after all other nearby conveyor belts had stopped.

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<sup>6</sup> This interpretation of the statutory language is also consistent with Commission precedent. *See Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting, *sub silentio*, operator's claim that 30 C.F.R. § 56.14101(a)(1) did not require brakes once installed to be maintained in functional condition); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) (construing 30 C.F.R. § 77.507 to require that switches be installed with *functioning* lockout devices).

Tr. I 33, 38, 45.<sup>7</sup> As the judge noted, however, there is also evidence that the switches were inspected and found to be working properly prior to the August 10 fire, and that the same switches continued to be used without incident for at least two years after the fire, without being replaced or modified. 17 FMSHRC at 895; Tr. II 91, 155-56, 171-72, 200-01; Tr. III 11-16, 39-40, 59-60, 74; Resp. Exs. B & C. In addition, MSHA inspector Gore, who wrote the relevant citation, admitted that during his inspection at the mine on August 18 he did not examine either of the switches to determine whether they were operating or not. 17 FMSHRC at 894.<sup>8</sup> Instead, Gore based his conclusion on an inspection of electrical wiring diagrams and a computer printout that Western Fuels contends is unreliable. *Id.*<sup>9</sup>

Thus, the record does not clearly establish whether or not the switches on conveyor belt EM3 actually malfunctioned at the time of the August 10 incident and, if so, why they appear to have worked properly both before and after the incident without being serviced or repaired. Based upon his erroneous legal conclusion that Western Fuels could establish a valid defense to this citation by simply showing that the EM3 conveyor belt was "equipped" with the required safety switches, the judge essentially concluded that any malfunction of the switches was irrelevant, and thereby avoided making critical factual findings as to whether these switches functioned properly at the time of the August 10 fire. We therefore remand this matter to the judge to make findings regarding these critical factual issues, and thereby determine whether a violation of section 75.1102 occurred.

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<sup>7</sup>According to the Secretary, the only other possible cause for the failure of this conveyor belt motor to stop operating, and the resulting fire, would have been the presence of a jumper — a device designed to bypass the switches — at the control center. 17 FMSHRC at 893; Tr. I 153. The Secretary rejected this potential explanation based upon the statements from Western Fuels personnel that there were no jumpers present at the time of the fire. 17 FMSHRC at 893; Tr. I 95-96, 154, 206; Tr. III 74, 98.

<sup>8</sup> Gore wrote in item 17 of the citation: "The system was examined and no malfunctions were found or occurred at the time of examination." *Id.*

<sup>9</sup> To support its claim that the printout was unreliable, Western Fuels adduced evidence that certain events that were known to have occurred underground are either not shown on the printout or are depicted as having occurred at incorrect times or out of sequence. *See* Tr. I 75-76, 83-84; Tr. II 96, 99-100, 158-62, 164-67.

### III.

#### Sensing Devices on Dry Powder Chemical Fire Suppression System (Citation No. 3587227)

##### A. Judge's Decision

The judge vacated Citation No. 3587227, which alleged a violation of section 75.1101-16(a),<sup>10</sup> based on a rationale similar to that underlying his vacation of Citation No. 3587226. The judge concluded that a preponderance of evidence did not establish that the dry powder chemical fire suppression system for the EM3 conveyor belt was not “equipped” with sensing devices “designed” to activate the fire control, sound the alarm and stop the conveyor drive in the event of a rise in temperature, as required by this regulation. 17 FMSHRC at 896. The judge found that the system was equipped with a sensing device that did in fact activate the fire control system and sound the alarm. *Id.* In addition, he relied upon undisputed evidence that the citation was abated without any repair or modification of the sensing device, and that the device continued to function properly after the August 10 fire, as “very strong, if not[] conclusive evidence that the fire suppression system was equipped with sensing devices ‘designed’ to stop the conveyor drive motor in the event of a rise in temperature.” *Id.*<sup>11</sup> While noting that there was conflicting evidence as to whether this sensing device also stopped the conveyor drive motor at the time of the fire, the judge concluded that even if it did not, no persuasive evidence was presented that the system was not “equipped” with a sensing device “designed” to accomplish that result. *Id.*

##### B. Disposition

The Secretary asserts that the judge’s interpretation of section 75.1101-16(a) as only requiring that the fire suppression system be “equipped” with devices “designed” to stop the belt motor, irrespective of whether those devices actually function properly when required, is unreasonable since it is contrary to the purposes of the Mine Act and could render lawful systems that fail to stop the spread of fire and result in the injury or death of miners. S. Br. at 14-15. The Secretary also contends that substantial evidence establishes that the sensing devices on the system failed to stop the conveyor drive motor, making it necessary to turn off the motor manually. *Id.* at 3-4, 13-14.

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<sup>10</sup> Section 75.1101-16(a) provides, in relevant part:

Each self-contained dry powder chemical system shall be equipped with sensing devices which shall be designed to activate the fire-control system, sound an alarm and stop the conveyor drive motor in the event of a rise in temperature, . . . .

<sup>11</sup> The judge also noted that inspector Gore wrote in this citation: “The system was examined and no malfunctions were found or occurred at the time of examination.” *Id.*

While Western Fuels did not directly address this alleged violation in its brief, we construe its brief as raising an argument that the judge properly vacated the citation because the Secretary failed to demonstrate by a preponderance of evidence that the sensing devices on the fire suppression system failed to function properly. W.F. Br. at 2-8.

The Commission has recognized that, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

We conclude that the language of section 75.1101-16(a) is clear and unambiguous, and requires that a dry chemical fire suppression system be equipped with *functional* sensing devices. For essentially the same reasons discussed above with respect to the proper interpretation of the word "equipped" in section 311(g) of the Mine Act, we believe that reading that term as used in section 75.1101-16(a) to have a functional component — that is, requiring that the sensing devices perform their intended function, including stopping the conveyor drive motor — is consistent with the ordinary meaning of that term, and the structure and underlying safety purpose of Mine Act. Therefore, we conclude that the judge erred by reading the component of functionality out of the regulatory language, and reverse his determination that section 75.1101-16(a) does not require the sensing devices on fire suppression systems to actually perform the specified functions.

It is undisputed that the fire suppression system was equipped with sensing devices that did in fact activate the system and sound the alarm, in accordance with the requirements of section 75.1101-16(a). 17 FMSHRC at 896. There is conflicting evidence, however, as to whether the system also stopped the drive motor on conveyor belt EM3, as further required by this regulation. The judge failed to resolve this conflict in the evidence, but rather concluded that no violation of section 75.1101-16(a) was established even "[a]ssuming arguendo that [the system] did not stop the conveyor drive motor[.]" in the absence of evidence that the system was not "equipped" with a sensing device that was "designed" to stop the motor. *Id.* Thus, the judge's ultimate determination was based directly on his erroneous interpretation of this standard. In these circumstances, we remand for a determination whether section 75.1101-16(a) was violated.



#### IV.

##### Adequacy of Dry Powder Chemical Fire Suppression System (Citation No. 3587228, Order No. 3587231)

#### C. Judge's Decision

The judge concluded that a preponderance of the evidence established a violation of section 75.1101-15(d), governing the number of nozzles and reservoirs on dry powder chemical fire suppression systems, relying on the testimony of MSHA inspector William Vetter that the fire suppression system at issue here was inadequate to completely put out the August 10 fire. 17 FMSHRC at 899. The judge further concluded that this violation was S&S, affirmed the corresponding section 104(b) order, and assessed a civil penalty of \$4,000. *Id.* at 900-01.

The judge also concluded that the remaining citation (No. 3587228), alleging, as amended, a violation of section 75.1101-14(a), was duplicative. He reasoned that it was abated by the same action taken to abate the section 75.1101-15(d) violation — installing a second dry chemical reservoir which shortened the length of the piping to less than 50 feet from each reservoir to the nozzles, thereby permitting more effective disbursement of the chemicals. *Id.* at 899; Tr. II 38-39; Resp. Ex. A. Based on this analysis, the judge vacated this citation and the corresponding section 104(b) order. 17 FMSHRC at 899.

#### B. Disposition

The Secretary contends that the judge erred in vacating this citation as duplicative merely because it was abated by the same action taken by Western Fuels to abate a separate violation of section 75.1101-15(d). S. Br. at 15-17. The Secretary asserts that the two alleged violations were not duplicative, even though they may have been abated by the same action, since they involved two distinct violations of standards that impose separate and distinct duties on the operator. *Id.* at 16-17.

Western Fuels asserts that the judge properly vacated this citation because the Secretary originally alleged a violation of an inapplicable standard, and it was abated by the same action that abated the section 75.1101-15(d) violation. W.F. Br. at 10-12. Western Fuels also contends that because this citation was first amended at the hearing to allege a violation of section 75.1101-14(a), it never refused to comply with that standard and therefore the related section 104(b) order, which was based upon the alleged failure to abate a violation of a different standard, cannot be sustained. *Id.* at 11.

We affirm the judge's decision to vacate this citation as duplicative. The Commission has held that citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). See also *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (August 1982); *El Paso*

*Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). However, as applied to the faulty fire suppression system at issue here the two standards did not impose separate and distinct duties on Western Fuels. Rather, section 75.1101-15(d) simply specified a particular method of carrying out the broadly worded obligation contained in section 75.1101-14(a).

Section 75.1101-14(a), the standard that Western Fuels was alleged to have violated in Citation No. 3587228, requires that:

Self-contained dry powder chemical systems shall be installed to protect each belt-drive, belt takeover, electrical-controls, gear reducing units and 50 feet of fire-resistant belt or 150 feet of non-fire resistant belt adjacent to the belt drive.

This standard imposes a broad obligation to install dry powder chemical systems that will protect the components of a conveyor belt system most susceptible to fires.

Section 75.1101-15 contains several directives pertaining to the construction of such dry powder chemical systems. Western Fuels was found to have failed to comply with subsection (d), which specifies that:

Nozzles and reservoirs shall be sufficient in number to provide maximum protection to each belt, belt takeover, electrical controls and gear reducing unit.

Implicit in the duty to install a self-contained dry powder chemical system that protects the specified components of the conveyor belt is the duty to install a sufficient number of nozzles and reservoirs so that the chemical substance is effectively disbursed to those components. Because the duty to install a sufficient number of reservoirs is subsumed in the duty to install a dry powder chemical system that adequately protects the specified components, every violation of section 75.1101-15(d) will inexorably constitute a violation of section 75.1101-14(a). This occurs because any system which lacks a sufficient number of reservoirs automatically fails to "protect each belt-drive, belt takeover, electrical-controls, [and] gear reducing unit" as required by section 75.1101-14(a). Thus, section 75.1101-14(a) indirectly imposes the same duty to provide sufficient nozzles and reservoirs by virtue of its broad requirement that the system be installed to protect each of the belt components specified therein.<sup>12</sup>

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<sup>12</sup> Contrary to the impression created by our dissenting colleague, our determination that the two citations are duplicative is not based on our premise that every violation of 15(d) is also a violation of 14(a). Our inquiry does not stop there. Rather, we ask whether MSHA is citing the operator on the basis of more than one specific act or omission. Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence (lack of sufficient reservoirs) used to support the violation of the specific standard, we would not have found them duplicative.

Since both standards require sufficient reservoirs, an operator who constructs a system that contains an inadequate number of reservoirs can be cited under either standard. However, in order for the Secretary to sustain two distinct violations under both standards, she must be able to point to more than just the single shortcoming of insufficient reservoirs. Accordingly, because these two standards did not impose separate and distinct duties on Western Fuels with respect to the proper installation and construction of the dry chemical fire suppression system involved here, the judge could reasonably conclude that the section 75.1101-14(a) violation alleged in this citation was duplicative of the section 75.1101-15(d) violation he had already found. We affirm this determination, and the judge's resulting decision to vacate this citation and the related section 104(b) order (Order No. 3587231).<sup>13</sup>

V.

### Conclusion

For the foregoing reasons, we (1) reverse the judge's determinations that section 75.1102 does not require slippage and sequence switches to be functional, and that section 75.1101-16(a) does not require sensing devices on dry powder chemical fire suppression systems to be functional; (2) vacate his findings that the Secretary failed to establish a violation of sections 75.1102 and 75.1101-16(a); (3) affirm his decision to vacate Citation No. 3587228, alleging a violation of section 75.1101-14(a), and Order No. 3587231, as duplicative; and (4) remand for further consideration consistent with this decision.

  
Mary Lu Jordan, Chairman

  
James C. Riley, Commissioner

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<sup>13</sup> Given our disposition based on our conclusion that the citations alleging violations of sections 75.1101-14(a) and 75.1101-15(d) are duplicative, we do not address Western Fuels' alternative argument that the related section 104(b) order could not be sustained because it was based upon the alleged failure to abate a violation of a different standard.

Commissioner Marks, concurring in part and dissenting in part:

I concur in the foregoing disposition of all charged violations, except the disposition regarding Citation No. 3587228 alleging a violation of 75.1101-14(a). As to that citation, I conclude that the judge erred in finding that the citation was “duplicative” merely because it was abated by the same conduct that abated a separately charged violation of section 75.1101-15(d) — the installation of a second dry chemical reservoir. 17 FMSHRC at 899. Accordingly, I dissent from the majority’s conclusion to affirm the judge’s determination regarding Citation No. 3587228.

While the two referenced standards both contain requirements that are applicable to dry powder chemical fire suppression systems, this does not in itself warrant a finding that they are duplicative. As the Commission has recognized:

[t]he 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory safety standard simply because the operator violated a different, but related, mandatory standard.

*Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993) (quoting *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981)). We have also recognized that even though violations may have emanated from the same events, they will not be found duplicative where the applicable regulations impose separate and distinct duties on an operator. *Cyprus Tonopah*, 15 FMSHRC at 378; see also *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (August 1982) (upholding judge’s finding of two violations “[d]espite the fact that . . . transgressions arose out of a single series of events”).

Although the judge did not engage in any independent analysis of whether the requirements of section 75.1101-14(a) were in fact violated, or whether those requirements were significantly different from those contained in section 75.1101-15(d), I conclude that sections 75.1101-14(a) and 75.1101-15(d) impose separate and distinct duties on an operator. Section 75.1101-15(d) requires a sufficient *number* of nozzles and reservoirs on a fire suppression system to provide maximum protection to the belt control system. Section 75.1101-14(a), by contrast, is concerned with the general installation of the system, and contains the additional requirement that the system must be designed to protect either 50 feet of fire-resistant belt or 150 feet of non-fire-resistant belt. Thus, it is possible for an operator to violate section 75.1101-14(a) without necessarily violating the requirements of section 75.1101-15(d).

My colleagues, however, have concluded that “the two standards did not impose separate and distinct duties on Western Fuels,” and therefore the violations were duplicative. Slip op. at 11. This conclusion is supported by their determination that every violation of section 75.1101-15(d) will constitute a violation of 75.1101-14(a). In so concluding, my colleagues expand the

reach of the Commissions' review authority beyond the limit set forth in *Cyprus Tonopah*. Slip op. at 10-11. In that case two related standards were charged by the Secretary and ultimately sustained by the presiding judge and Commission. *Cyprus Tonopah*, 15 FMSHRC at 378. One of the standards, 30 C.F.R. § 56.3200,<sup>14</sup> not unlike the subject section 75.1101-14(a), set forth a *general* overarching requirement to maintain a hazard-free work environment. *Id.* Whereas, the second standard charged, 30 C.F.R. § 56.3130,<sup>15</sup> provided *specific* types of requirements not unlike section 75.1101-15(d). *Id.* In both cases there is substantive overlap; however, in *Cyprus Tonopah*, the Commission did not condition its determination on whether every violation of section 56.3130 would also be a violation of section 56.3200. Had that analysis been considered relevant to the disposition of that case, it is entirely possible that the Commission would have concluded that every charge of the *specific* standard section 56.3130 could support a charge of the *general* standard section 56.3200. Rather, the Commission correctly limited its consideration and determination to whether the standards imposed separate and distinct duties on the operator — they did in *Cyprus Tonopah* and they do in this case. To require that the Secretary may not charge a violation of two separate standards that stem from one condition, as my colleagues have chosen to do in this case, represents an unsupported and unnecessary encroachment upon the Secretary's enforcement authority.

Indeed, no statutory authority or any other basis is supplied to support my colleagues' conclusion that the Secretary may not charge a violation of both standards, as was done in this case. Slip op. at 11. The cited sections of the Code of Federal Regulations are distinct standards that have been duly promulgated and enforced. That there is some overlap between the specific requirements found in section 75.1101-15(d) and the general requirements found in section 75.1101-14(a) is the result of time honored, wise promulgation practice that provides for the enumeration of *specific* requirements and prohibitions, and also a more *general* standard in order to ensure that the broad goal of the standard is effectuated even if some circumstances that could

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<sup>14</sup> Section 56.3200, entitled "Correction of hazardous conditions," provides:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

<sup>15</sup> Section 56.3130, entitled "Wall, bank, and slope stability," provides:

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.



potentially diminish the intended level of safety were unanticipated at the time of promulgation. Thus, this case is not unlike the common situation where a motorist is simultaneously charged with the *general* violation of operating a vehicle in a dangerous manner, and the *specific* violations of failing to observe a traffic signal and failing to observe the speed limit — with all charges stemming from one traffic stop. Similarly, in this case the Secretary had the discretion to charge a violation of both the *general* and the *specific* standards after inspection of the fire suppression system.

Because I conclude that the two standards impose separate and distinct requirements, and because I am unaware of any requirement that bars the Secretary from enforcing the standards as was done in this case, I conclude that the judge erred in vacating Citation No. 3587228 as duplicative.

Accordingly, I would reverse the judge's decision to vacate the citation as duplicative, and remand for a determination whether the fire suppression system in place at the time of the subject August 10 fire separately violated section 75.1101-14(a).

A large, stylized handwritten signature in black ink, reading "Marc Lincoln Marks".

Marc Lincoln Marks, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 9, 1997

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)  
on behalf of CHARLES H. DIXON  
BERNARD EVANS, RICHARD  
GLOVER, EDGAR OLDHAM,  
MARK MARCH, DON RILEY, CHARLES  
JOHNSON and ELEVEN (11)  
UNNAMED EMPLOYEES OF PONTIKI  
COAL CORPORATION

v.

PONTIKI COAL CORPORATION

Docket No. KENT 94-1274-D

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). By order dated November 17, 1995, the Commission granted the Secretary of Labor's unopposed petition for interlocutory review of Administrative Law Judge Gary Melick's February 6, 1995 order. In the February 6 order, the judge determined that the Commission has no jurisdiction over complaints filed by the Secretary regarding (1) discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), against individuals who have not filed initiating complaints, and (2) acts of discrimination not alleged in the initiating complaint. At the same time, the Commission also granted the unopposed petition

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<sup>1</sup> Commissioner Verheggen assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

for interlocutory review filed by Pontiki Coal Corporation ("Pontiki") challenging the judge's September 29, 1995, order. In his September 29 order, the judge ruled that the determination as to when Charles H. Dixon became a representative of miners depends upon when he was so designated by at least two miners at the subject mine. The Commission stayed proceedings before the judge pending resolution of these appeals.

For the reasons that follow, we reverse the judge's February 6 order and direct the judge to resume proceedings with respect to all complainants and allegations in the Secretary's complaint. We also vacate that portion of our November 17 order directing review of Pontiki's petition, and deny Pontiki's petition.

## I.

### Factual Background

Pontiki operates the Pontiki No. 2 Mine, an underground coal mine in Lovely, Kentucky. *Jt. Stip.* 1. On March 11, 1994, Pontiki's vice president for operations, Charles Wesley, held a meeting with all three shifts of miners at the No. 2 Mine and told them that the company would recognize and welcome the participation of any miner employed by Pontiki properly designated as a miners' representative, but that it would not recognize non-employees, including officials of the United Mine Workers of America ("UMWA"), as miners' representatives because the company did not believe non-employees could serve as miners' representatives. *Jt. Stip.* 16.

During that meeting, the employees were also told that Pontiki would actively oppose the designation of any non-employee as a miners' representative, including non-employee UMWA officials, that if such a designation occurred Pontiki might have to expend considerable legal fees to defend its position that only Pontiki employees are entitled to act as representatives of miners at the mine; and that costs incurred could affect their job security. *Jt. Stip.* 17. Wesley stated that Pontiki would not post any certification that appointed non-employees as representatives and that such action would cost the company \$5000 per day in penalties assessed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). *S. Mot for Summ. Decision*, Gov't Ex. 3 at 2. Wesley also stated that the money could be put on the bathhouse floor and divided up among the miners, which he calculated would amount to about \$1800 per miner. *Id.* Gov't Ex. 3, p.2.

On April 14, 1994, UMWA employee Charles H. Dixon filed with MSHA information required under 30 C.F.R. Part 40<sup>2</sup>. *Jt. Stip. Doc. C.* The Part 40 filing consisted of a "Certificate

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<sup>2</sup> 30 C.F.R. § 40.1, entitled "Definitions," provides in relevant part (emphasis in original):

As used in this Part 40 . . .

(b) *Representative of miners* means:



of Representation” designating the UMWA as miners’ representative, including Dixon, six other non-employee UMWA officials, and three Pontiki employees. Jt. Stip. Doc. C. On April 15, 1994, Pontiki received its copy of the Part 40 filing. Jt. Stip. 18. That same day, Pontiki posted on the mine bulletin board the Part 40 filing, Dixon’s transmittal letter and a notice stating that Pontiki had posted the designation papers “under protest” because Pontiki refuses to recognize non-employees as miners’ representatives. Jt. Stip. 19 & Doc. D.

On April 26, 1994, Dixon filed a discrimination complaint with MSHA pursuant to the provisions of section 105(c)(2) of the Act.<sup>3</sup> Jt. Stip. 20 & Doc. E. After conducting an

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(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and (2) *Representatives authorized by the miners, miners or their representative, authorized miner representative*, and other similar terms as they appear in the Act.

30 C.F.R. § 40.2, entitled “Requirements,” provides in relevant part:

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by §40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the [A]ct relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District Office and shall be made available for public inspection.

<sup>3</sup> Section 105(c)(2) provides in relevant part:

Any . . . representative of miners who believes that he has been . . . interfered with, or otherwise discriminated against . . . may, within 60 days after such violation occurs, file a complaint with the Secretary. . . . Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as [s]he deems appropriate . . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the . . . representative of miners

investigation of the complaint and making a determination of violation, the Secretary filed a complaint with the Commission on September 2, 1994, which was amended on October 3, 1994. The amended complaint alleged that Pontiki discriminated against Dixon, six other non-employee miners' representatives listed on the Part 40 designation, and 11 unnamed miners who had designated the UMWA officials to be their representatives. Am. Compl. ¶¶ 5,6. It alleged that from March 1994 on, Pontiki discriminated against Dixon and the 17 other individuals by (1) refusing to recognize the non-employee miners' representatives, (2) posting the designation with the admonishment that it would refuse to recognize non-employee miners' representatives, and (3) holding employee meetings and threatening employees with possible job loss if they continued their effort to designate non-employee miners' representatives. *Id.* ¶ 6.

## II.

### Procedural Background

Before the judge, Pontiki filed a motion to dismiss on the grounds, inter alia, that the Commission lacks jurisdiction over individuals who have not filed initiating complaints with MSHA under section 105(c)(2) of the Act, and for whom the Secretary has not issued a written determination concerning their complaints. P. Mot. to Dismiss at 3-4. The judge granted partial dismissal, ruling that the Commission had no jurisdiction over individuals who had not filed an initiating complaint with MSHA. Feb. 6 Order at 4. The judge also determined that he lacked jurisdiction over allegations of discrimination not set forth in the initiating complaint. *Id.*

The judge further concluded that he was "without jurisdiction to consider any alleged acts of discrimination occurring before April 15, 1994[,] the date Pontiki received the Part 40 filing notifying it of Dixon's status as a representative of miners. Feb. 6 Order at 5. However, following a hearing held on March 9, 1995 on the motion to dismiss, the Secretary entered into evidence an affidavit by Dixon averring that, prior to March 11, 1994, five miners had signed the Part 40 designation appointing Dixon as their representative. Aff. of Charles Dixon (March 2, 1995, ¶ 5). Based on this evidence, the judge issued an amended order dated March 10, 1995, deferring, for a hearing on the merits, the determination of when Dixon became a representative of miners. Am. Order Granting Partial Dismissal.

The Secretary then filed a petition for discretionary review ("PDR") challenging the judge's February 6 order. On March 21, 1995, the Commission denied the PDR as premature on the ground that the February 6 order was not a final decision. On April 6, 1995, Pontiki moved for reconsideration of the March 10 amended order. On September 29, 1995, the judge denied

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alleging such discrimination or interference and propose an order granting appropriate relief. . . .

30 U.S.C. § 815(c)(2).

Pontiki's motion for reconsideration. Both the Secretary and Pontiki filed motions for certification of the February 6 and September 29 orders, respectively. The judge denied both motions and these petitions for interlocutory review followed.

### III.

#### Disposition

The Secretary argues that the judge erred in dismissing her complaint filed with the Commission on behalf of the individuals whose names did not appear on the complaint filed with MSHA because the language of the statute, the statute's purpose and Commission precedent all establish that section 105(c) authorizes her to file a complaint whenever she learns through investigation of an initiating complaint that the operator has engaged in unlawful conduct. S. Pet. at 8-11. Stressing the broad and liberal construction to be accorded the Act's anti-discrimination provisions, the Secretary contends that the judge and the Commission should defer to her interpretation of section 105(c). *Id.* at 9-11. The Secretary further argues that, under the plain language of section 105(c)(2), she is required to conduct such investigation "as [s]he deems appropriate," and that nothing in that section precludes the Secretary from filing a complaint if she learns during the investigation of an initiating complaint that the operator has engaged in unlawful acts of discrimination (1) against miners who did not file an initiating complaint, or (2) which were not specifically set forth in the initiating complaint. *Id.* at 13-15.

Pontiki argues that the judge correctly determined that the Commission lacks jurisdiction over claims asserted by the Secretary on behalf of the 17 individuals who failed to file a complaint with the Secretary under section 105(c)(2). P. Resp. Br. at 33. According to Pontiki, a person who believes he has been discriminated against must first "file a complaint with the Secretary alleging such discrimination." *Id.* at 10. Pontiki contends that the judge correctly determined that the section 105(c)(2) complaint filed with the Commission on behalf of the individuals who did not file their own initiating complaints with MSHA must be dismissed. *Id.* at 11-14. Pontiki asserts that the Commission need not reach the Secretary's contention that the judge erred by dismissing the complaint insofar as it contained allegations not included in the initiating complaint. *Id.* at 6-8.

With respect to the September 29 order, Pontiki argues that the judge erred in ruling that Dixon could have become a representative of miners as soon as two miners designated him as such, and prior to the filing of his Part 40 papers. P. Br. at 8-22. Pontiki asserts that the standard adopted by the judge is inconsistent with the decision of the court of appeals in *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) ("*UP&L*"). P. Br. at 13-16. Pontiki further argues that the Commission cases relied upon by the judge have not survived *UP&L*, and in any case do not support his ruling. *Id.* at 16-22.

The Secretary responds that the judge correctly deferred to her interpretation of the term "miners' representative" as including all individuals authorized by two or more miners to

represent them for purposes of the Act. S. Br. at 9-10. The Secretary asserts that her interpretation is consistent with the language of her Part 40 regulations, their purpose, and the Mine Act. *Id.* at 11-13. She contends that *UP&L* is inapplicable because it involved a representative's attempt to assert walkaround rights. *Id.* at 16-19. The Secretary further argues that Commission decisions recognize that an individual becomes a miners' representative when two or more miners so designate him or her, and that these holdings are unaffected by *UP&L*. *Id.* at 19-21.

A. Whether Dixon's Initial Complaint was Properly Brought on Behalf of the Miners Who Designated Dixon as their Representative

Pontiki argues that the Act precludes the filing of complaints by a representative of miners on behalf of the miners he represents. P. Resp. Br. at 10. Pontiki's contention rests on the use of the singular pronoun in section 105(c)(2) of the Act, which states that "[a]ny . . . representative of miners who believes that *he* has been . . . discriminated against . . . may . . . file a complaint with the Secretary alleging such discrimination." *Id.* (emphasis supplied).

We reject this argument. Section 105(c)(2) specifically lists a "representative of miners" as a person authorized to file a complaint, and does not restrict the ambit of any such complaint. Pontiki's construction of section 105(c)(2) is at variance with the notion of a *representative* of miners who, as the statutory title suggests, is expected to act on behalf of miners. *See also* the regulatory definition of miners' representative at n.2, *supra*. Nothing in the language or legislative history of the Act suggests that Congress intended, by use of the word "he," to prevent miners' representatives from acting in that very capacity. Thus, section 105(c)(1) states:

[n]o person shall . . . interfere with the exercise of the statutory rights of any miner, representative of miners . . . because of the exercise by such miner [or] representative of miners . . . *on behalf of himself or others* of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1) (emphasis supplied).

The purpose of legislatively authorizing, empowering, and protecting a class of persons known as a "representative of miners" was to enable miners to appoint someone to help them ensure that their work environment would be free from health and safety hazards, and to ensure that their statutory rights would be protected. Absent that function, the "representative of miners" has no purpose under the Act. We therefore conclude that Congress' inclusion of representatives of miners among the parties protected under section 105(c) was intended not only as a way to protect the individual representative (who may not even be an employee,<sup>4</sup> and thus

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<sup>4</sup> The caselaw is clear that non-employees may serve as miners' representatives. *See Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275 (10th Cir. 1995); *Kerr-McGee Coal Co. v. FMSHRC*, 40 F.3d 11257 (D.C. Cir. 1994), *cert denied*, 115 S.Ct. 2611 (1995).



may not be at risk of incurring the usual types of retaliation suffered by employees) from operator discrimination, but also as a further protection to the miners, whose representative may be more informed regarding the protections under the Act, and can therefore more readily enlist the protection of MSHA. *See Utah Power & Light Co.*, 897 F.2d 447, 451 (10th Cir. 1990). Thus, Dixon had the lawful authority to file a complaint of discrimination both on his own behalf and on behalf of those miners he was designated to represent.

We also disagree with the rationale relied on by the judge to preclude Commission jurisdiction over the miners who had signed Dixon's authorization but had not signed the initiating complaint filed with MSHA. The judge reasoned that Dixon's complaint was filed by Dixon "alone" and processed as an individual complaint by the Secretary. In support of this finding, the judge stressed that Dixon "is the only named complainant and only Dixon's signature appears on the Complaint." Feb. 6 Order at 4. The judge added that the Secretary's letter to Dixon following the investigation referred to "'your' complaint of discrimination and conclude[d] that 'you' have been discriminated against." *Id.* In light of these findings, the judge concluded: "There is, accordingly, no legal basis for the Secretary's expanded complaint filed with this Commission alleging discrimination against persons other than Charles Dixon." *Id.*

By focusing on Dixon's name and signature on the complaint, the judge has misconstrued its core purpose. The complaint clearly challenges Pontiki's refusal to recognize the lawful representatives of miners pursuant to the designation filed by Dixon. It contains the following requests for relief:

- (1) [t]hat management be directed to immediately cease and desist from interfering [sic] *with the statutory rights of the miners* to freely choose a miners' representative.
- (2) that Pontiki . . . properly post *the Miners['] Certificate of Representation* without any protests.
- (3) [t]hat Pontiki . . . immediately post a notice to employees which apologizes *to the miners for the company's interference with their statutory rights.*
- (4) that MSHA properly fine Pontiki . . . for the company's treatment and intimidating *interference with the miners' statutory rights.*
- (5) that management conduct a meeting *with the miners* whereby [Dixon] can be properly introduced as *the miners['] authorized representative.*

Jt. Stip. Doc. E (emphasis supplied).

Thus, the complaint contains allegations of illegal discrimination against the miners as a group and clearly reflects that Dixon filed the complaint in his representative capacity, not simply on his own behalf. Additionally, since the gravamen of both Dixon and the Secretary's complaint is Pontiki's refusal to recognize the designation of non-employee representatives of miners and Pontiki management's threatening statements to the miners, we do not agree with the judge that the Secretary has in any meaningful sense "expanded" Dixon's initiating complaint.

In sum, we conclude that Dixon's complaint is an adequate predicate to the complaint filed by the Secretary on behalf of the miners whom Dixon represented. Accordingly, we reverse the judge's determination that he had no jurisdiction over the Secretary's complaint as it pertains to these individuals.

Whether Dixon, as a representative of *miners*, may file a complaint on behalf of other *miners' representatives* under section 105(c)(2) is a question we need not address. In this case, as we explain in Part III-B, we conclude that the Secretary's complaint alleging discrimination against the other miners' representatives is based on, and reasonably related to, his investigation of the same complaint filed by Dixon, and therefore falls within the Commission's jurisdiction.

B. Whether the Secretary's Complaint is Limited to the  
Individuals and Charges Set Forth in the Initiating Complaint

In contending that the Secretary's complaint is overbroad, Pontiki relies on section 105(c)(2) and argues that the Secretary is limited to filing complaints only on behalf of those who have filed an initiating complaint. The Secretary contends that section 105(c)(2) permits her to file a complaint alleging all discrimination her investigation may have uncovered, even discrimination that affected individuals who did not file an initiating complaint. We are thus presented with a question of statutory construction on which the Secretary has offered her interpretation of the Mine Act. In such circumstances, the first inquiry is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. When a statute is silent or ambiguous with respect to the question at issue, however, we defer to the interpretation of the agency charged with administering the statute, so long as that interpretation is reasonable. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir 1994), *aff'g* 15 FMSHRC 587 (April 1993).

Under section 105 of the Mine Act, Congress reserved final authority to the Commission for determining both the validity and scope of complaints but charged the Secretary with administration of the statute. Thus, if a Mine Act provision is not clear, we ask whether her interpretation is reasonable. Here, section 105(c)(2) is silent concerning the relationship between the initiating complaint and the Secretary's complaint filed with the Commission. Accordingly, we proceed to examine the reasonableness of the Secretary's interpretation that she is not limited



to the bare allegations of the initiating complaint to MSHA in drawing up her complaint to the Commission.

We find that the Secretary's interpretation is consistent with the language of section 105(c)(2) governing the issuance of her complaint. That language specifies that, upon receipt of an initiating complaint,

the Secretary . . . shall cause *such investigation to be made as [s]he deems appropriate*. . . . If upon such investigation, the Secretary determines *that the provisions of this subsection have been violated*, [s]he shall immediately file a complaint with the Commission . . . alleging *such discrimination* . . . ."

30 U.S.C. § 815(c)(2) (emphasis supplied).

We conclude that the Secretary reasonably interprets "such discrimination" to refer to the discrimination uncovered during the Secretary's investigation of Dixon's initiating complaint. We also conclude that the scope of the Secretary's investigation, and her authority under section 105(c)(2) to issue a complaint based upon her investigation, are broader than Pontiki contends. This is consistent with our conclusion that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (February 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.'" (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978))).

The Secretary's interpretation of section 105(c)(2), insofar as she claims authority to file a complaint reasonably related to the initiating complaint, is also consistent with other Mine Act provisions giving the Secretary broad authority to investigate and remedy violations of the Mine Act. As the Secretary points out (S. Pet. at 12-13) and Pontiki concedes (Oral Arg. Tr. on Review at 30-31), under section 104(a) of the Act, 30 U.S.C. § 814(a), the Secretary is required to issue a citation for any violation of the Act she uncovers upon inspection or investigation.

In addition, the Secretary's interpretation of section 105(c)(2) is consistent with Commission precedent recognizing that it is the scope of the Secretary's *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (April 1991), the operator moved to dismiss a discrimination claim prosecuted by an individual miner under section 105(c)(3) of the Act on the grounds that the miner's complaint differed substantially from the complaint he initially filed with MSHA, and that MSHA had never investigated the allegation contained in the section 105(c)(3) complaint. The Commission stated:

If the Secretary's . . . investigation . . . did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

*Id.* at 546. The corollary to this holding is that the prerequisites *were* met if the investigation had included the matters contained in the section 105(c)(3) complaint. Our holding here merely applies this corollary to a complaint filed by the Secretary herself under section 105(c)(2).

Moreover, in this case the complaint filed by the Secretary alleges the same discriminatory conduct alleged by Dixon in the initiating complaint filed with MSHA. Both complaints concern Pontiki's refusal to acknowledge non-employee representatives of its miners. Thus, the Secretary's addition of the names of other representatives of miners similarly affected, like her addition of the unnamed miners, changes neither the relief sought nor the basis of the charge as originally filed. The Secretary's complaint merely identifies those who were affected by the alleged discriminatory conduct. We also find that the issues raised in the Secretary's complaint do not deviate from those set forth in Dixon's complaint to MSHA.<sup>5</sup>

Accordingly, we reverse the judge's determination that the Commission lacks jurisdiction over the Secretary's complaint as filed in this case.

C. Whether Dixon Became a Representative of Miners Prior to His Part 40 Filing

Based on his order dismissing the Secretary's complaint on behalf of all individuals other than Dixon, the judge initially determined that he had no jurisdiction to consider any alleged acts of discrimination occurring before April 15, 1994, the date Pontiki received a copy of the certificate of representation filed by Dixon. Feb. 6 Order at 4. On March 10, 1995, the judge amended this ruling and set an evidentiary hearing to determine the date on which Dixon was designated by two miners to be their representative. By order dated September 29, 1995, the judge denied Pontiki's motion for reconsideration of the March 10 amended order.

Given our reversal of the judge's dismissal of the miners from this proceeding, the date that Dixon became a miner's representative is no longer relevant. There is no dispute that Dixon was a miner's representative on April 26, 1994, the date he filed his complaint with MSHA.<sup>6</sup> Nor is there a dispute that the miners on whose behalf Dixon filed the initiating complaint, and

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<sup>5</sup> In light of these conclusions, we need not determine in this case the extent of the Secretary's authority to file with the Commission a complaint of discrimination that contains allegations of discrimination not set forth in the initiating complaint.

<sup>6</sup> Before the judge, Pontiki at one point disputed Dixon's status as a miner's representative even after the April 15, 1994 Part 40 filing. Feb. 6 Order at 5. However, Pontiki has apparently abandoned that position. *See* P. Mot. for Certification at 10; P. Br. at 22.


on whose behalf the Secretary filed his section 105(c)(2) complaint; were miners at the time the allegedly discriminatory actions took place. Accordingly, the judge has jurisdiction over all acts of discrimination alleged in the complaint.

Because we need not reach the issue whether Dixon became a representative of miners prior to April 15, 1994, we vacate that portion of our order dated November 17, 1995 granting Pontiki's petition for interlocutory review, and we deny Pontiki's petition.

IV.

Conclusion

For the foregoing reasons, we reverse the judge's February 6, 1995 partial dismissal of the Secretary's complaint. We vacate our grant of Pontiki's petition for interlocutory review, deny the petition, lift the stay previously imposed in our order of November 17, 1995, and direct the judge to resume proceedings with respect to all alleged discriminatees and issues set forth in the Secretary's complaint.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 9, 1997

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

v.

STILLWATER MINING COMPANY

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Docket No. WEST 97-179-M  
A.C. No. 24-01490-05583

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 16, 1997, the Commission received from Stillwater Mining Company ("Stillwater") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Stillwater.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Stillwater asserts that it intended to contest this citation and the related penalty but did not submit a request for hearing ("Green Card") because the assessment was sent by MSHA to the company directly at its mining site, rather than to its attorneys of record. Stillwater contends that after receiving Citation No. 7900016 on May 24, 1996, it notified the Secretary on June 13, 1996, through its attorneys, that it intended to contest the citation and any "proposed penalty assessments related to [that] citation." Mot. at 1-2 & Attach. 2. Stillwater's attorneys entered their appearance in the contest proceeding (Docket No. WEST 96-281-RM), and requested that



future "correspondence, pleadings, communications, and proposed penalties concerning this matter . . . be directed" to their attention. Mot. at 2 & Attach. 2. On April 28, 1997, more than eight months after Administrative Law Judge Richard W. Manning entered an order staying further proceedings in the case until the Secretary filed a related civil penalty proceeding, counsel for the Secretary indicated that MSHA's Office of Assessments had advised him that a proposed penalty assessment for eleven citations (including Citation No. 7900016) had been issued on October 10, 1996, assessing a total penalty of \$550 (\$50 for Citation No. 7900016), and that payment for all the citations had been received by November 7, 1996. Mot. at 2-4 & Attachs. 3, 9, 10. Stillwater asserts that, despite the request in its notice of contest to communicate directly with its counsel of record, MSHA instead mailed this proposed penalty assessment to it directly at the mine site. Mot. at 4. Stillwater contends that, as a result, it unknowingly paid the assessment of \$550 for the eleven violations, including a \$50 penalty for Citation No. 7900016, despite its intention to contest this citation and any related penalty. *Id.* at 5. Attached to Stillwater's motion are various documents and correspondence relating to the underlying proceeding involving its contest of Citation No. 7900016, which indicate that Stillwater intended to contest the citation and any related penalty assessment. Stillwater asserts that it is entitled to relief under Rule 60(b)(1), (3), and (6) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 60(b)(1), (3), and (6).

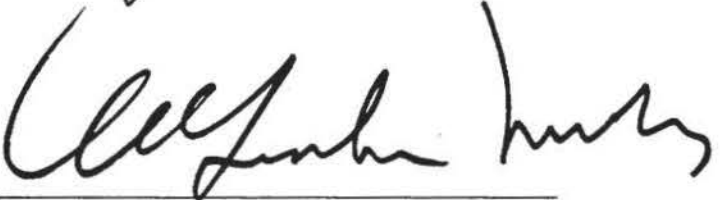
We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). We have also noted that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

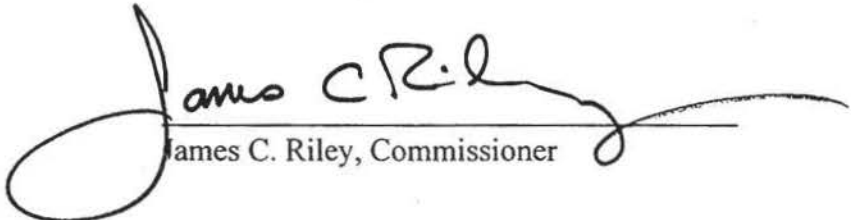
It appears from the record that Stillwater intended to contest this citation and any related penalty and that, but for an apparent lack of coordination between the recipient of the proposed penalty assessment at its mining facility and its attorneys, it would likely have returned the Green Card and contested this proposed penalty assessment. While Stillwater does not deny receiving the proposed assessment sent by MSHA to the mine site, in the circumstances presented here (in particular, the Secretary's failure to send the penalty assessment to Stillwater's counsel, despite their explicit request), its failure to submit the request for hearing as to this particular penalty assessment, and payment of the proposed assessment, can be reasonably found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Westmoreland Coal Co.*, 11 FMSHRC 275, 276 (March 1989) (operator asserted that penalty had been paid in error); *Tug Valley Coal Processing*, 16 FMSHRC 216, 216-17 (February 1994) (same); *Drummond Co.*, 17 FMSHRC 883, 883-84 (June 1985) (operator mistakenly circled on Green Card the citations and



orders it was not contesting rather than those it wished to contest); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (operator filed notice of contest as to alleged violations, but was unaware that contest of civil penalty proposals was also required). Accordingly, in the interest of justice, we grant Stillwater's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 7900016. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 18, 1997

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

v.

BLUESTONE COAL CORPORATION

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Docket Nos. WEVA 93-165-R  
WEVA 94-117

BEFORE: Jordan, Chairman; Marks, Riley and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves alleged significant and substantial ("S&S") violations by Bluestone Coal Corporation ("Bluestone") of 30 C.F.R. § 77.1600(b),<sup>1</sup> for failure to standardize and post traffic signs warning of a steep downgrade on its haulage road, and 30 C.F.R. § 77.1607(c),<sup>2</sup> for failure to ensure that a truck was operated at a speed that is prudent and consistent with the haulage road conditions. Administrative Law Judge David Barbour concluded that Bluestone did not violate section 77.1600(b), but that it did violate section 77.1607(c) and that the violation was S&S. 16 FMSHRC 2500, 2511-19 (December 1994) (ALJ). The Commission granted cross-petitions for discretionary review filed by the Secretary challenging the judge's conclusion that there was no violation of section 77.1600(b), and by Bluestone challenging the judge's conclusion that it

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<sup>1</sup> Section 77.1600(b) states:

Traffic rules, signals, and warning signs shall be  
standardized at each mine and posted.

<sup>2</sup> Section 77.1607(c) states:

Equipment operating speeds shall be prudent and consistent  
with conditions of roadway, grades, clearance, visibility, traffic,  
and the type of equipment used.

committed an S&S violation of section 77.1607(c). For the reasons that follow, we reverse in part, affirm in part, and remand.

I.

Factual and Procedural Background

Bluestone operates the Keystone No. 6 Strip Mine in McDowell County, West Virginia. 16 FMSHRC at 2500, 2509; Gov't Ex. 2, at 3. It contracted with Blackstone Coal Company ("Blackstone") and other independent contractors to develop and operate underground coal mines on the property. 16 FMSHRC at 2502, 2509-10. Blackstone, in turn, subcontracted with Mullins Trucking Company ("Mullins") to transport coal to the Keystone No. 1 Preparation Plant. *Id.* at 2510; Gov't Ex. 2, at 3.

On January 11, 1993, Theodore Payne, a truck driver for Mullins, was driving a haulage truck loaded with coal from the Blackstone No. 39 Mine to the preparation plant, a distance of about 7.3 miles. 16 FMSHRC at 2502; Gov't Ex. 2, at 3, 5. The haulage road consists of various state, county, and private roads. 16 FMSHRC at 2502. It has several curves and the final mile before the preparation plant has a steep downgrade ranging up to 16 percent. *Id.* at 2503, 2505, 2516; Tr. I 50; Jt. Ex. 1; *see also* Gov't Ex. 2, at 5-6.<sup>3</sup> In addition to miners, members of the public use the haulage road. 16 FMSHRC at 2503. As Payne descended the final grade of the haulage road, he lost control of his truck's speed. *Id.* at 2502-03, 2516-17. He called on his C.B. radio to warn other drivers that the truck was out of control. *Id.* at 2507. After traveling about 200 feet past the turn for the access road to the preparation plant, Payne jumped from the truck and rolled 56 feet to his death. *Id.* at 2502, 2505; Gov't Ex. 2, at 2. Shortly thereafter, the truck struck an embankment at a curve in the haulage road and overturned. 16 FMSHRC at 2502-03; Gov't Ex. 2, at 5.

Although MSHA's investigation of the accident failed to reveal what caused Payne to lose control of the truck, MSHA personnel suspected that the truck might have lost its brakes, the transmission might have gone out of gear, or parts might have dropped off the truck. 16 FMSHRC at 2516; Tr. I 122, 151-52, 187, 240-41; Tr. II 17. MSHA accident investigator Jerry Sumpter issued Bluestone Citation No. 2723400,<sup>4</sup> pursuant to section 104(a) of the Mine Act, 30

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<sup>3</sup> The hearing was conducted on July 26 and 27, 1994. "Tr. I" refers to the July 26 hearing; "Tr. II" refers to the July 27 hearing.

<sup>4</sup> Citation No. 2723400 states:

Management did not have traffic rules, signals or warning signs standardize[d] on the steep mountain incline, to provide the coal haulage equipment a warning of the steep incline on [B]urke

U.S.C. § 814(a), alleging an S&S violation of section 77.1600(b) for insufficient traffic signs warning of the steep downgrade. 16 FMSHRC at 2504-05; Gov't Ex. 4. In addition, Sumpter issued Bluestone Citation No. 2723974,<sup>5</sup> pursuant to section 104(a), alleging an S&S violation of section 77.1607(c) because the truck exceeded an operating speed consistent with road conditions. 16 FMSHRC at 2507; Gov't Ex. 5. The Secretary subsequently proposed civil penalty assessments of \$6,000 for each of these alleged violations and Bluestone challenged the proposed assessments. The alleged violations were abated by installing warning signs and re-instructing truck drivers to be aware of conditions of the haulage road and to operate trucks in a manner specified by the truck manufacturers regarding payload weight limits. 16 FMSHRC at 2506-07; Gov't Exs. 4 & 5. In addition, four speed berms and three escape ramps were installed. 16 FMSHRC at 2505, 2517; Gov't Ex. 5.

Following an evidentiary hearing, the judge concluded that Bluestone did not violate section 77.1600(b). 16 FMSHRC at 2515. He determined that the language of the standard "does not specify which rules, signals or warning signs are required to be exhibited at certain places. Rather, it mandates that *if* they are exhibited they be uniform in appearance and location and they be posted, that is, placed where they may be observed and read." *Id.* at 2513. The judge found that "Bluestone was not cited because its rules, signals and signs lacked uniformity or were exhibited improperly. Rather, it was cited because it did not have certain specific signs in the places MSHA believed they should have been and because it did not include among its rules and regulations those MSHA thought necessary." *Id.* at 2513. He found that the Secretary lacks standards that require operators to install warning signs at hazardous areas or that specify the content of traffic rules. *Id.* at 2514-15. Accordingly, he vacated the citation. *Id.* at 2521.

However, the judge concluded that Bluestone violated section 77.1607(c). 16 FMSHRC 2517. He based his determination on his finding that Payne failed to retain control of the truck.

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[M]ountain road to the preparation plant. This was revealed after a fatal truck haulage accident.

Gov't Ex. 4.

<sup>5</sup> Citation No. 2723974 states:

Based on evidence obtained during a fatal accident investigation, it was determined that the 1979 DM 600 Mac coal haulage truck was being operated at a speed that was not consistent with the conditions of the roadway, grades, visibility, and traffic while descending the Burk[e] Mountain coal haulage road with a full load of coal. An accident occurred on 01/11/93 about 1:55 p.m. when the truck ran away and turned over at the switchback.

Gov't Ex. 5.

*Id.* at 2516. The judge determined that the truck was traveling too fast to negotiate a curve in the haulage road and that, therefore, its speed was neither prudent nor consistent with the grade, curve, and condition of the truck's brakes. *Id.* at 2517. The judge specifically rejected Bluestone's challenge to the Secretary's alleged requirement that it abate the hazard by installing speed berms and escape ramps and limiting haulage truck payload weight. *Id.* at 2517-18. He reasoned that, since Bluestone had not objected to the abatement measures by refusing to comply and then contesting any resulting section 104(b) withdrawal order, it had waived its right to challenge the abatement measures. *Id.* In addition, the judge concluded that the violation was S&S because the speed of the truck contributed to Payne's death. *Id.* at 2519. He assessed a civil penalty of \$500. *Id.* at 2521.

## II.

### Disposition

#### A. Section 77.1600(b)

The Secretary requests that the Commission accord deference to her interpretation of section 77.1600(b). S. Br. at 3-6. She argues that the judge ignored the purpose of the standard, which is "to ensure that mine operators post adequate and appropriate traffic requirements." *Id.* at 4-5. The Secretary contends that the judge misinterpreted section 77.1600(b) to require operators to post traffic "requirements" if they have them, but not if they do not have them. *Id.* at 5. She argues that the judge's interpretation of the standard would render it unenforceable and would produce an absurd result. *Id.*

Bluestone responds that no deference is due because the Secretary has not consistently interpreted the standard to require the posting of particular types of signs, referring to an interpretation offered by Investigator Sumpter. B. Resp. Br. at 4-7. The company argues that the standard fails to provide notice of the types of signs required to be posted or the particular hazards to be addressed. *Id.* at 2-3, 7-9. Bluestone also argues that it was in compliance with the standard because it had written traffic rules for the haulage road that were standardized and posted. *Id.* at 3.

The Commission has long recognized that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996) (citations omitted). It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Since we find that the meaning of section 77.1600(b) is clear and unambiguous, we do not address the Secretary's argument that her interpretation of the standard is entitled to deference.



In the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation. See *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). The prescriptive wording of section 77.1600(b) that “[t]raffic . . . warning signs shall be standardized at each mine and posted” clearly and unambiguously requires mine operators to post warning signs at their mines. The term “warning,” in turn, refers to hazardous, dangerous conditions. “Warning” is defined as “announcing something imminent or impending or the presence of danger.” *Webster’s Third New International Dictionary (Unabridged)* 2577 (1986). It is also defined more succinctly as “[a] pointing out of danger.” *Black’s Law Dictionary* 1584 (6th ed. 1990). Additionally, the term “post” means “to publish, announce, or advertise by or as if by the use of a placard” and “to make (a person) familiar with a subject.” *Webster’s* at 1771. These definitions indicate that the term “traffic warning sign” means a sign that points out or announces a road hazard which, to be effective, must be posted at some location before a driver encounters the hazard. Thus, we conclude that section 77.1600(b) required Bluestone to post a sign or signs warning of the steep, 16-percent downgrade, the obvious danger of which was never disputed by Bluestone.

We are unpersuaded by the judge’s comparison of section 77.1600(b) with 30 C.F.R. § 56.9100(b), entitled “Traffic control,” by which he intended to demonstrate that section 77.1600(b) fails to require that operators “install warning signs at hazardous areas.” 16 FMSHRC at 2514. Section 56.9100(b) requires that “[s]igns or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine.” The only significant difference between this requirement and section 77.1600(b) is that section 56.9100(b) explicitly states that signs warn of “hazardous conditions” and “be placed at appropriate locations,” both of which are implicit elements of section 77.1600(b) as explained above. More significantly, both standards unambiguously require operators to post traffic warning signs. The judge’s contrary conclusion with respect to section 77.1600(b) is at odds with the clear language of the standard.

We are also unpersuaded by Bluestone’s argument that section 77.1600(b) fails to provide notice of the types of signs required to be posted or the particular hazards required to be addressed. B. Resp. Br. at 2-3, 7-9. From our conclusion that section 77.1600(b) clearly requires that signs warning of traffic hazards must be posted at hazardous locations, it follows that the standard provided Bluestone with notice that it was obligated to post a warning sign at the steep downgrade. We also find unavailing Bluestone’s argument that it was in compliance with the standard because it had written traffic rules that were standardized and posted at the mine. *Id.* at 3. Although the record indicates that Bluestone had provided written traffic rules for the haulage road to its contractors (Tr. II 189-90; B. Ex. 1), the fact remains that no sign was posted on the haulage road warning truck drivers of the steep downgrade. We thus conclude that the record supports no other conclusion than that Bluestone violated the standard.

Based on the foregoing, we conclude that the judge erred in determining that Bluestone did not violate section 77.1600(b). Accordingly, we reverse the judge’s determination and remand for a determination of whether the violation was S&S and assessment of an appropriate civil penalty.

B. Section 77.1607(c)

Bluestone argues that the Secretary's interpretation of section 77.1607(c) is unreasonable. B. PDR at 4-8; B. Reply Br. at 2-4. Bluestone asserts that it should not have been cited for the violation because the standard only applies to drivers of mobile equipment who have demonstrated lack of prudence in operating such equipment. B. PDR at 4-5; B. Reply Br. at 2-4. Bluestone further maintains that the citation is invalid because it is based on a failure to fulfill requirements, i.e., installation of speed berms and escape ramps, not contemplated by the standard, and that the judge erred in concluding that Bluestone must object to such requirements by refusing to abate and then seeking review of any resulting section 104(b) withdrawal order. B. PDR at 5-11. Bluestone explains that it is not objecting to the propriety of the abatement measures but that such measures indicate the unreasonableness of the Secretary's interpretation of the standard. B. Reply Br. at 2-4.

The Secretary responds that the plain language of section 77.1607(c) supports the judge's determination that Bluestone violated the standard. S. Resp. Br. at 3-4. He asserts that the proposed method of abatement has no effect on the issue of violation. *Id.* at 5-6. Further, the Secretary argues that under the Mine Act, Bluestone is liable without fault for its contractor's violative action. *Id.* at 6-7.

1. Violation

The clear language of section 77.1607(c) supports the judge's determination that the standard requires that mobile equipment be operated at speeds that are prudent and consistent with the conditions of the road and equipment. 16 FMSHRC at 2516-17. We agree with the Secretary that the abatement requirements are irrelevant to the issue of whether the operating speed of Payne's truck violated the standard. The citation indicates that it is based on the truck's unsafe operating speed, not on the lack of speed berms, escape ramps, and a payload weight limit.<sup>6</sup> Gov't Ex. 5.

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<sup>6</sup> The judge believed that Bluestone was attacking the abatement requirements and he specifically rejected this challenge in his decision. 16 FMSHRC at 2517-18. In its petition for discretionary review, designated as its opening brief, Bluestone contends that the judge erred in concluding that it must raise objections to these requirements by refusing to abate and then seeking review of any resulting section 104(b) withdrawal order. B. PDR at 10-11. Moreover, the Secretary interpreted Bluestone's petition as challenging the abatement requirements. S. Resp. Br. at 5-6. However, in its reply brief, Bluestone denies that it is challenging the requirements for abatement, explaining that it refers to the abatement requirements only to cast doubt on the Secretary's interpretation of the standard. B. Reply Br. at 2-4. Accordingly, we do not address the propriety of the abatement requirements or whether Bluestone could have appropriately challenged the requirements at the hearing.

At issue is whether section 77.1607(c) gives an operator fair notice that speeding trucks are prohibited, not whether speed berms and escape ramps are required to be installed. From our conclusion that section 77.1607(c) is clear, it follows that the standard provides fair notice to operators that unsafe speed is prohibited.

Moreover, substantial evidence supports the judge's determination that Bluestone violated section 77.1607(c).<sup>7</sup> 16 FMSHRC at 2517. The record indicates that the loaded coal truck sped past the turn to the preparation plant near the bottom of the 1-mile-long, steep downgrade on the haulage road, at which point the driver attempted to abandon his rig by jumping clear. Tr. I 33, 37-38, 163-64, 170-71, Tr. II 185; Jt. Ex. 1; Gov't Ex. 2, at 3-5. Unfortunately, he died in the attempt to escape. Tr. I 163-64. Moments before the accident, Payne was heard on the C.B. radio exclaiming that his truck was out of control. Tr. I 189; Gov't Ex. 2, at 4. Although Inspector Murdock testified that no one knows exactly where Payne lost control of his truck or what caused it to happen (Tr. I 79), Investigator Sumpter and MSHA Inspector John Cheetham testified that the truck's brakes were badly worn and that they were out of adjustment. Tr. I 108-09, 148. In view of this evidence, we conclude that the judge correctly inferred that the truck was not operated at a speed consistent with the steep downgrade and curve of the haulage road and the condition of the truck's brakes. See *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (November 1989) (a violation can be proven by inference).

We also disagree with Bluestone's argument that the standard applies only in instances where a driver demonstrates a lack of prudence in operating mobile equipment. Section 77.1607(c) requires that equipment operating speeds be both "prudent and consistent" with the conditions of the road and equipment. Thus, the absence of one of these requirements violates the standard. In this case, the record supports the judge's finding that the truck's speed was not "consistent" with the conditions of the road and the truck's brakes. 16 FMSHRC at 2517. Therefore, we conclude that the standard was violated regardless of whether Payne exercised prudence in operating the truck.

## 2. Liability of Bluestone

We reject Bluestone's argument that it should not have been cited for the violation because the standard applies only to drivers of mobile equipment. B. PDR at 4-5; B. Reply Br. at 2-4. We perceive Bluestone's argument as two-fold: (1) that Bluestone is not liable because it

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<sup>7</sup> The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

had no ability to control the operating speed of the haulage truck, and (2) that the Secretary abused his discretion in citing Bluestone.

Operators are liable without regard to fault for violations of the Mine Act and its standards. *E.g.*, *Fort Scott Fertilizer - Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Asarco, Inc. - Northwestern Mining Dept.*, 8 FMSHRC 1632, 1634-36 (November 1986), *aff'd*, 868 F.2d 1195, 1198 (10th Cir. 1989). As the mine operator, Bluestone is strictly liable for all violations of the Act that occur at its mine, including those committed by its contractors' employees. *See Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991) ("the Act's scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees, agents, and contractors"); *see also Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981) (mine operators are "strictly liable for the actions of independent contractor violations").

Further, the Commission has recognized that the Secretary has wide discretion to prosecute an operator for violations of the Mine Act or its standards, whether committed by the operator's own employees or the employees of its contractors. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 (February 1997), *appeal docketed*, No. 97-1392 (4th Cir. March 25, 1997); *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994); *Bulk Transportation Services*, 13 FMSHRC at 1359-60; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-39 (D.C. Cir. 1986). Although the Commission has determined that "its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion" (*W-P*, 16 FMSHRC at 1411), the facts of this case support the Secretary's decision to cite Bluestone. Bluestone was responsible for maintaining the haulage road and provided written traffic rules for the haulage road to its contractors. Tr. II 158-60, 181-82, 189-90; B. Ex. 1; Gov't Ex. 2, at 5. In addition, the unsafe operating speed of the truck created a hazard that endangered not only Payne, but everyone who used the haulage road, including members of the public, employees of other contractors,<sup>8</sup> and Bluestone's 13 employees. 16 FMSHRC at 2519; Tr. II 150-51, 171. Where, as here, a contractor's violation affects the safety of the operator's employees, the Commission has upheld the Secretary's exercise of discretion to cite the operator. *Mingo Logan*, 19 FMSHRC at 250. Therefore, we conclude that the Secretary was justified in proceeding against Bluestone for this violation.

### 3. Significant and Substantial

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. 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 Div., Nat'l Gypsum Co.*, 3

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<sup>8</sup> At the time of the accident, there were 12 to 15 mines on the property operated by independent contractors. Tr. II 154-55.



FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

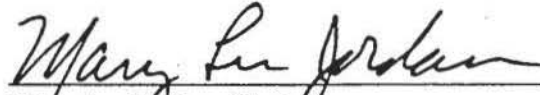
In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed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

*Id.* at 3-4 (footnote omitted). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Clearly, the truck's runaway speed caused Payne to jump from the truck in an effort to save himself from the impending accident. Thus, we conclude that it was a significant contributing cause to his death and that substantial evidence supports the judge's conclusion that the violation was S&S. Accordingly, we affirm the judge's determination.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Bluestone did not violate section 77.1600(b) and remand for a determination of whether the violation was S&S and penalty assessment, and we affirm the judge's determination that Bluestone committed an S&S violation of section 77.1607(c).

  
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Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
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## **ADMINISTRATIVE LAW JUDGE DECISIONS**



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1035

## I.

### SECRETARY'S MOTION TO ADD ENTECH, INC., AND MONTANA POWER COMPANY AS RESPONDENTS

At the time the citations and orders were issued in these cases, Basin Resources operated the Golden Eagle Mine in Las Animas County, Colorado. The mine is now closed. The mine was an underground mine that used the longwall method to extract coal. Basin Resources contested the penalties in these cases and in other dockets because it believes that the penalties are excessive especially since its only mine is closed and it is in the process of winding down. It contends that the penalties should be significantly reduced under the criteria set forth in section 110(i) of the Mine Act, specifically the "effect on the operator's ability to continue in business" criterion. 30 U.S.C. § 820(i). The Secretary disagrees and argues that when an operator is out of business, the "ability to continue in business criteria" no longer applies and the penalties should not be reduced.

The Secretary moved for partial summary decision on this issue. By order dated January 7, 1997, I denied the Secretary's motion. 19 FMSHRC 211. I held that if a mine operator establishes that it is no longer in the mining business and does not intend to reopen its mines or otherwise return to the mining business, this fact should be taken into consideration when assessing a civil penalty under the ability to continue in business criterion. My reasons for this conclusion are set forth in my order which I hereby incorporate by reference. To summarize, I held that civil penalties are remedial, not punitive, and are designed to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." *Id.* at 212 (citation omitted). I indicated that I would assess lower penalties against Basin Resources than proposed by the Secretary because it was no longer a mine operator.

The Secretary filed a motion to add Entech, Inc., and Montana Power Company as respondents in these and the other Basin Resources cases. The Secretary contends that these entities were "operators" of the Golden Eagle Mine as that term is used in section 3(d) of the Mine Act. 30 U.S.C. § 802(d). In my decision issued on April 7, 1997, in *Basin Resources, Inc.*, Docket No. WEST 95-104, 19 FMSHRC \_\_\_\_\_ (April 1997), I addressed this issue in detail and denied the Secretary's motion. I incorporate my analysis of that issue into this decision by reference. For the reasons set forth in that decision, the Secretary's motion is denied.

## II.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE CITATIONS AND ORDER AT ISSUE

#### A. Roof and Rib Support Citations

##### 1. Citation No. 4058042

On July 20, 1995, MSHA Inspector Earl Simmons issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that the roof in the 4-Left 009-0 longwall was not being supported or controlled to protect persons from falls of roof. The citation states that the No. 4 shield was "down from the immediate roof approximately 12 inches." He determined that the alleged violation was not significant and substantial ("S&S"). The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. Section 202(a) provides, in part, that the roof and ribs of "areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls" of the roof or ribs.

Inspector Simmons stated that the condition was obvious and could have been caused by a leak in the shield hydraulic system or by a failure to make sure that the shield was raised against the roof. (Tr. 123-24). He testified that material could fall through the 12-inch opening and strike a miner below. (Tr. 124). He was not sure if the shield was in contact with the roof at some point along its length. (Tr. 129).

Jim Peterson, a former safety supervisor with Basin Resources, testified that loose material against the roof prevented the shield from making full contact with the roof. (Tr. 133). He believed that the condition observed by the inspector did not violate the roof control plan. (Tr. 134-35). He also believed that miners working under the shields were protected from falling rock because there was very little space between the shields. (Tr. 135-36). He testified that only small pieces of material could fall between the shield and the adjacent shields. *Id.*

I credit the testimony of Inspector Simmons and find that the Secretary established a violation. I reject Basin Resources' argument that the Secretary failed to introduce evidence that the conditions were as described in the citation. (B.R. Br. 10). I find, however, that only small pieces of material could fall between the shield and adjacent shields. Thus, I find that the violation was not serious. A penalty of \$200 is appropriate.

##### 2. Citation No. 4057583

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that loose ribs were present that

needed to be controlled between crosscut No. 20 and crosscut No. 23 along the No. 8 belt conveyor. The inspector estimated the distance to be about 300 feet. Inspector Simmons determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$2,072.00 for the alleged violation.

Inspector Simmons was concerned that the loose ribs could fall and injure a miner. (Tr. 158). He testified that the belt examiner and beltman were exposed to this hazard. *Id.* The inspector believed that an injury was reasonably likely, in part, because miners have been injured at the mine as a result of rib falls. (Tr. 161). He stated that the violation was S&S because it was reasonably likely that the loose rib would fall and seriously injure a miner. (Tr. 162). He admitted that the roof was adequately supported in the area. Inspector Simmons testified that he based his citation solely on his visual observation of cracks in the ribs and he did not test nor attempt to take down the ribs. (Tr. 165-66). He had never inspected the Golden Eagle Mine prior to this inspection. *Id.*

Mr. Peterson testified that the ribs along the No. 8 belt conveyor had not changed much in the days prior to July 6 and the ribs did not present a hazard of falling. (Tr. 167). He further testified that one cannot determine whether ribs are loose in the mine by visual observation alone. (Tr. 168). He stated that when miners started barring down the area cited by Inspector Simmons, they had difficulty getting any material down. (Tr. 168-69). Mr. Peterson stated that the fact that material could not be barred down establishes that the ribs were not loose. *Id.* Kay Hallows, the former safety director at the mine, testified that the people responsible for abating the citation tried to find loose material in the cited area and could not get a significant amount of material down because the ribs were not loose. (Tr. 172).

I find that the Secretary failed to establish a violation. I credit the testimony of Messrs. Peterson and Hallows that, upon closer examination, the ribs were not loose. The citation is vacated.

### 3. Citation No. 4057964 and Order No. 4057203

On November 14, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that loose roof was not controlled in the No. 3 entry of 3-left tailgate beginning 20 feet inby crosscut 25 and extending 50 feet outby the crosscut. The citation states that roof cutters have broken the roof in the cited travelway. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$4,600.00 for the alleged violation.

Inspector Simmons testified that the weekly examiner must travel through the cited entry at least once a week. (Tr. 174). He stated that "cutters" are areas in the roof where pressure causes the roof to break up along weak zones. (Tr. 175). The cutter he observed was running through the cited entry. *Id.* Broken rock was hanging over the area where people would travel. Inspector Simmons testified that roof bolts were present and cribs had



been set in the area. (Tr. 176). He stated that these supports were not controlling the loose roof created by the cutter. Inspector Simmons further testified that it was reasonably likely that a person walking through the area would be seriously injured by falling roof. (Tr. 176-77).

In the citation, Inspector Simmons established a termination due date of November 17, 1995. On November 22, 1995, Inspector Simmons issued Order No. 4057203 under section 104(b) of the Mine Act alleging that no apparent effort had been made to correct the cited condition. He stated that he did not observe any materials in the area to abate the condition and did not observe any changes in the roof support. (Tr. 181). A company representative did not accompany the inspector on his inspection, so he did not know why the condition had not been corrected. (Tr. 179). He stated that abatement would require the installation of planks, steel rails, or J-channels. (Tr. 182-83).

Jeffrey Salerno, a former safety inspector with Basin Resources, testified that at the time the citation was issued the roof was supported by roof bolts and straps. (Tr. 262). He stated that there was some loose material above the straps down the center of the entry. *Id.* He testified that Inspector Simmons wanted the area above the straps to be barred down. Mr. Salerno believed that barring down the area would increase the risk of a roof fall. Jack Schuster, a former miner and fireboss with Basin Resources, was with Inspector Simmons as a UMWA representative when the section 104(b) order was issued. He testified that planks had been installed above the straps where coal and rock had fallen out. (Tr. 281). This testimony was supported by Mr. Hallows. (Tr. 295). He further testified that he did not believe that the roof presented a hazard on November 22. *Id.* Mr. Schuster testified that Inspector Simmons wanted the mine to install more planks or J-channels. He stated that it would not have been practical to install additional planks or J-channels. (Tr. 283).

The Commission has held that the "adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Cannon Coal Co.*, 9 FMSHRC 667, 668 (April 1987). I find that the Secretary established that additional support was necessary to protect persons from falling material, taking into consideration the reasonable prudent person test.

I find, however, that the section 104(b) order should be vacated. I credit the testimony of UMWA walkaround representative Schuster that additional planks had been installed before November 22. He believed that the roof did not present a hazard on that date. I credit this testimony. I find that the violation described in the underlying citation had been abated and no longer existed at the time the section 104(b) order was issued. *See Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (April 1989). Accordingly, Order No. 4057203 is vacated.

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is the key element in this situation: whether it was reasonably likely that the hazard contributed to would result in an injury. It is important to recognize that this element does not require the Secretary to establish that it was more probable than not that an injury will result from the hazard contributed to by the violation. *U. S. Steel Mining Co., Inc.*, 18 FMSHRC 862, 865 (June 1996). The test is whether such an injury is reasonably likely. Assuming continued normal mining operations, it was reasonably likely that the conditions would result in a serious injury.

I further find that Basin Resources' negligence was moderate. Although extensive roof support had been placed in the area, there was loose material down the center of the entry. (Tr. 262). Basin Resources should have known that this condition needed to be taken care of. A penalty of \$1,200 is appropriate.

#### 4. Citation No. 4057201

On November 22, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that additional roof support was required in the headgate area of mechanized mining unit ("MMU") 009-0 about 30 feet inby crosscut 29 in the No. 1 entry, 4-left panel. The citation states that the rib on the travelway side had rolled away from the solid pillar so that the row of roof bolts adjacent to the rib was about 6 to 7 feet from the rib for a distance of about 18 feet. The citation further states that cap coal about 12 inches thick was loose in the cited area where persons normally travel. Inspector Simmons determined that the violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Inspector Simmons stated that pressure in the roof caused the rib to fall. (Tr. 186). The rib had recently fallen at the time the inspector observed it. (Tr. 189-90). This condition left the roof adjacent to the rib unsupported. Roof bolts are required to be within five feet of the ribs. He testified that additional support had not been provided in the area and barricades or warning devices were not present. Inspector Simmons further stated that persons entering the longwall section would have to pass by the cited area. (Tr. 187-88; Ex. P-5). He testified that it was reasonably likely that someone would be seriously injured if the roof was not supported. (Tr. 188-89).

Mr. Hallows testified that the preshift and onshift reports indicate that the rib must have fallen immediately prior to Inspector Simmons' inspection. (Tr. 195-96; Ex. R-8). He also testified that he talked to Mr. Schuster, the UMW walkaround representative, after the citation was issued. Mr. Schuster advised Mr. Hallows that the rib had only recently fallen. (Tr. 197). Mr. Schuster told Hallows that the fallen coal looked black and fresh. *Id.* He also stated that rock dust and footprints were not on the fallen coal.

Mr. Schuster testified that he was with Inspector Simmons at the time he issued this citation. (Tr. 287). The citation was issued at 2:55 pm, during the shift change. He said that the day crew had already left the section and the swing shift crew had not arrived. *Id.* Mr. Schuster testified that in his opinion the rib fell between the two shifts, because the coal was fresh. (Tr. 288). He said that the oncoming miners traveled through the area but that they walked under supported roof. (Tr. 289). Once the swing shift crew arrived, the condition was abated.

Basin Resources contends that the citation should be vacated because there was no indication that additional roof support was necessary prior to the rib fall. (B.R. Br. 17). The Commission considers the reasonable prudent person test when analyzing alleged violations of this safety standard. *Cannon Coal Co.*, 9 FMSHRC at 668 (April 1987). I believe that a reasonably prudent person would have recognized that the support observed by Inspector Simmons was inadequate. Prior to the rib fall, on the other hand, such person would not have known that additional roof support was required.

I find that the Secretary established a violation. The fact that the rib fall occurred just before the citation was issued does not negate the fact that additional support was necessary. The Mine Act imposes strict liability on mine operators. Based on the testimony of Messrs. Hallows and Schuster, I find that Basin Resources was not negligent with respect to the violation. I credit their testimony that the ribs fell during the shift change. I also find that the violation was not S&S because, assuming continued normal mining operations, it is highly likely that supplemental roof support would have been installed before miners were exposed to the hazard. Thus, it was not reasonably likely that anyone would be injured by the violation. A penalty of \$100 is appropriate.

##### 5. Citation No. 4057352

On December 21, 1995, MSHA Inspector Melvin Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that the mine roof was not supported or controlled in crosscut No. 27 between entry Nos. 2 and No. 4, 5-Left section. The citation states that the coal rib had sloughed exposing the roof in an area seven feet long by six feet wide from nearest permanent roof support. No equipment or material was located in the crosscut. Inspector Shiveley determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Inspector Shiveley testified that the ribs at the Golden Eagle Mine slough easily exposing unsupported roof. (Tr. 50-51). The roof is made up of shale that cracks easily and falls if not supported. (Tr. 51). At the time he observed the roof, it was stable but subject to change. (Tr. 52). He believed that miners travel through the area frequently. He did not know how long the condition had existed. (Tr. 53-54).

For the reasons set forth above, I find that the Secretary established a violation. An area of roof was exposed by the sloughage but was not supported. Because it is likely that

the rib fell a short time before the citation was issued, Basin Resources's negligence is low. A penalty of \$200 is appropriate.

6. Citation No. 4057588

On July 7, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control loose coal ribs on the 011-0 working section. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of \$1,200 is appropriate.

7. Citation No. 4057351

On December 21, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the roof on the east mains. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of \$1,200 is appropriate.

8. Citation No. 4057589

On July 7, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.211(d). In the citation, the inspector alleged that a bar for taking down loose material was not provided for the roof bolting machine operating on the 011-0 MMU in the No. 5 entry. The citation states that loose ribs were present in the area. Inspector Simmons determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation. The safety standard provides, in part, that a "bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment."

Inspector Simmons testified that a bar was not available in the working place or in the last open crosscut. (Tr. 60). He stated that it was his understanding that the bar was subsequently found at the tailpiece on the section. *Id.* Inspector Simmons was not present when the scaling bar was found. (Tr. 64).

Mr. Peterson was with Inspector Simmons when he issued the citation. (Tr. 74). He testified that a mechanic had the scaling bar where he was working on a shuttle car in the



working place. (Tr. 75). The mechanic used the bar to pry down loose material near the shuttle car. *Id.* He testified that although the bar was in the same entry as the tailpiece, it was not at that location. He further stated that it would take a miner about ten minutes to get the scaling bar and return to the area where Inspector Simmons issued the citation. (Tr. 77).

The safety standard provides that a scaling bar must be made available in the working place. It does not require that the bar be in any particular location within the working place. I credit the testimony of Mr. Peterson that the bar was being used at another location in the working place. While it might be advisable to have several bars available, the regulation does not include such a requirement. Accordingly, the citation is vacated.

#### 9. Citation No. 4057590

On July 7, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.220(a)(1). In the citation, the inspector alleged that the mine failed to follow the approved roof control plan because the last row of roof bolts was more than five feet from the face in the No. 5 entry of MMU 011-0. The distance measured between five feet eight inches and six feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the basic facts set out in the citation, but argues that the roof bolter put the roof bolts as close as he could to the face. (Tr. 86-87). Mr. Peterson testified that muck is often present at the face and the bolting machine could not get close enough to the face to place the roof bolts within five feet of the face. *Id.* He also stated that the presence of the muck prevented anyone from going under the cited area.

I find that the Secretary established a violation. It is clear the Basin Resources violated the plan provision. I find that the gravity was low because of the location of the unsupported roof. A penalty of \$200 is appropriate.

#### 10. Citation No. 4057269

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.208. In the citation, the inspector alleged that Basin Resources failed to post a sign warning miners of unsupported roof at the last row of roof support in the 3rd north mains. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of \$1,000 is appropriate.



## **B. Ventilation Citations**

### **1. Citation No. 4057800**

On June 8, 1995, MSHA Inspector Jeffrey Fleshman issued a citation alleging a violation of 30 C.F.R. § 75.360(f). In the citation, the inspector alleges that an adequate preshift examination was not performed in the 4-Left active longwall section where miners were scheduled to work. The citation states that the date, time, and initials were not present where miners were observed working at the following locations: (1) 4-Left kitchen, crosscut No. 56, between entry Nos. 1 and 2; (2) 4-Left tool room, crosscut No. 56, between entry Nos. 2 and 3. Inspector Fleshman determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation. Section 75.360(f) is now at 75.360(e) and provides, in part, that "at each working place examined, the person doing the preshift examination shall certify by initials, date, and time, that the examination was made." The standard further provides that in areas outby a working section, the preshift examiner "shall certify by initials, date, and the time at enough locations to show that the entire area had been examined."

Inspector Fleshman testified he observed miners working in the cited area. (Tr. 21-23). He stated that there were date boards inby the cited area that showed that a preshift examination had been made in those areas and that there were date boards outby the cited area that showed that a preshift examination had been made all along the intake roadway. (Tr. 25-26). Inspector Fleshman testified that he did not know whether the cited areas had been preshifted, but he was sure that the examiner did not enter his initials, date, and the time on the boards in the cited areas. (Tr. 26).

Mr. Hallows testified that he spoke with the miner who performed the preshift examination. That miner advised Mr. Hallows that he examined the cited areas but that he did not enter his certification on the board at the kitchen or the tool room. (Tr. 31). Mr. Hallows testified that the examiner did not think that his initials were necessary because he entered the required certification at numerous other locations throughout the area. *Id.*

The safety standard specifically provides that in outby areas, such as the cited locations, the examiner must enter his certification "at enough locations to show that the entire area had been examined." The Secretary did not establish that Basin Resources violated this requirement. Inspector Fleshman stated that certifications were present throughout the area. (Tr. 25-26). Accordingly, the citation is vacated.

### **2. Citation No. 4058041**

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.370(a)(1). In the citation, the inspector alleged that the mine failed to follow the approved ventilation plan in the 4-Left 009-0 longwall because only 348 feet per minute ("fpm") of air was passing by shield No. 15 on the intake side. The plan requires 450 fpm

at that location. (Tr. 106; Ex. P-3). He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,779.00 for the alleged violation.

Mr. Peterson testified that an air measurement of 480 fpm was taken at shield No. 15 at the beginning of the shift and a reading of 511 fpm was obtained on the previous shift. (Tr. 113; Ex. R-2). He also testified that methane was not present at the time Inspector Simmons took his reading. He stated that as the shields on a longwall are pulled in, the gob behind the shields may not immediately cave in and the air velocity will drop. (Tr. 114). Once the area caves, the velocity increases again. The shields in the cited area had recently been advanced.

Basin Resources argues that the citation should be vacated because the inspector did not testify that the air reading was 348 fpm. (B.R. Br. 9). It states that the parties stipulated that the contents of the citations were not admitted for the truth of the matters asserted therein. Although it is true that Inspector Simmons did not state that his measurement was 348 fpm, he was asked how he obtained the 348 fpm reading. (Tr. 105).

I find that the Secretary established a violation. Although I recognize that the velocity may fluctuate over the mining cycle, the plan establishes the minimum amount of air that is required. The violation was not serious because the reading was obtained while the shields were moved. The shear was not cutting coal at that location and methane was not present. A penalty of \$200 is appropriate.

### 3. Citation No. 4057978

On November 28, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.380(d)(1). In the citation, the inspector alleged that the primary escapeway in the No. 4 entry, 3rd north panel, for 011-0 MMU was not maintained in a safe condition. The citation states that water had accumulated to a depth of 20 inches beginning about 10 feet inby crosscut No. 66 and extending inby to crosscut No. 67, a distance of about 100 feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation. The safety standard requires escapeways to be maintained in a safe condition to assure passage of persons.

Inspector Simmons testified that the water presented an unsafe condition in the escapeway. (Tr. 230). The water was murky and the bottom could not be seen. He determined that an injury was unlikely because miners could exit the section through the alternate escapeway. (Tr. 231).

Mr. Hallows testified that a pump was running in the cited area at the time of Inspector Simmons' inspection. (Tr. 232; Ex. R-14). Mr. Salerno confirmed that the mine had at least one pump running in the area to remove the water. (Tr. 276).

I find that the Secretary established a violation. There is no dispute that there was a significant amount of water in the escapeway. The violation was not particularly serious because there was at least one alternate route out of the section. Basin Resources' negligence was low because it was attempting to remove the water at the time the citation was issued. A penalty of \$100 is appropriate.

4. Citation No. 4057229

On February 20, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.312(g)(3). In the citation, the inspector alleged that the examinations of automatic fan signal devices for three fans had not been recorded since December 31, 1995. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard requires automatic fan signal devices to be checked at least once a month.

Inspector Simmons testified that the purpose for testing automatic fan signal devices and recording the results of the test is to determine if the fans are functioning properly. (Tr. 234). He determined that it was unlikely than anyone would be injured as a result of this violation.

Mr. Hallows testified that the mine was shut down at the time Inspector Simmons issued the citation. (Tr. 236). No coal was being produced and all miners had been terminated from employment at the mine. He further testified that the disputed examinations were performed, but were not entered in the record book. (Tr. 236-37; Ex. R-15).

I find that the Secretary established a violation. The mine was still being ventilated at the time the citation was issued. The mine was closed but had not been sealed at that time. I reject Basin Resources' argument that the Secretary failed to introduce evidence in support of the allegations in the citation. The violation was not serious. A penalty of \$100 is appropriate.

5. Citation No. 4057798

On June 8, 1995, Inspector Fleshman issued a citation alleging a violation of 30 C.F.R. § 75.340(a)(1). In the citation, the inspector alleged that the power center in 4-left, crosscut No. 36, was not ventilated into return air. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$2,606.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

6. Citation No. 4057799

On June 8, 1995, Inspector Fleshman issued a citation alleging a violation of 30 C.F.R. § 75.333(b)(3). In the citation, the inspector alleged that the stopping in 4-left, crosscut 56, between the belt and intake entries was not coated in its entirety on the belt side with a flame retardant material. Wood was exposed along the top of the stopping. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

7. Citation No. 4057748

On October 10, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.360(c). In the citation, as modified, the inspector alleged that the preshift examiner did not take his air measurements in the proper location, the last open crosscut of the working section. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

8. Citation No. 4057425

On January 10, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.351(f). In the citation, the inspector alleged that the AMS sensors that monitor the mine atmosphere in the NW 1 through 6 bleeders had not been calibrated since November 17, 1995. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$200 is appropriate.

**C. Accumulation and Rock Dusting Citations**

1. Citation No. 4058025

On August 1, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that loose coal and coal fines were allowed to accumulate on the 011-0 MMU. The citation states that the accumulations



extended from crosscut 64 in entry Nos. 1 through 3 and extended inby to crosscut 65. It states that the accumulations measured up to 18 inches in depth. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard provides that coal dust, including float coal dust, loose coal, and other combustible materials shall be "cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Inspector Simmons testified that he was concerned that if an ignition occurred, the accumulations could enhance a fire. (Tr. 138). Grab samples of the accumulations revealed that the accumulated material was 77 percent combustible in one sample and 88 percent combustible in the other. (Tr. 140; Ex. P-4). Inspector Simmons determined that the condition was not S&S because he did not observe an ignition source in the area. (Tr. 141). No mining was taking place at the time the citation was written because of a vacation shutdown. (Tr. 143). Mr. Hallows testified that the mine was shut down for vacation at the time the citation was issued and that the accumulation would have been cleaned up before production resumed. (Tr. 144-45; Ex. R-3).

The Secretary established a violation of the safety standard. The fact that the mine was not producing coal at the time the citation was issued is not controlling. The accumulation was created while the mine was producing coal and still existed when miners re-entered the mine to resume operations. Inspector Simmons took into consideration the fact that ignition sources were not present when he determined that the violation was not S&S. The violation was serious. A penalty of \$500 is appropriate.

## 2. Citation No. 4057977

On November 28, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that loose coal and coal fines were allowed to accumulate on the 011-0 MMU in the No. 1 entry between crosscut Nos. 67 and 68 for a distance of about 120 feet. The citation states that the accumulations were in the roadway and along both ribs to a depth of 18 inches. It further states that similar accumulations were present in crosscut No. 68 between the Nos. 1 and 2 entries for a distance of about 70 feet. The citation states that an energized machine was in the area. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Inspector Simmons testified that he was concerned that these accumulations could enhance a fire. (Tr. 220). He stated that if a fire started, the accumulations could develop into a major fire or explosion, especially if methane were present. Grab samples of the accumulations revealed that the accumulated material was 86 percent combustible in one sample and 85 percent combustible in the other. (Tr. 222; Ex. P-8). Inspector Simmons further testified that it was reasonably likely that the accumulations would help propagate a fire and a miner would be seriously injured because at least one ignition source was present. (Tr. 224).

Mr. Hallows testified that a miner was cleaning up the accumulations at the time the citation was issued. (Tr. 226). He stated that the cleaning operation took longer than usual because a hole had to be filled to get a scoop into the area. (Tr. 226; R-13). He also stated that there was no production on the section when the citation was issued or during the two previous shifts. (Tr. 227). Mr. Salerno testified that the section contained a "horrendous amount of water" so that cleaning the accumulations took longer than usual. (Tr. 269). He stated that one miner was using a scoop to clean the area at the time the citation was issued. (Tr. 270).

I find that the Secretary established the violation. I reject Basin Resources' argument that the Secretary failed to introduce evidence of a violative condition. I also find that the Secretary established the four elements of the Commission's S&S test. *Mathies*, 6 FMSHRC at 3-4 (January 1984). Assuming continued normal mining operations, it was reasonably likely that the conditions would result in a serious injury.

I also find that Basin Resources' negligence was moderate. I have considered its evidence that the cited accumulations were particularly difficult to clean up because of the problems encountered on the section and the fact that cleanup operations had commenced. A penalty of \$1,200 is appropriate.

3. Citation No. 4057265

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that combustible material, hydraulic oil, and motor oil were allowed to accumulate in the engine compartment on a mantrip. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

4. Citation No. 4057271

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that hydraulic oil was allowed to accumulate on a roof bolter in the 3rd north mains. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,457.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$1,200 is appropriate.



5. Citation No. 4057564

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that damp loose coal and coal fines were allowed to accumulate under the bottom rollers of the No. 8 conveyor, for a distance of about 1,900 feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

6. Citation No. 4057272

On July 7, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that combustible material, loose coal, and coal fines were allowed to accumulate at the tail of the No. 11 belt and in entry No. 3 on the 3rd north mains. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

7. Citation No. 4057679

On November 11, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that loose coal and coal dust were allowed to accumulate in the 4th left section, No. 2 intake travelway at two locations. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

8. Citation No. 4057202

On November 22, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate on the working 009-0 longwall section in the No. 1 entry of the 4 left panel. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$1,200 is appropriate.

9. Citation No. 4058092

On December 12, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate on the 011-0 MMU in the No. 3 entry of the 4 left panel. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

10. Citation No. 4057208

On December 5, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate on and around the energized 009-0 stageloader power cables and electrical components on the working MMU. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$1,200 is appropriate.

11. Citation No. 4057434

On January 22, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.400. In the citation the inspector alleged that loose coal and coal fines were allowed to accumulate in the travelway of the No. 2 intake entry of the 5 left panel. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

12. Citation No. 4057268

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.402. In the citation the inspector alleged that rock dust was not applied to coal ribs in

entry No. 4, 3rd north mains. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

#### **D. Electrical Citations**

##### **1. Citation No. 4057565**

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.512. In the citation, the inspector alleged that the energized 480-volt electrical control box for the No. 8 belt line was not maintained in a safe operating condition because there was a ½-inch hole at the end of the box. He states that this hole allowed coal dust and moisture to enter the box. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard provides that when a potentially dangerous condition is found on electric equipment, it shall be removed from service until the condition is corrected.

Inspector Simmons stated that he looked into the box and did not observe any coal dust. (Tr. 154). He was concerned that coal dust in the electrical box could burn, creating a smoke inhalation hazard, and that moisture in the box could create a shock hazard. He agreed that MSHA does not require such control boxes to be permissible or air tight. (Tr. 155-56). I find that the Secretary established a violation because the hole presented a potentially dangerous condition. The violation was not serious and Basin Resources' negligence was low. A penalty of \$100 is appropriate.

##### **2. Citation No. 4058022**

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1002-1(a). In the citation the inspector alleged that a non-permissible mantrip was 95 feet from the operating longwall pillar line of the 009-0 MMU. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

3. Citation No. 4057270

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.503. In the citation the inspector alleged that a roof bolter was not maintained in permissible condition in the 3rd north mains. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$500 is appropriate.

4. Citation No. 4057586

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.512. In the citation the inspector alleged that the 480-volt take-up control box for the No. 11 belt was not maintained in a safe operating condition. The citation indicates that because of a defect in the control switch, a miner would not know whether the switch was on or off. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$800 is appropriate.

5. Citation No. 4057587

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.515. In the citation the inspector alleged that the power cable for the No. 2 belt conveyor motor for the No. 8 belt was not adequately bushed. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

6. Citation No. 4057749

On October 11, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.900. In the citation the inspector alleged that a 480-volt power cable circuit in entry No. 9 for the east mains was not protected by a suitable circuit breaker. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

**E. Fire Protection Citations**

**1. Citation No. 4057467**

On June 15, 1995, Inspector Fleshman issued a citation alleging a violation of 30 C.F.R. § 75.1100-2(f). In the citation the inspector alleged that a portable fire extinguisher was not provided in the 4-left section where six 5-gallon drums of hydraulic oil were stored. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

**2. Citation No. 4057267**

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 75.1104. In the citation the inspector alleged that hydraulic oil in crosscut No. 59, 3rd north mains, was not being kept in fireproof, closed metal containers. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

**3. Citation No. 4057560**

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1107-16(b). In the citation the inspector alleged that fire suppression device for a tractor at the underground mantrip station was not being maintained. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.



4. Citation No. 4057230

On February 5, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1106-3(a)(2). In the citation the inspector alleged that an oxygen cylinder was not placed securely in a designated storage area but was loose in a pickup truck. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

**F. Machinery and Equipment Citations**

1. Citation No. 4058021

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1725(a). In the citation, the inspector alleged that the front left headlight was not working on a mantrip. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. Section 75.1725(a) requires, in part, that mobile equipment be maintained in safe operating condition.

There is no dispute that the headlight was not working. Mr. Hallows testified that it was his understanding that a safeguard issued at the mine in 1989 required only one headlight be provided for mantrips. (Tr. 102). He stated that the safeguard was not violated and that Basin Resources should not be cited for a violation of section 75.1725(a) if it complies with the safeguard. Inspector Simmons understood that the safeguard only concerned the need for a single light at the rear of each mantrip. (Tr. 93). The safeguard was not produced at the hearing.

I find that the Secretary established a violation. A safeguard is issued when an inspector observes a transportation hazard that is not being addressed at a mine. 30 C.F.R. § 75.1403. He issued a notice that establishes a mine-specific safety standard. In this instance, it is not clear what the safeguard notice required. In any event, the cited mantrip was equipped with dual headlights. One of the headlights was not working. Inspector Simmons determined that the condition created a safety hazard. I credit his testimony. A penalty of \$200 is appropriate.

2. Citation No. 4057266

On July 6, 1995, Inspector Shiveley issued a citation alleging that a mantrip was not maintained in a safe condition in violation of 30 C.F.R. § 75.1725(a). The citation states



that because the right front headlight was not working and the windshield was dirty, the operator of the mantrip could not see clearly. Inspector Shiveley determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$2,384.00 for the alleged violation.

Inspector Shiveley testified that the rubber-tired mantrip normally carries up to ten people into the mine. He stated that the route it travels includes many turns and that it was reasonably likely that someone would be injured if the condition was not corrected. (Tr. 41-43). He testified that the operator of the mantrip would not be able to see very well and he could hit an object in the road or possibly a miner. (Tr. 43-44). He stated that the condition was obvious.

Basin Resources does not deny the condition of the mantrip, but alleges that only one headlight was required. For the reasons set forth above, the fact that a safeguard was issued does not invalidate the citation. In this instance, the inspector determined that the condition of the mantrip created a safety hazard in violation of section 75.1725(a). The Secretary established a violation.

I also find that the Secretary established that the violation was S&S. Basin Resources points to the fact that Inspector Simmons issued a citation for a similar violation and determined that the violation was not S&S. (Tr. 46-47; Ex. R-1). In that instance, however, the windshield was clean. (Tr. 97). In the citation at issue, Inspector Shiveley considered the fact that the windshield was dirty, the roadways were wet and heavily traveled, the mantrip was required to go around corners, and rib falls are relatively common. (Tr. 41-44). He also stated that the mantrip operator could inadvertently run over an object and the passengers could jam their heads against the canopy. (Tr. 44).

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies*, 6 FMSHRC at 3-4 (January 1984). I find that the factors set forth by Inspector Shiveley establish that an injury was reasonably likely and that any injury would be of a reasonably serious nature. A penalty of \$500 is appropriate.

### 3. Citation No. 4058111

On August 16, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1725(a). In the citation, the inspector alleged that the coal feeder on the 011-0 MMU was not being maintained in a safe operating condition. He alleged that hydraulic oil was leaking into the motor compartment from the hose connected to the pump motor. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Inspector Simmons testified that the condition created a fire hazard. (Tr. 147-48). He was concerned about smoke inhalation. Mr. Hallows testified that the condition was abated by tightening the fitting and that the employee who examined the equipment failed to

fix the condition. (Tr. 151-52; Ex. R-4). The Secretary established a violation. Basin Resources' negligence was low because the miner operating the equipment failed to take action to correct an obvious safety hazard. A penalty of \$100 is appropriate.

4. Citation No. 4058043

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1725. In the citation the inspector alleged that the energized 4-left longwall machine (009-0 MMU) was not maintained in safe operating condition because of a number of tripping hazards. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$500 is appropriate.

5. Citation No. 4057581

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1722(b). In the citation the inspector alleged that the guard for the rear take-up roller was not large enough to prevent a person from reaching behind the guard and becoming caught in the roller and belt. He determined that the alleged violation was S&S and could result in a permanently disabling injury. The Secretary of Labor proposes a civil penalty of \$2,173.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

6. Citation No. 4057584

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1722(a). In the citation the inspector alleged that the guard for the No. 8 belt conveyor tail rollers was inadequate because it contained a 34-inch opening. He determined that the alleged violation was S&S and could result in a permanently disabling injury. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

7. Citation No. 4057585

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1722(b). In the citation the inspector alleged that the guard for the head roller

of the No. 11 belt conveyor was not large enough to prevent a person from reaching behind the guard and becoming caught in the roller and belt. He determined that the alleged violation was S&S and could result in a permanently disabling injury. The Secretary of Labor proposes a civil penalty of \$2,173.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

8. Citation No. 4057582

On July 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 75.1403-5(g). In the citation the inspector alleged that a clear travelway was not provided along the No. 8 belt in certain areas. Loose rock and coal were present on both sides of the belt. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious. A penalty of \$800 is appropriate.

G. Surface Citations

1. Order No. 4057563

On July 6, 1995, Inspector Simmons issued an order under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 48.31(a). In the order the inspector alleged that Basin Resources failed to provide hazard training for two technicians from Wagner Rents. The inspector observed the technicians performing work near the surface maintenance shop. The order states that Basin Resources' employees did not check to see if they had been given hazard training. The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$3,000.00 for the alleged violation. The regulation requires that specified persons be provided with surface hazard training.

Inspector Simmons testified that he observed the technicians working in an area that was somewhat isolated from mining hazards. (Tr. 239). The inspector determined that the violation was unwarrantable because the technicians were working at the mine and nobody from Basin Resources checked to see if they had been trained. (Tr. 240-41). The inspector apparently talked to the technicians and Mr. Peterson. (Tr. 243). Inspector Simmons did not ask the security guard at the mine entrance whether he inquired about the technicians' training. (Tr. 244).

Mr. Hallows testified that the two Wagner Rents technicians were given their job assignments over the phone. (Tr. 245-46). Mr. Hallows further testified that the security guard at the mine entrance asked the technicians whether they had received hazard training. (Tr. 248; Ex. R-16). He testified that the technicians told the security guard that they had received hazard training. *Id.* Apparently, employees of Wagner Rents frequently worked at the mine and were generally trained. Mr. Hallows also stated that if either of the technicians had stated that he had not received surface hazard training, such training would have been provided before he proceeded to work. (Tr. 250-51).

Basin Resources does not contest the violation, but contends that it was not the result of its unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1997). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

I find that the Secretary did not establish aggravated conduct. The security guard inquired about the technicians' hazard training. Apparently, the technicians pointed to some papers in the truck as if to indicate that they had their training cards. (Tr. 248, 254-55, Ex. R-16). Mr. Hallows' testimony is supported by company records. (Ex. R-16). I find that Basin Resources' negligence was moderate. The service technicians were at the mine to repair equipment owned by Wagner Rents and were familiar with the equipment. The violation was not serious. Order of Withdrawal No. 4057563 is modified to a section 104(a) citation. A penalty of \$200 is appropriate.

## 2. Citation No. 4057970

On November 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 77.408. In the citation the inspector alleged that the maintenance shop was not ventilated while welding was being conducted in the shop. The citation states that smoke was settling throughout the shop. The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation. The safety standard provides that welding operations shall be shielded and well-ventilated.

Inspector Simmons was concerned that the welder would breathe the smoke and damage his lungs. (Tr. 201). The inspector observed the smoke during his inspection. He stated that a vacuum had been provided to eliminate the smoke, but it was not operating at the time of the inspection because the filters were clogged up. (Tr. 203). He did not test the vacuum to see if it worked. (Tr. 205-06). Inspector Simmons did not detect any carbon monoxide in the area.

Mr. Hallows testified that Basin Resources had purchased equipment to alleviate any problems created by welding fumes, including a vacuum collector. (Tr. 212; Exs. R-10, R-11, & R-12). Filters for the vacuum were stocked in the warehouse. He further testified



that when the vacuum was tested the next day, it was working properly. (Tr. 216). He believes that the welder did not have the vacuum turned on when the welding was performed. Mr. Salerno testified that the vacuum operated without any problems when it was tested the following day. (Tr. 266).

I find that the Secretary established a violation. I find that the violation was not serious. Based on the testimony of Messrs. Hallows and Salerno, I find that Basin Resources' negligence was low. A penalty of \$100 is appropriate.

3. Citation No. 4057264

On July 6, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 77.408. In the citation the inspector alleged that shielding was not provided at the mine shop where welding was being performed. It states that persons were traveling in the area. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of \$1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was not serious. A penalty of \$200 is appropriate.

4. Citation No. 4058000

On July 20, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 77.205. In the citation the inspector alleged that stumbling and slipping hazards were present in the maintenance shop work area and travelway to the tool room. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$500 is appropriate.

5. Citation No. 4057426

On January 10, 1996, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. § 77.400(d). In the citation the inspector alleged that the guard provided for the bottom take-up pulley for the load-out belt was not secured in place. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of \$1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of \$500 is appropriate.

### III.

#### APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 888 citations and orders in the 24 months preceding July 5, 1995, and that Basin Resources paid penalties for 816 of these citations and orders during the same period. (Ex. P-10). I also find that Basin Resources was a rather large mine operator with 23,505,829 tons of production in 1994 and 15,002,375 tons of production in 1995. (Stipulation). The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. With one exception, the Secretary has not alleged that Basin Resources failed to timely abate the citations and order. Unless otherwise noted above, all of the violations were serious and the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

### IV.

#### ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties, as discussed above:

| <u>Citation No.</u> | <u>30 C.F.R. §</u> | <u>Penalty</u> |
|---------------------|--------------------|----------------|
| <u>WEST 96-21</u>   |                    |                |
| 4057798             | 75.340(a)(1)       | \$500.00       |
| 4057799             | 75.333(b)(3)       | 200.00         |
| 4057800             | 75.360(f)          | vacated        |
| 4057467             | 75.1100-2(f)       | 200.00         |
| 4057588             | 75.202(a)          | 1,200.00       |
| 4057589             | 75.211(d)          | vacated        |
| 4057590             | 75.220(a)(1)       | 200.00         |
| 4058000             | 77.205(b)          | 500.00         |
| 4058021             | 75.1725(a)         | 200.00         |
| 4058022             | 75.1002-1(a)       | 200.00         |
| 4058041             | 75.370(a)(1)       | 200.00         |



| <u>Citation No.</u> | <u>30 C.F.R. §</u> | <u>Penalty</u> |
|---------------------|--------------------|----------------|
| 4058042             | 75.202(a)          | 200.00         |
| 4058043             | 75.1725(a)         | 500.00         |
| 4058025             | 75.400             | 500.00         |
| 4058111             | 75.1725(a)         | 100.00         |

WEST 96-123

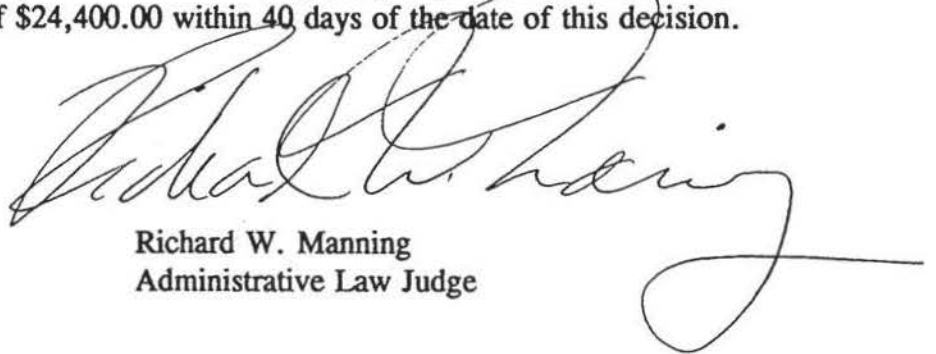
|         |               |          |
|---------|---------------|----------|
| 4057264 | 77.408        | 200.00   |
| 4057265 | 75.400        | 500.00   |
| 4057266 | 75.1725(a)    | 500.00   |
| 4057267 | 75.1104       | 200.00   |
| 4057268 | 75.402        | 200.00   |
| 4057269 | 75.208        | 1,000.00 |
| 4057270 | 75.503        | 500.00   |
| 4057271 | 75.400        | 1,200.00 |
| 4057560 | 75.1107-16(b) | 200.00   |
| 4057564 | 75.400        | 500.00   |
| 4057565 | 75.512        | 100.00   |
| 4057581 | 75.1722(b)    | 800.00   |
| 4057582 | 75.1403-5(g)  | 800.00   |
| 4057583 | 75.202(a)     | vacated  |
| 4057584 | 75.1722(a)    | 800.00   |
| 4057585 | 75.1722(b)    | 800.00   |
| 4057586 | 75.512        | 800.00   |
| 4057587 | 75.515        | 200.00   |
| 4057272 | 75.400        | 500.00   |

WEST 96-134

|         |           |          |
|---------|-----------|----------|
| 4057748 | 75.360(c) | 500.00   |
| 4057749 | 75.900    | 200.00   |
| 4057679 | 75.400    | 500.00   |
| 4057964 | 75.202(a) | 1,200.00 |
| 4057201 | 75.202(a) | 100.00   |
| 4057202 | 75.400    | 1,200.00 |
| 4058092 | 75.400    | 500.00   |
| 4057351 | 75.202(a) | 1,200.00 |
| 4057352 | 75.202(a) | 200.00   |

| <u>Citation No.</u> | <u>30 C.F.R. §</u> | <u>Penalty</u> |
|---------------------|--------------------|----------------|
| <u>WEST 96-180</u>  |                    |                |
| 4057970             | 77.408             | 100.00         |
| 4057977             | 75.400             | 1,200.00       |
| 4057978             | 75.380(d)(1)       | 100.00         |
| 4057208             | 75.400             | 1,200.00       |
| 4057425             | 75.351(f)          | 200.00         |
| 4057426             | 77.400(d)          | 500.00         |
| 4057434             | 75.400             | 500.00         |
| 4057229             | 75.312(g)(3)       | 100.00         |
| 4057230             | 75.1106-3(a)(2)    | 200.00         |
| <u>WEST 96-195</u>  |                    |                |
| 4057563             | 48.31(a)           | 200.00         |
| Total Penalty       |                    | \$24,400.00    |

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and order listed above are hereby **VACATED, AFFIRMED, or MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$24,400.00 within 40 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

**Distribution:**

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RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 5 1997

|                           |   |                           |
|---------------------------|---|---------------------------|
| ROLDAN A. AVILUCEA,       | : | DISCRIMINATION PROCEEDING |
| Complainant               | : |                           |
| v.                        | : | Docket No. CENT 97-103-DM |
|                           | : |                           |
| PHELPS DODGE CORPORATION, | : | SC MD 97-01               |
| Respondent                | : |                           |
|                           | : | Chino Mine                |

## DECISION

Before: Judge Fauver

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

Complainant alleges acts of discrimination occurring from October 28, 1993 through May 5, 1994. His complaint to the Mine Safety and Health Administration (MSHA), United States Department of Labor, is dated October 4, 1996. In his letter of that date to Special Investigator David J. Haupt of MSHA, Complainant stated that he had not filed a complaint with MSHA earlier for the following reasons:

I have not filed a complaint with the Mine Safety and Health Administration because I have become increasingly ill with depression due to the injustice that the Phelps Dodge Corporation meted out to me. It was just recently that I was able to listen to the tape records and, as a result, discover the transaction, the bribe, that the Phelps Dodge Corporation made with Mr. C. Chester Brisco, the arbitrator.

Section 105(c)(2) provides that a miner "who believes that he has been discharged . . . or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

The latest act of discrimination in the complaint is an allegation that Respondent bribed an arbitrator on May 5, 1994, based upon statements tape-recorded when Complainant accidentally left his tape recorder on during a recess in an arbitration hearing concerning his discharge by Respondent.

On April 29, 1997, a Show Cause Order was entered requiring Complainant to show cause why this action should not be dismissed for failure to file a complaint with MSHA within the 60-day limitation provided in section 105(c)(2) of the Act.

On May 5, 1997, Respondent filed a motion for summary decision under the Commission's Rules of Procedure, 29 C.F.R. § 2700.67, on the ground that the complaint is untimely.

On May 19, 1997, Complainant filed a response to the Show Cause Order. Complainant states that when he was notified by the Company, on November 3, 1993, that he was terminated effective that date, he was "emotionally devastated" and "became depressed." His response states further in part:

At that time I was the sole breadwinner for my family. As soon as I found buyers for my tools and other possessions that had taken me and my wife years to acquire, I would sell them. The Christmas Season was upon us, and, at that time, my oldest son was 14 years old, my next oldest son was 12 years old, and my youngest one was 9 years old. I had no other choice but to sell what I could. While I was selling what I could, I was also trying to find employment, but, at that time, no one was hiring.

\*\*\* The only option that was left for me was to continue to sell all that was left and move somewhere else. This realization further added to my already growing depression.

On February 3, 1994, I went to see Dr. Fed M. Fox, M.D., at the La Cienega Family Practice to see if he could help me with my depression and headaches that I had started to have since the shoving incident of October 28, 1993 .... Dr. Fox recommended that I continue seeing him but due to my financial situation I could not afford to.

I can't recall the exact date, but sometime in May of 1996, I began to listen to the tape recording that I had made of the Arbitration Hearing of May 5, 1994. While doing so I discovered the portion where Mr. Gurtler, the Technical Services Supervisor for the Phelps Dodge Corporation, had offered the bribe to the arbitrator, Mr. C. Chester Brisco.

After having made this discovery, I became increasingly ill with depression and vomiting spells, but somehow I managed to contact Mr. David Estrada, an employee of the Mine Safety and Health Administration from the Arizona district on June 1, 1996.

Mr. Estrada gave me the following telephone number to call: 1-602-649-5452. I called that number and spoke to Mr. Cole, also an employee for [MSHA]. Mr. Cole then transferred me to Mr. Fink and Mr. Fink transferred me to Mr. Haupt in Dallas, Texas. Mr. Haupt then assigned my case to Mr. Mesa and Mr. Mesa transferred my case to Mr. Dennis Rayn in Arlington, VA. I complained to all of the above mentioned men about the discovery that I had made. In other words, I complained [to] MSHA.

What I am saying is that as soon as I discovered the bribe I reported it to the Mine Safety and Health Administration.

On January 10, 1997, MSHA notified Complainant that its investigation revealed no violation of section 105(c). On March 27, 1997, Complainant filed this action.

### **DISCUSSION WITH FINDINGS AND CONCLUSIONS**

Under section 105(c)(2) of the Act, if a miner believes that he has been discharged in violation of section 105(c)(1), and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with MSHA within 60 days after the alleged violation. After investigation of the complaint, the Secretary is required to file a discrimination complaint with the Commission on the miner's behalf if the Secretary determines that the Act was violated. If the Secretary determines that the Act was not violated, he must inform the miner, and the miner may then file his own complaint with the Commission.

The purpose of the 60-day time limit is to avoid stale claims, but a miner's late filing may be excused on the basis of "justifiable circumstances." *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982); *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (1984).

The legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 181, 95<sup>th</sup> Con., 1<sup>st</sup> Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).



The imposition of a time limit for instituting legal proceedings is primarily designed to assure fairness to the opposing party by:


... preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

*Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965), quoting *R.R. Telegraphers v. REA*, 321 U.S. 342, 348-349 (1944).

I do not find justifiable circumstances that excuse the delay of over 2 years in instituting this action. The tape cassette that triggered Complainant's decision to bring this action was in his possession and control from May 5, 1994, onward. He could have listened to it at any time, and his access to the tape was not interfered with by any act of Respondent. The depression attributed to Complainant's discharge on November 3, 1993, may explain his distraction and lack of interest or motivation to listen to the tape recording of his arbitration case for over 2 years. However, it did not prevent him from listening to the tape. The shortness of the time limit Congress set for bringing actions under section 105(c) indicates that a delay of over 2 years would require very special circumstances to justify the delay. I find that the response to the Show Cause Order does not carry that burden.

#### **ORDER**

WHEREFORE IT IS ORDERED that the Motion for Summary Decision is **GRANTED**, and this proceeding is **DISMISSED**.

  
William Fauver  
Administrative Law Judge

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dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 5 1997

|                             |   |                          |
|-----------------------------|---|--------------------------|
| SECRETARY OF LABOR          | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH      | : |                          |
| ADMINISTRATION (MSHA),      | : | Docket No. SE 95-459     |
| Petitioner                  | : | A. C. No. 01-01401-04102 |
| v.                          | : |                          |
|                             | : | No. 7 Mine               |
| JIM WALTER RESOURCES, INC., | : |                          |
| Respondent                  | : |                          |

## DECISION ON REMAND

Before: Judge Fauver

This is a civil penalty case under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Commission has vacated the judge's civil penalty assessment and remanded for reassessment.

The Commission's decision expresses concern that the judge may have "considered deterrence as a separate factor in his analysis." Slip opinion, p. 4.

The Commission has held that "a judge may not go beyond the six criteria set forth in section 110(i)" and that "Deterrence is not a separate component used to adjust a civil penalty amount after the statutory criteria have been considered." Id., quoting the Commission's decision in Ambrosia Coal & Constr. Co., 18 FMSHRC 1552, 1565 (1996), and Dolese Bros. Co., 16 FMSHRC 689, 695 (1994).

The Commission has also held that the penalty provision requires "proper consideration of the statutory criteria and the deterrent purpose underlying the Act's assessment scheme" (Sellersberg Stone Co., 5 FMSHRC 287, 2921-291 (1983) (emphasis added)).

In assessing a penalty, I have considered the six statutory factors, individually and as a whole, in relation to the deterrent purpose of the Act's penalty provision. I have not considered any other factor.

My consideration of the deterrent purpose of section 110(i) is not an added factor after weighing the six statutory factors. It is a fundamental and integral part of my evaluation of the six factors to determine an appropriate penalty. I believe a basic purpose in evaluating the six statutory factors is to consider the deterrence implications of each factor and the factors combined.

The reason that I find an integral relationship between deterrence and the six factors in section 110(i) is that the underlying purpose of the penalty provision is to deter violations. As stated by the Supreme Court, a "major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective." National Indep. Coal Operators' Ass'n v. Kleppe, 423 U.S. 388, 401 (1976) (emphasis added). As the D.C. Circuit stated in Coal Employment Project v. Dole, 889 F.2d 1127, 1133 (1989), "Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations" (emphasis added); and as this Commission has stated, section 110(i) requires "proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme" (Sellersburg, supra; emphasis added).

The legislative history makes clear that Congress intended close consideration of deterrence in assessing civil penalties. For example, the Senate Committee Report on the 1977 Amendments states: "To be successful in the objective of [inducing] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."<sup>1</sup>

#### **SPECIFIC FINDINGS ON THE SIX FACTORS IN SECTION 110(i)**

Section 110(i) of the Act provides that, in assessing civil monetary penalties, the Commission shall consider:

[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

##### **1. Operator's History of Violations**

The findings and discussion as to this factor in my original decision are incorporated.

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<sup>1</sup>/ S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 40-41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Con., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978).

**2. Appropriateness of the Penalty to the  
Size of the Business of the Operator**

Respondent is a large operator. The penalty assessed is appropriate to the size of Respondent's mining business.

**3. Whether the Operator Was Negligent**

The findings and discussion as to this factor in my original decision are incorporated.

**4. Effect of Penalty on Operator's Ability  
To Continue in Business**

The penalty assessed will have no effect on Respondent's ability to continue in business.

**5. Gravity of the Violation**

The findings and discussion as to this factor in my original decision are incorporated.

**6. Demonstrated Good Faith of Operator  
To Achieve Rapid Compliance After  
Notification of the Violation**

The findings and discussion as to this factor in my original decision are incorporated. I add the following: I find that the facts as to this factor are neutral. That is, they do not impact to lower or raise the amount of the penalty.

**ASSESSMENT OF PENALTY**

The six statutory factors demonstrate in this case the need for a strong penalty to achieve the deterrent purpose of section 110(i).

Respondent has a very poor compliance history. The instant violation and Respondent's history of violations of the same safety standard (section 75.400) demonstrate a repeated and serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine. Respondent had ample notice of its need to take greater measures to prevent violations of the standard, including many assessments of civil penalties for aggravated violations of section 75.400. Despite this, its violations of section 75.400 increased rather than decreased during the 2 years preceding the instant violation. From June 1993 to June 1994, Respondent was issued 123 citations and orders charging violations of section 75.400. The following year the number of charges increased to 168. At Mine No. 7, more than one out of five

of all orders and citations charged a violation of section 75.400.<sup>2</sup> Virtually all of the charges, for both years, resulted in a final disposition as violations.

Despite repeated government conferences, warnings, citations, orders and assessments of civil penalties for aggravated violations of section 75.400, Respondent committed the instant violation, which is another very serious, extensive-accumulation violation. The violation

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<sup>2/</sup> Government Exhibit 8-A supplements Exhibit 8 by adding Respondent's history of violations at all of its four mines in the 2 years preceding the instant violation. Respondent's section 75.400 violations represented about 20 percent of all orders and citations. At Mine No. 7, 23 percent of the citations and orders charged a violation of section 75.400. Virtually all of the charges resulted in a final disposition as violations. Government Exhibit 9 includes final orders that involved aggravated violations of section 75.400. A synopsis of several of these orders demonstrates the repetition of extensive-accumulation violations of section 75.400 despite assessments of civil penalties for aggravated violations (civil penalties are taken from Govt. Exhibit 8):

| <u>ORDER NUMBER</u> | <u>VIOLATION DATE</u> | <u>PENALTY PAID</u> |
|---------------------|-----------------------|---------------------|
| 3187091             | 6/15/93               | \$2,500             |

Coal accumulations on longwall belt for distance of approximately 1,000 feet. "Seventeen belt rollers were turning in coal." This belt line was recorded as "needing cleaned" for a week.

|         |         |         |
|---------|---------|---------|
| 3187215 | 7/28/93 | \$3,000 |
|---------|---------|---------|

Coal dust had accumulated on entire length of 7,400 feet of belt line. "This condition and or portions of this condition were reported in the belt book on 7-25, 7-26, 7-27-93."

|         |         |         |
|---------|---------|---------|
| 3185386 | 3/22/94 | \$4,500 |
|---------|---------|---------|

Float coal dust had accumulated on belt line for distance of approximately 2200 feet. Bottom rollers turning in the loose coal.

|         |         |         |
|---------|---------|---------|
| 3185633 | 4/12/94 | \$5,500 |
|---------|---------|---------|

Coal accumulations up to two feet deep along a belt line. The belt was "approximately 1,500 feet long and every bottom roller on the belt was turning in coal or stuck with coal build up around it."

|         |         |         |
|---------|---------|---------|
| 3183955 | 6/11/94 | \$4,000 |
|---------|---------|---------|

Accumulations of up to 36 inches deep along a 1,800 feet belt line.



involves a high degree of gravity and aggravated conduct beyond ordinary negligence. The combustible accumulations were obvious, extensive, and dangerous -- particularly in the presence of extremely hot rollers and rubbing points creating friction between the belt and the steel belt structure.

In the posthearing brief, the Secretary described Respondent's record of violations of section 75.400 as "abysmal," and submitted that Respondent's record of "routinely disregard[ing] this standard" warranted "a substantial increase in the proposed assessment [of \$7,000]" as "the lone means of bringing about compliance at the No. 7 Mine" (Sec's Br. pp. 11, 18). The Secretary did not specify the higher amount of penalty considered appropriate to deter violations.

Considering the six statutory factors, discussed above and incorporated from my original decision, I find that a civil penalty of \$15,000 is appropriate to achieve the deterrent purpose of section 110(i).

### ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of \$15,000 within 30 days of the date of this decision.



William Fauver  
Administrative Law Judge

#### Distribution:

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dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

**JUN 6 1997**

|                              |   |                          |
|------------------------------|---|--------------------------|
| SECRETARY OF LABOR,          | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH       | : |                          |
| ADMINISTRATION (MSHA),       | : | Docket No. KENT 97-20    |
| Petitioner                   | : | A. C. No. 15-13720-03663 |
| v.                           | : |                          |
|                              | : | Tall Timber Mine         |
| RAWL SALES & PROCESSING CO., | : |                          |
| Respondent                   | : |                          |

## DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
William C. Miller, II, Esq., Jackson & Kelly, Charleston, West Virginia, 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 a civil penalty assessment in the amount of \$3,407, for an alleged violation of mandatory respirable dust standard 30 C.F.R. § 70.100(a), as stated in a section 104(a) "S&S" citation issued by an MSHA inspector on May 29, 1996. Upon expiration of the initial abatement time, a second inspector issued a section 104(b) non-compliance order on July 10, 1996, which remained in effect for approximately five minutes, and subsequently terminated on July 18, 1996.

The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Pikeville, Kentucky. The parties filed posthearing arguments, and I have considered them in the course of my adjudication of this matter.

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

### Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory health standard, (2) whether the alleged violation is "Significant and Substantial" (S&S), and (3) the appropriate civil penalty to be assessed for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

An additional issue raised in the course of the hearing is whether or not the validity of the uncontested section 104(b) non-compliance order is an issue in this civil penalty proceeding, and whether or not any consideration of the order should be limited to the section 110(i) negligence and good faith civil penalty criteria.

### Stipulations

The parties stipulated to the following (Tr. 8-10):

1. The Commission has jurisdiction in this matter.
2. The respondent's history or prior violations is reflected in an MSHA computer print-out covering the period May 29, 1994, through May 29, 1996 (Exhibit P-1).
3. The respondent's overall coal production for the period in question was over 21 million tons as stated in MSHA's attachment to its proposed civil penalty assessment (Exhibit A). The mine production at that time was 898,097 tons.
4. Assuming the violation is affirmed, the petitioner's proposed civil penalty assessment of \$3,407, if levied, will not adversely affect the respondent's ability to continue in business.
5. The petitioner's exhibits, P-1 through P-6, were offered and received in evidence without objection.

### Discussion

Section 104(a) "S&S" Citation No. 9981345, issued at 10:05 a.m., on May 29, 1996, by MSHA Inspector Michael Wolford, cites an alleged violation of mandatory respirable dust standard 30 C.F.R. 70.100(a), and the cited condition or practice states as follows (Exhibit P-2):

According to advisory No. 0080 dated 05-28-1996, the average concentration of respirable dust analyzed from five valid samples collected by the

operator during a bi-monthly period in the working environment of the designated occupation 036 in MMU 003-0 amounted to 2.6 milligrams. Management shall take corrective action to lower the concentration of respirable dust to within the 2.0 milligrams standard and then sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory.

Inspector Wolford fixed the abatement time as 7:00 a.m., June 19, 1996. Subsequently, additional dust samples were collected and submitted by the respondent to abate the violation. The test results reflected an average respirable dust concentration of 3.6 percent. MSHA Inspector Ronald Hayes then issued a section 104(b) non-compliance withdrawal Order No. 4236728, at 6:15 a.m., on July 10, 1996, closing down the entire 003-0 mechanized mining unit (MMU). The order states as follows (Exhibit P-5):

Results of the five most recent samples received by MSHA and collected from the working environment of the designated occupation (continuous miner operator 036), in a Mechanized Mining Unit 003-0 shows an average concentration of 3.6 mg/m<sup>3</sup>. Due to the obvious lack of effort by the operator to control the respirable dust, during the reasonable period of time set by citation no. 9981345, the citation is not further extended. All miners working on this M.M.U. shall be withdrawn until the violation is corrected.

Inspector Hayes modified his order at 6:20 a.m., on July 10, 1996, and the modification states as follows (Exhibit P-5, second page):

The operator has submitted and implemented a revised respirable dust control plan, therefore the order is modified to permit M.S.H.A. to collect respirable dust samples on the 003-0 M.M.U. to determine if compliance is attained. The minimum spray pressure is raised from 70 PSI to 80 PSI; the water sprays are changed from FC type to Flat Type sprays.

On July 18, 1996, Inspector Hayes terminated his order, and the termination notice states as follows (Exhibit P-5, third page):

The results of 5 valid samples taken by M.S.H.A. showed a section average of 0.442. This is in the allowable limit of the 003-0 M.M.U. dust standard of 2.0.

#### Petitioner's Testimony and Evidence

MSHA Inspector Michael Wolford testified that he issued his section 104(a) "S&S" citation on May 29, 1996, and served it by mail on the respondent. He issued the citation after receiving the results of the respondent's then current bi-monthly dust sampling cycle for the

designated "high risk" occupation 036, continuous miner operator, for mechanized mining unit (MMU) 003-0. The average concentration of respirable dust for that occupation was 2.6 percent, which exceeded the section 70.100(a) regulatory allowable exposure limit of 2.0 percent (Tr. 15-16).

Mr. Wolford confirmed that the respirable dust sampling cassette and pump is used by the designated continuous miner operator to monitor his dust exposure during the sampling cycle in order to determine whether the entire mechanized mining unit is in compliance with the 2.0 percent standard. The purpose of the testing is to control the dust exposure and prevent Black Lung disease (Tr. 16-18).

On cross-examination, Mr. Wolford stated that at the time he issued the citation he was a dust specialist. He confirmed that compliance cannot be determined by visual observation, and if a mine has a history of compliance, the only method to alert the operator that he might be out of compliance is by dust sampling. He explained that as a general rule, a mine operator can take corrective action by reviewing the approved mine ventilation plan. He believed that the respondent in this case should have checked the parameters of the ventilation plan, and confirmed that the lack of adequate water supply could result in worst dust problems (Tr. 19-21).

Mr. Wolford stated that the MMU unit consisted of a continuous miner machine, two shuttle cars, and two roof bolting machines. He confirmed that he was not involved in the abatement of the violation. He stated that he based his "S&S" finding on the fact that respirable dust non-compliance violations are routinely found to be significant and substantial violations because they contribute to black lung, and that in this case he believed that one miner, namely the designated miner operator, would be affected by the violation. He further stated that he based his moderate negligence finding on his belief that the respondent should have been aware that the unit was out of compliance, and that this amounted to ordinary negligence. He confirmed that he had previously inspected the mine for approximately one year, and it had always been in compliance with the dust standard (Tr. 24-27; 75).

Ronald Hayes, MSHA Dust Specialist, testified that he issued his section 104(b) non-compliance order on July 10, 1996, after receiving the results of the respondent's dust sampling on the cited mechanized mining unit. He noted the fact that a prior section 104(a) citation was issued by Inspector Wolford, with an abatement date of June 19, 1996, because the sampling in support of that citation reflected an average dust concentration of 2.6 percent, which exceeded the 2.0 percent regulatory standard. Since the respondent's dust sample results of June 19, 1996, reflected an increased average dust concentration of 3.6 percent, rather than a decrease, he concluded that there was an "obvious lack of effort" to achieve compliance and wrote the order and took it to the mine and personally served it on mine superintendent Lynn Hatfield (Tr. 30-34).

Mr. Hayes stated that he modified his order five minutes after he issued it, so that MSHA could conduct additional dust sampling under normal mining conditions to determine whether



the respondent's revised dust control plan achieved compliance. He noted that the respondent raised its minimum water sprays pressure from 70 p.s.i. to 80 p.s.i., and changed the type of water sprays that it had been using in the past (Tr. 34-36).

Mr. Hayes confirmed that the July 10, 1996, additional MSHA sampling results reflected an average dust concentration of 0.442 percent, and resulted in compliance. He subsequently terminated his order on July 18, 1996. He believed that the corrective action taken by the respondent to accomplish compliance should have been taken at the time the initial citation was issued by Inspector Wolford (Tr. 47). Mr. Hayes confirmed that the mine was in compliance on July 10, 1996, when he issued the section 104(b) order (Tr. 47-48).

On cross-examination, Mr. Hayes reiterated that he based his conclusion of an "obvious lack of effort" by the respondent to achieve timely compliance on the fact that the initial 2.6 percent sample results increased to 3.6 percent after additional sampling. He stated that there was "a lack of something somewhere" or that the respondent "didn't do something." He could not recall what the respondent may have done to achieve compliance, and he confirmed that he based his order strictly on the 3.6 percent sampling results of June 19, 1996. He further confirmed that he made no inquiries to determine the respondent's compliance efforts and that Mr. Hatfield offered no explanations. The second sample results of 3.6 percent was the sole determining factor that prompted him to issue the order (Tr. 37-40). The order is issued "automatically", and he has no discretion to do otherwise (Tr. 42-43). He explained his conclusion that there was an "obvious lack of abatement effort" by the respondent as follows at (Tr. 47-50):

JUDGE KOUTRAS: Now, you're not suggesting that during that time that the operator wasn't doing anything?

A. No, I'm not. I'm not suggesting one thing or the other.

JUDGE KOUTRAS: You have no knowledge of what they were doing to try to bring them into compliance?

A. I hadn't even been there yet, not until July 10<sup>th</sup>. No contact with them as far as I know.

JUDGE KOUTRAS: Is it possible that when you went there on July 10<sup>th</sup> and issued this order that the mine was, in fact, in compliance on that day?

A. It's possible that they were then because I was running samples.

JUDGE KOUTRAS: You ran samples that day and they reflected a rather drastic reduction to 0.442 right?

A. Yes.

JUDGE KOUTRAS: So that would indicate that they were in compliance on July 10<sup>th</sup>; would it not?

A. Yes, it did.

\* \* \* \*

JUDGE KOUTRAS: Have you ever conducted a regular inspection?

A. Yeah, prior to being in dust.

JUDGE KOUTRAS: Have you ever issued a section 104(b) order on a regular inspection?

A. Yes, I have.

JUDGE KOUTRAS: And what criteria do you follow in issuing --- to issue a 104(b)?

A. Evidence usually showing that they didn't comply with what the citation says.

\* \* \* \*

JUDGE KOUTRAS: And how would you develop that evidence?

A. Well, the one I issued there would be available. They might talk to the operator and ask him why.

JUDGE KOUTRAS: But that didn't happen in this case?

A. Yeah.

JUDGE KOUTRAS: Is that right? In this case you didn't inquire of the operator why he wasn't in compliance and all that business before issuing the order?

A. No, I didn't.

JUDGE KOUTRAS: Is that the accepted way of doing it, do you know?

A. That's the accepted way of doing things, yes, Your Honor.

JUDGE KOUTRAS: On respirable dust?

A. Yes, it is.

JUDGE KOUTRAS: But different on other inspections?

A. Yes, it is. Respirable dust you go on the evidence of what the operator runs and sends to you. That's the evidence you go on.

JUDGE KOUTRAS: But you had no evidence that there was an obvious lack of effort, other than the test results?

A. That's all, yes.

Mr. Hayes confirmed that non-compliance with the 2.0 percent dust standard cannot be determined by visual observation. He stated that he reviewed the respondent's prior dust compliance record for the prior year and it did not disclose any violations of section 70.100(a), during the prior six sampling cycles over a 12 month period. He further confirmed that if the June 19, 1996, sampling results had reflected a dust concentration of 2.3 percent, he would still have issued his order. He explained that the delay from July 10, 1996, when he modified the order, to July 18, 1996, when he terminated it, was due to a two-week mine vacation period and training that he was taking. He further believed that all respirable dust non-compliance violations are "automatically" considered "S&S" violations (Tr. 40-55, 63, 75-76).

#### Bench Ruling Regarding Respondent's Motion to Dismiss

At the conclusion of the petitioner's case, the respondent's counsel moved for a directed verdict on the ground that Inspector Hayes acted arbitrarily when he issued the section 104(b) non-compliance withdrawal order, and failed to consider the degree of danger any extension of the abatement time would cause miners, the respondent's diligence in attempting to meet the initial abatement time, and the disruptive effect that the extension would have (Tr. 78-79).

The respondent's counsel stated that the respondent is not contesting the violation or the citation and concedes a violation of section 70.100(a), but challenges the propriety of the inspector issuing a section 104(b) order based simply on the respirable dust sample test results (Tr. 78-79).

In opposition to the motion, the petitioner's counsel took the position that the section 104(b) order is not in issue in this penalty case because of the failure by the respondent to contest it within 30 days as required by Commission Rule 20, 29 C.F.R. § 2700.20. In support of his argument, counsel stated that the issuance of a section 104(b) withdrawal order based solely on the results of dust sampling is "unique" (Tr. 56). Counsel asserted that it is clear that the citation was not timely abated and "there was no application for an extension of the abatement" (Tr. 56-57). Counsel took the position that the validity of the order is not in issue in this case, "only the question of good faith abatement" (Tr. 74). He further argued that there was

no evidence regarding the diligence of the respondent to abate the violation, and that the order was made a matter of record in this case to show a lack of good faith compliance by the respondent in connection with the section 104(a) citation (Tr. 80-81). The respondent's motion to dismiss was denied.

### Respondent's Testimony and Evidence

Mine Superintendent Lynn T. Hatfield testified that he was aware of the May 29, 1996, citation issued by Inspector Wölford and took steps to achieve compliance by checking the ventilation and fans, changing the continuous miner water lines from 1 1/4" to 1 1/2", replacing and aligning broken miner bit lugs, and replacing a valve on the miner hydraulic cutting head that was reportedly cutting into the mine roof. He stated that the mine ventilation plan could not be changed without MSHA's approval, and that the stated adjustments were made while the additional dust sampling was taking place (Tr. 82-85).

Mr. Hatfield stated that the additional dust samples were submitted on June 19, 1996, and that he was aware of the sample results before July 10, 1996, when Inspector Hayes came to the mine and served his order. He explained that his Pikeville office informed him of the results of the sampling and that a new ventilation plan needed to be submitted. He contacted the MSHA office and submitted a new ventilation plan on June 21, 1996, which was approved on June 26, 1996, but not received by the mine safety office until July 8, 1996. Although he was informed verbally that the plan had been approved sometime after June 21, 1996, he indicated that the plan could not be implemented until the written approval was received (Tr. 86-88).

Mr. Hatfield stated that the miners were on vacation for a two week period which ended on July 10, 1996, and that no coal production was taking place during the vacation period. There were only 11 miners working at the mine doing maintenance work. He stated that all of the changes that were made to address the violation were made and in effect on July 8, 1996, and he had no reason to believe that the mine was still out of compliance. He alluded to certain water supply problems for the continuous miner machine caused by attempts to service another MMU unit mining in another area of the mine, and candidly conceded that his attempts at finding and correcting the dust problem seemed to make matters worse (Tr. 89-91).

On cross-examination, Mr. Hatfield reiterated his efforts to abate the initial citation, including the replacement of old continuous miner water sprays with new ones, changing the miner filters and cutting bit lugs, and repairing the HIC valve that controls the height of the miner cutting head that was reported by the miner operator to be cutting into the top. He further stated that he had 6,000 cfm's of air behind the ventilation curtain, tightened the ventilation curtains, and made fan adjustments in an effort to address the problem (Tr. 91-94).

Mr. Hatfield believed that the decision to change the size of the miner water lines may have resulted in the dust exposure increase from 2.6 to 3.6 percent, and that it became evident that the ventilation plan needed to be changed. He also believed that the water line changes and

miner cutting head valve problem may have contributed to the increased dust level. He explained that a single water line supplied both MMU continuous miner machines and could have affected the water sprays. He stated that he did not know that the cited unit was still out of compliance, but decided to change the water sprays and spray pressure when the 3.6 sample results were received, and these measures achieved compliance (Tr. 94-96).

Mr. Hatfield stated that he was in the process of changing the water lines when the 2.6 test results were received, and since he did not believe that these results were particularly unusual, he did not contact MSHA. He further stated that he did not know who was conducting the on-shift examinations during the abatement period and did not recall speaking to the examiner. He explained that he was in communication with the continuous miner operator because that was where the dust problem existed (Tr. 96-107). He further stated that he tightened and adjusted the ventilation fan belts to prevent any slippage, and he did not know what caused the mine to be out of compliance when the dust test results reflected 2.6 and 3.6 percent (Tr. 107).

#### The Petitioner's Arguments

The petitioner points out that the respondent has conceded the validity of the citation, and offered no proof that the citation was not properly characterized as "significant and substantial" or the result of the respondent's moderate negligence. Under the circumstances, the petitioner asserts that the only issue in this case is the validity of the section 104(b) order issued by Inspector Hayes. Contrary to the position stated by counsel during the hearing, the petitioner does not now take the position that the respondent is foreclosed from challenging the validity of the order in this civil penalty proceeding notwithstanding the fact that it did not file a timely contest regarding the order.

The petitioner states that the disposition of this case is controlled by the recent decision of the Court of Appeals, for the D.C. Circuit in the case of Energy West Mining Company v. FMSHRC, No. 96-1243, slip op. (D.C. Cir. April 25, 1997), and that the presiding judge need look no further than this case to find the basis for upholding the validity of the section 104(b) order.

The petitioner submits that a section 104(b) withdrawal order presents a unique set of circumstances in the context of abatement of dust sampling violations. As an example, the petitioner states that although Mr. Hayes testified that he relied exclusively on the results of dust samples from the May-June 1966, bi-monthly sample period, as stated in the June 19, 1996, "advisory" showing 2.6 respirable dust, in excess of the 2.0 regulatory maximum, it is clear that analyzing the facts of this case, and comparing them to the facts of Energy West, that additional factors emerge which on the face of the record justify the issuance of the order by Mr. Hayes.



An "additional" factor cited by the petitioner is the increased level of dust concentrations evidenced by the second set of dust samples communicated to MSHA in the June 19, 1996 "advisory" reflecting a 3.6 average dust concentration. These samples were taken to abate the initial citation.

The petitioner maintains that regardless of whether an inspector articulates all of his bases for issuing a section 104(b) order or testifies that he relied exclusively on the results of the second sampling, the Commission must apply an objective standard and analysis to its consideration of the validity of the 104(b) order, and should analyze all of the factors surrounding the issuance of the order to determine whether there are objective bases for a finding that the section 104(b) order was validly issued without regard to the subjective intent of the issuing inspector.

In this case, however, the petitioner further takes the position that the threshold issue to be determined by the presiding judge before examining any other factors in determining whether the inspector properly exercised his discretion in issuing the section 104(b) order is the question of whether or not the operator communicated a request for an extension of the abatement time to the inspector. In support of this argument, the petitioner cites the following statement by the Court:

We also agree with the Commission that the burden rested on Energy West to bring to MSHA's attention any specific abatement measures justifying extension of the abatement period, particularly in the face of what appeared to be deteriorating mine conditions.

The petitioner asserts that in this case, the respondent made absolutely no effort to communicate to Mr. Hayes that it had acted to abate the violation or that it desired to have the abatement period for the original 104(a) citation extended. Instead, it chose to alter its ventilation plan in order to achieve compliance with section 70.100(a), and never sought to have the abatement time extended. Relying on the Court's decision in Energy West, the petitioner concludes that before an operator may challenge the validity of a 104(b) order, it must first establish that it communicated to MSHA its desire and reasons for seeking the extension of the abatement time for the original citation. Since the respondent knew shortly after the second sample results came back on June 19, 1996, that it had not achieved compliance, and opted to submit a new ventilation plan to fix the problem, without communicating to Mr. Hayes or to any other MSHA official that it wished an extension of the abatement period, the petitioner concludes that Mr. Hayes was justified in issuing the order effectively mandated by the June 19, 1996, sampling results.

Finally, the petitioner submits that the Court's decision in Energy West stands for the principle that MSHA is not required to offer to the operator what the operator itself does not seek. Accordingly, the petitioner concludes that the respondent's challenge to the section 104(b)

order should be denied when it only communicated its dissatisfaction with the order by way of a notice of contest filed some four months after the fact.

### The Respondent's Arguments

The respondent states that upon receiving the initial section 104(a) citation on May 29, 1996, it took various steps to correct the violation, including checking the ventilation system and fan, tightening the fan bolts, checking the belts for slippage, checking, aligning, and replacing continuous miner cutting head bit lugs, changing the cutting head HIC valve to prevent cutting into the mine roof, checking and replacing the miner water sprays, and changing the miner filters.

The respondent asserts that it collected five additional dust samples during June 7, through June 14, 1996, and following a notification that it was still out of compliance, and with the help and advice from MSHA, submitted a new ventilation plan in an attempt to correct the problem. Further, at the suggestion of MSHA, the type of water sprays were changed, and superintendent Hatfield determined on his own to increase the miner spray pressures from 70 pounds to 80 pounds. The new plan was submitted on June 21, 1996, and after it was approved on July 8, 1996, it was immediately implemented by Mr. Hatfield. The respondent further states that prior to the mid-May 1996, sampling the mine had been in compliance with section 70.100(a) for over a two-year period and a total of approximately 12 sampling periods.

The respondent contends that the section 104(b) order was improperly issued by Inspector Hayes and that he should have extended the abatement period of the section 104(a) citation. In support of its contention, the respondent cites Peter White Mining Corporation, 1 FMSHRC 255, 265 (April 1979), where Judge Fauver vacated a section 104(b) order because the inspector failed to give any consideration to the extension of time allowed for abatement of the citation. The judge found that such consideration was a basic requirement for the issuance of such an order.

The respondent further cites United States Steel Corporation, 1 MSHC 1490 (November 29, 1996), holding that an inspector's authority under Section 104(b) in determining whether the abatement time for the violation should be extended, or an order of withdrawal issued, carries the implication that it will be exercised reasonably, not arbitrarily or capriciously, and Eastern Associated Coal Corporation, 1 MSHC 1665 (June 22, 1978), involving a challenge to the inspector's failure to extend the abatement time for a violation of section 70.100(b), and which resulted in the issuance of a section 104(b) order. In the Eastern Associated case, Judge Stewart held that such an order should be based on the prevailing circumstances, including the initial sampling processing time, the time required to evaluate the samples and make changes, the time to review the results of additional samples, and the degree of hazard presented. The judge noted that the operator could not evaluate the efficacy of its repairs until the results of dust sampling analysis had been received.

Finally, the respondent cites the presiding judge's decision in Peabody Coal Company, 11 FMSHRC 2068 (October 1989), vacating a section 104(b) order issued following non-

compliance with a section 104(a) citation issued for an alleged violation of section 70.101, and quotes as follows from that decision at 11 FMSHRC 2102:

I find no rational basis for an inspector to automatically issue a section 104(b) withdrawal order simply because an operator's sampling results reflects continued non-compliance with the dust standards. If this were the case, an inspector could refuse to further extend any abatement time for any violation simply because an operator has not abated the condition within the initial time fixed for abatement, completely ignoring the circumstances presented \* \* \* \*.

The respondent maintains that Inspector Hayes failed to conduct a follow-up mine inspection as required by the Act, and failed to inquire of mine personnel as to what steps had been taken to abate the violation. Further, the respondent points out that Mr. Hayes based the issuance of his order strictly on the second set of dust samples, and had no facts to make an informed decision prior to issuing the order.

The respondent contends that the inspector was of the mistaken opinion that if the second set of samples indicated non-compliance, the issuance of the order was automatic and that he had no discretion to extend the abatement time further. The respondent concludes that the inspector's belief is clearly wrong and in direct contravention of its cited cases and that the issuance of the order was improper.

The respondent rejects any suggestion that the disputed order was appropriate because of the danger any extension posed to the safety of miners. The respondent concludes that if safety had been a concern to the inspector, he would not have permitted 20 to 21 days to pass before issuing his order, he could have issued it in a more timely manner, or if he were unavailable, another inspector could have issued it.

The respondent states that it was permitted, with the exception of approximately five minutes while shut down by the order, to resume and continue to operate until the results of the third set of samples was analyzed and determined to be well within compliance, and that extending the abatement time would not have altered its conduct in any manner. The third set of samples would have been taken, the section would have continued to operate, the sample analysis would have indicated compliance, and the citation would have been terminated. The respondent emphasizes the fact that it had not been cited for excessive dust levels in the entire two-year period preceding the issuance of the order, and the mine had no dust problem history.

The respondent maintains that simply because the dust concentration was greater on the second set of samples does not justify the issuance of the order. The respondent argues that the instant case is factually distinguishable from Energy West Mining Company, where the dust samples from a mechanized mining unit indicated an average concentration of 2.2 milligrams, and the sample taken to terminate the citation showed an average of 2.3 milligrams. In that case, the inspector issued a § 104(b) order based upon the second set of samples and the fact that the

mine had been frequently out of compliance. The respondent points out that Judge Morris relied upon two grounds in upholding the issuance of the § 104(b) order, namely, the fact that the operator had made only minimal and inadequate efforts to control the dust and had a prior history of being out of compliance with the dust standard.

The respondent maintains that, as previously detailed, it took numerous and extensive steps prior to the issuance of the order to correct the dust problem, and did more than simply check the ventilation plan parameters to assure the system was functioning as required. Unlike the mine in Energy West, which had a history of being out of compliance on 11 of 22 dust samplings over a two-year period, the respondent points out that its mine had no previous history of dust problems and had no dust violations for the previous two years. The respondent concludes that the Energy West decision is distinguishable on both the grounds upon which it was decided and does not control the outcome in the instant case.

Finally, the respondent contends that the question of whether it had complied with the on-shift examination requirements of section 75.362(a)(2), raised for the first time by the petitioner at the hearing, is not an issue in this case. The respondent asserts that it was not cited for a violation of this section and was not aware that this was an issue.

#### Findings and Conclusions

The undisputed facts establish that the section 104(a) "S&S" Citation No. 9981345, was issued and served by certified mail on the respondent on May 29, 1996, for a violation of the respirable dust requirements found at 30 C.F.R. § 70.100(a). The citation was based on the fact that five valid dust samples collected by the respondent for the designated occupation in mechanized mining unit 003-0, amounted to 2.6 milligrams, exceeding the 2.0 milligram section 70.100(a), standard. The respondent has conceded the validity of the citation and does not dispute the fact that the dust sampling results establish a violation in this case. Accordingly, the citation citing a violation of section 70.100(a), IS AFFIRMED.

#### The Section 104(b) Order

Pursuant to Commission Rule 20(a), 29 C.F.R. § 2700.20(a), an operator may contest the reasonableness of the abatement time associated with a section 104(b) withdrawal order. However, pursuant to Rule 20(b), the contest must be filed within 30 days of the receipt of the order.

Pursuant to Commission Rule 21, 29 C.F.R. § 2700.21, the failure by an operator to timely contest a section 104 citation or order does not preclude the operator from challenging, in a penalty proceeding, "the fact of violation or any special findings . . . including the assertion . . . that the violation was of a significant and substantial nature or was caused by the operator's unwarrantable failure to comply with the standard".



As noted earlier, at the hearing in this matter, the petitioner took the position that the validity of an uncontested section 104(b) withdrawal order cannot be challenged in a civil penalty proceeding. However, in its posthearing brief, the petitioner changed its position and asserts that the respondent is not foreclosed from challenging the validity of the order in this case. I note in passing, however, that the Secretary's Arlington, Virginia Solicitor's Office, in a recent contest case before Chief Judge Merlin, took the position that an operator may not obtain review of an uncontested section 104(b) order in a civil penalty proceeding seeking a penalty assessment for a violation noted in the underlying unabated section 104(a) citation. Consolidated Coal Company, Docket No. WEVA 97-84-R. In that case, Judge Merlin, on April 29, 1997, denied the Secretary's motion to dismiss the untimely contest challenging the validity of the order. Judge Merlin concluded that the intent of Commission Rule 21 is to secure review of special findings.

Black Diamond Coal Mining Co., 5 FMSHRC 764 (April 1983), is a civil penalty case concerning proposed penalty assessments for two violations cited in two section 104(d)(1) "S&S" orders. In view of the operator's failure to timely contest the orders, I declined to consider the merits of the inspector's unwarrantable failure findings in the context of the penalty proceeding, but nonetheless considered the evidence in this regard as part of the negligence criterion found in section 110(i) of the Act. The Commission affirmed my decision, Black Diamond Coal Mining Company, 7 FMSHRC 1117 (August 1985), and stated as follows at 7 FMSHRC 1122, fn. 7:

The issue Black Diamond raises — the impact of special findings in a withdrawal order upon a civil penalty proposed by the Secretary for the violation alleged in the order — is different than the issue of whether the merits of such special findings may be challenged in a civil penalty proceeding when the operator has not sought review of the order pursuant to section 105(d). We leave consideration of the latter issue to a case in which it is squarely presented.

Bethlehem Mines Corp., 6 FMSHRC 1011, 1039-1041 (April 1984), concerned a civil penalty proceeding for a violation cited in a section 104(a) citation, followed by a section 104(b) order for untimely abatement. Absent any evidence of a timely contest of the order, and taking into account that MSHA's proposed civil penalty assessment was limited to the citation, and did not include the order, I concluded that the validity of the order, including the question of whether or not the inspector abused his discretion in not extending the abatement time, was not directly in issue. However, I considered the operator's abatement efforts in connection with the elements of good faith compliance and negligence pursuant to section 110(i) of the Act, and took this into consideration in the penalty assessment for the violation.

In Quinland Coals, Inc., 9 FMSHRC 1614 (September 1987), the Commission held that the failure by an operator to timely contest a section 104(d)(1) order alleging a violation and containing special "S&S" and unwarrantable failure findings, did not preclude the operator from challenging such special findings in a subsequent civil penalty proceeding. The Commission noted the "interdependent nature" of special findings and a penalty assessment and further noted



that a "a special finding is a critical consideration in evaluating the nature of the violation and bears upon the appropriate penalty to be assessed", 9 FMSHRC 1621, 1623. The Commission stated as follows at 9 FMSHRC 1623:

\* \* \* \* Because of the interdependent nature of special findings and the penalty assessment provisions of the Mine Act, it is appropriate to allow contest of such findings in a civil penalty proceeding and not to preclude this challenge because the operator failed to contest the validity of the order in which the findings are contained within 30 days of its issuance.

In Moline Consumers Company, 12 FMSHRC 1953 (October 1990), I imposed a penalty assessment of \$50, for a section 104(a) non-"S&S" guarding violation. With respect to the disposition of a section 104(b) order which was issued following the failure of the mine operator to timely abate the cited condition, I noted the absence of any evidence that the respondent timely contested the issuance of the order and concluded that the validity of the order was not directly in issue. However, I further concluded and found that since MSHA considered the issuance of the order as part of its proposed penalty assessment for the violation, particularly with respect to the question of negligence and good faith compliance, the order was relevant to my consideration of the penalty assessment criteria found in section 110(i) of the Act.

Energy West Mining Company, 16 FMSHRC 835 (April 1994), is a civil penalty case in which former Commission Judge John Morris affirmed a violation of 30 C.F.R. § 70.100(a), cited in a section 104(a) citation issued by an inspector after he found that the designated MMU longwall operator occupation was out of compliance with the applicable 2.0 mg/m<sup>3</sup> standard. The five dust samples taken by the mine operator showed an average dust concentration of 2.2 mg/m<sup>3</sup>. Subsequent samples taken during the abatement period of approximately three weeks given by the inspector should an increase in the dust concentration to 2.3 mg/m<sup>3</sup>. The inspector refused to extend the abatement period further and issued a section 104(b) withdrawal order. The parties stipulated that the judge had jurisdiction and that the citation and order were properly issued and served on the operator. It would appear that the issue of the reviewability of the uncontested section 104(b) order was not specifically raised, and the judge's decision is silent with respect to this question.

In Energy West, the inspector's determination that an extension of the abatement time was not warranted was based on increased dust levels as reflected by the subsequent dust samples taken to abate the initial section 104(a) citation, frequent prior MMU citations for violations of section 70.100(a), the increase in the number of abatement samples that were out of compliance, and the operator's failure to incorporate changes to its ventilation plan that it had made previously to bring the cited MMU into compliance.

On appeal, the Commission affirmed the judge's decision upholding the violation, as well as the section 104(b) order. However, the Commission vacated the \$3,000, penalty assessment and remanded the case for reassessment in view of the judge's apparent failure to consider

evidence of a gravity level lower than "high" as found by the judge, 18 FMSHRC 565 (April 1996). No mention is made of any review problem with respect to the section 104(b) order.

In upholding the judge's determination that the inspector did not abuse his discretion in issuing the order, the Commission pointed out that the inspector relied on several factors (enumerated above) to support his determination that the initial abatement time should not be further extended. The Commission rejected the operator's contention that the judge erred in failing to consider that it moved the MMU as part of its abatement efforts, a fact apparently not communicated to the inspector when he issued the order. In this regard, the Commission noted that the mine Act and legislative history does not address the extent of an inspector's inquiry in determining whether the abatement time should be extended, and it concluded that the inspector was not obliged to ascertain, before issuing the order, that the MMU had not been moved. 18 FMSHRC 565, 570-71 (April 1996).

Energy West's further appeal to the U.S. Court of Appeals for the D.C. Circuit was denied, Energy West Mining Company v. FMSHRC and the Secretary of Labor, No. 96-1243, slip op. (D.C. Cir. April 25, 1997). The Court affirmed the Commission's determination that an inspector can rely on increased dust levels determined by dust samples to support his decision not to extend the abatement time and to issue a section 104(b) withdrawal order without further inquiry concerning the operator's abatement efforts.

In the instant case, the initial section 104(a) citation was issued by Inspector Wolford on May 29, 1996, and he fixed the abatement time as 7:00 a.m. on June 19, 1996. The respondent took five additional dust samples that day, and the test results reflected an increased dust concentration from 2.6 to 3.6 for the cited MMU, and Mr. Hayes confirmed that he received the test results by computer that same day (Tr. 33-34).

The disputed order was not issued until July 10, 1996, and Mr. Hayes confirmed that it was "automatically" issued solely because of the increased second dust sample results of June 19, and that he had no discretion not to issue the order (Tr. 42-43). The petitioner's counsel attributed the delay from June 19 to July 10, 1996, to a mine vacation period for part of this time, and the fact that Mr. Hayes had taken over the dust sampling program from Mr. Wolford only a short time after the issuance of the original citation. However, Mr. Hayes further attributed the delay to the fact that he was in training and on leave (Tr. 46).

Mr. Hayes asserted that he had no knowledge as to what steps the respondent may have taken to achieve compliance before July 10, and he confirmed that he was not suggesting that the respondent was not doing anything to achieve compliance (Tr. 47). As a matter of fact, he believed it was possible that the mine was in compliance on the very day he issued his order on July 10, because he was taking dust samples at that time and the test results reflected a drastic dust concentration reduction from 3.6 to 0.442. He agreed that this would indicate that the mine

was in fact in compliance on that day (Tr. 47-48). He admitted that he had no evidence apart from the test results to support the "obvious lack of effort" notation that he made on the face of his order (Tr. 50).

Mr. Hayes stated that after he modified the order to facilitate the taking of samples, he allowed the unit to stay in production and did not reinstate the order "because we have no idea of knowing whether they're going to be out or in" (Tr. 60), and that "you give that benefit of a doubt that they are there, you know, in good faith . . . because they've done something to comply" (Tr. 61) (emphasis added).

In response to a question as to whether it was conceivable or possible that the respondent had taken reasonable steps to abate the citation prior to the issuance of his July 10, 1996, order Mr. Hayes responded as follows at (Tr. 39):

A. If he took any other steps he didn't volunteer to tell me that he'd done other things when I got there at that mine. If he had, I would noted it in my notice. It's not there so he did not tell me anything that he had done prior to the (b) order.

The record reflects that Mr. Hayes modified his 104(b) order five minutes after he issued it so that dust sampling could be accomplished under active working conditions. I take note of the fact that on the face of his modified order, Mr. Hayes noted that the respondent submitted and implemented a revised respirable dust control plan, that the types of water sprays that were in use were changed, and that the water spray pressures were raised from 70 psi to 80 psi. When asked if the respondent had explained to him on July 10, about any efforts made to achieve abatement, Mr. Hayes responded "Just this right here is all. Just what I wrote on the modification". He also confirmed that prior to going to the mine, his dispatcher told him that the mine ventilation plan had been submitted to raise the water spray pressures (Tr. 64-65). Mr. Hayes admitted that prior to going to the mine on July 10, he knew that the respondent had changed its ventilation plan and had an MSHA approved modified plan in place. He also knew that the water sprays had been changed, and that the water spray pressures had been increased (Tr. 53-54; 64).

In view of the foregoing, it seems obvious to me that Mr. Hayes had knowledge of the respondent's abatement efforts before he issued his section 104(b) order, and I find his denials to the contrary because he had not noted them in his order to be incredible. Under the circumstances, I find that the fact that superintendent Hatfield did not tell Mr. Hayes what he already apparently knew is irrelevant. Further, given the fact that Mr. Hayes' practice was to automatically issue section 104(b) orders based solely on dust sample results, I find it reasonable to conclude that Mr. Hayes would have issued his order regardless of what abatement efforts may have been communicated to him by Mr. Hatfield.

The Commission's decisions in Black Diamond Coal Mining Co. and Quinland Coals, Inc., supra, concerned "special" S&S and unwarrantable failure findings noted in a section 104(d)(1) notice and a section 104(d)(1) order. In the Energy West Mining Company case,

although the D.C. circuit characterized the "paper" issued by the inspector as a section 104(d)(1) "S&S" citation, it was in fact a section 104(a) "S&S" citation (pg. 3, slip op.), and as previously noted, the issue concerning the reviewability of the uncontested section 104(b) order was never specifically raised or questioned.

I recognize the fact that a section 104(b) order is an "enforcement action" pursuant to the Act. However, I cannot conclude that such an order includes any "special findings" such as "S&S" and "unwarrantable failure". A section 104(b) order is a non-compliance order for failure to timely abate a violation noted in a section 104(a) citation. An operator may contest the reasonableness of the abatement time, but must do so within 30 days of the receipt of the order. Since the respondent in this case failed to timely contest the order, I conclude and find that it is precluded from now challenging the merits or the validity of the order. However, since the order had a direct impact on the proposed penalty assessment, as discussed below, I will consider the respondents' abatement efforts in connection with the section 110(i) good faith compliance penalty assessment criterion in assessing a de novo penalty for the violation that has been affirmed.

The proposed penalty assessment of \$3,407, is based on a "regular assessment" computed pursuant to the petitioner's regulatory penalty assessment criteria and procedures found in Part 100, Title 30, Code of Federal Regulations. The proposed assessment filed by the petitioner reflects a total of 63 "points" based on the respondent's size, prior history of violations, negligence, gravity, and good faith abatement. Based on the Penalty Conversion Table, at section 100.3(g), the 63 points converts to a monetary proposed penalty assessment of \$3,407. Ten of the 63 penalty points were assigned pursuant to section 100.3(f), because of the respondent's failure to abate the violation within the time fixed by the inspector. Although this section provides for a 30% penalty reduction for timely abatement, no reduction was made in this case. Further, in the course of the hearing, petitioner's counsel stated that the order was made a part of the record in this case to establish a lack of good faith compliance by the respondent in connection with the section 104(a) citation (Tr. 80-81).

The section 104(a) citation issued by Inspector Wolford required the respondent to "take corrective action to lower the concentration of respirable dust" and "then sample" and submit the valid samples to MSHA'S dust processing laboratory. I find that this is precisely what the respondent in this case did to address the dust problem.

In this case, I conclude and find that the credible and un rebutted testimony of mine superintendent Hatfield establishes that the respondent initiated a course of corrective action that it reasonably believed addressed a dust problem that had never been previously experienced in the mine. In order to cure such a problem, the respondent must know what caused it, and must be given enough time to discover the cause. The fact that the steps taken by the respondent to address the problem subsequently resulted in an increased, rather than decreased dust concentration, does not, in my view, detract from the respondent's good faith effort to timely correct and abate the cited violation. Indeed, Inspector Hayes admitted that even though he



stated on the face of his order that there was an "obvious lack of effort" by the respondent to control the dust, he was not suggesting that the respondent did nothing. He further conceded that he had no evidence of any "lack of effort" other than the dust sample results, and admitted that it would appear that the mine was probably in compliance when he issued his section 104(b) withdrawal order (Tr. 47-50). Under all of these circumstances, I conclude and find that the respondent acted in good faith and took reasonable steps in its attempt to address its very first respirable dust problem, and its efforts in this regard are reflected in the reduced penalty assessment that I have imposed for the violation in question.

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

Based on the stipulations by the parties, I conclude that the respondent, as a corporate operator, is a large mine operator, and that its Tall Timber mine is a relatively large operation. The parties stipulated that the proposed penalty assessment of \$3,407, will not adversely affect the respondent's ability to continue in business. Accordingly, I conclude and find that the penalty I have assessed will not adversely affect the respondent's ability to continue in business.

#### History of Prior Violations

The parties have stipulated to the respondent's history of prior violations is reflected in an MSHA computer print-out (Exhibit P-1). The print-out reflects that for the two-year period prior to the issuance of the May 29, 1996, citation in this case, the respondent paid civil penalty assessments for 236 of the 237 listed violations. The only exception is the instant contested case which concerns the only listed violation that resulted in the issuance of a section 104(b) order. All of the 236 prior violations are section 104(a) citations, 146 of which are "single penalty" \$50 assessments. Further as previously noted, there are no prior section 70.100(a) respirable dust violations included as part of the mine history. One prior violation noted is for violation of section 70.101, for respirable dust (with Quartz present), a single-penalty citation assessed at \$50 and paid by the respondent. For an operation of its size, I cannot conclude that the respondent's compliance history warrants any additional increase in the civil penalty assessed by me for the violation in question.

#### Gravity

The Commission has recognized that any violation of section 70.100(a) is serious and presumptively S&S. Consolidation Coal Co., 8 FMSHRC 890, 899 (June 1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987).

In the Energy West Mining Company case, 18 FMSHRC 565 (April 1996), Judge Morris affirmed an "S&S" violation of section 70.100(a), and assessed a \$3,000 civil penalty after finding that the gravity of the violation was high, given the risk of pneumoconiosis, and the fact that such section 70.100(a) violations are generally considered to be S&S. The Commission



affirmed the violation, but vacated the penalty assessment and remanded the case to the Judge to consider the fact that the Secretary withdrew his S&S allegations because the affected miners were wearing personal protective equipment (helmets) which the Judge found provided "a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels". The Commission observed that there was no indication in the judge's analysis that he considered this evidence in determining that the violation was of high gravity or in assessing the civil penalty, 18 FMSHRC 571-572.

As noted earlier, the respondent did not contest the issuance of the section 104(a) "S&S" citation.. Further, the respondent did not address this issue in its posthearing brief, and presented no evidence to rebut the inspector's credible "S&S" finding. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

#### Negligence

Inspector Wolford testified that he had previously inspected the mine for approximately a year and found that it was always in compliance with the cited standard section 70.100(a) (Tr. 24). He confirmed that he based his moderate negligence finding on his belief that the respondent should have been aware that the cited MMU was out of compliance, and that this amounted to ordinary negligence (Tr. 75). The respondent's compliance history for the two-year period prior to the May 29, 1996, citation issued by Inspector Wolford reflects no prior violations of section 70.100(a). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and the inspector's moderate negligence finding IS AFFIRMED.

#### 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 \$1,200, is reasonable and appropriate for the violation in this case.

#### Order

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Section 104(a) "S&S" Citation No. 9981345, May 29, 1996, citing a violation of mandatory health standard 30 C.F.R. § 70.100(a), IS AFFIRMED.

2. The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$1,200, for the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

  
George A. Koutras  
Administrative Law Judge

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/mh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 6 1997

|                                   |   |                               |
|-----------------------------------|---|-------------------------------|
| SECRETARY OF LABOR,               | : | CIVIL PENALTY PROCEEDING      |
| MINE SAFETY AND HEALTH            | : |                               |
| ADMINISTRATION (MSHA),            | : | Docket No. LAKE 97-10-M       |
| Petitioner                        | : | A. C. No. 33-00134-05557 A    |
| v.                                | : |                               |
|                                   | : | Redland Ohio - Woodville Mine |
| ROBERT J. COX Employed by REDLAND | : |                               |
| QUARRIES U.S., INC.,              | : |                               |
| Respondent                        | : |                               |
|                                   | : |                               |
| SECRETARY OF LABOR,               | : | CIVIL PENALTY PROCEEDING      |
| MINE SAFETY AND HEALTH            | : |                               |
| ADMINISTRATION (MSHA),            | : | Docket No. LAKE 97-11-M       |
| Petitioner                        | : | A. C. No. 33-00134-05558 A    |
| v.                                | : |                               |
|                                   | : | Redland Ohio - Woodville Mine |
| DALE BUSDEKER, Employed by        | : |                               |
| REDLAND QUARRIES U.S., INC.,      | : |                               |
| Respondent                        | : |                               |
|                                   | : |                               |
| SECRETARY OF LABOR,               | : | CIVIL PENALTY PROCEEDING      |
| MINE SAFETY AND HEALTH            | : |                               |
| ADMINISTRATION (MSHA),            | : | Docket No. LAKE 97-12-M       |
| Petitioner                        | : | A. C. No. 33-00134-05559 A    |
| v.                                | : |                               |
|                                   | : | Redland Ohio - Woodville Mine |
| GILBERT A. SANCHEZ, Employed by   | : |                               |
| REDLAND QUARRIES U.S., INC.,      | : |                               |
| Respondent                        | : |                               |

## ORDER GRANTING MOTIONS TO DISMISS

Before: Judge Fauver

These are civil penalty cases against corporate employees alleged to be agents under section 110(c) of the Federal Mine Safety and Health Act of 1997, 30 U.S.C. § 801, *et seq.* The charges stem from a citation issued against the corporation on December 13, 1994. The cases against Respondents were filed on November 27, 1996.

Respondents have moved to dismiss on the ground that the charges are untimely.

Neither the Act nor the Secretary's regulations impose a time limit for bringing penalty actions under section 110(c). However, section 105(d) of the Act provides that hearings before the Commission shall be conducted under section 5 of the Administrative Procedure Act, which provides in part:

Persons entitled to notice of an agency hearing shall be timely informed of --

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

This section has been applied to require a timely petition for civil penalties in section 110(c) cases. *Manuel Palacios*. (Docket No. DENV 76-29) (Office of Hearings and Appeals, U.S. Department of the Interior; Order of Judge Sweitzer, June 16, 1977); *Wayne R. Steen*, 16 FMSHRC 2293, 2300, fn 2 (Judge Fauver, 1994), reversed on other grounds, 18 FMSHRC 1552 (1996). See also: *Robert V. Swindall*, 13 FMSHRC 310, 313-14 (Judge Broderick; 1991) (suggesting that an 18 month delay with prejudice to the party, e.g., disbursement of witnesses and faded memories, would warrant dismissal); *Ernie Brock*, 4 FMSHRC 201 (Judge Koutras, 1982) (dismissing a section 110(c) case where 26 months elapsed); *Curtis Crick*, 15 FMSHRC 7335, 737 (Judge Melick, 1993) ("[B]ecause [section 110(c)] cases directly impact individual rights, the concepts of fair play and due process must be even more carefully protected.")

Section 110(c) cases, with their focus on enforcement against individuals, are analogous to criminal cases where fairness and due process are of heightened importance. The rationale for requiring diligent notification of charges in criminal cases was succinctly stated by Judge Skelly Wright in *Nichens v. United States*:

Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags.


323 F.2d 808, 813 (D.C. Cir. 1973), cert. denied, 379 U.S. 905 (1974).

Respondents' motions to dismiss demonstrate untimeliness in the charges with prejudice to Respondents. The citation against the corporation was issued in December 1994. In February 1995, the Secretary conducted a special investigation. No individuals were charged. On October 10, 1996, the Secretary notified Respondents that they would be charged with violations. Petitions were filed before the Commission on November 27, 1996. On December 5, 1996, a key

witness died (William Diels, a maintenance employee who actually worked on the brakes that are the subject of the alleged violations). Important documents are missing, a number of witnesses have left the company, and it is reasonable to presume that memories have faded over this long period, with prejudice to Respondents' defenses.

I find that the delay of nearly 2 years warrants dismissal.

Accordingly, the motions to dismiss are **GRANTED** and these proceedings are **DISMISSED**.

  
William Fauver  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

**JUN 6 1997**

|                        |   |                               |
|------------------------|---|-------------------------------|
| ASARCO, INC.,          | : | CONTEST PROCEEDING            |
| Contestant,            | : |                               |
| v.                     | : | Docket No. SE 94-362-RM       |
|                        | : | Citation No. 3052272; 3/16/94 |
| SECRETARY OF LABOR,    | : |                               |
| MINE SAFETY AND HEALTH | : | Young Mine                    |
| ADMINISTRATION (MSHA)  | : | Mine ID No. 40-00168          |
| Respondent,            | : |                               |
| and                    | : |                               |
| INTERNATIONAL CHEMICAL | : |                               |
| WORKERS' UNION,        | : |                               |
| Intervenor             | : |                               |

## DECISION

Appearances: Henry Chajet, Esq., and David Farber, Esq., Patton Boggs, L.L.P.  
Washington, D.C., for Contestant;  
Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of  
Labor, Arlington, Virginia, for Respondent;  
Randall Vehar, Esq., and Mr. Michael L. Sprinker, Akron, Ohio, for  
Intervenor.

Before: Judge Maurer

## STATEMENT OF THE CASE

This proceeding concerns a Notice of Contest filed by the Contestant (Asarco) against the Respondent (MSHA) challenging the validity of "S&S" Citation No. 3052272, which was issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a). The citation charges Asarco with a violation of the mandatory standards found at 30 C.F.R. §§ 57.5001(a) and 57.5005. The respondent filed a timely answer asserting that the citation at bar was properly issued and in due course, Asarco moved to vacate the citation, and grant the contest based on the Commission's decision in Keystone Coal Mining Corp., 16 FMSHRC 6 (January 1994). The administrative law judge, concluding that the case was controlled by Keystone, granted the motion to dismiss and vacated the citation by an unpublished Order of Dismissal on August 8, 1994. The Commission subsequently granted the Secretary of Labor's petition for discretionary review, vacated the judge's order, and remanded the case to the

undersigned for further proceedings, holding that "the legal basis underlying Keystone limits its application to underground coal mines" (emphasis added), whereas this case involves an underground zinc mine.

Subsequent to the Commission's remand in Asarco, Inc. v. Secretary of Labor, 17 FMSHRC 1 (January 1995), a substantial amount of discovery was completed by the parties, including several pre-trial depositions and a significant amount of documents were produced pursuant to request, both prior to and during the trial. The trial itself was conducted for 16 days spread over a period of time from March 25, 1996 through August 22, 1996. Additionally, three post-trial depositions for the record were also taken in September and October of 1996 and have been incorporated into the trial record.

The International Chemical Workers' Union, which is the exclusive bargaining representative for the miners working at the Young Mine, sought permission and was permitted to intervene in this proceeding as a representative of the miners. They fully participated in the trial of this case, as a party, and have filed a post-trial brief, and reply brief.

The Secretary of Labor and Asarco have likewise each filed a post-trial brief on January 31, 1997 and a reply brief on March 14, 1997.

I have considered the entire record and respective contentions of the parties in the course of my adjudication of this matter, and I make the following decision. To the extent that the proposed findings and conclusions sought by the parties are not incorporated into this decision, they are rejected.

#### STIPULATIONS

The parties stipulated to the following:

1. Asarco is subject to the jurisdiction of the 1977 Federal Mine Safety & Health Act and the Federal Mine Safety and Health Review Commission.

2. Citation No. 3052272 was based on one sample for airborne contaminants, which was taken over an eight-hour period on March 16, 1994 at the Young Mine. The citation issued by MSHA Inspector Dana L. Haynes, cited a violation of 30 C.F.R. §§57.5001(a) and 57.5005, and charged as follows:

The Skip Tender on second shift was exposed to a shift-weighted average of 2.30 mg/m<sup>3</sup> of respirable silica bearing dust on 3/16/94. This exceeded the TLV (exposure limit) of 1.84 mg/m<sup>3</sup> times the sampling factor (1.20 for respirable free silica dust sampling and analysis). Respiratory protection was used, however, a respiratory

protection program meeting the requirements of ANSI Z88.2-1969 was not in place. All feasible engineering controls were not in use to control employee's dust exposure. An operator's control booth was in place but not sealed adequately to prevent dust penetration. The original abatement date is for the institution of a respiratory protection program. When a respiratory protection program that meets the minimum requirements of ANSI Z88.2-1969 is in place, the abatement date will be extended to allow time for the installation of engineering controls. The analytical results received and citation issued on 4-18-94.

3. The sample was taken on a miner who was working under normal conditions in, and around, the "Skip Tender" location, at the Young Mine.

4. The Skip Tender's job is to operate the controls on doors which allow muck to flow from a surge bin into a chute (measuring capsule) and then into the skip for transportation to the surface. The Skip Tender sits inside a non-sealed booth, located underground next to the skip pocket, when he operates the controls. When he is not operating the controls, the Skip Tender performs clean-up of spillage, and on occasion is required to assist in the use of explosives to free "hangups" that occur in the dumping process.

5. Although the miner was wearing a 3M Model 87-10 respirator, the mine operator did not have in effect a respirator program consistent with the requirements of ANSI Z88.2-1969, which provides that respirators will be "fit tested" for individual employees.

6. MSHA's Metal/Non-metal Division's standard procedures for sample preparation, collection, transportation, analysis and compliance determinations were utilized to obtain and process the sample upon which the citation is based.

7. MSHA's Metal/Non-metal Division's standard procedures for sample preparation, collection, transportation, analysis and compliance determinations are described in the relevant parts of the Metal/Non-metal Health Inspections Procedures Handbook and NIOSH Manual of Analytical Methods 7500.

8. The sampling apparatus used to collect the sample -- an SKC Model No. 30 constant flow pump -- was calibrated for the sampling that was conducted and the sampling apparatus was functioning in its normal operating condition.

9. Constant flow pumps are designed so that it is not necessary to calibrate the pump during an eight-hour sampling period and to achieve a 1.7 liter per minute flow rate if properly calibrated.

10. An electronic Gillibrator calibration device was used to measure the pump flow rate before and after the sampling shift.

11. Even when properly calibrated, there is some variation in the flow rate of the SKC Model No. 30 constant flow pump used to collect the sample during the eight-hour period in which the sample was taken.

12. In making a calculation for compliance purposes, MSHA allows a co-efficient of variation ("CV") of 5 percent to account for variations in pump flow rate.

13. The 10mm nylon cyclone device that was used in taking the sample was the proper size and type of cyclone for use in sampling for respirable silica bearing dust and the cyclone was properly maintained.

14. The proper hose, filter and sampling cassette for use in sampling for respirable silica bearing dust were used in collecting the sample.

15. In making a calculation for compliance purposes, MSHA allows a co-efficient of variation ("CV") of 7 percent to account for variations in weighing accuracy.

16. In making a calculation for compliance purposes, MSHA allows a CV of 11 percent to account for variations in the results associated with the use of X-ray diffraction technology.

17. The MSHA Denver laboratory weighed the sample to determine the weight of the total sample. The X-ray diffraction process was used to determine the weight of the silica in the sample. The silica weight was divided by the total sample weight and multiplied by 100 to determine the percentage of silica in the sample.

18. The threshold limit value (the "TLV") for silica bearing dust in  $\text{mg}/\text{m}^3$  is determined by placing the percentage of silica into the following formula, which is found in the 1973 ACGIH Threshold Limit Value Manual:  $10 \text{ mg}/\text{m}^3$  divided by the percentage respirable silica+2. MSHA then multiplies the TLV by 1.2 for respirable silica bearing dust samples to attempt to assure a 95 percent confidence level, and to attempt to account for the co-efficients of variations described in Stipulation Nos. 12, 15 and 16. The 1.20 error factor is found on page A-11 of the MSHA Health Inspection Procedures Book. The result of this calculation provides the exposure limit ("EL") which MSHA utilizes for enforcement purposes in comparing the results of the single eight-hour time weighted average sample to the EL.

19. To determine whether a sample taken over an eight-hour period demonstrates an eight-hour time weighted average concentration of respirable silica bearing dust that is above the calculated EL, MSHA divides the total weight of the contaminant by .816. The .816 value is a result of multiplying the pump flow rate in liters per minute (1.7), the sampling period in minutes

(480 minutes) and 0.001 l/m<sup>3</sup>. This formula is found on page A-4 of the Health Inspection Procedures handbook.

20. The violation was abated on March 14, 1995.

21. Asarco is a large operator, the proposed assessment will not affect its ability to stay in business, it had a better than average history of compliance, and the citation was abated in good faith. The parties agree that the proposed \$178.00 penalty is appropriate if the violation is upheld.

22. The parties agree that due to a clerical error the penalty was paid inadvertently by Asarco but that such inadvertent payment does not moot this case or affect Asarco's ability to challenge the citation at issue.

#### APPLICABLE REGULATORY PROVISIONS

1. 30 C.F.R. § 57.5001(a) provides as follows:

§ 57.5001 -- Exposure limits for airborne contaminants.

Except as permitted by § 57.5005 -

(a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. This publication may be obtained from the American Conference of Governmental Industrial Hygienists by writing to the Secretary-Treasurer, P.O. Box 1937, Cincinnati, Ohio 45201, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration. Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

2. 30 C.F.R. § 57.5005 provides in pertinent part as follows:

§ 57.5005 -- Control of Exposure to airborne contaminants.



Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

(b) A respirator program consistent with the requirements of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969," approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration . . . ."

#### THE SECRETARY'S EVIDENCE

##### Margie E. Zalesak

Ms. Zalesak has been Chief of MSHA's Metal/Nonmetal Administration's Health Division ("Health Division") since July 1993. (Secretary's Exhibit 1; Tr. 59-60). She began working in the Health Division in 1981, and became a certified industrial hygienist in 1983. (Tr. 61-62, 67-68). From 1978 to 1981, she was a compliance officer for OSHA. (Tr. 65-66). Ms. Zalesak is a member of ACGIH and she was a member of ACGIH's TLV Committee between 1984 and 1995. (Tr. 68, 74). Ms. Zalesak was offered as an expert witness in industrial hygiene practices; in sampling strategies and the use of sampling equipment in industrial hygiene; and in MSHA's regulatory practices. (Tr. 77-80).

Ms. Zalesak testified that one mission of the Health Division is to ensure the health of metal/nonmetal miners by conducting inspections to determine whether mine operators are following MSHA regulations on airborne contaminants. (Tr. 38, 80-81). She emphasized that the Metal/Nonmetal Administration is one of two enforcement arms within MSHA, the second being the Coal Mine Safety and Health Administration. The airborne contaminant regulations in Sections 57.5001(a) and 57.5005, have been promulgated and are enforced by the Metal/Nonmetal Administration. They are not applicable to coal mines. (Tr. 81-83, 85).

Ms. Zalesak noted that the distinction between metal/nonmetal and coal mining operations with regard to airborne contaminants was made when Sections 57.5001(a)/.5005 were first enacted; when the Department of the Interior, Bureau of Mines -- MSHA's predecessor -- proposed an air quality standard expressly relating to metal/nonmetal mines, 34 Fed. Reg. 667, 677 (Jan. 16, 1969). (Secretary's Exhibit 2; Tr. 92-94). A final version of that proposal was adopted in 1970, 35 Fed. Reg. 18590 (Dec. 8, 1970). (Secretary's Exhibit 3; Tr. 94-95). And, in 1974, the current language in Sections 57.5001(a)/.5005 was adopted, with the only substantive change to the 1970 sections being incorporation by reference of the publication "entitled 'TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973,' pages 1 through 54 . . ." ("TLV for 1973") into Section 57.5001(a), 39 Fed. Reg. 24319 (July 1, 1974). (Secretary's Exhibit 4; Tr. 97-98). Ms. Zalesak further testified that since 1974, Sections 57.5001(a)/.5005 have not been changed and they were the regulatory requirements relied on by MSHA when the citation in this case was issued on March 16, 1994. (Tr. 99, 101, 275).

Pursuant to Sections 57.5001(a)/.5005, Ms. Zalesak indicated that MSHA regulates airborne contaminants in the form of dust which can be inhaled and have hazardous effects on miners when inhaled. Specifically, Section 57.5001(a) prohibits any miner from being exposed to such airborne dust contaminants beyond certain limits set out in TLV for 1973. Section 57.5005 is a sister regulation in that it requires mine operators to use engineering and administrative controls for reducing harmful exposure and, in certain circumstances, to provide miners with approved and fit-tested respiratory protective equipment. She stated that Section 57.5005 comes into play only when possible violation of Section 57.5001(a) is at issue. (Tr. 85-88).

Ms. Zalesak considers a TLV, as incorporated into Section 57.5001(a) from TLV for 1973 (Secretary's Exhibit 8), to be "an occupational exposure limit" ("OEL") for a miner. Its value can be a "ceiling" or never to be exceeded limit in terms of exposure. Or, its value can be a time-weighted average ("TWA") thereby permitting exposures over the TLV value ("permissible excursions") either during a miner's work shift ("TWA-TLV") or only for short periods during the work shift, i.e., a short-term exposure limit ("TWA-STEL"). (Tr. 105, 107, 110, 212-214). In this case, the airborne contamination citation was for "respirable silica bearing dust" which Ms. Zalesak stated is in the TWA-TLV category and is on page 32 of TLV for 1973. (Secretary's Exhibit 8 at Mineral Dusts, Silica, Crystalline Quartz). The TWA-TLV's excursion factor is on page 52. (Secretary's Exhibit 8 at Appendix D). She testified that MSHA has

always used this TWA-TLV in enforcing Sections 57.5001(a)/.5005 respirable silica bearing dust violations. (Tr. 202-203, 215-216, 359).

Ms. Zalesak testified that when MSHA samples miners for airborne contaminants in the TWA-TLV category, the sample is collected during the miner's work shift: "from the time that the miner comes on board to the time he goes home." MSHA refers to this as a "full shift sample" -- frequently referred to in this proceeding as a "single shift sample" -- and it is the sampling procedure used in the "majority" of silica cases. (Tr. 110, 112, 529). MSHA does not consider the full shift sampling procedure as a means of showing the miner's average exposure over an extended period of time, rather that "[t]he sample is accurate for what that miner was exposed to that day . . . ." (Tr. 115-116, 179, 532). "[W]e're not determining whether the person will get a disease." "The exposure was set [by MSHA in Section 57.5001(a)] to prevent development of the disease . . . . [I]f we keep exposure below that, then there will be an ultimate elimination of disease." (Tr. 3321-3322).

She further explained that MSHA is aware that there will be "temporal" variations in airborne contaminant concentrations for sampled miners; that from day to day, changes in activities, production, and engineering controls, for example, may affect the level of exposure. MSHA does not take this into consideration for enforcement purposes; again, because evaluation is being sought of the risk for the miner on the sampled day. (Tr. 339-349, 539-542, 3317-3319).

Ms. Zalesak acknowledged that in connection with TWA-TLVs, reference is made in TLV for 1973 to a "7 or 8-hour workday and a 40-hour workweek." (Secretary's Exhibit 8 at 1 (emphasis added)). Based on her reading of TLV for 1973 and knowledge of ACGIH; and her professional knowledge of the issues of novel work schedules and articles on that subject, she stated that when ACGIH was developing TWA-TLVs, it was assuming that the miner being sampled would be working a "traditional" work shift which is a 8-hour day/5-day workweek. By including the 40-hour workweek language in TLV for 1973, therefore, ACGIH was attempting "to put the parameters about which you could rely of this [TWA-TLV] limit to be protective." She further acknowledged that TLV for 1973 also contains the sentence: "In some instances it may be permissible to calculate the average concentration *for a workweek* rather than for a workday." (Secretary's Exhibit 8 at 2 (emphasis added)). But, although ACGIH "clearly said there might be situations where it was permissible . . . ACGIH hasn't come forward with guidance on a workweek." She is unaware of any statement by ACGIH that the 40-hour period is permissible for sampling for the silica TWA-TLV. MSHA does not use the "workweek" concept. (Tr. 220, 228, 246-250, 261-268, 468-469, 565, 689, 711-712; Sec. Exhs. 5, 15-18).

Ms. Zalesak also acknowledged that the 1973 TLV publication contains the statement that TLVs "should be used as guides in the control of health hazards and should not be used as fine lines between safe and dangerous concentrations." (Secretary's Exhibit 8 at 1). She stated, however, that when MSHA uses TLVs as the standard for issuing citations pursuant to its regulations, the agency is "not making a determination whether the individual is getting disease."

Rather, the TLV is used as "the guiding rule" for "the limit that people should not be exposed above." (Tr. 467-468).

Regarding silica as an airborne contaminant, Ms. Zalesak stated that in the mining environment it is "ubiquitous" and silica particles can be produced throughout the mining process. Although silica particles of various sizes are capable of being inhaled, only particles 10 microns or less are able to reach the lungs. She delineated how it is this fraction of silica particles which presents a health hazard to miners. Also a health hazard is dust, referred to in TLV for 1973 as "nuisance" dust. (Secretary's Exhibit 8 at 5). The instant citation speaks to "respirable silica bearing dust" because TLV for 1973's TWA-TLV for silica includes nuisance dust in combination with silica as an airborne contaminant. (Tr. 122-123, 140).

Ms. Zalesak described the way in which silica particles in the lungs can cause silicosis, either in its acute form or the more typical, chronic, form. (Tr. 139, 142-146; Secretary's Exhibit 5). She described the potential hazardous effects on lungs of silica particles and dust combined. (Tr. 154, 156). As an industrial hygienist, she has concluded that although there might not be a significant likelihood of developing silicosis from a single overexposure to respirable silica bearing dust, caution should be taken to avoid it. She pointed out smokers and individuals having other kinds of pulmonary diseases would probably be more vulnerable to overexposure. Moreover, silica particles have a "half life" of three or four years and, thus, if they remain in the lungs they pose a threat after even only one overexposure. In effect, overexposure is a "risk that the person would be taking, almost like a little health accident that you're not sure what the consequences are." In addition, "there is . . . no way to stop the progression of . . . [silicosis] once the silica exposure is ended." There are also other possible negative health effects, such as bronchitis or a predisposition to bacterial infections such as tuberculosis. (Tr. 147-152).

In enforcing Sections 57.5001(a)/.5005, Ms. Zalesak testified that the agency considers the regulations as requiring a certain level of performance by mine operators. The regulations specify, in general, what the operators should do to protect miners from airborne contaminants -- production, administrative, engineering controls -- but they do not dictate "in cookbook fashion" how this should be done. "[I]t's the operator's responsibility to ensure compliance with the standard. (Tr. 180-188, 3314-3315).

In enforcing the required level of performance, she pointed out that MSHA currently has 308 inspectors to oversee approximately 11,000 metal/nonmetal mines and protect the health of about 220,000 miners. (Tr. 60, 83). Hence, Ms. Zalesak explained that MSHA utilizes an audit approach. Its inspectors and field office supervisors rank metal/nonmetal mines for airborne contamination and spot check them on a one-, three-, or five-year basis depending on the perceived risk factor. Data routinely collected and maintained by MSHA -- "Personal Exposure Data" ("PED") -- which lists airborne contaminant samples taken by MSHA at each mine, are used for ranking purposes. (Tr. 157-158, 167-168, 444-447, 3386; Secretary's Exhibit 32).



Ms. Zalesak stated that PED historical information is not considered by MSHA in determining whether to issue a citation when a sample is made because the sample represents the airborne contamination situation at the mine on the day the sample is taken. But, she noted that in this case as to the Young Mine, for ranking purposes in terms of conducting a spot check, the mine "had a history of compliance that there's not ongoing problems." And, notwithstanding the citation that resulted, the Young Mine still maintains a low ranking. According to Ms. Zalesak, for MSHA, the citation uncovered "a problem with the controls" which has "been fixed". (Tr. 496-497).

Ms. Zalesak testified that the inspectors in charge of spot checks may or may not be industrial hygienists; however, they are trained by MSHA and the procedures to be followed are in written form in a handbook: Health Inspections Procedures Handbook. (Tr. 278-281, 580, 704-705; Stip. 7). In the context of a TWA-TLV -- as in this case, silica -- she described the procedure whereby at the mine to be audited, the inspector will select the individual miners to be sampled by singling out high risk occupations and, next, selecting miners "in every area and location" of the mine. Throughout the work shift during which the sampling is made, the inspector will follow procedures -- including preparation of written field notes -- to ensure and document that the work shift is a "representative shift" during which the miner is performing "normal activity." The inspector will also be checking the sampling equipment to ensure its proper operation. She emphasized that should there be departures from the norm either as to activity or equipment, the inspector is authorized to void the sampling. (Tr. 168-170, 172-176, 300-304, 580).

Ms. Zalesak further described the sampling equipment as "personal," in that the equipment is worn by the miner clipped to clothing near the head -- in the case of silica, "it would be on the collar" -- throughout the work shift. The sample thus obtained is considered by MSHA as indicative of the amount of airborne contaminants on that particular day which were in the miner's breathing zone: "the 2-foot radius around the head." This is a "standard industrial hygiene" concept for obtaining "a sample from where the person would be breathing." (Tr. 171-172, 178, 293-294, 299-300, 355, 3335). She emphasized that MSHA is not attempting to determine what is going on in different parts, environments, of the mine; rather that "[o]ur exposure limits are personal samples. We're determining - - when we're sampling, we're auditing that [particular miner's] position to ensure compliance with the standard. We would want everyone to be within the standard, but we would take samples to determine that." (Tr. 3319).

She stated that MSHA is aware of, but does not take into consideration "spatial" or "environmental" variations which occur because airborne contaminants are dispersed through the environment and the level of contaminant concentration from one area to another may vary because the areas are not identically located relative to the generating source. This can cause variation in sample results obtained from personal sampling equipment simultaneously attached to the right and left lapels and, hence, when sampling equipment is within the miner's breathing zone but in different areas. However, Ms. Zalesak emphasized that "I don't know of any group,



including NIOSH, that gives any recommendation on that, on side-to-side variability. We follow standard industrial hygiene practice." (Tr. 349-352, 640-645, 653-654, 3329-3332).

She further opined that even if ten samples were collected from ten different places on the miner and they produced different results, "they would all be accurate [as opposed to "the absolute true"] samples if the pumps were running and everything was correct . . . [o]f what they measured that day of - - of where they drew and how they were rotated and, you know, how the person moved." (Tr. 709-710). But, she stated that an average of the results of such multiple pump samples would not be appropriate. The more "bulk you hang on the miner, the more likelihood that you're going to alter their work behavior . . . [and] it would affect the result." Moreover, an averaged result could be distorted by the miner's work activity. "If I had a worker that was having to bend over and lean into an activity where the face was forward, and he was right-handed or left-handed, the orientation of the sampler to where the point source [of airborne contaminants] on that side would probably be more indicative of where he was breathing than the one on the other side." (Tr. 3333-3335).

The components of the sampling equipment -- pump, hose, cyclone -- and their functions are described. Ms. Zalesak stated that in her opinion, the "10-millimeter Doliver" cyclone, which contains the filter collecting the material to be tested, is consistent with directives in TLV for 1973. (Secretary's Exhibit 8 at 34 n.K). Also described are the procedures the inspector follows when removing the filter from the sampling equipment and submitting it, along with a control filter, for laboratory analysis. (Tr. 218, 282, 293-299, 301-302, 310-312, 561; Secretary's Exhibit 19).

Returned to the inspector are laboratory results indicating "the weight gain" -- the weight of material which was accumulated on the filter and -- as in this case involving sampling for silica -- "the weight of the crystalline silica." From this, the inspector calculates the appropriate TLV from TLV for 1973. (Tr. 358-360; Secretary's Exhibit 24).

The calculation procedure takes into account "sampling and analytical" errors or variations (the "SAE"), with MSHA requiring that the TLV be modified by an "error factor" in order to assure a 95% confidence level; in other words, "to assure that there's not an unfair penalty on the operator." (Tr. 3320-3321, 3394). This is the "standard of care" which NIOSH recommends in their sampling strategy for compliance purposes. For silica, it requires multiplying the TLV by 1.2 to account for equipment variability and limitations in connection with: "pump flow rate" (Stip. 12); "weighing accuracy" (Stip. 15); and "X-ray diffraction technology" (Stip. 16). This calculation gives the "exposure limit" ("EL"). Finally, when the sample is a full shift sample, MSHA requires a calculation to determine whether the sample taken over an 8-hour period demonstrates an 8-hour TWA concentration above the calculated EL. The result of this is called the "shift-weighted average" ("SWA"). When the SWA is compared with the EL, the SWA value must be higher than the EL value to substantiate a violation of the TLV standard in Sections 57.5001(a)/.5005. (Tr. 361-378, 523-524, 527, 625, 717; Stips. 7, 18, 19; Sec. Exhs. 25, 26).

If the SWA is higher than the EL, the inspector has no discretion other than to determine that enforcement action is warranted. (Tr. 584). No consideration will be given to TLV results for other miners/other locations at the mine being audited which may have been obtained the same day, or the day before or after. (Tr. 608). Ms. Zalesak further testified that after the abatement date in a citation, MSHA's policy is to investigate whether the mine operator has taken corrective action. If the inspector concludes that the action was reasonable, another full shift sample would be taken to check for airborne contaminants for the occupation originally sampled and upon which the citation is based. If that sample gives results which are below the EL, the citation will be terminated. (Tr. 412-414).

With regard to alternative enforcement approaches, Ms. Zalesak rejected the suggestion that a mine's PED historical information could be used to show an "average" exposure level for a particular occupations. It would be unreliable "because you wouldn't have any additional data as to the materials being handled, what the engineering controls were, were there changes through time to protection. It would give you a historical perspective, but it would not be protective of the miner to rely on it without taking a sample." MSHA is looking "to the characteristics of the worker that [sampling, not historical] day to determine if the . . . [mine operator was] in compliance with the standard on that occupation, that person." (Tr. 450, 607, 708-709, 3336-3338).

She also rejected the concept of a "rolling average": for example, six samples over a year taken every other month and then averaged to determine compliance. First, once the series of sampling started, there would be "too many ways . . . for the operator to be able to manipulate that data, to alter the situation so it does not reflect the actual exposure of the miner." "[I]n my opinion, there are natural tendencies, much like trying to catch someone speeding if there's cops - - you know the cops are coming up and you've seen one . . . . You can change production, You can change how often you hose down things. You can - - many things the operator has control over that would not make it a spot audit inspection that would give us a picture as to what the people were routinely working on." (Tr. 3340-3341, 3344-3345). Second, it would have an impact on MSHA's "ability to respond to immediate workers' complaints for acute situations." "It would commit [MSHA] resources to just a very narrow focus." With some 300 inspectors and 22,000 miners, "to do a sample at 11,000 mines six time that year, by my calculations, it looks like we would be doing nothing but doing the sampling, ignoring all the other activities." And, "[o]ur inspectors do accident investigations. Some inspectors do special investigations, complaint hazard investigations, complaint follow-up, compliance, quite a number of activities." In addition, she concluded that with "constraints by Congress on our budget," it would not be "feasible" to increase the number of inspectors. (Tr. 3366-3371, 3374). Third, Ms. Zalesak stated that she did not believe that MSHA would be applying TLVs as required, which is in terms of "a workday in a work shift." (Tr. 3372-3373).

Dr. Paul Hewett

Dr. Hewett, an 18-year employee of NIOSH, is an acknowledged expert in the areas of sampling strategy, data interpretation, and industrial hygiene practices. (Tr. 1651; Secretary's Exhibit 58). Dr. Hewett testified that OEL refers to a "concentration and set averaging time" and each OEL "will have a recommended averaging time that is recommended by the originator or deviser of the OEL." (Tr. 1665-66). "The rule of thumb is that it is correct to utilize the averaging time specified by the originator of the OEL, otherwise the level of protection provided by the OEL as you've reinterpreted it may be different from that intended by the risk assessor or the originator of the OEL." If, he noted, the OEL was based on an intended averaging time of eight hours, the practice of averaging multiple shifts, which might equal the OEL, would reduce the level of protection as intended by the original risk assessor. (Tr. 1666-67).

He stated that ACGIH denominates OELs as TLVs. Other agencies use different terms for the same concept; *e.g.*, NIOSH refers to "recommended exposure limits" (RELs), which it defines for respirable silica as "a time-weighted average for up to 10 hours per day during a 40-hour workweek." (Tr. 1668-71, 1677; Secretary's Exhibit 59 at 3). NIOSH considers that if either specified work period were exceeded by an employee, the given NIOSH REL for silica (as applicable to silicosis) "might not provide the level of protection that NIOSH assumed it would for up to a 10 hour per day 40-hour workweek." (Tr. 1677).

A TWA, according to Dr. Hewett, is a "common industrial hygiene concept" of the "average exposure over some period of time hardly ever exceeding the full shift"; with the exception being instances where STELs are recommended. (Tr. 1682-84). To his knowledge, the vast majority of OELs set by major agencies are meant to apply "to each single shift and not to the average of multiple shifts." "[T]he vast majority of the ACGIH TLVs, the OSHA PELs [permissive exposure limits] certainly and NIOSH RELs are to be interpreted as single shift limits; whether or not there is an . . . [OEL] out there that is defined as a long-term limit remains to be seen, and there are some that are certainly enforced as long-term limits." He does not believe that ACGIH's TWA-TLV for silica was intended to be enforced as a long-term average. (Tr. 1692-93, 1863-64, 1888-89, 3452-53, 3643).

During the 1960s, development of the personal sampling pump made possible "measurement" of TWAs by "breathing zone" samples. He explained the concept of "breathing zone" and its various aspects. He stated that it is part of the state of the art in the industrial hygiene world to sample within a "breathing zone." (Tr. 1835-37). And, "we're pretty much utilizing the same concept that the field arrived at in the late '60s, early '70s; that is, placing a respirable dust sampler within a person's breathing zone . . . [and] having that sampler remain on the person for the duration of the shift." (Tr. 1685-87).

Dr. Hewett agrees with the general proposition that a sampler measurement from the breathing zone will accurately represent the exposure of the individual being sampled, although it does not represent what is entering the individual's nose and mouth or is being deposited in the

lungs. (Tr. 1898-99). He explained that "accuracy," in the industrial hygiene and environmental sciences, reflects "both precision and bias" -- with "precision," in general science, denoting the repeatability of measurements and having nothing to do with how close to the true value the measurement is. (Tr. 1900, 1902). Further, he stressed that it does not follow from the foregoing that there is no concern as to what the individual "is actually breathing." (Tr. 1905). The breathing zone sampling device is designed to "measure that fraction of any dust cloud which is capable of being held - - inhaled by a general worker, a hypothetical, if you will." It is right now, technologically "impossible to measure accurately what any single individual is exposed to . . . . In fact, this concept of true worker exposure is a mental concept." "The measurements that are collected by any industrial hygienist anywhere . . . are best estimates to what individuals are exposed and are used for risk management purposes, are used to determine whether or not an environment appears to be acceptable or not acceptable. Nobody measures true exposure. I've not seen it done, and I doubt that it'll be done in the near or distant future." (Tr. 1915-16, 2049-50).

Hence, "accuracy" -- when it comes to breathing zone measurements -- is a concern with how accurate the measurement device itself is. NIOSH's concern, therefore, is with "the accuracy of the sampling and analytical system." (Tr. 1905, 1910, 1918). He further elucidated that the "well-accepted definition" of "method accuracy" is that "one must have a sample and analytical method that will 95 percent of the time get you within plus or minus 25 percent of the true concentration at the location of the sampling device." The 25 percent, rather than a lesser percentage, is dictated because "[w]e're trying to measure concentrations that vary across a work shift that for some substances can be difficult to measure in many varying workplaces. We're trying to come up with a reasonable concept of method accuracy that most labs can attain to." It is Dr. Hewett's understanding that this accuracy criterion can be met for silica. (Tr. 3595-97).

Dr. Hewett agrees, then, that environmental variability -- such as the side-by-side factor -- in obtaining measurements will not be taken into consideration in this approach to "accuracy." (Tr. 1903-05, 1918-20, 2053-54). He emphasizes, nonetheless, that "to the extent that it's feasible with today's technology . . . we are trying to estimate the individual's true exposure . . . ." For example, it is important "to sample as close to the individual's mouth and nose as possible." (Tr. 1906-08). Dr. Hewett does not agree, however, that an average of multiple measurements in the breathing zone necessarily will provide "a better understanding" of the real amount of dust that a miner is exposed to. Rather, you would have a better understanding of "what the exposures are across" the area between the multiple samplers. (Tr. 1909, 2047-48). While he does not dispute the general proposition that more, instead of less, information is useful in fashioning a more accurate estimate of exposure, he considers that it would be a waste of resources to place multiple samplers in an individual's breathing zone. "It would be a much better effective use of those resources to sample multiple people rather than the same individual multiple times within the same work shift; [but] that is not standard industrial hygiene practice. I know of nobody that does this." (Tr. 1910-11).



Dr. Hewett is familiar with a study done by Drs. Corn and Hall in which they analyzed paired samples which were gathered from metal/non-metal and coal mines. (Tr. 3551-53). Dr. Hewett's analysis of their data, however, leads to the conclusion that it shows "more variability from shoulder and shoulder than MSHA sees from miner to miner." (Tr. 3554, 3560-86; Secretary's Exhibits 81-85). Nonetheless, assuming that the amount of shoulder variation exists as reported by Drs. Corn and Hall, further analysis of their data suggests to Dr. Hewett that "if the exposure is less than 1, more times than not, either of the pair will tell you that." (Tr. 3587-91; Secretary's Exhibit 86).

Dr. Hewett agrees that day-to-day, temporal, variability is not accounted for in the definition of "accuracy" he has indicated above or in MSHA's sampling system. As to the suggestion that multiple samples over repeated work shifts for an individual would be preferable for enforcement purposes, there is discussion of work in this area by Dr. Robert Spear. Dr. Hewett does not agree that Dr. Spear's work undercuts single shift sampling. (Tr. 1920-53, 2052-53).

Specifically, with regard to ACGIH's TLV for 1973 and a requirement for single shift sampling, Dr. Hewett testified that such an interpretation is supported by ACGIH's statement that "excursions above the TLV are permissible provided they are balanced by lower exposures during the work shift . . . ." ACGIH is "not talking about between shift excursions, they're talking about within shift excursions . . . ." (Tr. 1773, 1775). He concedes that single shift sampling is not explicitly stated as a requirement in TLV for 1973. (Tr. 3630-31).

Dr. Hewett testified that in 1991, the American Industrial Hygiene Association (AIHA) Exposure Assessment Strategy Committee recommended that "industrial hygienists control exposures to the extent that one is 90 or 95 percent confident that no - - that 90 or 95 percent of the measurements are less than the single shift OEL." The Committee also stated that "it is inappropriate to simply compare the long-term mean or the long-term average to the single shift OEL. But if you are so inclined to do so, they recommend that it is feasible or perhaps permissible to take 1/3 of the single shift OEL and use that as your longterm limit." (Tr. 1693-96, 1718, 3479-81; Secretary's Exhibit 61 at 61). Dr. Hewett agrees with this concept, that "one maintain a work environment to the point that the majority of the exposures are less than the single shift average . . . . [It] is a concept that goes back decades." (Tr. 1700).

He further emphasized, therefore, that the "standard approach" in industrial hygiene has been "to define a reasonably controlled work environment" as one where on a daily basis overexposure occurs no more than 1 in 20 times. Stated differently, as one where no more than 5 percent of the shift time-weighted average (TWA) exceed the OEL. (Tr. 3453-56, 3632-33). Dr. Hewett is of the opinion that "the long-term exposure for any individual worker subject to exposures controlled to that model is well below the relevant standard." (Tr. 3464). If the control model is, as has been suggested, one of "averaging samples," and thereby allowing exposure to equal the standard, the result would be a "long-term exposure that's 2-1/2 times



greater than that which would result if exposures are controlled in the normal fashion." (Tr. 3464-65; Secretary's Exhibit 75).

Dr. Hewett believes that it is reasonable to collect a single measurement to accurately represent exposure to the individual. He believes that "[o]ne can estimate the average exposure across a single shift using a reasonably accurate sampling and analytical device placed in the breathing zone of a worker and worn for the full shift. It's accurate enough for practical purposes." Dr. Hewett explained that "mean or average is basically the balance point of a distribution . . . . In terms of a time-weighted average [TWA], it's the integrated average of exposures across the work shift." Thus, the TWA single-shift measurement, "is an estimate of the average exposure across that shift at the location where the device was placed." He distinguished, therefore, that if one is interested in "long-term exposure" -- "[i]f indeed you have a long-term standard . . . ." -- multiple measurements over time should be collected. (Tr. 1966, 1969-71, 1975, 2051-52). It is "axiomatic": "single measurements are inaccurate estimates of long-term exposure . . . ." This applies to the mining industry in general. (Tr. 1962-63).

There is discussion of NIOSH's manual regarding assessment, by both an employer and a regulatory agency, of a single contaminant sample. Dr. Hewett explained how NIOSH procedures would apply to the present facts and he concludes that pursuant to such application, the measurement here exceeded the TLV. (Tr. 1778-1817; Secretary's Exhibits 62-64). He concedes that NIOSH's manual does not say that sampling for silica should only be one shift, but it does discuss how you use a one-shift sample. (Tr. 1837-38, 3631-32). NIOSH's manual was developed for OSHA and its PELs; there is no reference to MSHA. In Dr. Hewett's opinion, however, there is no reason why "the strategies or the methods for analyzing exposure measurements [in the manual] could not be applied in other regulatory situations." (Tr. 1842, 2041).

Dr. Hewett testified as to his understanding of how MSHA determines whether a single exposure measurement can be classified as noncompliance. He considers this approach to be equivalent to NIOSH's procedure. He concludes that this case presents a noncompliance measurement. (Tr. 1823-33; Secretary's Exhibits 65-66).

Dr. Hewett is not of the opinion that the average exposure of different workers in the Young Mine between 1980 and 1996, would be significant in determining whether a skip tender is exposed to unhealthy conditions at a particular time, except in an extraordinary circumstance; namely, that the distribution of exposure in all of the mine's work environments is exactly the same and remains the same for a long period of time. He has never seen such constancy and professional literature suggests quite the opposite, that there is always variability. (Tr. 3482-83). Furthermore, Dr. Hewett is unaware of any text or standard reference for industrial hygiene that utilizes measurements "that are few in number that stretch over a 15-year period" for determining whether a particular operation, or individual working in that operation, is in compliance. (Tr. 3493).

As an industrial hygienist familiar with statistics and in response to contentions that MSHA's Denver laboratory is unreliable, Dr. Hewett discussed a statistical comparison he made among two laboratories and the Denver laboratory used by MSHA. All three are rated proficient by PAT standards. (Tr. 3515-36; Secretary's Exhibits 77-79). The comparison showed, in his opinion, that if he "sent a sample to any of these labs, that that measurement would come back to within plus or minus, say, 10 percent of what the reference labs would tell me that measurement would be." "If I had to pick one of these labs to use, . . . I would base my opinion upon proximity to where I am, the cost of the sample, how good their turnaround time, and whether or not they have experience analyzing the measurement or the types of samples that I generate as an industrial hygienist." (Tr. 3536-42).

Dr. Hewett acknowledged that there is language in the TLV for 1973 which says, in effect, that TLVs should not be adopted as fixed or legal standards. (Tr. 1732). He noted, however, that ACGIH stated in its 1995-1996 publication that it does not oppose the use of TLVs in a regulatory context. According to Dr. Hewett, "ACGIH does not apply a rigorous risk assessment policy or framework to the development of each TLV . . . ." ACGIH does not, "like OSHA does," "apply a criterion that they're trying to generate a TLV that results in a level of protection, such that only one person in 1000, such as with the benzene, OSHA PEL, is likely to develop the adverse end result after a lifetime of exposure . . . . These are their [ACGIH's] best estimates for safe and healthy work conditions." (Tr. 1733-34). Therefore, according to Dr. Hewett, while ACGIH might state that TLVs "should not be adopted as fixed or legal standards, it's because in a legal sense you should demand more of the occupational exposure limit than the ACGIH TLV committee imparted to them." (Tr. 1736).

Jerry W. Gregory

Mr. Gregory has been employed at MSHA as a supervisory chemist for the Denver Safety and Health Technology Center Laboratory (Denver lab) since 1984 and prior to that since 1974 as a chemist. Mr. Gregory supervises the day-to-day operations of the lab. The lab's function is to analyze samples collected by the Metal/Nonmetal Division of MSHA such as silica, gases, organic solvents and asbestos. Eighty-five percent of lab activity is analyzing silica samples. Quartz is one form of the family of minerals called silica (Tr. 1177). This silica analysis falls within the category of analytical chemistry. Mr. Gregory was accepted as an expert in analytical chemistry (Tr. 741-54).

The Denver lab assembles the sampling cassettes. They are pre-weighed by the Denver lab prior to being sent to the inspector for collection of silica samples. The pre-weighed cassettes are then sealed (presealed) (Tr. 797). The samples are then collected at the mine by the inspector after noting that the preseal was intact. The cassettes are again sealed (postsealed) by the inspector before they are returned to the lab (Tr. 799). The pre and post seals are to maintain the integrity of the testing process (Tr. 799). The lab receives the samples from the inspector in mailing tubes by regular mail. MSHA Form 4000-29 acts as a chain of custody and as the samples go through each step at the lab, someone fills in a line and initials it (Tr. 758-63).

Secretary's Exhibit 20 is the Form 4000-29 for the Young Mine samples at issue in this case. Each sample has a column on the form. Sample 84926 in column Number 1 is the one that is specifically at issue in this case (Tr. 765). The samples in question were all collected on March 16, 1994 from the Young Mine (Tr. 787).

The samples are returned to the lab and post-weighed to determine the amount of dust collected on the cassettes (Tr. 755). When the sample comes back to the lab, it is initially submitted to a desiccation process which removes the moisture out of the sample but does not remove silica (Tr. 765-67). It is important to remove all the water from the sample to get an accurate weight of the sample (Tr. 767). The lab, however, never examined the issue of how much dust and moisture the samples could collect because of humidity and the lab environment in the time frame between desiccation and the subsequent weighing of the sample (Tr. 946-50). There is a period of approximately 25 minutes between desiccation and weighing (Tr. 946-49).

The Denver lab has an automated robotic weighing system (Tr. 767). This device uses a microbalance which can weigh substances as small as 1 microgram (.001 milligrams) (Tr. 773, 857). The balance is calibrated to a 100 milligram internal standard on a daily basis (Tr. 855-58). The lab then weighs a 200 milligram and then a 300 milligram weight to check the calibration (Tr. 858-61). However, the scale is readjusted by hand and reset to zero between every sample weighing (Tr. 863-64). The test run by MSHA for accuracy of the robotic weighing device was last performed when the device was first set up in 1989. That test consisted of weighing a single filter cone consecutively 50 times. (Tr. 925). The coefficient of variation associated with the robotic weighing device is 7 percent (Tr. 923). This means that a particular reading would be plus or minus 7 percent of a median value that had been determined (Tr. 923).

Through the use of automation and bar codes there is no chance of mistaking different samples (Tr. 769-75). The computer program makes a calculation to determine the weight of the material collected on the cassette. That calculation consists of taking the postweight and subtracting the preweight and then subtracting [or adding] the change in weight for the control filter. (Tr. 777-82). The computer generated weight is then entered onto MSHA Form 4000-29, dated and initialed (Tr. 793). The change in weight of the control filter will usually be in a range of plus or minus 30 micrograms (Tr. 783, 957). In the case at hand, however, there was a 36 microgram loss of weight on the control filter which had to be factored into the above calculation (Tr. 951-52, 957). There are unwritten procedures at the Denver lab for those instances in which the control filter exceeds the 30 microgram range of variation, but they were not followed in this case (Tr. 857-58). The weight change in the filter could possibly have been caused by environmental changes in the lab or the wear and tear of moving and handling the control filter (Tr. 967-68).

The lab uses the NIOSH 7500 Method to analyze for respirable silica dust (Tr. 757). This is an X-ray diffraction technique for analyzing the amount of silica in the samples (Tr. 758). Although Mr. Gregory unequivocally stated on direct that the Denver lab follows the NIOSH

7500 Method, during cross-examination he conceded at several points that the lab did not follow the NIOSH 7500 protocol in testing the Young Mine sample at issue in this case.

After being weighed the sample is assigned a lab number. If the adjusted dust weight on a sample is less than .1 milligrams, the sample is not analyzed for silica (Tr. 794). After being assigned a lab number, the sample goes through a preparation step which is part of the NIOSH 7500 protocol (Tr. 812). In the preparation step, the cassette is snapped apart and the filter is removed (Tr. 804-05). The filter which contains the dust is then put in a centrifuge tube (Tr. 805). The centrifuge tube contains an organic solvent, tetrahydrofuran, which dissolves the filter material and leaves the dust in suspension in the liquid (Tr. 807). The suspension is then agitated in a sonic bath and then filtered through a second filter, a silver membrane filter which is 25 millimeters in diameter (Tr. 808).

After the dust is transferred to the silver filter, an X-ray diffraction analysis is performed to determine the amount of silica in the sample (Tr. 812). In the X-ray process, the sample is irradiated by an X-ray beam which comes out of the X-ray tube. When the X-ray beam strikes the sample, some of the X-rays pass through the sample and some are bent or diffracted from the sample (Tr. 818). The X-rays which are diffracted pass through a slit into the detection system of the instrument (Tr. 819). The signal is then amplified and recorded in the computer or on a printout. (Tr. 819). The intensity of the signal is directly related to the amount of silica present on the filter. The X-ray detector is able to move up and down in relation to the sample (Tr. 818-19).

There are three major diffraction peaks of silica which the lab tries to measure to determine the amount of silica present on the filter. These angles are 26.6 degrees, 20.8 degrees, and 50.2 degrees (Tr. 820). These are characteristic peaks of the silica X-ray diffraction pattern (Tr. 821). The most intense peak for quartz is at the 26.6 degree location. The second most intense peak is at the 20.8 degree location. The third most intense peak is at the 50.2 degree location (Tr. 823-24). The Denver lab would first look for silica at the most intense peak. Next, the lab would then check the second most intense peak to attempt to confirm the first silica measurement, but if there was interference at that peak, the lab would move on to the third most intense peak and so on (Tr. 825-27). Other minerals will peak at different locations, but those locations could be so close to the silica peaks as to cause interference at those locations. Interference is basically caused by other minerals present in the sample besides quartz (silica) (Tr. 828).

The Denver lab encounters interference problems with at least one peak in a sample approximately 50 percent of the time (Tr. 1098). The percentage of samples that have interference at two or three peaks is quite small, although it occurred with the sample at issue here (Tr. 1100-01). Normally, if there was a high quartz reading or readings that did not agree due to possible interferences, the procedure would be to test the bulk sample that was submitted along with the respirable sample in order to determine what the interferences might be (Tr. 1052). However, no bulk sample was submitted with this Young Mine sample, so when



interferences were detected, the normal lab procedure could not be followed and thus they could not determine what was causing the interferences. Mr. Gregory went on to opine that the lab only receives a bulk sample from the field inspector about 50 percent of the time (Tr. 1052-53, 1099).

Normally, if a high quantity of quartz is detected at the first intensity peak, even with no interference present, the lab will reinforce its determination by measuring the quartz at the less intense quartz lines (Tr. 838-39). If the test sample contains a level of quartz above .1 milligram, 100 micrograms, the lab measures all three major quartz lines (Tr. 839). In analyzing the instant Young Mine sample, interference was found at three of the four peaks looked at (Tr. 1069). The only one without interference was the 26.6 degree peak which is the most intense peak for silica (Tr. 1069). But because there was no bulk sample, and there was interference at all the other three tested peaks, there was no way to verify the quartz measurement at the 26.6 degree peak (Tr. 1070-71). Without the bulk sample, there was no way to verify that there was not interference on the 26.6 degree peak as well.

The XRD machine is calibrated every three or four weeks (Tr. 879, 1181-85, 4033). The lab also checks the XRD calibration by using comparison samples on a daily basis but such a procedure is not a "calibration" (Tr. 885-92).

In the testing process, however, the Denver lab does not follow the NIOSH 7500 Method for scanning silver membrane filters through the machine before and after scanning the samples (Tr. 1143-46, 1214). The NIOSH 7500 Method also prescribes running a full scan from 10 to 80 degrees on the respirable sample as well as the bulk sample. Yet, in this case the Denver lab did not follow this procedure for either the respirable sample at issue herein or obviously the non-existent bulk sample (Tr. 1048-50). The lab also does not develop a new calibration curve each day or plot the calibration curve on a daily or even yearly basis as required by the NIOSH 7500 Method (Tr. 1154-55, 1206). The lab also did not match the known silica fingerprint against the sampling results as is prescribed by the NIOSH 7500 Method for respirable samples where interference is suspected (Tr. 1179-80).

Any sample which contains .1 milligram of quartz would be a violation of the TLV (Tr. 839). Once the X-ray results are recorded, the intensity measurement is compared to a calibration standard or calibration line that was developed prior to the analysis (Tr. 840). Then, a standard calculation contained in the NIOSH 7500 Method is performed to arrive at the total respirable dust in the sample (the total amount of quartz) (Tr. 841-42). The lab then sends the results back to the inspector. The lab offers no determination that regulations promulgated under the Mine Act have been violated (Tr. 842).

The Denver lab participates in the proficiency analytical testing program ("PAT") which compares the results of approximately 90 to 100 different labs across the country which test for silica (Tr. 892-93). The PAT program sends out the results to the labs and in each category a "p"



for "proficient" is the best rating a lab can attain. The Denver lab between July 1992 and July 1995 never received a PAT rating lower than "proficient" (Tr. 898-05). (Secretary's Exhibit 46).

Even though the PAT program gave the Denver lab a rating of "proficient," the PAT program would give a grade of proficient if the lab was within plus or minus 3 standard deviations of the program's reference values, which roughly could be a plus or minus 70 percent variation (Tr. 1019-20).

Dr. David L. Bartley

Dr. Bartley, who holds a Ph.D. in Physics, is currently employed by the National Institution for Occupational Safety and Health ("NIOSH") as a research physicist (Tr. 1233, 1239). NIOSH was created along with OSHA under the Occupational Safety and Health Act of 1970 (Tr. 1233). Under the Act, NIOSH has responsibility for conducting research and providing advice for protecting the health of workers in the United States (Tr. 1234). NIOSH has a program called health hazard evaluation which gets involved with collecting samples for airborne contaminants (Tr. 1235). NIOSH has a method for analyzing silica samples known as the NIOSH 7500 Method (Tr. 1237). Dr. Bartley's duties at NIOSH involve determining how to establish the performance of various sampling methods for analyzing gases, vapors, and aerosols including silica (Tr. 1239-40). Dr. Bartley was qualified as an expert witness concerning analytical methods, sampling equipment, and data interpretation over Asarco's objection (Tr. 1258-77).

Dr. Bartley was familiar with continuous flow pumps in general, but not the SKC pump used to collect the sample at issue in this case (Tr. 1279). Dr. Bartley has never used an SKC pump in his research (Tr. 1507). A continuous flow pump is self-regulating, causing a constant flurry through the sampling device (Tr. 1279). The pump is self-regulating in that there is an electronic control that keeps the pump at a constant flow rate (Tr. 1279). The pump also has a pulsation dampener which oscillates and removes instances of fluctuation in the flow (Tr. 1280). Dr. Bartley did not know if the pulsation dampener was functioning on the SKC pump in question (Tr. 1280-81). If the dampener does fail, hypothetically, the filter will pick up less material and the sample would have a negative bias (Tr. 1285-86, 1445).

The cyclone is a part of the sampling cassette. Air enters the cyclone through a tiny aperture. The air is then pulled by a pump taking a circuitous route and eventually coming up through a tube and through the filter (Tr. 1286-87). As the air makes the circular loop along the circumference of the inside of the cyclone, larger particles, because of inertia, cannot easily follow the circular route and get deposited on the inner surface of the cyclone. Some of the particles drop into the bottom of the cyclone, known as the grit pot (Tr. 1287-88). The smaller particles follow the air through the tube and get deposited on the filter (Tr. 1287-88). Any particle big enough to get through the aperture is drawn into the cyclone (Tr. 1289). The optimum orientation for the cyclone is perfectly vertical with the filter at 12:00 o'clock and the grit pot at 6:00 o'clock (Tr. 1308).

The Metal/Nonmetal Administration uses a 10 millimeter Doliver cyclone. Dr. Bartley believes that a small fraction of 10 micron sized particles would make it onto the filter using this equipment, but that the smaller particles will have a better chance of following the airstream lines inside the cyclone and making it onto the filter itself (Tr. 1289, 1321). Secretary's Exhibit No. 52 is a chart created by Dr. Bartley which helps illustrate how larger particles drop and smaller particles rise toward the filter (Tr. 1290-91). For example, if the pump had a flow rate of 1.7 liters a minute and a 10 millimeter nylon cyclone, approximately 20 percent of the 6 micron size particles would actually reach the filter (Tr. 1301-02). The curve on the chart or graph in Exhibit 52 is called a cyclone or sampler penetration efficiency curve; or a sampling efficiency curve (Tr. 1303). The graph only goes up to 8 micron size but there is a small percentage of particles as large as 10 micrometers which do make it onto the filter (Tr. 1303). The nylon cyclone does not act as a perfect cut off point to protect against particles over 10 microns in size from being deposited on the filter (Tr. 1303-04, 1320-21, 1409-10). The flow rate of the pump used to collect the sample at bar (1.7 liters per minute as opposed to 2.0 liters per minute), increases the chances of the filter collecting particles larger than 10 microns in size (Tr. 1519-20).

The NIOSH 7500 Method specifies how a respirable silica sample should be taken and analyzed using X-ray diffraction techniques (Tr. 1325). NIOSH has adopted a standard of accuracy, a goal that the various methods are to meet, which is that 95 percent of the measurements fall within 25 percent of the true value of the concentration (Tr. 1342). The NIOSH position is to try to control the sampling and analytical accuracy through the NIOSH accuracy criterion. This means that only the sampling and analytical variability is accounted for in the NIOSH accuracy criterion. There is no accountability for environmental variability using the NIOSH Method (Tr. 1513). The environmental fluctuations of a contaminant often exceed the random variations of the sampling and analytical procedures by a factor of 10 to 20 (Tr. 1515-16, 1587-89).

The Proficiency Analytical Testing Program ("PAT") is a program that evaluates a lab's ability to analyze samples for use in the industrial hygiene area and to help labs improve their analytical techniques (Tr. 1350-51). One of the samples sent out in the PAT program is silica (Tr. 1351). Approximately 1300 labs participate in the PAT program (Tr. 1351). PAT rates the lab's testing as either acceptable or unacceptable. If the testing of a sample by a lab falls within three standard deviations of the reference lab's results, the lab is given a rating of acceptable. The lab is rated proficient relative to a specific compound like silica if the testing of those samples have been acceptable for a certain period of time (Tr. 1356). NIOSH produces the results of PAT sampling analysis and sends them to the labs (Tr. 1357).

The MSHA Denver lab participated in PAT (Tr. 1357). On average, the MSHA lab sample analysis results were 18 percent less than the reference lab's mean results (Tr. 1371, 1562). The relative standard deviation was 28 percent which means there is quite a lot of variability in the MSHA lab results around the reference mean results (Tr. 1361-62, 1371, 1562).

The Denver lab follows generally the NIOSH 7500 Method for testing samples but does not always utilize bulk samples to check for interfering minerals, which is recommended in that process (Tr. 1418, 1545-49). However, Dr. Bartley believes MSHA should be using bulk samples to identify interferences. (Tr. 1645). Also, he testified that the Denver lab is not accredited by the American Industrial Hygiene Association ("AIHA"); and, although the Denver lab participates in the PAT program, it could never serve as a PAT program reference lab because it is not accredited by AIHA (Tr. 1565-66).

The calibration standard for the X-ray diffraction process uses a standard reference material, alpha quartz, produced by the National Institute of Standards and Technology ("NIST") (Tr. 1389). NIOSH recommends using the NIST calibration standard (Tr. 1391, 1542). Dr. Bartley did not know if you could calibrate an XRD machine using a "solid silica disk" (Tr. 1551-58). Mr. Gregory had previously opined that such a procedure (running a solid quartz sample through the XRD machine) is not actually a calibration (Tr. 890-91). The reference material has a size distribution such that the mass median diameter is on the order of 2 micrometers. The size was selected to match the silica size distribution (Tr. 1389, 1540). X-ray diffraction intensity per microgram of silica is a function of the particle size distribution (Tr. 1539). If the mass median particle size distribution was larger than 2 micrometers, the test would be biased to producing higher results (Tr. 1544).

Not all labs in the PAT program use the same calibration standard which may account for some of the large variation in test results (Tr. 1395-96). For silica, PAT reference lab variability is large. It would be "real tough" for any lab in the PAT program to be rated nonproficient for silica (Tr. 1567-68).

### THE CONTESTANT'S EVIDENCE

#### Dr. Morton Corn

Dr. Corn is a Ph.D. industrial hygienist who is the Director of the Division of Environmental Health Engineering at Johns Hopkins University's School of Hygiene and Public Health. He headed OSHA from 1975 to 1977 (Asarco Exhibit 21; Tr. 2338-40). Dr. Corn was offered as an expert witness in industrial hygiene and regulatory approaches, and more specifically in the assessment and control of occupational hazards respecting the silica content of respirable mine dust (Tr. 2349-50, 2354-55).

Dr. Corn stated that the ACGIH threshold-limit value (TLV) time-weighted average for silica is a long-term and not a short-term average (Tr. 2363). As a chronic disease, short-term exposure limits have no applicability to silica; there is no evidence in the scientific literature that a short-term exposure to a chronic disease agent has a significant impact on the course of a multi-decade disease (Tr. 2365). And the scientific community recognizes these are long-term standards, since they are promulgated against the background that disease resulting from overexposure takes decades to develop (Tr. 2363-65). The standard is derived from

epidemiological studies over lifetimes (Tr. 2932-33). No "ceiling value," as that term is used by industrial hygienists, exists for silica exposure (Tr. 2365-66).

Based on a summary of OSHA and NIOSH measurements of respirable dust samples containing crystalline silica collected at the Asarco Young Mine between 1980 and 1995 (Asarco Exhibit 27), Dr. Corn had concluded that the mine was "well within" compliance with the ACGIH TLV (Tr. 2407). The ratio of the concentration to the exposure limit showed just two samples that exceeded the limit during that period (Tr. 2407-08). He concluded that the dust was well within the MSHA standard (Tr. 2407). Seven samples were taken respecting the skip tender -- enough to calculate a mean -- and the ratio of his exposure to the limit was approximately one-half (Tr. 2408-09, 2928-29). Further, the ratio of silica concentration to the exposure limit, .29 (Asarco Exhibit 27; Tr. 2933), led Dr. Corn to conclude that the people in this mine were, by a good margin of safety, exposed to lower dust levels when compared to the ACGIH TLV (Tr. 2934). He concluded that the mine adheres to the MSHA standard and that the exposure of the skip tender adheres to that standard (Tr. 2930).

Dr. Corn also visited the Young Mine. His purpose was to get an overall feel for the mine and, more particularly, for the skip tender position (Tr. 2355-56, 3039). He had earlier reviewed the results of sampling in the mine performed by MSHA and NIOSH (Tr. 2356). Those measurements were the primary determinant in forming his conclusions; the visit was merely "confirmatory" (Tr. 3034) and involved no measurements (Tr. 2915).

In his visit Dr. Corn attempted to determine the nature of the dust sources and the control of dust and to observe the circumstances under which the skip tender performed his duties (Tr. 3020-21). He observed full skip filling (Tr. 3023-24). He noted that the mine material, which falls into a chute, has a tendency to lock up and not flow to the skip car. The skip tender utilizes a "high pressure" water hose to lubricate it (Tr. 3043). About 60-70 percent of the time he used that hose. While the primary purpose of the hose may not be dust suppression, its use constituted a "very effective" dust suppression technique, Dr. Corn stated (Tr. 2357, 2905-09). Assisting in ventilation were an auxiliary axial flow fan adjacent to the skip tender and an optional respirator (Tr. 2357, 2760, 2910-12). Additionally, two airshaftways behind the operator supplied and removed air (Tr. 2915). Based on his observation and questioning, Dr. Corn stated that he had observed a "representative" day in terms of dustiness (Tr. 3025). He concluded that the Young Mine was a wet and low-dust mine (Tr. 2356, 2922) and that the workers were not at excess risk (Tr. 2955).

In his view, one sample is neither significant nor indicative of what is happening in a mine (Tr. 2409, 2944). It does not offer any insight into understanding silica exposure in a mine (Tr. 2378), and "doesn't tell me anything about this person's exposure" (Tr. 2954). If you take one sample, "[y]ou literally don't know where you are" (Tr. 2392); it is "meaningless" (Tr. 2408). Additionally, it is not "scientifically reasonable" to use a single sample to determine compliance with the ACGIH TLV for silica (Tr. 2389-90). No regulatory strategy can rely on one sample



(Tr. 2962). Nor is it scientifically valid to measure one full shift sample in determining compliance with the ACGIH standard (Tr. 2366-67).

Dr. Corn noted that ACGIH has suggested that samples may be taken for a week to help understand a work environment and to try to reasonably approximate a long-term average (Tr. 2803-04). Yet you must obtain multiple samples (Tr. 2804-08). The average for the 1980-1995 period of time as expressed in Asarco Exhibit 27, nonetheless, is "far more relevant" than one week. However, fewer samples are needed to determine whether a mine meets a standard than to accurately determine exposures over a period of time (Tr. 2871-72). Dr. Corn acknowledged that recent samples showing significantly different numbers than older samples might indicate some change in the level of exposure. But, he added, a sufficient confidence level for the latter period would nonetheless require multiple samples (Tr. 2947-48).

Dr. Corn was asked whether the average level of contaminant at a particular point could be determined by taking a full eight-hour sample and then averaging the total mass collected. He replied that it could not because there is fluctuation at that point. The worker is moving around, and thus his environment is changing (Tr. 2872-77). You must measure the different environments, which is the integrated measure of the whole mine (Tr. 2932).

Dr. Corn conceded that the ACGIH silica standard involves uncertainty due to variation (Tr. 2374). Dust measurements can vary greatly. The major sources of variability are the fluctuating environment, techniques for sampling, and time (Tr. 2372-74). Variation between mines is perhaps the largest environmental variable (Tr. 2374, 2388, 2810). A study funded by the American Mining Congress and the Bituminous Coal Operator's Association (Tr. 2436) and performed by Dr. Corn and others in which he performed paired sampling -- two samples on opposite lapels of a miner's breathing zone in a mine environment -- found "significant variation" (Tr. 2382). He found at least a 25 percent variation in the percent of free silica in paired samples in 50 percent of the respirable mine dust samples (Tr. 2384). Variation was chiefly associated with occupation, time, and sampling or statistical error (Asarco Exhibit 23; Tr. 2386-87, 2781). Dr. Corn concluded that in order to come within 1½ percent of the true value of free silica, six paired samples were needed (Asarco Exhibit 23, figure 5; Asarco Exhibit 22; Tr. 2383-84, 2386, 2798, 2856). Six samples "gives you the confidence of the average that you get" (Tr. 2799).

A study must be considered in the context of the particular mine being inspected. A mine known to have high variation or high amounts of dust would require more samples; a low-dust mine requires fewer (Tr. 2794-97). This is how OSHA enforcement is performed today, Dr. Corn testified; the compliance officer, who recommends to the area director whether to cite or not to cite, would examine the historical sampling done by OSHA or NIOSH at a site prior to making a recommendation (Tr. 2369-70). For a historically low-dust mine like the Young Mine, for example, you would place "reasonable confidence" in a fewer-sample result (Tr. 2857-58). He suggested a minimum of three samples on the same occupation in a twelve-month period, averaged with historic samples (Tr. 2848-55). In any event, the number to be used should be in the context of professional judgment (Tr. 2367).



Dr. Corn was questioned about the reliability of the methods used to determine average dust exposure and about the sources and extent of variation. He conceded that while industrial hygienists assume that what is in the breathing zone -- usually defined as a one-foot radius around the head (Tr. 2779) -- accurately portrays what is inhaled, studies have shown variation (Tr. 2766). If a worker were standing further away, say 20 feet, greater variation might be found -- if a worker were near "active points of generation of dust," for example (Tr. 2780-81). But Dr. Corn did not concede that the amount of contaminant measured in a person's breathing zone generally might be somewhat different from the amount actually entering that person's respiratory tract (Tr. 2767). Variations in a worker's breathing zone, further, would be fairly constant from day to day in the same mine, assuming other variables, such as mining method, water content, and silica content, remained pretty constant (Tr. 2772-73). Different variations appear to exist in different job categories (Tr. 2773-74). It is also possible -- depending on the work task -- for two workers doing the same job to have different variations within their breathing zones (Tr. 2774-75). Finally, Dr. Corn conceded that while a properly adjusted 10-millimeter nylon cyclone provides a reliable estimate of the respirable mine dust (as defined by the ACGIH TLV booklet) under laboratory conditions, it does not necessarily do so in the field (Tr. 2748, 2750).

Dr. Corn would not say that less dust would be inhaled if a standard which the air could not exceed rather than an average amount over time were enforced (Tr. 2822-24). But he would agree that it is likely that if a population's average exposure is at the TLV, a significant proportion of the population will have experienced exposure levels far in excess of the TLV (Tr. 2834-35).

Dr. Corn also stated that the spread of results between the laboratories in Pittsburgh and Denver (Asarco Exhibit 15) indicated that the Denver laboratory performance could not support a single sample citation on analytical capability alone (Tr. 2401). He termed the analytical proficiency "unacceptable" (Tr. 2416; see also Tr. 2424). The servicer of the X-ray diffraction equipment at the Denver lab found problems necessitating, in his opinion, that the lab be shut down temporarily to straighten out its problems (Tr. 2841-47, 3063; Asarco Exhibit 30).

#### Dr. Thomas A. Hall

Dr. Hall is a Ph.D. industrial hygienist who is currently an assistant professor at the University of Oklahoma (Asarco Exhibit 28; Tr. 2472). He was offered as an expert in occupational health, industrial hygiene, sampling strategies and analysis, and statistical analysis (Tr. 2473-74, 2476).

Dr. Hall initially testified about the TLV for silica. Like Dr. Corn, he stated that it is based on long-term chronic exposures because silica is a long-term hazard. Inhalation of crystalline silica at relatively high concentrations typically results in silicosis after 40 years of exposure (Tr. 2479, 2684). A TLV, however, should not be considered a fine line between compliance and noncompliance (Tr. 2484) or between safe and unsafe environments (Tr. 2716).

The values are to be considered guidelines for professionals to evaluate the environment (Tr. 2484, 2717).

The TLV refers to time-weighted concentrations for a seven- to eight-hour workday and 40-hour workweek (Tr. 2479-80, 2682-83). Approximately six samples, each collected for a full working day, should be taken to determine whether a TLV has been exceeded (Tr. 2480-81, 2713). The period of time over which the samples should be taken would depend on the sampling history (Tr. 2480). In the absence of such a history, Dr. Hall testified, the samples should be taken over a minimum of two weeks (Tr. 2481). In any event he recommends sampling at least once every two months (Tr. 2713-14).

Dr. Hall agreed with Dr. Corn that a single sample is not a valid estimator of exposure over time (Tr. 2500, 3786). A single eight-hour sample, he said, "does not provide an accurate estimate of what the exposure or the concentration of the dust in the breathing air is" (Tr. 2482). It does not account for the variability in the silica and dust concentrations in the breathing zone (Tr. 2482-83, 2583-84). (He defined the breathing zone, which is thought to "approximate" the air the miner breathes (Tr. 2483), as about a 1- to 2-foot sphere around the head of the individual (Tr. 2482, 2583)). A single sample does not tell you where within a range you fall (Tr. 2500, 2551-52); the sample at issue "could fall anywhere within a spectrum of potential values" (Tr. 2551). Samples must be looked at over periods of time and in the context in which they were taken (Tr. 2500-01, 2547, 2550-51). Even two samples give you a better estimate than one, but two still do not give you an accurate estimate of the true concentration (Tr. 2495).

Dr. Hall concurred that a single sample could indicate changes in the breathing environment. But before he would make that conclusion, he would inspect the mine, review the work position, and, like Dr. Corn, collect additional samples (Tr. 2503, 2508). He recommends a moving average of six samples. This involves, after a sufficient number of samples have been collected, dropping the results of the earliest sample following collection of the latest one (Tr. 2510-11). This method of collection looks at long-term trends of exposure, which is appropriate for a chronic toxin such as silica (Tr. 2509).

Dr. Hall also testified about paired sampling, in which monitors are typically placed on a worker's opposite lapels (Tr. 2484). Dramatically different results may occur, whether for concentrations of silica or respirable dust (Tr. 2485). Variability is of several types: 1) environmental, which is dependent on worker movement, worker orientation, and the amount of dust in the air (Tr. 2485-86); 2) temporal variability, which concerns the change in exposure across a day and from day to day (Tr. 2486), and 3) sampling and analytical error (SAE). In the instant case, the method of analysis was X-ray diffraction (Tr. 2486-87). SAE is thought to encompass 5-10 percent of the total variability (Tr. 2487-88). The dominant variability is environmental (Tr. 2488).

It was stipulated that MSHA assumes an SAE variation of 11 percent for the XRD analysis when they make compliance determinations (Tr. 2514). But Dr. Hall determined that

the variation should be closer to 20 percent (Tr. 2514-19; Asarco Exhibit 18). The X-ray diffraction method of analysis used in this case can increase overall variability, he said (Tr. 2719-20). Asarco Exhibit 36 examines the proficiency analytical testing (PAT) results for silica analysis at the Denver and Pittsburgh laboratories. Neither came within NIOSH's definitions of accuracy. To come within the definition, the Denver lab would have generated no more than 8 of the 175 results at more than 25 percent of the reference value; instead it generated 47, or more than 26 percent (Asarco Exhibit 36, p. 1; Tr. 3771). Similarly, Pittsburgh generated 69 results more than 25 percent different from the reference value, or 49 percent -- well more than the 5 percent figure accepted by NIOSH (Asarco Exhibit 36, p. 2; Tr. 3772). SAE may be as much as 70 percent or greater for single samples. From this data Dr. Hall concluded that MSHA's overall error factor of 20 percent should be much greater (Tr. 3773-74, 3798). It was maybe half of what it should be (Tr. 2734-35). Dr. Hall's confidence level -- considering only sampling and analytical error -- would not be MSHA's 95 percent, but something closer to 50-60 percent (Tr. 2735-36).

Dr. Hall further stated, based on the testimony of Mr. Gregory, that the Denver lab appears to have "loose" procedures; he would be concerned about the validity of their results (Tr. 2536-38). Further, their recordkeeping was not adequate (Tr. 2539).

A study co-conducted by Drs. Hall and Corn found "considerable" variability in both respirable mine dust and silica in both coal and metal/nonmetal mines (Tr. 2489-91; Asarco Exhibit 23). Pair-sampling investigators had set a distance of 14 inches between lapels (Tr. 2611). Paired respirable dust samples showed a ratio in excess of 1.25 -- meaning the measure in one lapel was higher by 25 percent or more than in the other -- in as much as 50 percent of the samples, and at least 10 percent of the samples had a ratio of 2 (Tr. 2492-93). At least half of paired free silica samples had a difference of 1.7 percent, and for at least 10 percent, the difference was approximately 7.7 percent (Tr. 2493-94). This study, Dr. Hall concluded, demonstrates how much variability exists in the breathing zone (Tr. 2495).

In a study of respirable mine dust at the Skyline mine, Dr. Hall determined that 50 percent or more of paired samples had differences of greater than 11 percent; 10 percent had differences equal to or greater than 73 percent (Tr. 2597, 2719). Some of the variation between samples may be caused by analytical variation (Tr. 2614), Dr. Hall said. He agreed that breathing zone variations between paired samples might be applied in a compliance/noncompliance determination (Tr. 2607).

Dr. Hall visited the Young Mine with Dr. Corn (Tr. 2548). He agreed that the mine was "very wet" (Tr. 2549, 2641), and that there was "considerable air flow" at the skip tender position (Tr. 2549), although he did not measure the air flow (Tr. 2640), and acknowledged that his conclusion concerning wetness was based only on observation (Tr. 2641-42). Like Dr. Corn, he testified that the water applied to the chute -- used to lubricate and free the materials (Tr. 2645) -- is an effective dust suppressant (Tr. 2549). In questioning the mine manager and the skip tender,

he determined that the mine had not changed its production methods significantly -- that is, not by more than 10 percent on a shift basis (Tr. 2502, 2641, 2646-48).

Dr. Hall prepared the tables of Asarco's Exhibit 27 (Tr. 2496). He testified that the estimates of the percentage of quartz in the samples were conservative. In support of his conclusion, he noted that for samples in which no quartz was detected, Dr. Corn decided that they would assume a minimum of .7 percent quartz (Tr. 2542-43; Asarco Exhibit 27, pp. 5-6). Further, the percent quartz in the sample at issue, 4.5 percent, falls very close to the upper 95 percent confidence interval of 4.6 percent, meaning that 90 percent of the time the quartz values (estimated on a conservative basis) are less than this value (Tr. 2544-45).

Further, the measured concentration of the sample at issue, approximately 104 micrograms per cubic meter, was just 4 micrograms per cubic meter of silica in excess of the 100-microgram TLV standard -- probably a statistically insignificant difference (Tr. 2546-47, 2573, 2730-31). MSHA's estimate that the sample was 50 percent above the TLV also overstates the risk associated with quartz, because the MSHA estimate includes respirable dust as a component of the TLV (Tr. 2730-31).

Like Dr. Corn, Dr. Hall explained that the average ratio of the concentration of respirable dust to the exposure limit over the 1980-95 period at the Young Mine was .29, or approximately 1/3 of the permissible level of allowable exposure (Tr. 2506; Asarco Exhibit 27, p. 6). At the skip tender position, the ratio of the concentration of respirable dust to the exposure limit was .55, indicating that the exposure was approximately half of the TLV over the 1980-95 period (Tr. 2507; Asarco Exhibit 27, p. 1). Additionally, he said, six of the seven samples taken at the skip tender position "indicate rather strongly" that the environment "has low concentrations of respirable dust and silica" (Tr. 2501). On cross-examination, Dr. Hall acknowledged that determining the average exposure of an individual over a 15-year period really depends on professional judgment (Tr. 2653). Six samples are generally acceptable, but he agreed that 20 would be better than six (Tr. 2654). Samples should be collected where there is an indication of a potential for increased exposure (Tr. 2655), such as if conditions in the mine had changed (Tr. 2657). Dr. Hall reiterated his conclusion that the sampling history at the Young Mine indicates a low level of exposure (Tr. 2654).

### FINDINGS OF FACT

1. MSHA issued the citation at bar after determining that a skip tender working at the Young Mine was exposed to concentrations of respirable silica bearing mine dust at levels that exceeded the permissible concentrations established in 30 C.F.R. §57.5001.

2. The violative determination was based on analytical results derived from a sample collected within the skip tender's "breathing zone" over a single work shift, or stated another way, an eight-hour period, on March 16, 1994. That analysis demonstrated to the satisfaction of



MSHA that the skip tender was exposed to a shift-weighted average of  $2.30 \text{ mg/m}^3$  of respirable silica bearing mine dust on that date.

3. The permissible concentration limit, or "threshold limit value" (TLV), for silica is determined pursuant to a formula developed by the ACGIH--10/Percent Silica + 2 and incorporated by reference into 30 C.F.R. § 57.5001.

4. In this instance, MSHA's Denver laboratory used a robotic weighing device to determine that 1876 micrograms of total mine dust were collected on the sample filter during the sampling period. And they used an X-ray diffraction (XRD) instrument to determine that 85 micrograms of silica were collected on the sample filter during the sampling period. Therefore, the percentage of silica in the concentration of total respirable dust was computed to be 4.5 percent. Accordingly, the TLV for the skip tender on that shift on March 16, 1994 was  $1.53 \text{ mg/m}^3$ .

5. In determining whether to issue a citation for an exposure exceeding the silica dust TLV, MSHA adjusts the TLV upward by 20 percent to account for the potential effects of sampling and analytical error on the gravimetric and analytical results. In this instance, applying the 20 percent error factor to the TLV, MSHA calculated an "enforcement level" of  $1.84 \text{ mg/m}^3$ , which is determinative of whether a citation will or will not be issued in the case. Since  $2.30 \text{ mg/m}^3$  (derived by the process described in Stipulation No. 19) is greater than  $1.84 \text{ mg/m}^3$ , the inspector had no discretion but to write the subject citation, which he did upon the receipt of the analytical results on April 18, 1994.

6. Exposure to silica particles and other respirable dust particles at levels above the TLV can eventually cause silicosis, a disease that diminishes the respiratory system and which may eventually be fatal. At or below the TLV level, most people will have sufficient time to "recover" from exposures on one shift before being re-exposed on a following shift.

7. MSHA used a properly calibrated SKC Model No. 30 constant flow pump and a 10 millimeter, nylon cyclone to collect the respirable dust sample at issue herein pursuant to their normal sampling procedure. The cyclone is used to separate particles that are larger than 10 micrometers (microns) from the smaller, respirable particles. Dust particles are drawn into the cyclone using a "constant flow" pump, which operates at a constant flow rate throughout the collection period. In this case, the pump was calibrated before and after the sample was taken to assure that the actual flow rate was within 5 percent of the desired flow rate of 1.7 liters per minute throughout the 8-hour sampling period. Ideally, at this flow rate, larger "oversize" particles (defined as those particles greater than 10 microns in diameter) are captured on the surface of the cyclone or fall into the grit pot, while only the smaller, respirable particles are collected on the sample filter.



Nevertheless, the 10 millimeter cyclone is acknowledged by MSHA to permit oversize non-respirable particles through to the filter to some degree, as a general proposition. However, there is no direct evidence in the record, one way or the other, concerning the sample at issue in this case, with regard to the presence or absence on the filter of oversize particles, or if present, to what extent.

8. The MSHA Denver laboratory does void dust samples if visual inspection reveals the presence of "non-respirable particles" significantly in excess of 10 micrometers (particles become visible to the eye at 40 microns in diameter). Like the Denver laboratory, the NIOSH laboratory also has no established procedure for detecting non-visible particles that exceed 10 microns in diameter, instead relying on the sampling instruments and individuals experienced in sampling procedures to assure a proper particle size distribution. Since the sample at issue in this case was properly collected by a trained MSHA inspector using instruments designed to produce the proper particle size distribution and the sample weighed only 1.876 milligrams, it is unlikely (although not impossible) that it contained a significant number of particles exceeding 10 microns in diameter. The actual number of oversize particles that were on the sample, if any, is of course, unknown.

9. When sampling for silica dust, the MSHA inspector selects the miner, or miners, perceived to be at the greatest risk of exposure to high levels of silica dust. The inspector attaches the sampling apparatus to the miner's person, placing the sampling train within the miner's "breathing zone," defined by MSHA as a location within a 2-foot radius of the miner's head. When the miner begins his work shift, the inspector activates the sampling apparatus and continuously collects a sample from within the miner's breathing zone for the entire length of the work shift. During the work shift, the inspector periodically returns to examine the operation of the sampling apparatus and to assure that the sampling apparatus is not being mishandled by the miner. At the completion of the work shift, the inspector takes possession of the sampling equipment and removes the sampling cassette containing the filter from the sampling apparatus. The inspector also determines whether the shift was a representative work shift for the miner sampled and whether there were any factors that affected the operation of the sampling pump or the integrity of the sample during the work shift.

10. After the sample is collected over the shift, the inspector sends the sample to MSHA's Denver laboratory for analysis to determine the concentration of respirable mine dust and the mass of silica on the sample filter.

11. MSHA's Denver laboratory is not accredited by the American Industrial Hygiene Association, the accepted accreditation body in the United States. In contrast, the labs used by NIOSH and OSHA are so accredited.

12. The mass measurement of respirable mine dust collected during the sampling period is determined at the Denver laboratory with a robotic weighing device (RWD).

13. Each filter that is used to collect respirable material is weighed at the laboratory before it is assembled in the sampling cassette and sent to field offices. After the sample is collected, the inspectors return the sampling cassettes to the laboratory in specially designed mailing containers. At the lab, the filter is removed from the cassette and desiccated to remove moisture from the sample and to allow the sample to acclimate to laboratory environmental conditions. After desiccation, the filter is placed on a rack with other filters. The filters are automatically removed from this rack by the arm of the RWD and placed onto the RWD's balance. The filter is then weighed by the RWD, and the results recorded by computer.

14. In order to determine the weight change associated with an individual filter, the pre-sample weight is subtracted by computer from the post-sample weight. The difference is the change in filter mass allegedly attributable to the sample. However, MSHA recognizes that in some cases, including the case at bar, factors other than respirable dust may influence the change in filter mass. For that reason, a "control filter," coming from the same manufacturer's lot as the filter used to collect the sample is utilized for comparison purposes. This control filter is not exposed to the mining environment, but is carried by the inspector and accompanies the actual sample taken in the mine and analyzed in the laboratory.

15. MSHA typically expects a maximum of approximately 30 micrograms of positive or negative change in the control filter, and if that range is exceeded by any appreciable amount, the laboratory would normally disregard the control filter or at least reweigh it. The Denver lab has no formal or written procedure, however, to deal with this phenomenon and even though the normal or usual range was exceeded by 20 percent in this case, the "unwritten" procedure to investigate such an anomalous result was not followed by MSHA lab personnel. The unexplained loss of weight on the control filter caused MSHA to add 36 micrograms of weight to the reading obtained from the RWD for the sample at issue in this case. However, in this case, it is important to note that the non-compliance determination would not have been affected. The sample at bar would still have been cited even if the lab had not added the 36 micrograms to the total weight.

16. The MSHA Denver lab begins the XRD process by transferring the respirable material from the sample filter onto a silver membrane filter using a centrifuge tube containing tetrahydrofuran that dissolves the sample filter and evenly distributes the dust in a liquid suspension. The suspension containing the respirable dust is then placed on the silver membrane filter which provides an even distribution of particles and lowers the background intensity inherent in the diffraction process. This filter is then placed on the XRD instrument for analysis.

17. The XRD instrument is programmed to direct the X-ray beam onto the silver membrane filter at pre-established angles, which correspond to the known silica diffraction peaks of greatest intensity. The process begins with the most intense silica diffraction peak (reflecting through an angle of 26.6 degrees). A result is produced that can be converted into a silica mass measurement by comparing the intensity to a calibration standard that was developed prior to the analysis.

18. MSHA is aware that there are numerous minerals that interfere with the XRD silica analysis. For that reason, the lab then performs the same process at the second most intense silica diffraction peak (reflecting through an angle of 20.8 degrees) and performs a similar calculation based on the results derived at the second most intense peak. If the results derived from the calculations at the two most intense peaks are consistent, the lab concludes that the detected mass is pure silica, with no interferences present, as opposed to silica in conjunction with another mineral.

19. If there is not agreement between the first two results, as was the case with the sample at issue herein, where the second peak was subject to interferences, the lab will continue the process at several additional peaks of known but lesser intensity in order to attempt to determine the mass of silica present. In fact, MSHA encountered an interference at each of the last three peaks it scanned on the sample at issue in this case, and therefore relied only on the first, unverified peak to issue the citation at bar. The lab never determined what other minerals were interfering with its analysis of the sample at bar and were unable to check the bulk sample for the interfering minerals since no bulk sample was available to be analyzed in this particular case. Since there never was agreement between any two peaks on the citation sample at issue herein, it was especially important to be able to rely on a bulk sample in this case to identify interferences. However, in this case, MSHA's Denver lab was unable to follow their own "standard procedure" to check the bulk sample for the interfering minerals because the inspector failed to send the lab a bulk sample along with his collected respirable samples.

20. Although the NIOSH 7500 Method requires a bulk sample to be collected and analyzed to identify interferences, the MSHA Denver laboratory does not follow this procedure approximately half the time because the lab only receives bulk samples from the inspector for about half of the field samples it analyzes. NIOSH, on the other hand, does follow this procedure to identify interferences and Dr. Bartley, a NIOSH employee who testified as an expert on MSHA's behalf opined that MSHA should follow it too.

21. MSHA professes to follow the NIOSH 7500 Method for XRD silica analysis at its Denver lab, but in point of fact, it does not in several important respects. At least it did not in connection with the sample at issue in this case, and to some extent, does not as a general rule. These deviations in procedure are particularly significant because MSHA adopts the precision estimate for the NIOSH 7500 Method, even though that error factor is based upon the experience of other labs that analyze samples under more controlled conditions.

22. The NIOSH 7500 Method dated May 15, 1989 was in effect at the time that the sample at issue in this proceeding was analyzed and was the version that the MSHA Denver laboratory based their own analytical procedures on that resulted in the issuance of the citation at bar.

23. The Denver lab does not scan blank silver membrane filters before each sample as required by the NIOSH 7500 Method.

24. The Denver lab does not run full scans from 10 to 80 degrees on respirable or bulk samples analyzed by the XRD process as required by the NIOSH 7500 Method.

25. While the NIOSH 7500 Method requires calibration of the XRD machine each day, the Denver lab calibrates the instrument every three to four weeks. The Denver lab also does not prepare the calibration standards required by the NIOSH 7500 Method. In contrast, NIOSH calibrates at every sample set, and Dr. Bartley, who appeared as MSHA's expert believes that MSHA should do likewise.

26. Although MSHA has the diffraction "fingerprint" for silica, in less than one percent of the cases, does the Denver lab attempt to match the fingerprint to analyses it creates of silica presence on samples. No such comparison was made in the instant case.

27. MSHA deviates from the NIOSH 7500 Method and/or their own internal laboratory procedures in at least three important areas: (1) A significant amount of the time, the lab does not account for interferences which are known to exist at the various silica diffraction peaks; (2) the lab does not calibrate its XRD equipment in accordance with the Method; and (3) the lab does not have an effective methodology to screen out oversize particles which can both overstate the weight of the respirable dust on any sample and adversely affect the XRD analysis of the silica in the dust.

## DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS

### I. MSHA's "Single-Shift" Sampling Enforcement Strategy

This case is before me on remand from the Commission. Asarco, Inc. v. Secretary of Labor, 17 FMSHRC 1 (1995). In directing further proceedings, the Commission indicated that Asarco is questioning and I should consider "the merits of single-shift sampling," *id.* at 3, 5. In pursuing that question before me, Asarco has framed the issue to be decided as whether MSHA's single sample strategy complies with the plain meaning of its own regulation. (Post-Hearing Brief at 1-2; Reply Brief at 1-2). The Secretary's view of the posture of the case accords; namely, that Asarco has challenged the enforcement strategy that MSHA has adopted to determine compliance with a mandatory regulation promulgated pursuant to the Mine Act. (Post-Hearing Brief at 7; *see also* Union Reply Brief at 1).

This issue has been thoroughly addressed by the parties in the evidentiary submissions entered in the record and in post-hearing and reply briefs. Indeed, at the hearing, broad leeway was given for exploration of matters even, at best, remotely relevant to the issue. I conclude, after due consideration and for the following reasons, that single-shift sampling as used by MSHA as an enforcement strategy is consistent with the regulation and is reasonably calculated to further the goal of protecting the health of miners who work in underground metal and nonmetal mines. The strategy is not, therefore, a basis upon which Citation No. 3052272 issued to Asarco at its Young Mine, a zinc mine, should be vacated.



Asarco contends that MSHA is failing properly to enforce a mine operator's compliance with Section 57.5001(a) because MSHA fails to collect a sufficient number of samples to determine accurately the concentrations of respirable silica dust to which miners are exposed. (See, e.g., Reply Brief at 4, 5-6). Since MSHA is interpreting and applying its own regulation, the enforcement strategy selected by the agency must be accorded significant deference.

The task of the administrative law judge is "not to determine whether the Secretary's interpretation of the regulation charged to his administration is the one . . . [he] would reach if deciding the question as a matter of first impression." Rather, the judge should "defer to the Secretary's interpretation of his regulations unless it is clearly erroneous." Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 462 (D.C. Cir. 1994), relying on Udall v. Tallman, 380 U.S. 1, 16-17 (1965). See also Secretary of Labor v. Buffalo Crushed Stone, Inc., 19 FMSHRC 231 (February 1997). As the Commission has noted, it is not its (nor a judge's) task "to devise the best method of monitoring injuries sustained by miners but to determine whether the Secretary's method, as implemented by the regulations, is reasonable." Energy West Mining Co., 15 FMSHRC 587, 592 (1993). Failure of the Commission, or the judge, to extend the appropriate deference to the Secretary's interpretation of his own regulation and of the Mine Act is a basis to reverse the Commission's, or the judge's, decision. See Secretary of Labor v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989).

The U.S. Court of Appeals for the Fourth Circuit in Secretary of Labor v. Mutual Mining, Inc., 80 F.3d 110, 114 (1996) has held that:

The Secretary's role of rulemaking and enforcement explains this deference to the Secretary's interpretations of the [Mine] Act. In order to promulgate health and safety standards in the first instance, the Secretary must evaluate a wide variety of information regarding the operation of the mining industry. And in enforcing these standards -- through, for instance, periodic inspections of mines and issuance of citations -- the Secretary comes into constant contact with the daily operations of the mines. See Martin v. OSHRC, 499 U.S. 144, 152 (1991). In short, developing rules and enforcing them endows the Secretary with the 'historical familiarity and policymaking expertise,' *id.* at 153, that are the basis for judicial deference to agencies.

See also Secretary of Labor v. FMSHRC, No. 96-1164 (D.C. Cir. May 2, 1997) ("We have 'several times observed that the primary purpose of the Mine Safety Act was to protect mining's most valuable resource -- the miner[,] and that Congress intended the Act to be liberally construed to achieve this goal.' [Citing Cannelton Industries, *supra*, 867 F.2d at 1437.]").

Moreover, the Supreme Court has held that "broad" deference is warranted when the agency's action involves the evaluation of a complex and highly technical regulatory program within the area of the agency's expertise. Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994). See also Huls America, Inc. v. Browner, 83 F.3d 445, 452 (D.C. Cir. 1996) (according "extreme" deference when scientific and technical matters are involved). Moreover, when



confronted with the merits of two respirable dust sampling methods applied by MSHA to coal mines, the Tenth Circuit noted that the "Secretary has discretion to adopt any sampling method that approximates exposure with reasonable accuracy" and the Secretary "is not required to impose an arguably superior sampling method as long as the one he imposes is reasonably calculated to prevent excessive exposure to respirable dust." The Court expressly stated that "our task is not to determine which method is better." American Mining Congress v. Marshall, 671 F.2d 1251, 1256 (10th Cir. 1982).

To the contrary, Asarco argues that the Secretary's position, here, that single-shift sampling comports with the regulation and MSHA's mission, is not entitled to deference. The chief reason advanced is that MSHA, assertedly, has taken inconsistent positions on single versus multiple samples. (Post-Hearing Brief at 33-35; Reply Brief at 6-8). The record undisputedly shows, however, that Section 57.5001(a) is specifically applicable to underground metal and nonmetal mines and has been virtually the same since first enacted in 1970; and, since 1974, identical to that relied on in this case. The record likewise shows that MSHA has consistently used single-shift samples for enforcement of the regulation.

I find, furthermore, that it is irrelevant to compare multiple-shift sampling used by MSHA for coal mines with single-shift sampling used for metal and nonmetal mines. The Commission held in its remand decision in this case that the legal underpinnings relied on for coal's multiple samples are not applicable to metal and nonmetal mines. Asarco, supra, 17 FMSHRC at 5. In addition, the Commission pointed out that the Secretary has stated his intention to use single-shift samples as well as multiple-shift samples to enforce the respirable dust standard in coal mines, *see* 59 Fed. Reg. 8356 (Feb. 18, 1994). *Id.* at 5 n.4. Thus, it is merely reemphasized, here, that MSHA's enforcement trend, overall, is toward, not away from single-shift sampling. (*See also* Secretary's Reply Brief at 31-32; Union Reply Brief at 13).

In light of the foregoing and, thus, bearing in mind the deference due to the Secretary's decision to use single samples in enforcing Section 57.5001(a), I turn to the mission MSHA is fulfilling. The record shows that it is to protect the health of miners; but not, as Asarco argues, by enforcing a mine operator's obligation to maintain, over time, working conditions throughout the mine which meet a permissible airborne contaminant exposure standard set by the agency. Rather, MSHA's approach is from the perspective of individual miners who may be overexposed to airborne contaminants at any time and in any place in the mine, and for whom even one such incident may have health repercussions, either immediately or in the future. There is much in the record before me suggesting that in underground mining, constancy in the airborne contaminant environment is not to be expected -- or is likely achievable -- on either a long- or short-term basis. MSHA, in any event, has made clear that Section 57.5001(a) is not intended to protect miners simply from long-term overexposure and its effects. While that is a goal to be desired, the regulation is directed to the detection of overexposure on a given day by sampling individual miners at their work station during their normal work shift.

This kind of detection is accomplished by spot checking mines, with frequency -- on a one-, three-, or five-year schedule -- dictated by the perceived risk factor at each mine for its miners. When the mines are checked, an MSHA inspector selects miners to wear personal sampling equipment throughout their work shift to sample exposure to airborne contaminants, with the work shift monitored by the inspector for normality. MSHA acknowledges that this approach has been adopted, in large part, because of scarce resources and budgetary constraints. The agency currently has only 308 inspectors to oversee approximately 110,000 metal and nonmetal mines employing some 220,000 miners. And, aside from enforcement of Section 57.5001(a), MSHA's inspectors perform many other health and safety activities. It is to be noted, nonetheless, that when spot checking results in issuance of a citation for a violation of Section 57.5001(a) because of an overexposure to a sampled miner, the inspector will return to the mine to sample the same miner, again, to ensure that the mine operator has eliminated the cause for excessive exposure.

Therefore, it is by means of periodically auditing what is going on in a mine -- vis-à-vis a miner sampled for the audit -- that MSHA seeks, under Section 57.5001(a), to ensure that mine operators are aware of their ongoing obligation to provide a healthy working environment at all times for all miners. Accordingly, I find that neither conditions in the mine as a whole nor the mine's history of airborne contaminant sampling -- whether by the mine operator or MSHA -- is considered by MSHA in citing a violation of Section 57.5001(a), nor should they be, given the purpose of the regulation.

The airborne contaminant exposure standard against which a mine operator's compliance with Section 57.5001(a) is judged, is, *in part*, a list of "threshold value limits" (TLVs), each applicable to a particular airborne contaminant. These TLVs are then modified by MSHA -- to account for "sampling and analytical" errors (SAE) -- to establish an "exposure limit" (EL) which, in turn, is compared with a "shift-weighted average" (SWA) calculation when the sample has been taken over a full shift. The SWA value must be higher than the EL value to substantiate a violation of Section 57.5001(a). Thus, it is the foregoing process, *in entirety*, which constitutes MSHA's compliance standard for Section 57.5001(a). (See Stipulations 18-19; Zalesak, Tr. 361-78, 523-24, 527, 625, 717).

It is to be noted that Asarco is not questioning TLV values used by MSHA, per se, or the concept of SAE adjustment. Moreover, quite clearly, SAE adjustment works to the advantage of mine operators because it raises the concentration level given in the TLV. That increase currently amounts to 20 percent. It also cannot be discounted -- as an advantage to mine operators -- that MSHA projects SAE adjustment on TLV concentration levels set out more than 20 years ago.

Thus, Section 57.5001(a) provides that "the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average [TWA], the threshold value limits [TLVs] adopted by the American Conference of Governmental Industrial Hygienists [ACGIH] . . . ." Thereafter, incorporated by reference into the presently effective Section 57.5001(a) are pages 1

through 54 of "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973." (TLV for 1973 at Secretary's Exhibit 8).

On pages 1 and 3 of TLV for 1973 there are statements that:

Threshold limit values refer to airborne concentrations of substances and represent conditions under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect. Because of the wide variation in individual susceptibility, however, a small percentage of workers may experience discomfort from some substances at concentrations at or below the threshold limit, a smaller percentage may be affected more seriously by aggravation of a pre-existing condition or by development of an occupational illness.

\* \* \* \* \*

They [TLVs] should be used as guides in the control of health hazards and should not be used as fine lines between safe and dangerous concentrations.

\* \* \* \* \*

In spite of the fact that serious injury is not believed likely as a result of exposure to the threshold limit concentrations, the best practice is to maintain concentrations of all atmospheric contaminants as low as is practical.

The record shows that the TLVs, so defined, are consistent with MSHA's stated objective for Section 57.5001(a). I conclude, therefore, that the TLVs have been embraced by the agency as recognized and scientifically established limits of exposure and are used as "guides" in an enforcement strategy aimed at enforcing the obligation of mine operators to protect their miners, "day after day," from overexposure. Asarco is misguided in asserting that MSHA is using TLVs as "fine lines" of demarcation between "safe" and "dangerous." (Post-Hearing Brief at 9). The record shows that MSHA is cognizant that the effect of exposure beyond a TLV -- let alone, of exposure at or below -- can vary widely from individual to individual. Almost any level of concentration may be safe, on the one the one hand, and dangerous, on the other, depending on the physical condition of the miner exposed to it. MSHA is not seeking to determine, through TLVs, whether a miner "is getting disease." (Zalesak, Tr. 147-52, 467-68).

On pages 1-2 of TLV for 1973 (emphasis added) there are statements that:

Threshold limit values refer to time-weighted concentrations for a 7 or 8-hour workday and 40-hour workweek.

\* \* \* \* \*

Time-weighted averages [TWAs] permit excursions above the limit provided they are compensated by equivalent excursions below the limit during the workday. *In some instances it may be permissible to calculate the average concentration for a workweek rather than for a workday.*

The language just highlighted, apparently, is the catalyst for Asarco's attack on MSHA's use of single-shift sampling to enforce Section 57.5001(a). It is by reliance on these phrases that Asarco primarily alleges that the regulation's TLVs are "long-term" averages and, consequently, must be sampled for "over more than one single 8 hour shift." (Post-Hearing Brief at 8, citing Drs. Corn and Hall).

I am compelled to note that the record is devoid of any indication as to why, after more than 20 years of enforcing Section 57.5001(a) by single samples pursuant to this language, a multiple sample position has suddenly surfaced. In this regard, it is further puzzling because there is no evidence that since 1973, there has been a scientific or technical development invalidating a single sample procedure. Dr. Hall, an expert witness for Asarco, testified that in the world of industrial hygiene, there is a "wide range" of sampling procedures (including single-shift sampling), all with their own strengths and weaknesses. He has testified that there is no perfect sampling strategy. (Hall, Tr. 2688-89).

It appears, therefore, that Asarco fervently believes that multiple sampling would be a better way for MSHA to use the 1973 TLVs in enforcing Section 57.5001(a). But, as earlier found, this is not a matter for me to decide. My task is confined to whether MSHA's interpretation of Section 57.5001(a), to require the use of single-shift sampling, is consistent with the language of the regulation and "is reasonably calculated to prevent excessive exposure to respirable dust," American Mining Congress, *supra*, 671 F.2d at 1256.

Asarco's same expert, Dr. Hall, has acknowledged that when one looks at TLV for 1973, there is no sampling strategy delineated for users of the document. (Hall, Tr. 2688; *see also* Hewett, Tr. 3630-31). Accordingly, I am not surprised that different sampling approaches might be projected on the foregoing "8-hour workday and 40-hour workweek" language. However, the Secretary's position is that "workweek" places parameters on the reliability of a TWA-TLV, which is for exposure up to an 8-hour workday per 40-hour workweek; in other words, for a work shift in terms of the traditional working schedule rather than a novel one (longer hours a day per fewer days a week, etc.). The Secretary rejects the notion that "workweek," in this sentence, is referring to multiple exposure averages in sampling for TWA-TLVs listed in TLV for 1973.

The Secretary's further position is that although TLV for 1973 suggests that there might be "some instances" calling for multiple samples to arrive at an "average concentration for a



workweek," no guidance has been forthcoming from ACGIH as to what those circumstances might be. MSHA's expert witness, Dr. Hewett, states that the pronouncement in TLV for 1973 definitively pointing to single samples as the sampling method for TWA-TLVs is that their TWAs "permit excursions above the limit provided they are compensated by equivalent excursions below the limit *during the workday*." (Emphasis added). According to Dr. Hewett, ACGIH is not talking about "between shift excursions," ACGIH is talking about "within shift excursions" and, consequently, about TWA-TLVs which are sampled for within the work shift time-frame. (Hewett, Tr. 1773, 1775).

Based on the record before me, including the TLV for 1973 language quoted above, I conclude that MSHA's use of single-shift sampling is a permissible sampling strategy --if not the required one -- for determining TWA-TLVs within the meaning of Section 57.5001(a). Moreover, such conclusion is reinforced by the earlier finding herein that these TWA-TLVs do not constitute the entire exposure standard for which mine operators are held accountable pursuant to Section 57.5001(a). Through SAE adjustment, Section 57.5001(a)'s overexposure level is higher than TWA-TLVs would otherwise permit. In short, consistent with a single-shift sampling strategy, the regulation holds mine operators accountable for overexposing individual miners on a given day, during a normal work shift, at one discrete location in the mine.

In this context, I am equally persuaded that MSHA's use of single-shift sampling is a reasonable means of ascertaining, to the requisite degree of accuracy, whether the enforcement concentration level standard in Section 57.5001(a) has been exceeded. Asarco argues that "no single 8 hour sample can provide an accurate representation of worker exposure," largely because MSHA does not consider "environmental variability" within a miner's breathing zone. According to Asarco, it has been demonstrated that when samplers are placed on a miner's opposite lapels, different exposure amounts will result. (Post-Hearing Brief at 11-14, 43-44).

The Secretary does not dispute that there can be such variation in contaminant concentration in an individual's breathing zone. But, it is pointed out that scientific and technical limitations prohibit anyone from determining what an individual is actually breathing. Therefore, the accepted practice used by industrial hygienists is to *estimate* an individual's *exposure* concentration level, with that estimate derived from a sample collected by a device placed within the breathing zone. Dr. Hewitt states, "Nobody measures true exposure, I've not seen it done, and I doubt that it'll be done in the near or distant future." (Hewitt, Tr. 1915-16, 2049-50).

In sum, I conclude that MSHA's single-shift sampling enforcement strategy is consistent with the language in Section 57.5001(a) and is a reasonable means for determining and preventing excessive exposure to airborne contaminants in underground metal and nonmetal mines consistent with the intent of the regulation.



## II. Collection and Laboratory Analysis of the Dust Sample at Bar

Given that MSHA's single-shift sampling strategy is a "reasonable" one, I now turn to the issue of the dust sample that was collected on March 16, 1994 in the Young Mine, later analyzed at MSHA's Denver lab and subsequently cited in Citation No. 3052272.

Unlike nearly everyone else that was involved in the trial of this case, I am primarily interested in the dust sample at issue in this case. After all, it is Citation No. 3052272 that has been contested. That citation concerns a particular dust sample that was collected by an MSHA inspector and later analyzed by MSHA at its Denver laboratory.

MSHA uses a variety of scientific instruments to collect dust samples and analyze them for silica. Some variation is inherent in the operation of these instruments, which is described by a "coefficient of variation" ("CV") that recognizes that analytical instrumentation will produce results that deviate to some extent from the true value. Since several independent instruments are used to collect and analyze silica dust samples, MSHA developed an error factor that accounts for all of the independent CVs associated with each of the instruments. MSHA determined the error factor associated with the entire sampling and analytical process for silica dust to be 20 percent. They use that error factor to effectively increase the TLV by 20 percent for respirable silica bearing dust samples to attempt to assure a 95 percent confidence level that the TLV itself was exceeded.<sup>1</sup>

Asarco, on the other hand, makes a credible claim that MSHA's reliance on the NIOSH 7500 Method's error factor is unreasonable because, among other objectionable practices, MSHA does not follow the NIOSH 7500 protocol. Asarco believes, for example, that there is far greater variability attributable to the XRD analysis of a sample than MSHA allows for in its error factor, and at least for the sample at bar, I agree.

MSHA's stated error factor of 20 percent is only reliable if MSHA's lab in fact adheres to the essential aspects of the 7500 Method, which they did not do in this particular case. In this particular instance, there were also several deviations from their own laboratory procedures, let alone the 7500 Method.

When sampling in the mines, MSHA uses a 10 millimeter, nylon cyclone to separate particles that are larger than 10 micrometers from the smaller, respirable particles. Dust particles are drawn into the cyclone using a constant flow pump, which operates at a steady and constant flow rate throughout the collection period. The pump is calibrated before and after the sample is taken to assure that the actual flow rate was within 5 percent of the desired flow rate throughout the 8-hour sampling period. The pump draws air at a rate of 1.7 liters per minute, which is the

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<sup>1</sup> In this case, MSHA issued a citation not because it determined that the actual average exposure was 2.30 mg/m<sup>3</sup>, but rather because it determined, with 95 percent confidence, that the average exposure exceeded the TLV.

proper flow rate for the cyclone. At this flow rate, the majority of the larger non-respirable particles are captured on the surface of the cyclone or fall into the grit pot, while the smaller, respirable particles are collected on the sample filter.

When sampling for silica dust, the MSHA inspector selects the mine, or miners, perceived to be at the greatest risk of exposure to high levels of silica bearing dust. The inspector then collects the sample using the procedure described in Finding of Fact No. 9, and when the sample has been collected over the shift, sends the sample to the Denver lab for weighing and analysis.

I find that MSHA uses a reasonable sample collection procedure utilizing scientifically recognized sampling equipment. I also find that the particular sample at issue herein was collected in accordance with MSHA's standard procedure over a "normal" work shift.

After the collected sample arrives at the Denver lab, it is prepared and weighed by the robotic weighing device as described in Finding of Fact Nos. 13-15.

Asarco complains in this instance that the unexplained loss of weight on the control filter caused MSHA to add .036 milligrams (36 micrograms) to the weight reading they obtained from the robotic weighing device. Further, the lab in this instance failed to follow their own informal procedure to investigate this anomalous result. Rather, they simply processed the compliance sample notwithstanding the unexplained and unexpected weight gain on the control filter. However, as I stated earlier in the findings of fact, this particular sample would have been cited regardless of the additional 36 micrograms added to the sample weight. I therefore find that to be a harmless error in this instance.

A problem somewhat related to the weighing process is MSHA's admitted failure to screen for oversize particles which can geometrically overstate dust weight and also adversely impact XRD analysis. I noted in Finding of Fact Nos. 7-8 that there is no evidence of oversize particles being an issue with this particular sample, but it is admitted by MSHA experts that the 10-millimeter cyclone does permit oversize particles through to the filter. Per Tom Tomb, who is Mr. Gregory's peer at MSHA's Pittsburgh lab, it would not be a complicated procedure to examine the sample to see whether it has any particles that exceed 10 microns in diameter using a microscope and a light grid. He expressed no opinion as to why they don't do that at the Denver lab, although because the sample has been run through the 10-millimeter nylon cyclone, he would not be concerned in any event.

Sample collection and weighing aside, the more serious problem with the citing of the sample at bar lies with the XRD analysis performed at the Denver lab. MSHA uses a CV of 11 percent to account for variations in the results associated with the use of the XRD technology. Asarco argues that the coefficient of variation attributable to MSHA's XRD analysis in the ranges of silica most commonly found on samples is closer to 20 percent. Using this number for the XRD, Asarco extrapolates that a more appropriate error factor for MSHA to apply to silica samples analyzed at its Denver lab would be 40 percent vice the 20 percent that is actually used.

A starting point for this discussion is the NIOSH 7500 Method for XRD analysis. Early on in the trial of this case, MSHA claimed they used this protocol to analyze samples for respirable silica dust. Mr. Gregory testified:

A. At the present time, we use the NIOSH 7500 Method.

\* \* \*

Q. To your knowledge, are there any parts of this protocol that MSHA disregards in doing its analytical work?

A. No.

(Tr. 757-58).

This original version of events would soon change. This witness, MSHA's expert on the XRD process and indeed, the person responsible for the analysis of these samples at the Denver lab, would soon retreat from his above-quoted testimony. MSHA in fact did not follow this NIOSH protocol in this case for the analysis of this sample in many important respects. In addition, the Denver lab also failed to follow their own "standard procedure" in analyzing this sample. The following discussion will address only the most significant particulars. But clearly enough to vacate this citation, beyond any doubt.

The XRD instrument and analysis of this particular sample is described in detail in Finding of Fact Nos. 16-20. Suffice it to repeat here only that the lab determined that they encountered interference from another mineral besides silica on at least three of the four known silica diffraction peaks and in the end relied only on the first, unverified peak to issue the instant citation. They are unable to determine what mineral was causing the interference. Mr. Gregory testified that: "[W]e didn't check for interferences on this particular sample." (Tr. 1051). The reason followed.

Mr. Gregory explained:

The standard procedure would be that when respirable samples are submitted, a bulk sample is also submitted. And if we got some unusually high quartz readings or series of readings that did not agree, normally the procedure would be to look at the bulk sample that was submitted along with the respirable samples in order to determine what the interferences might be.

\* \* \*

Q. . . . Are you saying there was a bulk sample submitted from the Asarco Young Mine together with the sample in this case?

A. As it turns out, there was not.

Q. Why wasn't there?

A. That would be something that the inspector would be responsible for. So I don't know the answer to that.

(Tr. 1052).

The importance of the missing bulk sample was admitted by Mr. Gregory:

Q. You only looked at four peaks, and you had three that you knew you had interference on and one that you did not believe you had interference on.

How did you verify that you didn't have interference on the first peak, the 26.6 peak?

A. I think we've already talked about this, and I've testified to the fact that the normal procedure would be to look at the bulk sample if it's provided and look for interference at whatever specific peak one may be trying to measure.

Q. But you didn't have a bulk sample here?

A. No, no, in this case that procedure -- we could not follow that procedure.

(Tr. 1070).

With no bulk sample available in this instance, there was no method of verifying that the most intense peak of silica measured at 26.6 degrees was interference free. Yet MSHA did not void this sample, but rather used it as the basis for the citation at bar. Even Counsel for the Secretary acknowledged at this point that this particular sample would be very difficult to sustain.<sup>2</sup> I have to agree.

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<sup>2</sup> In a colloquy with the Court, Mr. Turow candidly stated: Frankly, this aberration I think places into question whether this particular sample, whether the XRD process for this particular sample can be supported because in this case apparently the lab didn't use its standard procedure for this particular sample. . . . [I]t's going to be very hard for us to bear our burden of proof with respect to this particular sample, which as your Honor has pointed out, is the issue before the Court. . . . [F]rankly, the sample itself may not be able to withstand the burden of proof.

(Tr. 1083-86).

On cross-examination, Mr. Gregory admitted to several deviations from the NIOSH 7500 Method. For example, he was asked:

Q. You don't follow the 7500 Method requirements for scanning blank silver filters through the machine before and after scanning samples, do you?

A. Not precisely, no. . . .

(Tr. 1143).

With regard to running full scans from 10 to 80 degrees on respirable samples analyzed by the XRD machine, Mr. Gregory was asked:

Q. [A]lthough the NIOSH 7500 Method requires the full scan on respirable samples, you [Denver lab] didn't perform one on the respirable sample in this case, did you?

A. No, we didn't.

(Tr. 1150).

Other deviations from the NIOSH 7500 Method for XRD analysis are already contained in the findings of fact, supra, and I will not reiterate them here. See Finding of Fact Nos. 25-27.

I conclude that MSHA's utilization of the NIOSH 7500 Method's error factor is unwarranted, at least as it concerns the sample at bar, because MSHA did not follow the NIOSH 7500 protocol in analyzing this sample.

I also conclude that MSHA's "standard procedures" are not standardized with NIOSH-accepted procedures, are not replicable by the public (mining industry) and seem to vary from day to day and sample to sample. Moreover, in several important respects, the MSHA lab did not even comply with its own internal "standard" procedures.

Accordingly, I conclude that the Secretary's failure to meet his burden of proof regarding reliability of the XRD analysis of the particular sample at issue in this case must result in the instant citation being vacated. MSHA's failure to account for the actual variability experienced at its Denver lab using a hybrid standard/non-standard procedure loosely based on the NIOSH Method makes the result unreliable. I have no confidence in its accuracy. What I would suggest as a "fix" is that MSHA develop a written laboratory procedure for the XRD analysis of silica incorporating the essential aspects of the NIOSH 7500 Method. And then, most importantly, once that procedure is in place, follow it, so that all parties interested in the resultant analysis have some point of reference to begin a critical evaluation of that result, should they choose to do so. As it is, the analytical procedure appears so haphazard that no one can be sure of what procedure they are actually following on any particular sample on any given day.



Furthermore, on July 8, 1996, Asarco filed a motion for declaratory relief wherein it requested that this court issue "a declaration that the MSHA Denver laboratory cannot reliably report the amount of silica present on any single sample that it analyses under its current analysis procedures." Based on the foregoing findings of fact and conclusions of law pertaining to the sample at issue herein, that motion IS GRANTED.

Asarco's motion for sanctions against the Secretary of Labor for discovery-related issues IS DENIED. I believe counsel for the Secretary of Labor did a commendable job providing documentation pursuant to Asarco's many demands.

Lastly, I am mindful that I have not discussed every evidentiary basis for every contention of each of the parties contained in this voluminous record of trial. However, I have read and considered everything that is in the record and discussed those portions which I felt were necessary to my determination.

ORDER

On the basis of the foregoing findings and conclusions, Asarco's contest IS GRANTED, and the Contested Citation No. 3052272 IS VACATED.



Roy J. Maurer  
Administrative Law Judge <sup>3</sup>

---

<sup>3</sup> Although I was the presiding judge during the trial of this case, on March 1, 1997, in the midst of the briefing schedule, I was transferred from the Commission to the U.S. Department of Transportation. I have, however, through the above-stamped issuance date of this decision, remained an administrative law judge appointed pursuant to 5 U.S.C. § 3105.

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 10 1997

|                        |   |                           |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : |                           |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 96-10-M   |
| Petitioner             | : | A.C. No. 39-01328-05519   |
| v.                     | : |                           |
|                        | : | Docket No. CENT 96-31-M   |
| BOB BAK CONSTRUCTION,  | : | A.C. No. 39-01328-05520   |
| COMPANY,               | : |                           |
| Respondent             | : | Docket No. CENT 96-60-M   |
|                        | : | A.C. No. 39-01328-05521   |
|                        | : |                           |
|                        | : | Docket No. CENT 96-61-M   |
|                        | : | A.C. No. 39-01328-05522   |
|                        | : |                           |
|                        | : | Docket No. CENT 96-85-M   |
|                        | : | A.C. No. 39-01328-05523   |
|                        | : |                           |
|                        | : | Docket No. CENT 96-99-M   |
|                        | : | A.C. No. 39-01328-05524   |
|                        | : |                           |
|                        | : | Docket No. CENT 96-116-M  |
|                        | : | A.C. No. 39-01328-05525   |
|                        | : |                           |
|                        | : | Docket No. CENT 96-117-M  |
|                        | : | A.C. No. 39-01328-05526   |
|                        | : |                           |
|                        | : | Crusher No. 3 Mine        |


**DECISION ON REMAND**

These are consolidated civil penalty cases under section 105(d) of the Federal Mine Safety and Health Act of 1997, 30 U.S.C. § 801 et seq.

The parties have moved for approval of a schedule of payments to pay the civil penalties of \$16,266 assessed in these cases. The motion is **GRANTED.**

Accordingly it is **ORDERED** that the civil penalties of \$16,266 shall be paid as follows: Commencing on October 1, 1997, a payment of \$678 shall be made on the first day of each month for 23 consecutive months, and on the first day of the 24<sup>th</sup> month a payment of \$672 shall be made, for a total of \$16,266. Provided: If Respondent fails to make any monthly payment when due, the total remaining civil penalties shall become due, with interest accruing from that date until the full amount is paid. The applicable interest rate will be that announced by the Executive Director of the Commission.

This Order constitutes the Judge's final disposition of issues in these cases.

  
William Fauver  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUN 11 1997**

|                           |   |                              |
|---------------------------|---|------------------------------|
| VULCAN MATERIALS COMPANY, | : | CONTEST PROCEEDING           |
| Contestant                | : |                              |
| v.                        | : | Docket No. LAKE 96-128-RM    |
|                           | : | Citation No. 4105681; 5/7/96 |
| SECRETARY OF LABOR,       | : |                              |
| MINE SAFETY AND HEALTH    | : |                              |
| ADMINISTRATION (MSHA),    | : | Mine ID No. 12-00136         |
| Respondent                | : | Francesville Quarry          |
|                           | : |                              |
| SECRETARY OF LABOR,       | : | CIVIL PENALTY PROCEEDING     |
| MINE SAFETY AND HEALTH    | : |                              |
| ADMINISTRATION (MSHA),    | : | Docket No. LAKE 97-16-M      |
| Petitioner                | : | A. C. No. 12-00136-05514     |
| v.                        | : |                              |
|                           | : |                              |
| VULCAN MATERIALS COMPANY, | : |                              |
| Respondent                | : | Francesville Quarry          |

**DECISIONS**

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor,  
Chicago, Illinois, for the Petitioner/Respondent;  
William K. Doran, Esq., Smith, Heenan & Althen, Washington, D.C.,  
for Contestant/Respondent.

Before: Judge Koutras

**Statement of the Proceedings**

These consolidated proceedings concern 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). Petitioner seeks a civil penalty assessment of \$220, for an alleged violation of mandatory safety standard 30 C.F.R. 56.11001. The contest proceeding concerns a Notice of Contest filed by the contestant challenging the legality of the citation. A hearing was held in Peru, Indiana, and the parties appeared and participated therein. The parties filed posthearing briefs and I have considered their arguments in the course of my adjudication of these matters.



### Issues

The issues presented in these proceedings are (1) whether the respondent violated the cited mandatory safety standard, (2) whether the alleged violation is "significant and substantial" (S&S), and (3) the appropriate civil penalty to be assessed pursuant to the penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.
2. Sections 104(a), 105(d) and 110(a) and (i) of the Act.
3. 30 C.F.R. 56.11001.
4. Commission Rules, 29 C.F.R. § 2700.1, et seq.

### Stipulations

The parties stipulated as follows:

- (1) The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
- (2) Vulcan's operations affect interstate commerce.
- (3) Vulcan owns and operates the Francesville Quarry which is located in Pulaski County, IN.
- (4) The Francesville quarry crushes limestone.
- (5) The Francesville Quarry worked 43,084 man-hours from October 16, 1995 through October 16, 1996.
- (6) Vulcan worked 7,978,113 man-hours from October 16, 1995 through October 16, 1996 at all of its mines.
- (7) The Francesville Quarry had 18 violations in the preceding 24 months ending on May 7, 1996.
- (8) The payment of \$220.00 will not affect Vulcan's ability to continue in business.

(9) On May 7, 1996, Inspector Victor W. Chicky of the Federal Mine Safety and Health Administration conducted an inspection of the Francesville Quarry.

(10) During the course of the inspection, Mr. Chicky issued 104(a) Citation No. 4105681 for a violation of 30 C.F.R. § 56.11001.

(11) Vulcan owns and operates a Euclid 302 LD haulage truck, serial number 72754.

(12) The Francesville Quarry had 25 inspection days in the preceding 24 months ending on May 7, 1996.

### Discussion

Section 104(a) "S&S" Citation No. 4105681, May 7, 1996, alleges a violation of mandatory safety standard 30 C.F.R. 56.11001, and the cited condition or practice states as follows:

A outside handrail (retro-fit) was not provided on the elevated walkway of the Euclid, 302 LD, Ser. # 72754 operating in the quarry. The walkway is 18.5 inches wide, 8 feet long. Access is done on 2 shifts, 2-3 times a day. A fall of 8.5 feet would be possible from here. Conditions range from dry to wet due to weather. Hazard. Fall potential.

### MSHA's Testimony and Evidence

MSHA Inspector Victor W. Chicky testified to his experience and training, including 15 years in private industry, and the operation of bob cats, drilling machines, and work as a blaster. He confirmed that he conducted an inspection of the quarry on May 7, 1996, and that it was his first inspection visit to that mine. He observed two 300 Series 50-ton Euclid haulage trucks in operation, and upon inspecting them he found that they were not equipped with handrails along the walkway adjacent to the operator's cab. He identified photographic Exhibits R-4 (1) and (2), as one of the trucks in question, or one that appears to be similar to the cited truck. He cited both trucks, but the second citation was vacated after the truck was lost in a fire (Tr. 15-21).

Mr. Chicky stated that he took certain measurements and determined that the walkway was 8 feet long and 18 ½ inches wide. The distance from the front of the ladder used to reach the walkway to the edge of the cab door was four to five feet, and the distance from the top of the walkway to the ground below was 8 ½ feet. The truck operator informed him that he was on and off the truck two or three times a day (Tr. 23-24, 33).

Mr. Chicky stated that he determined that the absence of a handrail along the truck walkway presented a potential fall hazard to the ground below, and he cited a violation of

section 56.11001, for a failure to provide a safe means of access to the operator's cab, an area that he considered to be a working place. He also considered the walkway to be a travelway as defined by section 56.2. He concluded that the lack of a handrail presented a slip and fall hazard, particularly under wet or muddy conditions on a rainy day. Although it was not raining when he inspected the truck, there was intermittent rain later in the day (Tr. 25-26).

Mr. Chicky stated that he discussed the citation with plant superintendent Irvin Wilson, and pointed out the hazard to him. Mr. Wilson informed him that he made an inquiry in September 1995, regarding handrail retrofit kits, and found that there was a 8 to 10 week waiting period for the kits. Mr. Chicky had no knowledge that any kits had been ordered by Vulcan. Mr. Chicky confirmed that he based his moderate negligence finding on his conversation with Mr. Wilson. He believed that Vulcan knew that handrails were necessary. Mr. Chicky was of the opinion that no specific retrofit kits were required to comply with the standard and that Vulcan could have constructed its own handrails for the truck (Tr. 30-32).

Mr. Chicky stated that he based his "S&S" finding on his belief that it was reasonably likely that under adverse weather and slippery conditions a "fall of person" hazard 8 ½ feet to the ground below would exist as the operator entered or exited his operator's cab, and if this occurred, the fall would result in relatively serious back, head, or leg injuries. He further indicated that the grated walkway, which he described as "good," would be exposed to slippery conditions due to mud, frost, or snow (Tr. 32-35).

Mr. Chicky stated that the truck operator works alone while operating the truck. He confirmed that he discussed the citation with Mr. Wilson during his inspection closing conference, and Mr. Wilson disagreed with his "S&S" finding, and did not believe there was a violation of section 56.11001, because the truck was equipped with handholds. Mr. Chicky stated that prior to his inspection of May 7, 1996, he had never issued any other citations for violations of section 56.11001, at any mine for lack of handrails on any haulage trucks (Tr. 39-40).

Mr. Chicky identified exhibit P-2, a May 8, 1996, letter to Mr. David Bach, Vulcan's purchasing agent, from the McAllister Equipment Company, Chicago, Illinois, concerning the availability of handrail kits for Euclid Trucks, and stated that his supervisor faxed him a copy. He then acknowledged that he may have been in error regarding this letter, and on cross-examination clarified the matter and explained that the document he received was Exhibit R-2, a March 1, 1996, memorandum from his supervisor Ralph D. Christensen concerning hand railings for Euclid Haul Trucks (Tr. 39-40). Mr. Chicky did not know who made the notations that appear on the exhibit (Tr. 35-37).

On cross-examination, Mr. Chicky confirmed that he was aware of MSHA Program Information Bulletin No. P95-22, dated October 24, 1995 (Exhibit P-1). With regard to the "equipment precautions" listed on page two of the bulletin, particularly the one that states "Handholds or handrails should be within easy reach at critical locations," he confirmed that the

cited truck was equipped with handholds within easy reach on the top of the operator's cab, along the front windows, and along and over the top of the cab door, which opens outward. He also stated that the truck operator walks a distance of 4 or 5 feet from the top of the ladder shown in photographic exhibit R-4 (1), to reach the cab door (Tr. 46-50).

Mr. Chicky reviewed the last paragraph on page 2 of the bulletin, and it was his opinion that it was not necessary to install the handrail retrofit kits mentioned in the bulletin in order to comply with the cited standard. He further stated that he did not know how anyone would know from the information in the bulletin that handrails were required in order to comply with the cited standard. In response to a question as to why previous inspections at Vulcan's quarry did not result in citations for lack of handrails on the Euclid Truck in question, he stated that "some inspectors see things that others don't" (Tr. 46-51, 65).

Mr. Chicky confirmed that Mr. Wilson informed him that he had contacted a retrofit kit distributor and was informed that a kit was available but that it would take 8 to 10 weeks for delivery (Tr. 56). He identified Exhibit R-2, as an internal MSHA memorandum dated March 1, 1996, dealing with handrail retrofit kits for Euclid haulage trucks, and he stated as follows at (Tr. 58-61):

Q. This internal memorandum was not distributed to the industry; is that correct?

A. I really don't know.

Q. This was, in fact, a new policy, a new enforcement effort by MSHA to focus on haul trucks and handrails; isn't that correct?

A. I would say, yes, it was what the memo said.

Q. Now, there are two different series of trucks indicated on this particular memorandum. Could you tell me what it says with respect to the 200 series Euclid haul truck?

A. All 200 series Euclid haul trucks which were discontinued after the '74 model year did not have the retrofit handrail kit available for them.

Q. Okay. Now, with respect to a 200 series haul truck, if you found a 200 series haul truck on mine property without handrails, what would you do in that particular situation?

A. If I felt that walkway was high enough I would cite them for unsafe access.

Q. Now, how would a company with a 200 series haul truck know that they were supposed to have handrails on their truck?

A. I don't know.

Q. Would it be based on a program information bulletin that was sent out to the industry?

A. Quite possible, yes, sir.

Q. Doesn't that program information bulletin say that if there are no retrofit kits available, focus on increased training and proper placement of handholds?

A. Yes.

Q. So in that particular situation, they would not have information that they were supposed to have handrails on their trucks?

A. No.

Q. What would happen --- let me ask you this. In that particular situation, suppose you had a 200 series haul truck working alongside a 300 series haul truck. A 200 series haul truck and a 300 series haul truck are essentially the same configuration; isn't that correct?

A. I don't know.

Q. One's an older truck and one's a newer truck?

A. Yeah.

Q. A similar fall hazard essentially that you identified?

A. Yes.

Q. So under the program information bulletin, you would cite the 300 series haul truck for not having a handrail but not the 200 series haul truck?

A. No. If the heights were reasonable to cause a serious injury I would cite them.

Q. But under the information given to the industry and given to the particular operator, that operator might be inclined to think that his 200 series haul truck didn't need a retrofit kit under the policy under the program information bulletin, but the 300 series would need handrails?

A. I would say, yes, he would think that.



Mr. Chicky further explained that the memorandum states that retrofit kits are available for the 300 series Euclid trucks and that a parts list and diagram is attached. He confirmed that he gave this to Mr. Wilson, and that Mr. Wilson told him that he had called a distributor and was told that kits were not available. Mr. Chicky agreed that if Mr. Wilson was under the impression that no kit was available, he would be in the same situation as a person with a 200 series haul truck and would have to focus on increased training and use of handholds and the other precautions stated in the bulletin (Tr. 61-62). He confirmed that section 56.11001 does not mention retrofit kits, handrails, or mobile equipment (Tr. 66-67). He further confirmed that the October, 1995, MSHA bulletin makes no reference to the cited standard (Tr. 70).

In response to further questions, Mr. Chicky confirmed that the cited truck was equipped with handholds along the operator's cab, but he still believed that a handrail was necessary in the event someone were to slip on the travelway grating. If a belt or lanyard were used by the operator, he would not have cited a violation because this would provide protection from falling (Tr. 87). He denied that he informed Vulcan that it had to use a retrofit kit, and confirmed that it could have constructed its own substantial protective handrails. He was not aware of the March 1, memorandum before he went to the mine to begin his inspection (Tr. 88-91). Mr. Chicky confirmed that he has inspected Euclid trucks prior to his inspection and never cited any of them for lack of fall protection (Tr. 93). Vulcan had not previously been cited for lack of handrails on its Euclid trucks (Tr. 94).

#### Vulcan's Testimony and Evidence

Randy Logsdon, Vulcan's safety and health manager, midwest division, testified that he receives and reads MSHA program information bulletins, and if applicable to his operations, he sends them to the plant managers. He confirmed that he received MSHA's October 24, 1995, mobile equipment safe access program bulletin, and stated that the recommendations contained therein "are things that we do anyway". He further explained at (Tr. 104-105):

A. Well, we would have regular training. We require and enforce a process of accessing on ladders and in the cabs, a three-point contact, which means that the employee has to have either both hands and one foot or two feet and one hand in contact with the ladder or support at any given time. We do periodic safety meetings to reinforce those rules. We inspect our equipment to make sure that all of the safety equipment that is manufactured with the equipment is in good working order.

Mr. Logsdon stated that he sent the bulletin to each of the plant superintendents. Based on the bulletin language, he did not believe that handrails were mandatory. However, since the company had a number of older haul trucks, he instructed the plant superintendents, including Mr. Wilson, to make inquiries with distributors they deal with to determine if handrail kits were available, and if so, to make a determination as to whether they needed to be installed (Tr. 106-107).

Mr. Logsdon stated that Mr. Wilson called him in May, 1996, and informed him that two of the plant Euclid trucks were cited because the handrail retrofit kit was not available or installed on the trucks. Mr. Wilson advised that he had made an inquiry with the distributor shortly after receiving the bulletin and learned that a kit was not available (Tr. 107). Mr. Wilson also faxed him a copy of an internal MSHA memorandum dated March 1, 1996, regarding handrailings on Euclid haul trucks (Exhibit R-2).

Mr. Logsdon stated that he made an inquiry with company purchasing agent Dave Bach, and asked him to inquire with a large distributor in Chicago about the availability of kits, and learned that the kit was designed for an R50, fifty-ton capacity rear dump truck. The plant also has Mack trucks, and upon inquiry he learned that no kits are available for that model (Tr. 110).

Mr. Logsdon believed that safe truck access is provided with a number of handholds on the vehicle, and did not feel there was a reasonable danger or risk of an operator falling off the vehicle. He acknowledged that MSHA believed there was a problem, but believes he dealt with it and tried to follow MSHA's policy. If the bulletin had stated that "handrails must be or shall be installed on mobile equipment" the company would have installed them (Tr. 111).

Mr. Logsdon stated that a handrail retrofit kit was ultimately obtained for the cited truck and it was installed "with some difficulty". He was not present when it was installed (Tr. 111-112). It was his understanding that a retrofit kit was specifically required to abate the citation, and Mr. Wilson informed him that the kit was mandatory and if a handrail was fabricated by the company it would need to be approved by a professional engineer (Tr. 112).

On cross-examination, Mr. Logsdon confirmed that he received MSHA's October 24, 1995, bulletin before the citation was issued, and knew that retrofit kits were available for some truck models but had no knowledge that kits were available for the Euclid R-50 (Tr. 113-114). He stated that he was aware of section 56.11001, and he confirmed that the Euclid truck operator's cab is a working place and that the grating that the operator walks on is "an access point much like a ladder is an access", and agreed that it was a travelway within the regulatory definition of that term (Tr. 116-117). He agreed that if a driver were to fall from the travelway he could potentially and likely receive serious injuries (Tr. 118-119).

Mr. Logsdon believed that the existing truck handholds provide a safe means of access, and he has climbed on the truck and used the handholds, and the fact that there was no handrail to his rear did not bother him as long as he had good footing and contact with the handholds. He would not feel as comfortable using only handholds on the unguarded travelway if it were covered with snow and ice, but he would remove the snow and ice before accessing the cab. He further stated that the truck operator is required to perform a pre-operational inspection of the vehicle, including the travelway and handholds (Tr. 122-123).

Irvin Wilson, Francesville Plant Superintendent, for over two years, and 26 years with Vulcan, described the operation of the quarry, and confirmed that it has approximately 17 hourly

employees, and two haulage trucks that operator regularly. In May 1996, there were Euclid 302 model R50, 50-ton rear dump trucks operating at the mine. The trucks had no handrails, but did have factory installed handholds along the edge and top of the cab and above the door (Tr. 130).

Mr. Wilson confirmed that he read the MSHA bulletin after receiving it from Mr. Logsdon and explained as follows at (Tr. 130-132):

Q. Did you take any action as a result of reading that bulletin?

A. To the best of my recollection, I called Randy and I said, you know, is this something that we have to rush right out and do, you know. And he said, well, we have got --- you've got handholds on the trucks and as long as we --- you know, as long as we enforce our training and train our employees, you know, the proper way to mount and dismount the equipment, you know, in the presence of a handrail but there being a presence of handholds then we're within the guidelines.

Q. Now, did you check --- did you take any action with respect to finding a retrofit kit for this particular truck?

A. I had talked to the distributor, Rudd Equipment Company out of Indianapolis in reference to that, and was told at that time there was no kits available.

Q. When did you call Rudd?

A. It was sometime after getting the bulletin from Randy. I don't recall.

Q. You testified, I believe, that you read this when you received it. Was it your understanding that you were required to put handrails on there, ---

A. No.

Mr. Wilson stated that the Euclid trucks in question are "mid 80's vintage" and were at the mine before February, 1995, when he arrived, and they were inspected by MSHA (Tr. 133). He identified a record of a January 23, 1996, safety meeting which included a discussion about slip and fall hazards when mounting and dismounting mobile equipment and the "three-point contact method of climbing" (Tr. 134).

Mr. Wilson confirmed that he accompanied Inspector Chicky during his inspection of May 7, 1996, and informed him that he had checked on a handrail retrofit kit with a distributor and was told there were none available. Mr. Chicky provided him with a copy of the March 1, 1996, MSHA memorandum and attachments (Exhibit R-2) which indicates that a kit was

available for the 300 series haul trucks, and Mr. Wilson stated that he faxed a copy to Mr. Logsdon. Mr. Wilson stated that his division headquarters confirmed on May 8, 1996, that such a kit was available through a distributor in Chicago (Tr. 135-138).

Mr. Wilson stated that during the inspection closeout conference he informed Mr. Chicky that a kit was being ordered and asked if a kit could be fabricated by the respondent. Mr. Chicky informed him that it could be fabricated but it should be certified by a professional engineer (Tr. 138-139). Mr. Wilson confirmed that the MSHA program information bulletin does not mention company kit fabrications, or certifications by engineers. A kit was ultimately obtained and was received at the end of May or early June, 1996, and it was installed after experiencing several difficulties in mounting it on the truck (Tr. 140-142).

On cross-examination, Mr. Wilson confirmed that he inquired about the availability of a handrail kit for the Euclid truck after receiving the MSHA memorandum and before the citation was issued. He believed it was a good idea to install the kit on the truck if it was available because "it could possibly prevent a slip or a fall" (Tr. 145-147). However, the distributor informed him that the kit was unavailable and his understanding of that term "means there are none available". He was told the kit was available but out of stock and could be ordered, and it was his understanding that "there's no availability of receiving that" (Tr. 147).

Mr. Wilson stated that even though adequate handholds were on the truck, he was concerned about a fall of eight and a half feet by one of his drivers and that "there is a potential for a slip even though there are adequate handholds" (Tr. 147). He confirmed that the truck operator's cab is his working place that is accessed by the travelway. As a minimum, a driver enters and exits the cab twice a day depending on the frequency of his breaks (Tr. 148). He agreed the travelway can be slippery in adverse weather conditions (Tr. 150).

In response to further questions, Mr. Wilson confirmed that in inquiring about the availability of a retrofit kit, he was complying with the information in MSHA's program bulletin (Tr. 151). He further confirmed that company training programs specifically focus on operating in bad weather, and he pointed out that the company installed a small ledge on the truck for the operator to place his lunch bucket so his hands can be free while climbing up the truck ladder (Tr. 152).

David Bach, Vulcan's midwest division purchasing agent, confirmed that he checked on the availability of a retrofit kit for a Euclid 300 series haul truck with Euclid distributor McAllister Equipment Company in Elsa, Illinois, and he identified a copy of a letter dated May 8, 1996, that he received in response to his inquiry, and it states in relevant part as follows (Exhibit P-2; Tr. 55):

The R50 handrail kits are available from Euclid. The kits are not in stock at this time. Current schedule lead time is 8-10 weeks upon receipt of an order.



Mr. Bach stated that the respondent also uses Mack model 50 trucks in its operations and he was informed by the distributor that the manufacturer discontinued this particular truck in the late 1970's and that handrail retrofit kits are no longer available, and he was told a piece of pipe or beams could be used as a handrail (Tr. 157).

### MSHA's Arguments

MSHA asserts that Vulcan violated section 56.11001, in that it did not provide a safe means of access to the cited haulage truck operator's compartment. In support of this conclusion, MSHA states that the operator uses a walkway approximately 18.5 inches wide and 4 to 5 feet long, to reach the operator's compartment and does so without any means of protection. MSHA further states that there is no testimony that Vulcan provided fall protection to the miner (citing transcript pages 20-26 and 147-148).

MSHA states that the length of the walkway was 8 feet, but that the measured walkway distance from the access ladder to the compartment door was four to five feet long, and that the distance from the walkway to the ground below was 8 feet. MSHA states that the inspector based the violation on the fact that no handrail was provided on the walkway.

MSHA asserts that on the day of the inspection, the inspector "observed that it had rained and the conditions were slippery and muddy on the walkway (Tr. 20-26)", and that after interviewing the operator of the truck and observing the working conditions, the inspector determined that a fall from a height of 8 feet to the ground could result in an injury to the miner.

MSHA concludes that the inspector's significant and substantial (S&S) finding is clearly supported and must be upheld. In support of its conclusion, MSHA argues that it is uncontroverted that Vulcan had knowledge that handrails were required at the time of the inspection. MSHA asserts that the testimony and evidence shows that a retrofit kit was available for the truck, and that the inspector testified that MSHA "did not require Vulcan to purchase any particular type of retrofit kit" and "could have built their own handrails" (Exhibits R-1 and 2, Tr. 30-31).

MSHA maintains that a reasonably serious injury could likely follow from an 8-foot fall from the walkway, and that it is clear that the violation contributed to a measure of danger for the individuals exposed to the hazard.

MSHA asserts that it is reasonable to conclude that an injury to the truck operator could have occurred in that the inspector testified that it was wet at the time of the inspection, and that "it had rained during the day and there was mud", and that the inspector observed that the conditions could have resulted in slipping and falling from a height of eight feet with no protection from falling to the ground. Under the circumstances, MSHA concludes that the existing hazard could result in a substantial possibility of an injury. MSHA cites the inspector's determination that a leg, back, or head injury was reasonably likely, depending on how the miner



fell, and supports the inspector's conclusion that it was reasonably likely that a serious injury would occur if the hazard remained unabated. Under the circumstances, MSHA requests that the S&S citation and proposed penalty assessment of \$220, be affirmed.

#### Vulcan's Arguments

Vulcan asserts that it complied with section 56.11001, and provided a "safe means of access" to the operator's compartment of the cited Euclid haul truck. Vulcan explains that access to the operator's compartment is gained by climbing an eight foot ladder attached to the front of the truck, and then stepping four feet (approximately two steps) to the door of the operator's compartment. Respondent points out that personnel negotiate this route by using the properly located handholds which run horizontally and vertically along the short route to the compartment door, and that they also rely on their training regarding procedures for safely accessing mobile equipment.

Vulcan maintains that until MSHA changed its policy in late 1995, these handhold protections were never deemed to be inadequate to meet the applicable safe access requirements, and they are in fact consistent with the recommendations in MSHA's October 24, 1995, Program Information Bulletin regarding safe access to mobile equipment which instructs that in the absence of a retrofit kit, "greater emphasis should be placed on training and proper location of handholds." Vulcan concludes that in establishing a new requirement for handrails on haul trucks, where such a requirement has never before been construed, MSHA has confused the concept of "safe means of access" with "safer means of access."

Conceding that at the hearing it did not deny that the installation of handrails provides an additional level of protection for accessing mobile equipment, Vulcan maintains that it was this very consideration that motivated the Company, even though it was not deemed a mandatory requirement, to follow the handrail retrofit kit recommendation in the Program Information Bulletin and install handrails on all trucks which had available retrofit kits. However, Vulcan maintains out that this additional level of protection does not decrease the adequacy of the protection provided by the handholds as a means of safely accessing the operator's compartment.

Vulcan asserts that MSHA has apparently concluded that because handrails provide an additional level of protection, anything else, even the handhold protection which has been the sole means of safe access protection on this and other Euclid 300 Series trucks of 1980's vintage, is no longer sufficient to meet the safe access requirement of section 56.11001. Vulcan maintains that this conclusion is inconsistent with the actual facts regarding access to the operator's compartment, and with the fact that its reliance on the properly located handholds and effective training has resulted in no accidents or injuries related to movement between the operator's compartment and the top of the ladder.

Vulcan maintains that MSHA's argument regarding the inadequacy of handholds is also undermined by the fact that it has not raised any issue with respect to the relative safety of the

ladder leading up the front of the truck. To the extent any fall hazard exists, Vulcan points out that the ladder clearly presents an even greater fall potential — because unlike the platform at the top the ladder, persons on the ladder absolutely must hold onto the ladder at all times to keep from falling — yet no requirement for railings or fall protection has been asserted.

Vulcan asserts that the utility and effectiveness of the properly located handholds as a means for safely accessing the operator's compartment is not negated by the fact that handrails provide an additional level of protection. Vulcan suggests that while an airbag in a haul truck operator's compartment would provide more protection than just the seat belts required under section 56.14131, that fact, however, does not suddenly render the seat belts inadequate.

Vulcan maintains that in late 1995 or early 1996, MSHA initiated a new enforcement policy requiring handrails for haul trucks and that the inspector conceded that this was the case. Vulcan states that the new policy is revealed in the March 1, 1996, MSHA internal memorandum from Field Office Supervisor Ralph Christensen to MSHA District Manager Jim Salois, which states in pertinent part:

During an inspection this week, we were required to establish the determination for requirements of hand railings and to apply them as directed recently by Headquarters. (Exhibit R-2).

Vulcan asserts that the memorandum and handrail "requirements" were never communicated to the respondent, and the fact that this was a new interpretation is bolstered by the fact that the subject haul truck and other similarly configured trucks like it have been utilized in the mining industry for two decades with handholds as the sole means of safe access. Yet, no citations had been issued on this truck previously under section 56.11001, and the inspector, with 18 years of experience, had never issued a citation under this standard for trucks. Moreover, the inspector was unaware of any citation ever being issued for the lack of handrails on trucks. However, at the time of the inspection, the inspector was fully aware of the October 24, 1995 Program Information Bulletin recommending a "retrofit" — the term he used in writing the citation.

With respect to the issue of retrofitting handrails on haul trucks, Vulcan points out that the only information that it was provided with prior to the issuance of the citation, was the October 24, 1995 Program Information Bulletin which contains the following brief comments on the last page of the bulletin:

Many older machines were manufactured with narrow walkways and handholds for access to cabs and maintenance areas. When practicable, these machines should be upgraded to provide adequate fall protection. For some models, retrofitted handrail kits are available from the manufacturer and should be installed. Where kits are not available, greater emphasis should be placed on training and proper location of handholds. (Exhibit R-1).

Vulcan argues that the bulletin distributed six months before the citation was issued does not adequately notify the mining industry that handrails are mandatory requirements under 30 C.F.R. § 56.11001, and in fact does just the opposite. Vulcan points out that the bulletin qualifies the recommendation for upgraded fall protection by indicating that this “should” be accomplished “when practicable,” but provides no explanation of the term “when practicable.” To add to the confusion, Vulcan points out that the final two sentences of the quoted bulletin go on to say that handrails “should” be installed when retrofit kits are available from the manufacturer but if they are not available then reliance on increased training and proper location of handholds is appropriate.

Vulcan concludes that the bulletin communication only recommends an upgrade and in no way notifies the mining industry that the handholds provided on haul trucks will no longer be deemed an adequate means of safe access under section 56.11001, and that this was in fact the interpretation of safety manager Logdson and quarry superintendent Wilson upon reading the bulletin handrails reference. Further, Vulcan asserts that the inspector acknowledged that he did not know how an operator could interpret a mandatory handrail requirement from reading the bulletin and conceded that it instructs operators with trucks that do not have retrofit kits available — like 200 Series Trucks which are similarly configured with similar fall potential — that handrails do not need to be installed. Vulcan concludes that this is far from the across-the-board handrail requirement that the inspector referred to in describing MSHA’s enforcement stance.

Citing the Commission’s “reasonably prudent person” notice test enunciated in Lanham Coal Co., Inc., 13 FMSHRC 1341, 1343 (September 1991), Vulcan concludes that based on the absence of any MSHA enforcement history with respect to requiring handrails under section 56.11001 on haul trucks, the accepted practice of relying on the properly located handholds, and the misleading statements in the information bulletin, a reasonably prudent person could not construe from the language of section 56.11001 a mandatory requirement for handrails on haul trucks.

Vulcan maintains that MSHA’s new handrail requirement was a substantive rule requiring APA notice and comment rulemaking before implementation. Conceding that courts accord considerable deference in reviewing agency interpretations, Vulcan concludes that the new handrail rule should be accorded no deference because it is inconsistent with past agency enforcement and policy, citing Morton International, Inc. v. Secretary of Labor, 18 FMSHRC 533, 539-540 (April 24, 1996) rejecting a new MSHA interpretation of methane regulation in absence of either proper rulemaking, a policy letter or bulletin setting forth the new interpretation, or a clear and consistent regulatory history.

Assuming that the lack of handrails constituted a violation, Vulcan nonetheless concludes that it cannot be deemed to be significant and substantial (S&S). Citing several Commission decisions, Vulcan asserts the case law criterion for making an S&S finding must be based on the particular facts surrounding the violation.

Vulcan argues that MSHA's belief that the failure to install a handrail retrofit on the cited truck contributed to its eight foot fall hazard "theory" posed by persons moving from the top of the ladder along the four feet of grating to the operator's compartment specifically ignores the effectiveness of the properly located handholds that run the length of the route to the compartment and provide a means for avoiding and preventing exposure to any fall. Vulcan further believes that MSHA's hazard theory ignores the fact that this means of safe access has been utilized safely and effectively by miners for many years, and MSHA was unable to present any mine specific evidence of an accident or injury history related to accessing haul trucks. Vulcan contends that such a history simply does not exist.

Vulcan further argues that MSHA's information bulletin also demonstrates the absence of a discrete hazard in that it provides that haul trucks which do not have manufacturer's retrofit kits available can rely instead on increased training and proper location of handholds. Consequently, trucks like the Euclid 200 Series and the Mack, which have virtually identical configurations and access requirements are in compliance if operators do exactly what Vulcan did in this case. If those identical fall potentials are not evaluated as even constituting a violation — much less a hazard — then such evaluation cannot change simply because Vulcan's truck was built by a manufacturer who put a retrofit kit together.

Vulcan maintains that there was no reasonable likelihood of an injury resulting from any contributory hazard in that the handholds have been used safely and effectively due in large part to the fact that Vulcan emphasizes safe access techniques in its training of personnel, and any hazard which could be associated with moving between the ladder and the operator's compartment has been dealt with by focusing on the proper use of handholds, recognizing slip and fall hazards, and maintaining clean surfaces for accessing the cab. Additionally, to assist in the proper use of the handholds and the ladder, a mid-level platform is provided on the truck so that lunch pails or materials can be set down so hands are free to grip the ladder and handholds.

Vulcan further points out that there has not been an injury or accident related to a fall while accessing any haul truck at the mine, or within the respondent's Midwest Division, and that it has followed all five of MSHA's suggested precautions for avoiding slip and fall accidents as set out in its information bulletin. Vulcan maintains that all of these precautions were initiated years before the release of the bulletin and there is no reasonable likelihood that the use of protections other than handholds would cause injury. Under all of these circumstances, Vulcan concludes that there is no basis for the allegation that the alleged violation is significant and substantial.

Finally, Vulcan asserts that it was not negligent in this case and acted diligently in maintaining safety and compliance. In support of this conclusion, it relies on the following:

- 1). In providing fall protection on its haul trucks, Vulcan relied on the properly located handholds which were provided by the manufacturer.



- 2). The handholds have been used safely and effectively on the cited haul truck and other haul trucks throughout the 1980's and 1990's, and there have never been any truck access injuries or accidents at the subject Quarry or in Vulcan's Midwest Division.
- 3). Throughout the 1980's and 1990's, MSHA has inspected the subject truck, and all other haul trucks, none of which have had handrails, and has never issued a safe access citation.
- 4). MSHA's October 24, 1995 Program Information Bulletin was reviewed in good faith by Safety Manager Logsdon and Quarry Superintendent Wilson and interpreted as confirming that the handholds were proper means of safe access and in compliance with MSHA requirements.
- 5). Nonetheless, all operations — including the Quarry — on Mr. Logsdon's recommendation, made a good faith effort to obtain handrails for their trucks pursuant to MSHA's recommendation.
- 6). Superintendent Wilson contacted Rudd Equipment and, when told that a retrofit kit was not available for the Euclid 300 series, proceeded to follow the next recommendation set out in MSHA's Bulletin — increased safe access training. Mr. Wilson conducted a training session on safe access to mobile equipment on January 23, 1996.

Vulcan concludes that its management personnel made a thoroughly good faith effort to address MSHA's concerns even though they were under the specific impression that they were in full compliance with applicable mandatory safety requirements, and MSHA's reference to handrails in the bulletin was simply a recommendation. Given the absence of any enforcement history regarding handrails, the absence of any Company injury or accident experience involving access to haul trucks, and the confusing and actually misleading information disseminated to the mining industry via MSHA's information bulletin, Vulcan maintains that its personnel acted in an appropriate manner in dealing with the situation.

### **Findings and Conclusions**

#### **Fact of Violation**

Vulcan is charged with a violation of mandatory safety standard 30 C.F.R. § 56.11001, for failing to provide an outside retrofitted handrail along the elevated walkway of the cited series 300 Euclid haulage truck. Unlike mandatory safety standard section 56.15005, which requires the wearing of safety belts and lines when persons work where there is a danger of falling, or section 56.11002, which requires handrails on elevated walkways, section 56.11001, provides as follows:



§ 56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

A "working place" is defined by 30 C.F.R. § 56.2, as "any place in or about a mine where work is being performed".

On the facts of this case, I conclude and find that the operator's compartment of the cited truck is "a working place" within the definition of that term in section 56.2. It is obvious to me that in accessing his operator's compartment, and operating the truck from that location, the driver is in a working place. Further, although the inspector characterized the grated steel path of travel by the driver in reaching the compartment as a "walkway", it is nonetheless also a "travelway" as that term is defined in section 56.2 ("a passage, walk or way regularly used and designated for persons to go from one place to another"). The evidence in this case reflects that on any given day, a truck driver walks to the ladder and climbs on and off his truck 2 or 3 times daily. I conclude and find that this constitutes a regular use of the walkway or travelway by the driver to access his operator's compartment working place.

In Summit Incorporated, 13 FMSHRC 1511 (September 1991), former Commission Judge John Morris affirmed a violation of section 56.11002, because of the failure of the mine operator to install handrails along the walkway of a backhoe. The walkway was elevated approximately 4 ½ feet off the ground, and the operator's cab was located on the front part of the backhoe, and one could step out of the cab unto the walkway and walk down the walkway to the motor compartment. The perceived hazard "involved any worker who might fall off a walkway and be injured" 13 FMSHRC 1513. These facts appear to be similar to the instant case, except for the fact that the inspector here cited the rather general "safe means of access" section 56.11001, rather than the specific elevated walkway handrail requirement found in section 56.11002, or the "danger of falling" safety belt and line requirement of section 56.15005.

In Evansville Materials, Inc., 12 FMSHRC 12 (January 1990), I affirmed a violation of section 56.11001, because the operator failed to provide a safe means of access to a dredge anchored in the middle of a river. Employees reached the dredge by means of a motorized 12 foot "john boat". The inspector issued the citation after finding that the employees entering or exiting the boat to and from the dredge had to step up three feet "with nothing available for a handhold". The inspector testified that in the absence of any handholds, or other means of getting out of the boat, a person could fall in to the water or strike their head on the boat. Although the inspector's suggestion that a ladder be installed as a means of accessing the dredge from the boat was not adopted because it was impractical, the violation was abated after the operator welded handholds to the dredge deck.

In Mechanicsville Concrete, 16 FMSHRC 1444, 1458 (July 1994), former Commission Judge Arthur Amchan affirmed an "S&S" violation of 56.11001, after finding that a front-end loader that had a build-up of oil grease on the ladders and platform leading to the driver's cab

exposed the driver to a danger of slipping and falling 6 to 8 feet. The judge concluded that a safe means of access was not provided for the driver, but I find nothing to suggest that protective handrails or other devices were required, and I assume that the violation was abated by cleaning up the cited oil and grease build-up.

MSHA's Safe Access to Mobile Equipment Program Information Bulletin

MSHA Program Information Bulletin No. P95-22, October 24, 1995, Safe Access to Mobile Equipment, was issued "to inform the mining community about the high number of serious mining accidents associated with slips and falls from mobile equipment". The bulletin does not mention any mandatory safety standard, and in particular, makes no mention of section 56.11001. It states in relevant part as follows (Exhibit R-1):

Modern equipment is designed to minimize slip and fall hazards; but large machinery, new or old, can require access at heights with a fall potential that can cause serious injury. These concerns should be addressed by the mine operator, mobile equipment operator, and maintenance personnel. MSHA has compiled the following mobile equipment precautions to reduce the number of slip and fall accident in mining:

Equipment should be inspected for icy, wet, or oily areas at the start of each shift and whenever conditions dictate. Before climbing on, off, or around mobile equipment, footwear should be free of mud or other substances that could cause slipping.

Persons climbing on or off mobile equipment should face the machine. Both hands should be free for gripping the ladder, handrail, or handhold. When necessary, a cord, rope, or other line should be used to lift and lower lunch pails, thermos bottles, or tools.

Walkways should be no less than their original manufactured widths, constructed with slip-resistant surfaces, and securely attached. Unobstructed access should be provided to all areas of the machine where a person might travel.

Handholds or handrails should be within easy reach at critical locations.

Mobile equipment operators and maintenance personnel should be trained to recognize slip and fall hazards to reduce the risk of accidents.

Many older machines were manufactured with narrow walkways and handholds for access to cabs, and maintenance areas. When practicable, these machines should be upgraded to provide adequate fall protection. For some models, retrofitted handrail kits are available from the manufacturer and should be installed. Where kits are not available, greater emphasis should be placed on training and proper locations of handholds. (Emphasis Added).

MSHA's post-hearing brief has no discussion concerning the bulletin. However, in the course of the hearing, MSHA's counsel took the position that Vulcan was required to have "a retrofit kit or something equivalent, some kind of handrail to prevent the employee from falling" (Tr. 13), and stated as follows at (Tr. 175-176):

\* \* \* the position of the secretary is as follows is that the regulation --- you interpret the regulation, safe access, it's clear from the interpretation of that regulation that a handrail was necessary in this instance. Everybody recognized that there was a hazard of someone falling from that platform. And as far as all these interpretive bulletins, no one's testified saying that it was required to buy a retrofit kit. You know, there's nothing in those documents, and that's what we're going to be saying, Judge, in our brief.

JUDGE KOUTRAS: It says here, though, that for some models retrofitted handrail kits are available and should be installed.

ATTORNEY ALVAREZ: Right. Available, Judge. And someone could have called MSHA and said, do we have to buy it? No.

JUDGE KOUTRAS: And should be installed.

ATTORNEY ALVAREZ: Should be installed doesn't mean shall be installed, doesn't mean shall buy it. There's a difference between the shall and the should.

The concluding paragraph of the bulletin states that "older" machines equipped with handholds for access to cabs be upgraded "when practicable" to provide "adequate fall protection", with no further explanations other than the statements that available retrofitted handrail kits should be installed, and if not available, "greater emphasis should be placed on training and proper locations of hanholds". In short, the bulletin, on the one hand, seemingly suggests that retrofitted handrail kits, if available, will provide fall protection, but on the other hand, if such kits are not available, equivalent protection may be provided by greater emphasis on training and proper locations of handholds. Inspector Chicky agreed that a mine operator or Mr. Wilson reading the bulletin would conclude that this was the case (Tr. 61-62).

MSHA's assertion that "it is uncontroverted" that Vulcan had knowledge that handrails were required at the time of the inspection is without merit. Safety director Logsdon and

quarry superintendent Wilson testified credibly that based on the language of the bulletin, they had no reason to believe that the installation of handrails as a means of compliance with section 56.11001, was mandatory. Their lack of knowledge in this regard is supported by Inspector Chickey's testimony, which is as follows at (Tr. 51):

Q. Under this particular program information bulletin, how would someone know that handrails are required under that section of part 56?

A. I don't know. I don't know how they would know, but as an inspector handrails to prevent falls are what we recommend in numerous places besides haulage trucks.

Given the fact that the cited truck was equipped with handholds that had obviously been acceptable prior to the issuance of the citation in this case, and coupled with the fact that Vulcan had implemented several precautionary training and preventive measures to address a potential hazard that it has readily acknowledged, I cannot conclude that any reasonably prudent person with that knowledge and reading the MSHA bulletin would recognize or reasonably believe that handholds were no longer acceptable as a means of complying with section 56.11002, and that retrofitted handrails were required.

I find nothing in the bulletin that imposes any mandatory or regulatory obligation on Vulcan to install a retrofitted handrail on the cited truck in question. Further, I cannot conclude that the bulletin is a statement of MSHA's policy interpretation or application of any particular mandatory safety standard. I conclude that the bulletin was published pursuant to MSHA's general authority under the Act to disseminate information concerning a myriad of mine safety and health matters. After careful scrutiny of the bulletin, I conclude and find that its purpose is precisely what is stated on the face of the document, namely, to inform the general mining community about accidents associated with slips and falls from mobile equipment. The bulletin further communicates an MSHA compilation of mobile equipment precautions to reduce such incidents. I further conclude and find that the bulletin is informational and does not constitute a substantive "new handrail rule" that requires APA notice and comment rulemaking. Under the circumstances, Vulcan's arguments to the contrary ARE REJECTED. Any suggestion by MSHA that the bulletin imposed an obligation on Vulcan to install retrofitted handrails as a means of complying with section 56.11001, is likewise REJECTED.

#### The Alleged Violation

The inspector cited the violation out of concern that a potential slip and fall hazard of 8 feet existed from the elevated access travelway to the ground below. He believed such a hazard would exist when the vehicle operator walks to and from his operator's compartment under wet or muddy working conditions (Tr. 25). Contrary to MSHA's assertion in its brief that "on the day of the inspection the inspector observed that it had rained and the conditions were slippery and muddy on the walkway", the inspector testified that at the time of his inspection "I don't



believe it was wet or muddy. It was early in the morning , I don't believe the rain had started yet. It was probably some dampness due to moisture from the night" (Tr. 34). He confirmed that the rain started later in the day (Tr. 35).

The inspector stated that "we look at elevated areas and generally we suggest handrails or some means of prevention" (Tr. 26). He confirmed that although he has cited violations of section 56.11001, in "various other situations, elevated areas", he had never previously cited any trucks for lack of handrails (Tr. 40, 45).

I take note of the fact that on the face of the citation the inspector specifically cited the absence of a retrofitted handrail as the basis for the alleged violation of section 56.11001, and the citation was abated after the handrail was installed. Notwithstanding his denials to the contrary, there is a strong inference that the inspector believed the bulletin mandated the installation of a retrofitted handrail as a means of complying with section 56.11001.

As noted during the hearing, I find the bulletin to be rather confusing and contradictory. The listed "precautions" acknowledge the presence of handholds on mobile equipment, and caution that "both hands should be free for gripping the ladder, handrail, or handhold", and that "Handholds or handrails should be within easy reach at critical locations. Further, the information provided can reasonably be interpreted to permit the use of handholds at proper locations and increased emphasis on training as a means of compliance when handrail retrofit kits are unavailable. In this case, I conclude and find that Vulcan's credible evidence establishes that handrail retrofit kits were not available for the cited truck in question when the violation was cited.

The critical issue in this case is whether or not a safe means of access was provided for the cited truck in question. In this regard, I find nothing in section 56.11001, that mandates handrails as the only means of providing safe access to the operator's compartment of the cited truck in question. If MSHA believes that handrails are mandatory for all haulage truck elevated walkway areas "across-the-board", it is free to initiate proper notice and comment rulemaking. It may also consider citing section 56.11002, which requires handrails on elevated walkways, or section 56.15005, which requires the use of safety belts and lines where there is a danger of falling.

Neither party in this case produced any of the truck drivers to provide first hand testimony concerning access to the operator's compartment. Safety director Logsdon testified credibly that he has climbed on and off the truck in question and always used the handholds as a means of access. The absence of a handrail to his rear did not bother him, and as long as he had good footing and contact with the handhold, he believed the handhold would prevent a stumble or a fall (Tr. 121-122). Although Mr. Logsdon indicated that he would not feel comfortable using only the handholds if the travelway were covered with ice and snow, he confirmed that he would remove the snow or ice before accessing the operator's cab (Tr. 121-123).



Vulcan's safety director Logsdon testified credibly that Vulcan conducts regular safety training and meetings covering all of the precautions noted in MSHA's bulletin. Quarry superintendent Wilson confirmed that safety meetings concerning slip and fall hazards when mounting and dismounting mobile equipment and methods of climbing are conducted at the mine. He also confirmed that Vulcan installed a small ledge on the truck so that the operator can place his lunch bucket on it and have his hands free while climbing up the access ladder, and that drivers are required to conduct pre-operational inspections of the truck (Tr. 123, 134, 152).

Inspector Chickey acknowledged that handholds were in fact located within easy reach along the access way to the truck operator's compartment as shown in photographic exhibit R-4-1, and that the handholds were proper (Tr. 48, 51). The inspector confirmed that handholds were located directly above the grated travelway along the top of the windshield of the operator's compartment and along the top of the compartment doorway next to the travelway (Tr. 48-50).

The inspector described the walkway as an "open grated walkway which is one of the better ones to have" (Tr. 35), and there is no evidence that the walkway was obstructed or otherwise not in conformance with MSHA's bulletin suggestions.

Although the travelway was 8 feet long, there is no evidence that the truck operator traveled that distance to access his compartment, or that his duties required him to walk along the entire travelway. Indeed, the inspector confirmed that no one would walk beyond the compartment door, and he described the potential fall hazard zone as the area between the top of the truck ladder to the entrance of the operator's compartment, a distance of 4 to 5 feet (Tr. 25, 50). Further, the photograph exhibit reflects that the handrail installed to abate the citation does not extend beyond the doorway to the operator's compartment.

I conclude and find that the location of the alleged absence of a safe means of access was the 4 to 5 foot distance that the truck operator would walk to reach his operating compartment after climbing the ladder to board the truck. I further conclude and find that a driver would only need to take two or three steps from the ladder to reach the compartment.

The inspector confirmed that handholds were located within easy reach along the access to the cited truck compartment. A handhold was located directly above the platform at the top of the ladder, along the top of the windshield, and along the top of the compartment door next to the platform (Tr. 48-50). Thus, I conclude and find that at each step of the way, from the top of the truck ladder to the door of the driver's compartment, a driver taking two or three steps to travel the 4 or 5 feet to the compartment door would have handholds readily and easily within reach for his use. Under the circumstances, and notwithstanding the absence of a handrail, I conclude and find that the handholds provided a safe means of access for the truck operator to reach the operating compartment, and that this means of access was in compliance with section 56.11001. Accordingly, I conclude that MSHA has not shown that Vulcan failed to provide a safe means of access in this case, and the contested citation IS VACATED.

ORDER

Based on the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

- 1). Vulcan's contest of the alleged violation cited in section 104(a) "S&S" Citation No. 4105681, May 7, 1996, 30 C.F.R. § 56.11001, IS GRANTED.
- 2). Section 104(a) "S&S" Citation No. 4105681, May 7, 1996, citing an alleged violation of mandatory safety standard 30 C.F.R. § 56.11001, IS VACATED, and MSHA's proposed civil penalty assessment of \$220, IS DENIED and 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 16 1997

|                        |   |                          |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : |                          |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 94-197   |
| Petitioner             | : | A.C. No. 11-00877-04049  |
| v.                     | : |                          |
|                        | : | Wabash Mine              |
| AMAX COAL COMPANY,     | : |                          |
| Respondent             | : |                          |

## DECISION ON REMAND

Before: Judge Bulluck

This civil penalty proceeding involves a violation of 30 C.F.R. § 77.201, a mandatory safety standard for surface coal mines and surface work areas of coal mines requiring that, "[t]he methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

The case was heard by former Commission Administrative Law Judge Arthur Amchan, who concluded that AMAX Coal Company ("AMAX") did not violate the standard and vacated the citation. 17 FMSHRC 48 (January 1995) (ALJ). The Commission reversed the judge, found a violation, and remanded the case for further proceedings to dispose of the significant and substantial ("S &S") designation and to assess an appropriate civil penalty. *AMAX Coal Company*, 19 FMSHRC 470 (March 1997). Because Judge Amchan had left the Commission, the remanded case was assigned to me.

## THE FACTS

In its decision, the Commission summarized the facts as follows:

On February 2, 1994, MSHA Inspector Arthur Wooten entered the "head house" that was on top of Silo No. 1 at the Wabash Mine. Silo No. 1 is used to store clean coal after preparation prior to shipping. The house, which is approximately 16 by 20 feet, is enclosed and contains electrical equipment, including a 4160 volt conveyor belt, a 220 volt lubrication system, 480 volt heaters, and 120 volt lighting circuits. The conveyor which carries coal into the silo enters the head house through an enclosure before dumping the coal through an opening into the silo. The head house is constructed with tin sheeting placed over a steel framework. The floor of the head house is approximately 6 feet above the roof of

the silo. The roof of the silo has several holes in it for ventilation and access. AMAX tests for methane in the head house on every shift. In the 20 years that the head house had been located on the silo, neither AMAX nor MSHA had ever detected measurable amounts of methane.

As Wooten entered the head house, his methane detector activated, indicating a methane concentration in excess of 1 percent. Wooten took several readings that ranged from .4 to 1.4 percent. The highest readings were found near a light switch and the opening where the conveyor dumps coal into the silo. Both locations are about 3 ½ feet off the floor and about 1 foot away from the sides. AMAX's safety director, Charles Burggraf, who accompanied Wooten, opened several doors to dilute the methane, and the methane concentration dropped below 1 percent.

Previously, on January 13, 1994, AMAX had experienced a brief ignition at the base of Silo No. 1, where coal was loaded into railroad cars. On February 1, another MSHA inspector had detected a methane concentration of 3.1 percent at a train loading area, about 200 feet below the head house. The next day — the same day as the citation at issue — the methane concentration at the location was 4 percent.

Wooten issued a citation alleging a violation of §77.201. Wooten designated the citation significant and substantial (S & S). In order to abate the violation, he required AMAX to remove two sides of the house to keep concentrations of methane below 1 percent. AMAX accomplished this by shutting down its preparation plant and moving its five employees to the silo where they removed the head house sides. *Id.* at 471 (citations omitted).

On review, the Commission reversed the judge's finding that a violation of the standard had not been established, concluding that the language of §77.201 is a clear and unambiguous prohibition against methane accumulations in excess of 1 percent and that the standard's subparts set forth "important steps in addressing the problem that methane presents." *Id.* at 474.

#### PROCEEDINGS ON REMAND

By remand order of April 7, 1997, I directed the parties to determine whether they could agree upon the S & S designation and an appropriate penalty. By letter dated April 18, 1997, the parties informed me that they were unable to reach agreement on the S & S and penalty issues, and referenced their respective positions as set forth in their post hearing briefs.

The Secretary filed her post hearing brief on January 11, 1995, essentially arguing that the violation was S & S because the head house was inadequately ventilated to reduce non permissible methane accumulations, airborne coal dust in combination with methane in the head house was capable of contributing to an explosion, there was electrical equipment in the head

house, and conditions in Silo No. 1 beneath the head house, including a prior methane/coal dust ignition, affected the methane levels in the head house. Secretary's Post Hr'g Br. at 11- 14.

AMAX filed its post hearing and reply briefs on January 10 and 17, 1995, respectively, arguing that the violation was not S & S because the head house was a drafty structure which was accessible to examination, there was no evidence to indicate methane concentrations in the explosive range, miner exposure to the head house was limited, and there was no nexus between the methane conditions at the bottom of Silo No. 1, including the incident of the prior ignition, and the methane conditions in the head house. Accordingly, AMAX concluded that the Secretary had failed to establish that it was reasonably likely that the hazard contributed to would have resulted in an injury. AMAX's Post Hr'g Br. at 19-23.

### SIGNIFICANT AND SUBSTANTIAL

Section 104(d)(1) of the Mine Act designates a violation S & S when it is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S & S "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 set forth the four criteria the Secretary must establish in order to prove that a violation is S & S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3<sup>rd</sup> 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2<sup>nd</sup> 99, 103-104 (5<sup>th</sup> Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, when evaluating the reasonable likelihood of an ignition or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In deciding whether the instant violation is S & S, it is necessary to resolve the dispute between the parties as to the origin of the methane in the head house. Inspector Wooten testified on behalf of the Secretary that he determined the reasonable likelihood of a serious accident happening in the head house based on excessive levels of methane detected in the train loading area of the silo 200 feet directly below, (Tr. 26, 35 and 42), and because a methane and/or coal dust ignition had occurred approximately two weeks before in the train loading area. Tr. 24-26, 28. Furthermore, Inspector Wooten believed that, at the time he issued the citation in question, coal being dumped into the silo forced the methane up out of the silo into the 4 by 4 foot chute of the head house. Tr. 28, 36.



AMAX takes the contrary view that the methane in the head house did not originate in the silo. Samuel Laws, the preparation plant manager, testified that, in his opinion, methane was expelled from the coal coming into the head house on the conveyor belt, when it was discharged into the chute that dumps coal into the top of the silo. Tr. 103, 107-108. He further testified that it is implausible that methane dispelled in the silo would migrate up with sufficient air pressure to enter the head house through the chute, by overcoming the downward pressure created by the coal being discharged from the conveyor belt through the chute into the top of the silo. Tr. 102-103, 106-107.

I conclude that the Secretary has failed to provide a plausible explanation as to why the methane would seek the path of greater resistance, that is, rising up through the chute against the pressure of the coal being discharged, as opposed to escaping through the ventilation holes in the top of the silo and dissipating into the general atmosphere. To the contrary, I am persuaded by the lack of measurable methane ever detected prior to the incident in question, as well as the evidence that Inspector Wooten's highest readings were taken at two locations of similar height, one being "closer to where the opening is where the belt dumps into the silo," (Tr. 60), that the methane in the head house originated from the coal being discharged from the conveyor belt into the chute. Having so found, I decline to apply the methane and/or coal dust conditions in the silo below to the conditions in the head house.

The evidence establishes that the head house was a drafty structure that was partitioned into a side housing the conveyor belt and chute, and the other side housing the bulk of the electrical equipment. Tr. 81, 83, 87. While Inspector Wooten concluded that the methane (irrespective of its origin), in combination with the open-type, non explosion-proof electrical equipment and airborne coal dust, was reasonably likely to have caused an ignition or explosion, (Tr. 58-59), he conceded that he did not take a methane reading in the vicinity of the belt motor, belt starter and automatic lubrication system, nor did he to specify the methane level in close proximity to the heaters or the lights. Tr. 53-54. Therefore, given the considerable separation of the conveyor belt/chute from the electrical equipment, the lack of evidence of non-permissible levels of methane around the electrical equipment, the lack of evidence indicating excessive airborne coal dust, the lesser methane readings higher than 3 ½ feet from the head house floor, the "confluence of factors" necessary to cause an ignition or explosion was not present. This conclusion takes into account the lack of any ignition or explosion in the 20 year history of the head house. Consequently, based on the evidence, I find that there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury from a methane ignition. Accordingly, I find that the violation was not S & S.

#### CIVIL PENALTY ASSESSMENT

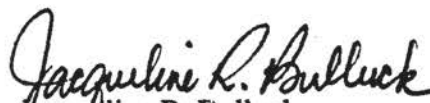
While the Secretary has proposed a civil penalty of \$595.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. §820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F. 2<sup>nd</sup> 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-484 (April 1996); *Jim Walter Resources, Inc.*, 19 FMSHRC 498, 500 (March 1997).

Addressing these criteria, the parties have stipulated that (1) the Wabash Mine extracted 3,431,815 tons of coal from January 1, 1993 to December 31, 1993 and AMAX extracted 65,385,647 tons of coal from all its mines during the same period; (2) AMAX had 992 violations at the Wabash Mine in the preceding months ending on October 31, 1993; and (3) the payment of the proposed penalty would not affect AMAX's ability to continue in business. Tr. 15-16. Accordingly, I find that AMAX is a large operator with a significant history of previous violations.

The remaining criteria involve consideration of the gravity of the violation and the negligence of AMAX in causing it. I find the gravity of the violation to be serious, since the potential hazard to a miner conducting a shift inspection or maintenance of the head house ranges from burn injury to death. However, because methane had never been detected in the head house prior to the instant violation, and because I find, like Judge Amchan, that AMAX had acted prudently in anticipating non permissible methane and had taken immediate and appropriate corrective action when put on notice of the violation, I attribute very low rather than moderate negligence to AMAX. Consequently, having considered AMAX's large size, significant history of prior violations, seriousness of the violation, good faith abatement and small degree of negligence, I find that a civil penalty of \$100.00 is appropriate.

### **ORDER**

Accordingly, Citation No. 3845251 is **MODIFIED** by deletion of the S & S designation and reduction of the degree of negligence from "moderate" to "low," and AMAX is **ORDERED** to pay a civil penalty of \$100.00 within 30 days of the date of this decision.

  
Jacqueline R. Bulluck  
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 19 1997

|                         |   |                          |
|-------------------------|---|--------------------------|
| SECRETARY OF LABOR,     | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH  | : |                          |
| ADMINISTRATION (MSHA),  | : | Docket No. WEVA 96-165   |
| Petitioner              | : | A.C. No. 46-01318-04269  |
| v.                      | : |                          |
|                         | : | Robinson Run No. 95 Mine |
| CONSOLIDATION COAL CO., | : |                          |
| Respondent              | : |                          |

**DECISION**

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

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge Citation No. 3493950 issued by the Secretary of Labor to the Consolidation Coal Company (Consol) and to contest the civil penalty proposed for the violation charged therein. The general issue before me is whether Consol violated the cited standard and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 3493950 issued on March 18, 1996, as modified on March 25, 1996, reads as follows:

Based on the results of (2) valid respirable dust samples collected by MSHA, the average concentration of dust in the working environment of the 013 occupation (clean-up man/belt cleaner) exceeds to 2.0 mg/M3 standard.

The dust samples collected from 2-20-96 to 3-05-96 show an average concentration of 11.22 Mg/M3 for the 013 occupation, 001-0 entity, which is located along the No. 2 5 North Mains belt line from the 6D transfer to the Mains section.

Mine management shall take corrective action to lower the respirable dust and then to sample 701-2 each day until five valid samples are taken and submitted to the Pittsburgh respirable dust processing laboratory.

The cited standard, 30 C.F.R. Section 70.100(a) provides as follows:

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 and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

Scott Springer, a coal mine health and safety inspector for the Mine Safety and Health Administration (MSHA), set up a dust pump on February 20, 1996, on the belt cleaner who worked the 5 North Mains No. 2 beltline. Under his observation the belt cleaner attached the approved sampling device. At the end of her shift Springer removed the cassette and, following standard procedures, sent it to the Pittsburgh processing laboratory for analysis. On March 5, 1996, Springer took another dust sample on the same miner. That sample was also sent to the Pittsburgh processing laboratory for analysis. Springer subsequently received a computer printout of the samples reporting an average dust concentration of 11.2 mg. per cubic meter. Springer accordingly issued the instant citation on March 18, 1996, for an average concentration of dust in the working environment of the belt cleaner exceeding the 2.0 mg.-per-cubic-meter respirable dust standard.

Consol argues that the Secretary failed to sustain her burden of proving the violation claiming that the sampling and laboratory testing were performed contrary to the Secretary's established procedures and were therefore not reliable. More specifically Consol argues that the sample results were unreliable because there was a problem with the dust pump used to collect the sample on February 20, 1996. The testimony of Inspector Springer in this regard is undisputed. The pump stopped running for several minutes in the first two hours of sampling. Springer hypothesized that the sampling tube had been pinched-off due the miners position when riding on the mantrip to her work station and that the pump automatically shut off as a result. Springer explained however that the pump itself was not defective and that once the problem was discovered and corrected, the pump operated for the remainder of the shift.

MSHA's dust weighing laboratory chief, Lewis Raymond, testified moreover that for valid sampling the dust pumps need only to operate for 100 minutes. On February 20, 1996, the sampling pump ran for approximately 360 minutes. While agency regulations require dust pump failures to be reported on the dust data card, the failure to report in this case was irrelevant to the validity of the sample. The pump at issue operated for the entire time that the belt cleaner worked along the belt and in excess of the minimum time required for a valid sample. Consol's argument herein is accordingly rejected.

While Consol also alleges that the testing laboratory procedures were contrary to established agency procedures, this allegation is not supported by the evidence. Consol has not



established that either the February 20 or March 5 sample exceeded the oversized particle standard necessary to void either sample. Indeed, Raymond found that both samples were normal. Consol's argument in this regard must also therefore fail. The violation is accordingly proven as charged.

Consol acknowledges that, if there was a violation, it was "significant and substantial". Accordingly I find that the violation was also "significant and substantial" and of significant gravity. The Secretary also maintains that the operator was only moderately negligent in that the area tested was not known by prior sampling to have been one of high dust concentration. The Secretary also observes, however, that Consol was placed on notice of possible high dust concentration from prior complaints by the subject belt cleaner dating back to as early as January 1996. I accept the Secretary's evaluation of Consol's negligence as moderate.

The Secretary maintains however that Consol did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. As a preliminary matter it is noted that in order to abate the violation the operator was required to obtain "five valid samples" of the subject belt examiner and to submit those samples to the Pittsburgh respirable dust processing laboratory. The samples are mailed to the laboratory and, following analysis, results are mailed back to the operator. Only then can the operator know whether it is in compliance. There may accordingly be delays of several weeks between the actual sampling and notification to the operator of the results of the sampling. To further complicate matters and delay compliance efforts, the submitted dust samples may be invalidated by MSHA for any number of reasons, some of which are beyond the control of the mine operator. It is also apparent that respirable dust levels in the ever-changing environment of a coal mine are not a precise constant and that individual exposure may vary depending on that person's work habits and motivation to reduce exposure. Finally, it should be observed that experts in the field may, in good faith, disagree as to the best way to reduce respirable dust exposure.

The citation at bar issued March 18, 1996, set the abatement or termination for April 1, 1996. An extension for abatement was granted on April 30, 1996, after five valid respirable dust samples for the period March 20, 1996 through April 2, 1996, showed a respirable dust concentration of 2.9 mg. per cubic meter -- still above the 2.0 mg. per cubic meter required by the regulatory standard. In the extension to the citation MSHA Inspector Charles Thomas noted abatement efforts the operator had already taken and others it was planning to take. Those actions were noted as follows:

... The velocity has been increased at the No. 74 Block (5N-No.2) to 57' Fpm. The velocity of air has been increased to 165 fpm at the 5N mains tail piece. The operator has ordered a different type of spraying system for the belt lines. Also a tamper proof system is being installed at the water spray system outlets to prevent the water from being shut off. The keys will only be given to two authorized persons on each shift. Additional time is granted to the operator to increase the air at the No. 74 block (5N No.2), to install the water systems and install the tamper proof controls for the outlets that control the water



flow on the new spraying systems. Sampling will begin on the day shift (4/22/96) and continue until 5 valid samples are collected. The operator will submit a plan prior to sampling. The operator has also agreed to divide the dragging of the affected area between the different shifts.

Inspector Thomas returned to the subject mine on May 6, 1996, and granted another extension of the abatement period noting in the "subsequent action" form dated May 6, 1996, the reasons for MSHA's invalidation of a number of samples. The form indicates as follows:

Four (4) of the five (5) required valid samples were submitted for the 013 occupation between 4-16-96 and 5-6-96. On following dates samples were taken and voided for following reasons,

- 1) 4-24-96 cassette number 50-234511 did not work entire shift at location
- 2) 4-29-96 cassette number 50-233897 person injured not on location all shift
- 3) 4-30-96 cassette number 50-234515 dust pump bottom failure

Also the 013 occupation travelled with federal inspector as walkaround 4-23-96 and took one graduated vacation day (4-25-96) during the sampling period from 4-16-96 - 5-6-96, the fifth valid sample was submitted but rejected by the computer as invalid code on 4-22-96 and operator became aware 5-6-96.

On May 16, 1996, Inspector Thomas, accompanied by William Ponceroff, the Chief of Health at MSHA District No. 3 returned to the subject mine. Ponceroff found insufficient abatement efforts and issued a closure order under Section 104(b) of the Act.<sup>1</sup>

The order states as follows:

An adequate effort was not made to abate Citation No. 3493950, dated 3/18/96. The concentrations of respirable dust was 11.22 mg/m<sup>3</sup> (average concentration) for the 013 occupation (001-0 entity). This occupation is located along the No. 2, 5 North Mains belt line. Adjustments and corrections were made and the subsequent sample reflected an average concentration 2.9 mg/m<sup>3</sup>. The citation was extended based on increasing the air, install new auto flow water spray system on the 7-D & 8-D beltlines, install a water spray systems on the No. 2 5-N beltline where intentional shutdown of the spray system is

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<sup>1</sup> "Section 104(b)" Order No. 3493571, contrary to previous secretarial practice, was not included nor referenced in any way in the petition for civil penalty herein. Citation No. 3493950 was misidentified in the petition as "104(a)-104(b)". There appears to be no legal authority that would permit this Commission to compel the Secretary, against her wishes, to amend the petition to include that order in this proceeding. Consol has accordingly filed a separate contest challenging the validity of the order.

minimized, restruct the individual sampled and increase the airflow to 80 fpm after these adjustments were made. The results of the respirable dust samples (average) was 2.2 mg/m<sup>3</sup>. Upon investigation of the changes after the second continued noncompliance, the following conditions were observed: a tamper spray (intentional shutdown of the spray system for the No. 2, 5-N belt was not installed. Two of the 3 sprays (top) were shut off. The top belt was dry from the No. 64 crosscut to the No. 91 crosscut, a distance of 2,700 feet. The water spraying system for the 8D beltline did not have a water spray for the top surface of the top belt. The valve to prevent intentional shutdown of the water spraying system was connected to a hose, but not installed in the water system. A citation for float coal dust was issued at the 8-D belt transfer where coal is dumped on the No. 2, 5 North beltline. The tamper proof valve to prevent intentional shutdown of the sprays for the 7-D system was not installed to prevent the sprays from being shut off. Two of the three bottom sprays were turned off. The 9-D beltline also dumps coal on the 5N, No. 2 beltline. A top spray was not installed to spray the top surface of the top belt. Management was aware that the valve to minimize intentional shutdown was being defeated by using an acetyline wrench. This had occurred on at least 2 occasions. Measures were not implemented to prevent this from happening. Management has failed to assure that the new system for the water were installed and properly maintained. No other means of evaluation were implemented by the company.

Ponceroff was not, at the time he issued his order, aware, however, of all of the efforts made by Consol to abate the violation. Ponceroff himself also acknowledged that it was not necessary for Consol to have taken any of the measures cited in his order so long as compliance was achieved. Under the unique circumstances of this case wherein Consol, prior to the issuance of the order, paid an outside expert consultant, Conflow, Inc., to conduct a complete evaluation of the cited respirable dust problem and had either implemented or was in the active process of implementing all of the recommendations of this consultant, I find that Consol is entitled to some mitigation in penalty for good faith efforts to achieve compliance. Robert Semple, sales engineer for Conflow, Inc., described these efforts in detail at hearing (Tr. 251-301). It is apparent that the Secretary was not fully aware of all of these abatement efforts at the time the "Section 104(b)" order was issued. On the other hand it is apparent that Consol had not in fact, at the time the order was issued, achieved compliance with the respirable dust standard. This too is taken into consideration in assessing a penalty herein.<sup>2</sup>

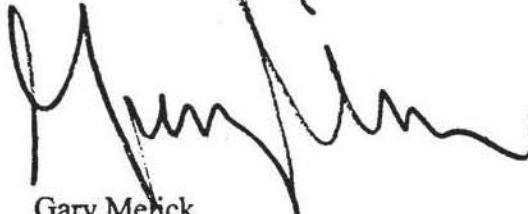
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<sup>2</sup> The scope of review for this criterion in evaluating a civil penalty is not necessarily congruent with the scope of review of a "Section 104(b)" failure-to-abate order. Recently, in *Energy West Mining Co. v. FMSHRC and Secretary of Labor*, No. 96-1243 (D.C. Cir. April 25, 1997), the circuit court held that the MSHA inspector could rely on continuing violative respirable dust samples as a basis for issuing a "Section 104(b)" order without conducting any further inquiry concerning the operator's efforts to abate the violation. The court also placed the burden on the mine operator to bring to MSHA's attention any specific abatement measures justifying extension of the abatement period. Accordingly, Consol's abatement efforts in this

Under the circumstances and considering all of the criteria under Section 110(i) of the Act I find that a civil penalty of \$800 is appropriate for the violation herein.

**ORDER**

Citation No. 3493950 is affirmed and Consolidation Coal Company is directed to pay a civil penalty of \$800 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read 'Gary Meick', is written over a horizontal line.

Gary Meick  
Administrative Law Judge  
703-756-6261

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Elizabeth S. Chamberlin, Esq., Consol, Inc., 1800 Washington Road, Pittsburgh, PA 15241-1321

/jf

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**Footnote 2 Continued**

case which were not completely brought to MSHA's attention and which have been considered in some mitigation of the penalty amount, would not be relevant in evaluating the validity of the related 104(b) order.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**JUN 23 1997**

|                             |   |                           |
|-----------------------------|---|---------------------------|
| SECRETARY OF LABOR,         | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH      | : |                           |
| ADMINISTRATION (MSHA),      | : | Docket No. SE 94-74       |
| Petitioner                  | : | A. C. No. 01-01401-03987  |
| v.                          | : |                           |
|                             | : | Docket No. SE 94-84       |
| JIM WALTER RESOURCES, INC., | : | A. C. No. 01-01401-03988  |
| Respondent                  | : |                           |
|                             | : | Docket No. SE 94-115      |
|                             | : | A. C. No. 01-01401-03993  |
|                             | : |                           |
|                             | : | No. 7 Mine                |

## **DECISION ON REMAND** **AND** **ORDER APPROVING SETTLEMENT**

Before: Judge Barbour

On March 17, 1997, the Commission reversed in part the decision of Commission Administrative Law Judge Arthur Amchan (*Jim Walter Resources, Inc.*, 16 FMSHRC 2477 (December 1994)). The Commission held that the judge applied an improper test when he determined that two violations of 30 C.F.R. § 75.1725 were not the result of the company's unwarrantable failure to comply with the standard (Docket Nos. SE 94-74 and 94-115). It also held that he erroneously concluded two violations of 30 C.F.R. § 75.400 were not unwarrantable (Docket Nos. SE 94-74 and 94-84). Accordingly, the Commission remanded the matters for reconsideration of whether the violations of section 75.1725 were unwarrantable and, if necessary, for reassessment of the applicable civil penalties. The Commission also ordered reassessment of the penalties for the violations of section 75.400 (*Jim Walter Resources, Inc.*, 19 FMSHRC 480 (March 1997)).

In light of the Commission's decision, the parties have settled the matters. They have filed a joint motion pursuant to Commission Rule 31 (29 C.F.R. § 2700.31) seeking approval of the settlement. The proposed settlement is as follows:

SE 94-74

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-------------------|-------------------|
| 3015093                        | 08/17/93    | 75.1725(a)         | \$ 7,000          | \$ 4,250          |

Order No. 3015093 concerns a conveyor belt that was out of alignment, running side to side, and cutting into the metal supporting structure of the conveyor. Jim Walter concedes it did not maintain the belt in safe operating condition or immediately remove the belt from service, as required by the cited standard (16 FMSHRC at 2478). The parties agree that at the time the violation was cited there was no indication a belt fire was highly likely and they agree to modify the inspector's finding of gravity from "highly likely" to "reasonably likely". Further, the Secretary concedes she cannot establish the inspector's finding that 22 miners were affected by the violation. Therefore she agrees to modify the finding to "four to five" miners.

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-------------------|-------------------|
| 3015095                        | 08/17/94    | 75.400             | \$ 5,000          | \$ 3,750          |

Order No. 3015095 concerns accumulations of loose coal and coal dust at a belt feeder. The belt feeder was improperly positioned so that some of the coal from the belt dumped onto the floor rather than into waiting ram cars. The judge found the Respondent violated the standard, which requires coal dust and loose coal to be cleaned up and not to be permitted to accumulate in active workings (16 FMSHRC at 2483). The parties agree that although the inspector found 10 persons were affected by the violation, a more reasonable number is 4 and the Secretary agrees to modify the order accordingly. They also note the feeder is equipped with water sprays, fire fighting equipment was stored at or close to the feeder, and all of the ram cars are equipped with fire extinguishers. In addition, a miner usually is stationed at the feeder to monitor problems. The Secretary has no evidence of fires occurring at belt feeders in the mine.



SE 94-84

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-------------------|-------------------|
| 3015087                        | 07/29/93    | 75.1725(a)         | \$ 7,000          | \$ 4,250          |

Order No. 3015087 concerns the same conveyor belt involved in Order No. 3015093. As in the latter order, the belt was improperly aligned and was rubbing against the metal supporting structure of the conveyor. In addition, several rollers were out of place and the belt was not supported adequately. The judge found the Respondent violated the standard (16 FMSHRC at 2484). The parties agree that for reasons identical to those set forth for Order No. 3015093, the inspector's gravity finding will be modified from "highly likely" to reasonably likely" and his finding as to the number of persons affected by the violation will be modified from "25" to "4 to 5."

SE 94-115

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-------------------|-------------------|
| 3182957                        | 08-16-93    | 75.400             | \$ 4,900          | \$ 3,675          |

Order No. 3182957 concerns an accumulation of float coal dust under a conveyor belt. The belt was rubbing in the dust. The judge found the Respondent violated the standard, which requires the dust to be cleaned up and not to be permitted to accumulate (16 FMSHRC at 2486). The parties agree that although the inspector found 10 persons were affected by the violation, a more reasonable number is 4 to 5. The parties agree the inspector's finding regarding the number of persons should be modified from "10" to "4 to 5." In addition, the Secretary has no evidence of reportable belt fires at the mine.

| <u>Citation/<br/>Order No.</u> | <u>Date</u> | <u>30 C.F.R. §</u> | <u>Assessment</u> | <u>Settlement</u> |
|--------------------------------|-------------|--------------------|-------------------|-------------------|
| 3183157                        | 09-02-93    | 75.400             | \$ 7,500          | \$ 5,625          |

Order No. 3183157 concerns a belt tailpiece that was turning in an accumulation of coal dust. The judge found the Respondent violated the standard (16 FMSHRC at 2487). The parties agree that although the inspector found 22 persons were affected by the violation, a more reasonable number is 4 to 5. The parties agree the inspector's finding regarding the number of persons affected should be modified from "22" to "4 or 5." In addition, the Secretary has no evidence of reportable fires occurring on belts in the mine.

In further support of the proposed settlement, the parties have submitted information pertaining to the remaining civil penalty criteria as found and applied by Judge Amchan.

After review and consideration of the pleadings, arguments and submissions in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

**ORDER**

Respondent **IS ORDERED** to pay a total civil penalty of \$21,550 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. In addition, the Secretary **IS ORDERED** to modify the orders, as set forth above, within the same 30 days. Upon receipt of full payment and modification of the orders, these proceedings are **DISMISSED**.



David F. Barbour  
Administrative Law Judge

**Distribution:**

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dcp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

303-844-3577/FAX 303-844-5268

**JUN 24 1997**

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

v.

MOBILE PREMIX SAND & GRAVEL  
COMPANY,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 95-339-M  
A.C. No. 05-00860-05537

Specification Aggregates

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

v.

DON DEWILD, employed by  
MOBILE PREMIX SAND & GRAVEL  
COMPANY,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 96-223-M  
A.C. No. 05-00860-05540 A

KEITH BUESCHER, employed by  
MOBILE PREMIX SAND & GRAVEL  
COMPANY,  
Respondent

Docket No. WEST 96-224-M  
A.C. No. 05-00860-05541 A

Specification Aggregates

**DECISION**

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado, for Petitioner;  
Laura E. Beverage Esq., Jackson & Kelly, Denver, Colorado, for  
Respondents.

Before: Judge Manning

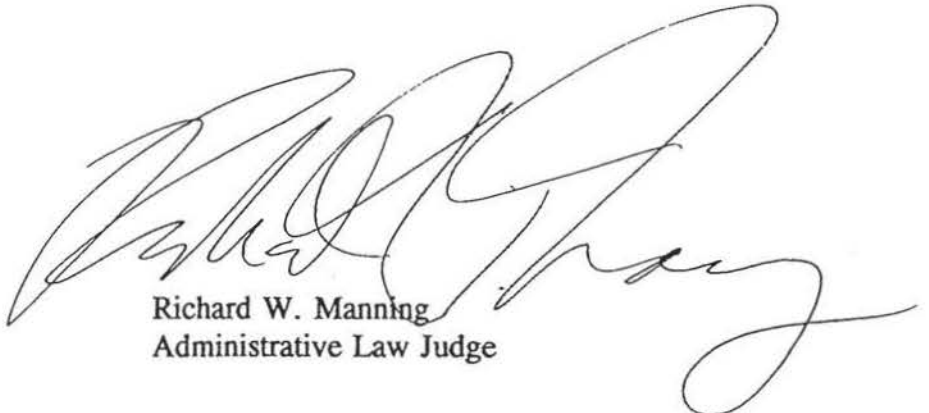
These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Mobile Premix Sand and Gravel Company ("Mobile Premix"), Don DeWild, and Keith Buescher, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act"). The citation in each petition, No. 4423012, alleges that the respondents violated 30 C.F.R. § 56.16002(c). The citation also alleges that the violation was of a significant and substantial nature and was caused by the operator's unwarrantable failure to comply with the safety standard.

A hearing was held in these cases in Denver, Colorado. At the beginning of the second day of the hearing, counsel for the parties announced that they reached a settlement of all issues in these cases. (Tr. 282-84). Subsequently, the Secretary filed a motion for approval of settlement incorporating all of the terms and conditions of the settlement.

In the motion, the Secretary states that based on "additional information presented in the course of this litigation, counsel for the Secretary has concluded that insufficient evidence exists to pursue the § 110(c) penalties against either Mr. DeWild or Mr. Buescher." (Motion at 3). The Secretary agrees to withdrawal the penalties she proposed against Messrs. DeWild and Buescher. The Secretary also agrees to reduce the proposed penalty against Mobile Premix from \$2,000 to \$1,600. In reducing the penalty, the Secretary considered "certain mitigating factors, including the fact that the employees referenced in the citation had received lockout and safety line training, as well as the fact that there existed conflicting evidence regarding the actual hazard present." (Motion at 4). Mobile Premix agrees to pay the amended penalty. The parties do not seek other modifications to the citation.

I have considered the representations, documentation, and the evidence presented at the hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Accordingly, the motion for approval of settlement is **GRANTED**, the penalties against Don DeWild and Keith Buescher are **WITHDRAWN**, and Mobile Premix Sand & Gravel Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,600.00 within 30 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

**Distribution:**

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**RWM**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 26 1997

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

Petitioner

v.

UNITED STATES STEEL  
MINING CO., INC.,

Respondent

: CIVIL PENALTY PROCEEDINGS

:

: Docket No. WEVA 96-151

: A. C. No. 46-05868-03575

:

: Pinnacle Prep. Plant

:

:

: Docket No. WEVA 97-40

: A. C. No. 46-01816-03952

:

: Gary No. 50 Mine

## DECISION

Appearances: James F. Bowman, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Mount Hope, West Virginia, for the Petitioner;

Gary R. Kelly, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These consolidated proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). These consolidated matters were called for hearing on March 19, 1997, in the vicinity of Beckley, West Virginia. At the hearing the parties moved to settle the two citations in Docket No. WEVA 97-40 by reducing the total proposed civil penalties from \$270.00 to \$50.00. The settlement terms included vacating Citation No. 3337871 because the facts surrounding the cited condition did not support the alleged violation of the subject safeguard. The respondent agreed to pay the remaining \$50.00 civil penalty assessed for the non-significant and substantial (non-S&S) violation in Citation No. 7159220. At the hearing, I concluded the settlement terms were consistent with the criteria set forth in section 110(i) of the Act. Accordingly, the parties' motion to approve settlement of WEVA 97-40 was granted on the record, and the settlement terms are incorporated in this decision.

Docket No. WEVA 96-151 concerns a total \$100.00 proposed civil penalty for two non-S&S 104(a) citations issued at the respondent's Pinnacle Preparation Plant on March 26, 1996, by Mine Safety and Health Administration (MSHA) Inspector Gerald L. Cook. The citations involve the mandatory safety provisions of section 77.400, 30 C.F.R. § 77.400, that govern mechanical equipment guards. Citation No. 3581246 concerns the question of whether a large u-shaped expanded metal area guard installed in front of the respondent's SB-3 tail pulley was "securely in place" as required by section 77.400(d) because only four of its six metal plates, or "feet," were bolted to the concrete floor.

Citation No. 3581248 concerns the issue of whether or not there was an adequate expanded metal guard on the respondent's 11-1 belt head pulley at the time of Cook's inspection. Section 77.400(c) requires that guards "extend a distance sufficient" to prevent persons from reaching behind the guard. Although Citation No. 3581248 refers to the "*existing guard* installed on the 11-1 belt (emphasis added)," at trial, the Secretary asserted there was no guard at the cited location other than pipes or the belt's metal framework that ran along the side of the head pulley.

The parties' post-hearing proposed findings of fact and conclusions of law, and reply briefs, have been considered in the disposition of these issues. In view of the non-S&S nature of the alleged guarding violations, the only issues for resolution are whether the violations in fact occurred. As discussed below, the Secretary has failed to satisfy her burden of proof. Consequently, Citation Nos. 3581246 and 3581248 shall be vacated.

#### Citation No. 3581246

MSHA Inspector Cook arrived at the Pinnacle Preparation Plant at approximately 10:00 p.m. on the evening of March 25, 1996. From 10:00 p.m. until midnight, Cook was accompanied by David Bailey, a Miner's Representative. Shortly after midnight, Cook was joined by Thurman Chapman, the respondent's Maintenance Foreman and Shift Manager. Chapman remained with Cook throughout the remainder of his inspection, which lasted until approximately 4:00 a.m. on March 26, 1996.

At approximately 1:00 a.m., Cook observed the SB-3 belt conveyor. Cook noted the SB-3 tail pulley was guarded by a large one piece, three-sided, u-shaped expanded metal guard. Cook testified that he was unable to estimate the dimensions or weight of the subject guard. (Tr. 79-80, 91). The respondent asserts the guard was approximately 60 inches in height and was 102 inches in length. (Ex. R-14). The u-shaped guard was located on a concrete surface resting on six metal plates or "feet." Four of the six metal feet were secured by bolts or studs driven into the concrete. John O'Brien, the respondent's Safety Director, opined that the guard weighed between 150 and 180 pounds. (Tr. 273). The respondent's estimations of the dimensions and weight of the guard are consistent with the photographic evidence. (See Gov. Exs. 6-8). Regardless of the precise weight of the guard, Cook admitted that moving the guard required a certain degree of effort, analogous to moving a piece of furniture such as a credenza. (Tr. 114-15). Cook also conceded moving the guard required a concerted effort in that the

footings were on metal plates rather than on wheels. (Tr. 115). Thus, moving the guard required lifting it, or dragging the guard's feet on the concrete floor. (Tr. 115-16). Consequently, Cook acknowledged the guard could not be moved casually or accidentally by brushing against it. (*Id.*). Moreover, given the fact that four of the six feet were bolted to the floor, the guard could only be moved approximately two feet. (Tr. 116). However, two feet was an adequate distance to permit someone to "move in" behind the guard. (Tr. 116-17).

As a result of his observations, Cook issued Citation No. 3581246, alleging a violation of the mandatory safety standard in section 77.400(d). Citation No. 3581246 stated, "[t]he guard located for the S-3B belt conveyor tail pulley was not secured in place in that the guard on the creek side could be moved exposing the tail pulley." Section 77.400(d) provides, "[e]xcept when testing machinery, *guards shall be securely in place* while machinery is being operated (emphasis added)."

Thus, the operative phrase is the "securely in place" provision in section 77.400(d). Courts routinely defer to agency interpretations of their regulations so long as they are "logically consistent with the language of the regulations and . . . serve a permissible regulatory function." *Morton International, Inc.*, 18 FMSHRC 533, 541 (April 1996) (Concurring Opinion) *quoting Rollins Envtl. Services, Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). Generally speaking, an object is securely in place if it is "stable" or "not likely to fail or give way." *Webster's New World Dictionary* 1288 (Second College Edition 1980). The Commission has addressed the regulatory purpose of the Secretary's guarding provisions in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984). The Commission stated:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. FMSHRC at 2097.

While the Secretary is normally entitled to deference when interpreting her own mandatory safety standards, deference cannot be afforded to the Secretary's interpretation "if it is plainly wrong" and inconsistent with the intended purpose of the regulation. *See, e.g.*, 18 FMSHRC at 541. As noted by the Commission in *Thomas Brothers*, the logical purpose of section 77.400(d) is to prevent any reasonable possibility of contact and injury resulting from inadvertence or momentary carelessness. The purpose of guarding is not to lock-out potential victims of pinch points who are deliberately determined to remove guarding installations for the purpose of accessing moving equipment without de-energizing it.



Here, the term "securely in place" connotes installation of a guard in a manner that prevents the guard from being dislodged by vibrations inherent in the operation of equipment. In this regard, the subject 150 to 180 pound six feet high metal guarding cage, bolted to the concrete floor in four places, was securely in place within the plain meaning of the regulatory standard. If the Secretary wishes the regulatory standard to require that guards be locked in place, similar to lock-out devices on circuit breakers, she should pursue such a regulatory course through the rulemaking process. Accordingly, the Secretary has failed to demonstrate the cited condition violated section 75.400(d). As a consequence, Citation No. 3581246 shall be vacated.

Citation No. 3581248

At approximately 1:45 a.m. Cook inspected the respondent's 11-1 belt head pulley. Although various wire mesh ("expanded metal") screens were installed around the head pulley, Cook testified the wire mesh screen guard was missing on the down stream side of the head pulley in the early morning hours on March 26, 1996. Consequently, Cook issued Citation No. 3581248 alleging a violation of the mandatory standard in section 77.400(c). Specifically, the citation alleged "*the existing guard installed on the 11-1 belt . . . did not extend [a] sufficient distance. . . (emphasis added).*" Section 77.400(c) requires guards at conveyor pulleys "to extend a distance sufficient" to prevent a person from reaching in behind the guard and becoming caught between the belt and the pulley.

The respondent, through the testimony of its wage mechanic Estel Lane and shift manager Chapman, maintains that, at the time of the issuance of the citation, there was a three feet by three feet guard, constructed of angle iron and expandable metal, that extended approximately six inches above the conduit as depicted in Gov. Ex. 9. (Tr. 226-29, 322-29). Wage mechanic Raymond Walker testified he abated the citation on the morning of March 26, 1996, by removing a smaller guard consisting of angle iron and expanded metal and replacing it with a higher guard. (Tr. 311-18).

Although, at the hearing, Cook maintained there was a "missing guard" at the cited head pulley, Citation No. 3581248, consistent with the respondent's assertion that a guard was installed, reflects there was an "existing guard installed" at the down stream side of the 11-1 head belt pulley. (Tr. 130, 147, 151). Cook attempted to reconcile the discrepancy in his testimony concerning an alleged "missing guard" with his reference in Citation No. 3581248 to an "inadequate guard," by explaining that he assumed the respondent was using the metal pipes or framework surrounding the head pulley as a substitute for guarding. (Tr. 151).

However, MSHA Supervisory Inspector Jules Gautier, Cook's supervisor, failed to shed light on Cook's testimony. Gautier testified that he participated in the abatement of Citation No. 3581248 on the afternoon of March 26, 1996. Gautier believed there were four guards surrounding the perimeter of the 11-1 head pulley at the time of Cook's inspection. Based on his observations during the abatement process, Gautier concluded three of the guards were the same size, and the fourth guard, which was the one cited by Cook, was smaller than the other three.

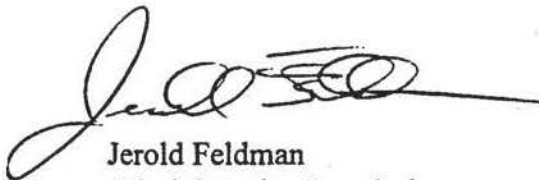
The citation was abated by welding additional metal to the existing framework of the fourth guard. (Tr. 334, 339-49). Gautier characterized the piece of metal added for the purposes of abatement as "an extension" to the existing structure. (Tr. 360). In apparent contradiction to Cook's testimony, Gautier testified that he did not consider it appropriate to refer to the belt rail, framework or pipes at the 11-1 head pulley depicted in Gov. Ex. 9 as a guard.

Section 104(a) of the Act, 30 U.S.C. § 814(a), requires that each citation "shall describe with particularity the nature of the violation." The description of the cited condition on the face of the citation dictates the parameters for determining whether the Secretary has established the fact of a violation. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (March 1993). Here, despite having cited an inadequate guard that did not extend far enough, the Secretary set out to establish a missing guard. In the final analysis the Secretary's case establishes neither. While I am certain Cook attempted to testify truthfully and to the best of his recollection, his testimony, given its uncertainty and the contradictory testimony by his supervisor, Gautier, is inadequate to overcome the testimony of respondent witnesses Chapman, Lane and Walker. Consequently, Citation No. 3581248 shall also be vacated.

#### Order

In view of the above, consistent with the parties settlement agreement in Docket No. WEVA 97-40, Citation No. 3337871 in **IS VACATED**, and, **IT IS ORDERED** that the respondent pay, within 30 days of the date of this decision, a \$50.00 civil penalty in satisfaction of Citation No. 7159220. Upon timely receipt of the \$50.00 payment, Docket No. WEVA 97-40 **IS DISMISSED**.

**IT IS FURTHER ORDERED** that Citation Nos. 3581246 and 3581248 **ARE VACATED** and Docket No. WEVA 96-151 **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge



**Distribution:**

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**\t**

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 27 1997

|                             |   |                           |
|-----------------------------|---|---------------------------|
| SECRETARY OF LABOR,         | : | CIVIL PENALTY PROCEEDING  |
| MINE SAFETY AND HEALTH      | : |                           |
| ADMINISTRATION (MSHA),      | : | Docket No. KENT 97-14-M   |
| Petitioner                  | : | A. C. No. 15-00112-05547  |
| v.                          | : |                           |
|                             | : |                           |
| M. A. WALKER COMPANY, INC., | : |                           |
| Respondent                  | : | Clover Bottom Underground |

## DECISION

Appearances: Donna Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Lyle A. Walker, President, M.A. Walker Company Inc., McKee, Kentucky, *pro se*, for the Respondent.

Before: Judge Koutras

## Statement of the Case

This is a civil penalty proceeding initiated 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 penalty assessment of \$987, for an alleged violation of mandatory safety standard 30 C.F.R. § 57.4761, as stated in a section 104(a) citation served on the respondent on March 27, 1996.

The respondent filed a timely answer contesting the alleged violation, and a hearing was held in London, Kentucky. The petitioner filed posthearing arguments, but the respondent did not.

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

### Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, (2) whether the alleged violation is "Significant and Substantial" (S&S), and (3) the appropriate civil penalty to be assessed for the violation, taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

### Stipulations

The parties stipulated to the following (Tr. 6-8):

1. The Commission and presiding judge have jurisdiction in this matter and the inspectors were authorized to inspect the subject mine.
2. The mine is a crushed limestone operation employing approximately 25 miners, and had an annual production of 27,939 man-hours worked or production tons.
3. The size of the mine is small, and the overall size of all of the respondent's mining operations is medium.
4. The section 104(b) order issued for non-abatement of the alleged violation is still in effect, and the section 104(a) citation has not been terminated.

### Discussion

Section 104(a) "S&S" Citation No. 4304716, March 27, 1996, cites an alleged violation of mandatory safety standard 30 C.F.R. § 57.4761, and the cited condition or practice is described as follows:

There were no measures taken to confine or prevent the spread of toxic gases from a fire that originates in the underground shop where maintenance work is routinely done on mobile equipment.

The inspector fixed the initial abatement time as 8:00 p.m., on May 1, 1996. On May 2, 1996, he extended the abatement to July 1, 1996, and noted that "a sprinkling system is being designed and planned for the shop. More time is needed for installation".

On July 22, 1996, the inspector issued a section 104(b) order, and it states as follows:

No apparent progress is being made in the underground shop to install a means to confine or prevent the spread of toxic gases from a fire that originates in the shop. The underground shop is hereby ordered withdrawn from service until the shop is equipped with a means to confine or prevent toxic gases from a fire in the shop from spreading to other working areas in the mine, and an MSHA inspector can observe the means installed to control the hazard.

#### Petitioner's Testimony and Evidence

MSHA Inspector Donald Baker, testified that he has over 25 years of mining experience, including serving as a mine superintendent, and has served as a mine inspector for five years. He was assigned to inspect the respondent's mine in September 1995, before his regular mine inspection, and while updating some information on the mine map with the respondent's safety director, he noticed an underground area marked "shop area" (Exhibit G-1). He explained the requirements of section 57.4761 to the safety director, and informed him that if in fact the area was used as a shop he needed to comply with section 57.4761 and submit a new map with proper information (Tr. 30-32, 41).

Mr. Baker stated that he went to the shop area when he issued the citation on March 27, 1996, and confirmed that it is located in the area shown on the map (Tr. 38). He identified exhibit G-2, as the mine map requirements submitted by the respondent indicating the location of the shop (Tr. 39-40).

Mr. Baker stated that after his initial contact with the safety director in September 1995, he visited the mine in December 1995, on a regular inspection, and again went to the shop area and observed a truck parked in the shop. He also observed a small air compressor, permanent lighting, electrical outlet banks in the area, oxygen and acetylene tanks, and pieces of scrap metal that appeared to have been cut off by oxygen and acetylene torches. He concluded that the area was a shop, and informed safety director Karl Riley that he would have to comply with section 57.4761, but did not issue a citation at that time (Tr. 42). He also informed superintendent Donny Colbin later, and they discussed the installation of doors in order to comply with the regulation (Tr. 42-43).

Mr. Baker stated that he next returned to the shop area in March, 1996, for an inspection and no shop changes had been made, and he observed the same type of equipment that he found in December. He activated a smoke tube that creates a puff of smoke and found that it trailed the air from the shop area to the working face. After concluding that the area was indeed a shop, he issued the citation (Tr. 44-45, Exhibit G-3).

Mr. Baker explained that he issued the citation for the following reasons (Tr. 46):

A. Well, there were no controls. After I determined it was a shop, there were no controls put in place to control carbon monoxide or chemical smoke from materials in the shop. They were all available and present. You've got oil. You've got electricity. You've got evidence of torch work. You've got tires on equipment. You've got hydraulic hoses. You've got fabric that's in the cabs of the vehicles.

Q. So it was your opinion that these materials posed a safety hazard?

A. Yes, it was.

Q. And what type of safety hazard was posed?

A. A fire could erupt and spread carbon monoxide out into the working place, or thick heavy chemical smoke from rubber products and oil, and people could be asphyxiated by it.

Mr. Baker confirmed that he made a determination that the violation was significant and substantial because the air flow from the shop area traveled directly to the working face when he activated the smoke tube, and it was extremely likely that this would lead to an injury or illness while regular maintenance was being done with all of the materials that were available, and "it could happen at anytime" (Tr. 47). He further concluded that "there could have been asphyxiation by smoke, or inhalation of carbon monoxide could cause death" (Tr. 47-48). He believed five people in the area could have been affected by the cited condition (Tr. 48).

Mr. Baker confirmed that he found moderate negligence based on his belief that the violation was not deliberate, and that the respondent may not have realized that it needed to comply after working the area for a number of years. He did not speak with Mr. Walker, the operator, at that time (Tr. 48-49). Mr. Baker further stated that "at the time I didn't think it was high negligence" (Tr. 50).

Mr. Baker stated that he extended the abatement time after he was told during a subsequent inspection that the respondent had requested a representative of a fire suppression company to look the area over to determine what needed to be done to achieve compliance. When he next returned for an inspection in July 1996, Mr. Baker found that nothing further had been done in the shop area, and he spoke to Mr. Walker at that time and was informed "that the cost was absolutely too much, and he couldn't do it" (Tr. 52). After discussing other alternative ways to comply with the regulation, Mr. Walker made no further commitment, and Mr. Baker issued the section 104(b) order (Exhibit G-4). Mr. Baker stated that the alternate compliance methods discussed with Mr. Baker included bulkhead doors, routing the shop air to direct exhaust ventilation, or fire suppression with an alternate escapeway, all of which are provided for in section 57.4761 (Tr. 52-53). The order was served on foreman Allen Rose on July 22, 1996 (Tr. 54-55).



Mr. Baker stated that the mine is "naturally ventilated", but there are three six-foot mine fans that "just circulates what air is there. It does nothing to increase the quality or quantity of natural ventilation" (Tr. 56). The mine does not emit methane, but there is "respirable dust or total dust", but no quartz is involved (Tr. 57). He explained the effect of the mine ventilation as follows at (Tr. 58-59):

A. Well, it just moves from one area to another. If you're having a problem here with dust and you've got the ventilation, it will bring it out. But that's basically, you know, about all it does, just moves it around from the working personnel.

JUDGE KOUTRAS: You mean the ventilation doesn't ventilate the underground mine areas?

A. No, sir. It's like setting a fan on a stool right here in this room. It's not positive. All it's doing is just moving stuff around.

JUDGE KOUTRAS: What takes out all the airborne contaminants that contain respirable dust?

A. They generally try to keep them down with water or move them out of the way from this area they're working. They just go in the mine and work through the circled area. They can be mining in one area and the ventilation will maybe move the dust away from them if it gets too bad, or keep it down, you know, so to speak.

\* \* \* \*

A. The only requirement is, maintain 19.5 oxygen. That's the only requirement and they do this by just generally flooding the mine openings, several opening in the mine, and air just comes in naturally.

JUDGE KOUTRAS: And have they generally been in compliance with that requirement?

A. Yes.

Mr. Baker believed that the fans in question were not adequate to control a fire because they are inside and do not provide mechanically induced mine ventilation. In order to comply with the standard, the ventilation air would have to be forced in with a fan, and in the event of a fire, the ventilation could be reversed to pull the smoke to the outside. He believed the fans in question would not be strong enough to handle this situation and "wouldn't do anything other than just blow it in a different direction," and the fans were not ventilated to the outside (Tr. 60).

In response to several bench questions. Mr. Baker confirmed that a fire extinguisher "was probably around on vehicles and maybe the old storage area, " but with the presence of electricity, welding and cutting torches and all the other stuff around could ignite and cause a fire" and if a fire is burning, carbon monoxide could flow out of the area (Tr. 61). He believed that a fire could happen at any time during regular work (Tr. 62). He confirmed that he did not discuss the shop area with the inspector who conducted prior inspections, did not determine why the shop area had not been cited during prior inspections, and had no knowledge that the mine had been cited for any prior violations of section 57.4761(Tr. 63). He also confirmed that he had never previously cited any other mines for violations of this standard (Tr. 64).

On cross-examination, Mr. Baker confirmed that the green arrows shown on the mine map are primary and secondary escapeways that go by the shop area, and they constitute alternative routes that can be used to travel to the outside surface area. One escapeway would be construed to be a primary escape route, and the other would be an alternative route (Tr. 66-68).

Mr. Baker stated that the mine fans are marked in red on the mine map, and that he has observed them in operation. He confirmed that the fan in the lower bottom area shown on the map has a direct vent to the outside and that in a "very minute fashion" would help exhaust the air in that area. He explained that the red marking simply denotes where the fan is located and "it's like setting a fan here and pointing it at a door 75 feet away, and is not boxed in like a bulkhead positive ventilation fan" (Tr. 69). He confirmed that there is no prohibition against using a variable pitch mine fan (Tr. 69). He further explained as follows at (Tr. 69-70):

Q. And is that vent there, is that not something that mine operators put in to vent their mines other than the mine openings?

A. This is to help vent, but it's --- it's very --- it helps very minutely.

Q. What do you base that minutely on?

A. Well, it's --- again, I'd have to --- to be simplistic, I have to try ---. It's like setting a fan right here and blowing out an opening over there. You're only going to get a very small volume of air from behind you and if you'll notice where this fan is located, it's near the crusher, which leads to the outside. So in my estimation, this fan is drawing mostly fresh air from the outside and just circulating it right back around.

Q. Did you verify that?

A. With a smoke tube, yes. I smoked the area and seen where it was going. I walked up behind the fan and took the smoke out.

Mr. Baker confirmed that the fans were in operation when he was in the mine, that the air quality and oxygen content was good, and he never experienced any failed air samples (Tr. 71). He would not dispute that the mine area where work was being performed was 27 feet high and 50 feet wide. He did not know the total air volume in the worked out areas (Tr. 75). He did not believe that a relative air volume to any potential fire hazard has any relevance to an underground shop fire emitting toxic gas. He confirmed that everyone has a self rescuer of one hour duration to wear in the event of a fire. The shop area is 1,200 feet from the outside and it would not take more than an hour to put on a self rescuer (Tr. 76). He observed people walking in and out of the mine, and he walked in (Tr. 79-80).

Mr. Baker stated that surface shops are required to have fire extinguishers around flammable materials, and he observed fire extinguishers in the underground fuel and oil tank areas as required by the regulations. He confirmed that he was not an engineer, has taken courses in mine ventilation, but has had no formal training concerning the physical properties reaction when a fire ignites (Tr. 82-83).

Mr. Baker stated that some of the unhealthy and somewhat toxic smoke from underground blasting is dissipated to the outside through the mine natural ventilation system, and if it did not escape at all, it would accumulate to intolerable levels if it took a circular motion. He confirmed that after an area is shot it is watered down and he did not believe that smoke or toxic fumes are emitted in harmful quantities and that "in the natural ventilation process, some of the stuff is eventually going to get to the outside" (Tr. 89-92).

On re-direct examination, Mr. Baker stated that the fans in question were not adequate to carry smoke out of the mine in the event of fire, and were not capable of mechanical ventilation reversal. He reiterated that the mine is ventilated naturally and not mechanically (Tr. 93). He confirmed that the shop area had a small ten pound hand-held fire extinguisher, and another one was at the oil drum storage area (Tr. 96).

Mr. Baker stated that gases released during blasting pose different hazards than a fire in the shop area and in the event of toxic gases released in a shop fire, some of the gas would not be visible and a miner might be overcome by the fumes before he could put on his self-rescuer. Blasting produces mostly dust that is watered down, and very little blast smoke, and a shop fire would release carbon monoxide and chemicals from burning vehicle rubber and fabrics. Further, blasting is a normal planned occurrence (Tr. 98-99).

In response to further questions, Mr. Baker stated that during his conversations with mine management prior to issuing the citation, no one ever suggested that any existing underground fan system would comply with section 57.4761 (Tr. 100). He further explained the presence of shop area ignition sources such as hydraulic oil and greases, welding torches, and batteries, and the pieces of cut metal indicated that welding and cutting equipment had been used (Tr. 100-103).

MSHA Inspector Donald L. Walker, testified that he has 35 years of prior mining experience working in limestone, iron ore, uranium, and silica sand mines. He was assigned to inspect the respondent's mine in September 1996, and Inspector Baker advised him of the outstanding section 104(b) order affecting the shop area. When he conducted his inspection in December, 1996, the order was still in effect and nothing had been done to correct the cited shop area conditions. The mine safety person told him that the shop area would no longer be used and that a truck had been purchased to service the equipment. He observed a compressor, stored oxygen and acetylene tanks, used oil storage tanks, permanent lighting fixtures and extensions, and a truck was hooked up to a battery charger. He returned to the mine in January, 1997, and the shop had not been cleaned out, and he observed the same conditions that existed during his prior visit (Tr. 109-111).

On cross-examination, Mr. Walker confirmed that when he had occasion to take air samples, the results were good and the mine has no history of bad air. He attributed this to the natural air flow, and when he was at the mine on prior occasions, there were no fans in the shop area. He surmised that the equipment was in excellent shape, and the ventilation was adequate enough to maintain the air at an acceptable quality level. However, "dead spots" may be found in mine headings and the shop area (Tr. 113-115). He did not sample the air quality or air flow at the time of his inspection (Tr. 117). To the best of his knowledge, the mine has never been cited for any violations of the air quality standards (Tr. 121).

In response to certain bench questions, Inspector Walker was of the opinion that the mine fan in question that was located on the floor could not control the air so that it would flow down the drifts or around the beams, and that it was "just sitting there blowing --- it's just circulating" (Tr. 127). He confirmed that the underground mine is ventilated by a natural air flow, and that this has MSHA's approval. He stated that "the oxygen is above the standard that's safe" (Tr. 128).

Mr. Walker suggested that the approved natural air flow method of ventilating the mine does not include the shop area because "most times it does not, because there's no fans in that area, and that shop is in the back over where it's deadheaded" (Tr. 128). He further stated that section 57.4761, requires different ventilation for the shop area, and he was of the opinion that the three fans in question were not sufficient to route the shop air directly to an exhaust system. (Tr. 128). He further believed that the mine has no exhaust ventilation system, and explained further at (Tr. 129-130):

JUDGE KOUTRAS: What are these three fans considered to be? Are these ways of ventilating the mine as suggested by Mr. Walker?

A. There's no way that those three particular fans can ventilate the mine, he would have to put brattice cloth or put bulkheads in certain areas or certain drifts. That's the only way he can control it. In a natural ventilation, it takes its own course.

JUDGE KOUTRAS: You're saying they don't have that in this mine?

A. They have natural ventilation that goes whatever direction the natural ventilation allows.

JUDGE KOUTRAS: I assume reversal ventilation means or implies that there needs to be a mechanical ventilation system in place that can be reversed in case of a fire in the shop; is that what that means?

A. Yes, sir.

JUDGE KOUTRAS: And you're saying that there's no mechanical ventilation system in this mine?

A. Not a mechanical, no, sir.

Inspector Walker further explained that the three fans in question did not constitute a mechanical ventilation reversal system pursuant to section 57.4761(c), because they were not bulkheaded so that the opening was only through the fan opening, and they were not installed or equipped to operate in reverse to pull or push air in and out of the mine. He stated that although some of the natural air circulated by the fans circulated through the shop area, the mine does not have a structured ventilation exhaust system *per se* as provided for in section 57.4761(b), and that any air that flows through the mine does so naturally. He did not dispute the fact that the mine has never been cited for "bad air" (Tr. 136-142).

In response to mine operator Walker's assertion that the red arrows on the mine map depicting the location of the fans and the flow of air generated by those fans, indicates that the air would travel down the escapeways shown by the green and black arrows to the fan shown at the bottom of the map where it is exhausted out of the mine, Inspector Walker conceded that some of the air may possibly exhaust, but the rest of it would circulate through the area where the fan is blowing. He confirmed that the fans were intended to circulate the air in the immediate area where they are located. He believed the shop area was 150 feet long and 100 or 150 feet wide and did not believe that one fan could ventilate that area (Tr. 142-146). He did not know why the mine had not previously been cited for a violation at the shop area (Tr. 148).

In response to bench questions, mine operator Lyle Walker stated that the shop has been in existence since approximately 1972 or 1973. He further stated that the actual shop area is smaller than the area designated on the mine in blue, and he circled and marked the "actual shop" on the map" (Tr. 151). Inspector Walker stated that he assumed that the entire area circled in blue was the shop area because of the presence of parked and junked equipment in the area. He confirmed that if the entire area was used as a "parking lot" with no maintenance work being



performed, it would not be a shop area. The "shop" that he observed was back in the area where he observed the truck with a battery charger attached to it, and not in the "immediate shop area" (Tr. 154).

### Respondent's Testimony and Evidence

Lyle A. Walker, respondent's president, testified that he has been in the crushed limestone business since May, 1968, and developed both of his mines (Clover Bottom and Indian Creek). He graduated in civil engineering from the University of Kentucky, and implemented the ventilation systems for his mines. Prior to serving as company president, he participated in MSHA inspections and is familiar with the process. His current safety director and superintendent have received MSHA training and schooling. Since he has been in business, he has protested approximately 10 violations, and has fully cooperated with MSHA. However, in this case he takes exception to any suggestion that he does not adequately ventilate his mines to properly ensure the safety of his employees (Tr. 157-160).

Mr. Walker stated that mine ventilation cannot be segregated from the general mine area, "and that means that you either have a ventilation system for the mine which incorporates any areas in it, or you don't have one" (Tr. 160). He pointed out that on a day-to-day basis the mine air quality is good, and that he has always complied with MSHA's fire suppression requirements for mobile equipment and shop areas. He believed that he had adequate mine ventilation to address MSHA's risk concerns (Tr. 162).

Mr. Walker stated that there are three underground eight-foot in diameter variable pitch fans in place that are specifically designed to ventilate mines, and the fan blades can be changed for lower air volumes or air reversal and they have always been adequate to ventilate the mine. He explained that his safety director was of the opinion that the inspector wanted a bulkhead door or a fire suppression system for the shop area, and he accordingly solicited bids for a fire suppression system.

Mr. Walker disagreed with the need for a fire suppression system because he believed that the mine ventilation was adequate to ventilate a fire. He pointed out that if the air was not being exhausted to the outside by the fans he would not have been able to maintain the acceptable levels of air quality over the years (Tr. 165-166). He further explained as follows at (Tr. 165):

It was also based on the knowledge of physics that when the fire does burn, it automatically draws pressure from the outside to the inside to feed the consumption of the oxygen that's taking place with the fire. It's a proven fact that if you have an underground fire, you will draw air from whatever source you can which is normally the outside and it will create its own ventilation system, regardless of all of our fans and most mines have always been and we've found it to be most effective to exhaust to the outside.

Mr. Walker stated that the cited shop has not been dismantled, and it was his understanding that work could be performed on his equipment on a random basis, but if he designated a shop area, he was told it would have to comply with the regulation. He did not believe that parking equipment in the area, or storing parts and equipment, constituted a shop. He confirmed that he purchased a mechanics's truck and crane for \$14,000, that can be used to service and repair his equipment on location. He also confirmed that the shop has been in existence since early 1972 (Tr. 169-173).

Mr. Walker stated that trucks are still parked in the cited shop area, but the truck that he has purchased does no maintenance work in that area, and it is used as a "mobile truck" (Tr. 174). He has always believed that he has been in compliance because of the "good air" in the shop area, and that he should be able to maintain the shop (Tr. 175).

Inspector Baker was called in rebuttal by the petitioner and he testified that an approved ventilation system is not required for a limestone mine, but it must have "approved quality of air, oxygen". He described the three mine fans in question as "a freestanding fan with no positive direction of ventilation" (Tr. 177). He did not believe the fans were adequate to handle the ventilation in the event of a fire in the shop, but stated that "the ventilation system was adequate for normal mining conditions" (Tr. 177). He confirmed that at the time he issued the citation, the cited area was in use as a shop, and that he "observed the normal shop stuff where routine maintenance would be taking place" (Tr. 178).

Mr. Baker agreed that the smaller area marked on the map by Mr. Lyle Walker in the course of the hearing was the shop area, and he explained as follows at (Tr. 179-181):

A. No. I agree. But I maintain that they probably --- by this whole area that they probably have done routine maintenance work in this area because they had broke down vehicles they parked and waiting for service.

JUDGE KOUTRAS: You assume that someone had gone out to where these vehicles were parked, actually did the maintenance work there?

A. Yes. This is the shop and garage area, so I would contend that they would be brought to this area to be worked on. Now, as far as the electrical, the permanent lighting, the air compressor, the tanks, this is true. This is where they were in the actual shop area that they marked. This is true.

JUDGE KOUTRAS: So for purposes of this standard where it says, in an underground shop?

A. Yes.

JUDGE KOUTRAS: What, in your opinion, is the underground shop? Would it be the area that's circled, or the entire blue area?

A. Well, for purposes, I would say this particular area contained everything like a shop, but the area around it was for parking vehicles to be fixed or whatever — at a later date.

Mr. Baker stated that the three mine fans in question do not meet the mechanical ventilation reversal alternative method of compliance found in section 57.4761(c), because they provide no control for fan reversal of the natural ventilation, and the fan "just circulates what air is in there" (Tr. 182). He further stated that the fans do not constitute an exhaust system for the shop air as an alternative compliance method pursuant to section 57.4761(b), because there was no way to directly blow air to an exhaust system, and in a natural ventilation system, pressure is the determining factor and the air may go in different directions (Tr. 184).

Mr. Baker confirmed that even though the natural mine ventilation has maintained the air quality in compliance with the standards, a separate system of air ventilation is required if there is a clearly defined shop area where maintenance work is taking place. He further explained as follows at (Tr. 186-187):

BY ATTORNEY SONNER:

Q. Now, to clarify, the reason you feel they need an additional system is that because the natural ventilation system that's in place would not be sufficient to move the toxic gases out quickly in the event of a fire?

A. There's no way to direct it quickly. Like I say, it just circulates, so it would blow smoke wherever the pressures sent it. There's no direct way to get it out of the mine.

Mr. Baker confirmed that when he made his smoke tube test and followed the smoke past the two fans shown at the top of the mine map, the smoke swept the faces and then circled around and went back to the face area toward the shop and it did not dissipate (Tr. 188).

Mr. Baker stated that in order for the variable pitched fans described by mine operator Walker to be reversed, someone would have to be at the controls to reverse them, and if they are to be used for that purpose they must be manned at all times, or accessible from some other location. The fans in question were not accessible from another location, and assuming they were reversed, they were not capable of moving gases rapidly out of the mine (Tr. 189-190).

### Petitioner's Arguments

The petitioner states that in September, 1995, Inspector baker was at the mine updating information on the mine map when he found an area marked "shop" on the map. The inspector informed the respondent's safety director at that time that if the respondent intend to use the area as a shop, it needed to comply with the requirement for controlling toxic gases in the event of a shop fire, and the inspector explained all of the alternative ways of complying with section 57.4761 to the safety director.

The petitioner states that Mr. Baker was in the mine in December 1995 on a regular inspection, and was in the designated shop area and observed a truck parked in this area, a small air compressor, and permanent lighting. He also observed banks of electrical outlets, oxygen/acetylene tanks, and various pieces of metal that "looked like it had been cut off by oxygen/acetylene torches, scrap." He informed the safety director and superintendent that the evidence indicated it was a shop, and that they would have to comply with 30 C.F.R. § 57.4761, and he explained all the alternatives. Mr. Baker did not issue a citation at that time.

The petitioner further states that Mr. Baker was again in the mine on March 27, 1996 for a regular inspection, and found no changes in the shop area. He observed the same type of equipment and same conditions, and a loader (Tr. 43). At this time, Mr. Baker used a smoke tube to test the air flow. He started the smoke trail in the shop area and it went "right up into the face where . . . they're working" (Tr. 44). After determining that the area was being used as a shop, Mr. Baker issued the citation, and concluded that there were no ventilation controls in place to control carbon monoxide or chemical smoke released from materials in the shop in the event of a fire.

In support of the violation, the petitioner relies on the testimony of Inspector Baker who testified that the fans utilized by the respondent were not adequate to control a shop fire because the air is not forced underground, and the existing fans would not be strong enough to do anything other than just blow smoke into a different area. The fans were not exhausted to the outside. Petitioner states that Mr. Baker confirmed that the mine is ventilated naturally and not mechanically, and the fans that were in place were not capable of mechanical ventilation reversal. There were no mine fans for mechanically ventilating the mine by bringing in air ventilation from the outside, and there was no fan capability for reversing the fans to carry smoke straight to the outside and allow people to escape any fire. Petitioner maintains that at no time during Mr. Baker's two mine visits prior to issuing the citation did the mine superintendent or safety director suggest that there was an existing underground fan system that would comply with the cited standard.

The petitioner rejects the respondent's suggestion that the three fans that were in place constituted a method of routing the mine air directly to an exhaust system or were a reversal of mechanical ventilation and were therefore in compliance in section 57.4761. The petitioner's position is that the shop area required a different kind of ventilation, and the fans in question



cannot be considered an adequate ventilation system that was in place in the event of a shop fire. Although the inspector believed that the fans were adequate for normal mining conditions, they were "free-standing" with no positive direction of ventilation, and there was no control over the natural ventilation.

Although the respondent was in compliance with the air quality standards through its natural ventilation system, the petitioner maintains that section 57.4761, requires a separate ventilation system if there is an underground shop where maintenance work is taking place. In support of this conclusion, the petitioner asserts that a natural ventilation system simply circulates the air and would blow smoke wherever the pressure sent it, with no direct way to get it out of the mine.

The petitioner notes that when Inspector Baker tested the air flow with a smoke tube, the smoke did not exhaust and he followed it to the working face by the two fans, and commented that "it has a tendency to just drift around toward the three openings to the outside" and to "just travel in a circle". After the smoke swept the faces, it circled back to the shop and did not dissipate. Mr. Baker concluded that the shop exhaust air was not routed to an exhaust system.

The petitioner states that the respondent's belated contention that the free-standing fans were an alternative method of compliance with section 57.4761 is contradicted by the failure of its safety director or mine superintendent to suggest to Inspector Baker on two occasions that the fans' purpose was to comply with that standard. Further, when the section 104(b) order was issued the respondent did not raise this argument at that time and attempted to gain extra time in order to pursue a fire suppression system in order to abate the citation, and requested a cost estimate from a contractor for the installation of the system. Petitioner concludes that the respondent is now trying to rely on the use of the fans in question to justify its position after-the-fact.

The petitioner further relies on the testimony of Inspector Donald Walker, who had 35 years of mining experience, including work as a maintenance foreman and superintendent, and work in a limestone mine. Inspector Walker inspected the mine in December 1996, when the section 104(b) order issued by Inspector Baker was still in effect. Petitioner points out that Mr. Walker observed a compressor, oxygen and acetylene tanks, used oil, extension fixtures, and permanent lighting in the shop area, as well as a truck parked there with a battery charger on it, and agreed that the fans utilized by the respondent were used to circulate the air.

The petitioner cites the testimony of Inspector Walker that the ventilation requirements for underground shop areas found in section 57.4761, are separate from the required general mine ventilation scheme, and that the shop area requires different ventilation. Inspector Walker believed that the three fans that were in use were not sufficient to route the shop air directly to an exhaust system, and in his opinion, the mine had no ventilation exhaust system.



The petitioner further cites Inspector Walker's testimony that the mine openings are fifty feet, and that since the fans are approximately six feet, there was no way to control the air to travel down the drifts or around the beams, and that the air "was just sitting there blowing --- it's just circulating" and that the fans were "really not strong enough" to push the air all the way out of the mine (Tr. 126-127; 138; 156).

The petitioner acknowledges that some of the air would leave the mine through the escapeways, but that the rest of it would circulate through the area in which the fan was blowing. The petitioner concludes that the fans are intended to circulate in the immediate area where they are located, and that in order to route the air to a "natural" exhaust system utilizing fans, the mine would have to have bulkheads or have the roadways blocked off to control or direct the air in one direction.

Finally, the petitioner asserts that section 57.4761 requires that one of the four alternative measures listed therein shall be taken to prevent the spread of toxic gases from a fire originating in an underground shop. Since none of these measures were in place or taken by the respondent, the petitioner concludes that it has established a violation. In support of its conclusion, the petitioner states that the free-standing fans utilized by the respondent for air circulation were inadequate to prevent the spread of gases in the event of a fire and did not comport with the requirements for "mechanical ventilation reversal" enumerated in the regulations. The fans were not capable of "rapid air reversal" as required by the regulation, and they were not provided with a second independent power cable or set of conductors from the surface. The mine shop air was not routed to an exhaust system, and Inspector Baker verified by means of a smoke tube that the air flowed from the shop directly into the working face.

#### Respondent's Arguments

As noted earlier, the respondent did not file any posthearing arguments in this matter. However, I have considered Mr. Lyle's Walker's arguments made on the record in the course of the hearing in my adjudication of this matter.

Mr. Walker was of the opinion that without the ventilation provided by the three fans that were in place the air quality in the mine would significantly deteriorate. He contended that the fans exhausted the air to the outside, and believed that they were sufficient to take care of any shop fire. He took the position that based on 30 years of experience ventilating his mines with the same type of fans, they were sufficient to maintain the air quality in compliance with MSHA's standards. If he had to depend only on natural ventilation, he would be unable to maintain the required air quality. He insisted that the fans "are the mechanical means that we've always used to maintain our air quality" (Tr. 130-135).

When reminded of the fact that when inspector Baker, on two occasions, discussed the matter with his safety director and superintendent, they never suggested that the fans were installed to comply with section 57.4761, Mr. Walker stated that "there was talk of bulkhead

doors and other fire suppression systems that seemed to be the answer that somebody wanted to hear" (Tr. 133). In response to a question of why he would seek an estimate for a fire suppression system that cost \$85,000, if he believed that the three fans in question were in fact the mechanical means for ventilating the shop area in compliance with section 57.4761, Mr. Walker responded as follows at (Tr. 135):

Because my superintendent thought that's what the man wanted to hear and get. My superintendent, I'll be perfectly blunt with you. If an inspector tells him to go jump off the cliff, he'll go jump off the cliff. And sometimes I have to take exception to that.

Mr. Walker believed the fans that were in place were either substitutes for, equal to, or were in fact a method of routing the mine air directly to an exhaust system or a reversal of mechanical ventilation (Tr. 123). He stated that he has never had any trouble ventilating the mine, and in the course of questioning Inspector Baker, Mr. Walker suggested that if the existing mine ventilation was adequate to remove any smoke resulting from underground blasting from the mine, it would also be adequate to remove any toxic smoke or fumes that might result from any shop fire (Tr. 88-92).

Mr. Walker stated that except for flammable materials that might be on any mobile equipment, or flammable liquids in a shop or service area, there are few sources of ignition in a limestone mine. He stated that the variable pitched fans in question are specifically designed to ventilate the mine, and he believed they were adequate to ventilate the shop area (Tr. 163, 165). He further stated as follows at (Tr. 165-166):

It was also based on the knowledge of physics that when the fire does burn, it automatically draws pressure from the outside to the inside to feed the consumption of the oxygen that's taking place with the fire. It's a proven fact that if you have an underground fire, you withdraw air from whatever source you can which is normally the outside and it will create its own ventilation system, regardless of all of our fans and most mines have always been and we've found it to be most effective to exhaust to the outside.

Now if they did not exhaust to the outside and never did over the years, our air quality would not be acceptable. And we can turn those fans off and prove that the natural ventilation is nowhere sufficient to ventilate either mine. \* \* \* \*

But if the ventilation system was not adequate or if it was not operating properly, we couldn't operate the mine. So based on that criteria, I felt like when they cited us and looking at the other criteria for being in compliance, that after reviewing our mine ventilation system, I felt like we were in compliance.

Finally, Mr. Walker expressed his opinion that although the inspector was "well-intentioned" in issuing the citation, he nevertheless based it on incorrect facts and "a completely wrong set of criteria for what they've cited" (Tr. 204).

### Findings and Conclusions

#### Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 57.4761, for failing to take measures to confine or prevent the spread of toxic gases in the event of a fire in the underground maintenance shop. The cited standard provides in relevant part as follows:

#### § 57.4761 Underground shops.

To confine or prevent the spread of toxic gases from a fire originating in an underground shop where maintenance work is routinely done on mobile equipment, one of the following measures shall be taken: use of control doors or bulkheads, routing of the mine shop air directly to an exhaust system, reversal of mechanical ventilation, or use of an automatic fire suppression system in conjunction with an alternate escape route. The alternative used shall at all times provide at least the same degree of safety as control doors or bulkheads. (Emphasis Added).

Subsections (a) through (d) of the regulation provide the specific requirements that must be followed for each of the enumerated methods that may be used as a means of confining or preventing the spread of toxic gases from an underground shop fire.

Inspector Baker identified the cited shop area as the large area that is labeled "shop/garage area", and encircled in blue on a copy of a section of the mine map submitted to MSHA in 1994 by the respondent. The inspector confirmed that he made the color copy from the original map on file at his MSHA office, and he confirmed that he visited the area underground and the shop was where it is shown on the map (Tr. 33-38).

Mine operator Lyle Walker did not deny the existence of an underground shop, nor did he deny the existence of the equipment and materials that were observed and described by the inspectors when they visited the area, or the fact that maintenance and repair work was performed in the shop area. Indeed, Mr. Walker confirmed that the shop has been in use since 1972 or 1973, and he circled and labeled an area on the mine map (Exhibit G-1) where he believed the shop was located (Tr. 150-151).

Mr. Walker disputed the purported size of the shop area shown on the map, and suggested that his safety director was in error if he in fact described the entire area encircled in blue as the actual shop area. Mr. Walker stated that the actual shop area where work was performed was much smaller and that the greater area was used to park vehicles awaiting maintenance.

The cited section 57.4761, on its face, requires compliance in order to confine or prevent the spread of toxic gases from a fire originating in an underground shop where maintenance work is routinely done on mobile equipment. In the absence of any credible evidence that maintenance was actually performed in the "parking area", I conclude and find that the requirements of section 57.4761, apply only to the actual shop area where vehicle maintenance is routinely performed.

Inspector Baker agreed that the smaller area marked on the map by Mr. Walker was the shop area that contained the permanent electrical and lighting equipment, air compressor, and tanks, and that the remaining area was used to park vehicles awaiting maintenance. In response to a question as to whether or not the shop was in fact the entire blue area shown on the map, Mr. Baker stated "I would say this particular area contained everything like a shop, but the area around it was for parking vehicles to be fixed or whatever — at a later date" (Tr. 180-181). Mr. Baker further agreed that the area marked by Mr. Walker on the map was the shop area containing all of the repair and maintenance equipment (Tr. 179). Mr. Baker simply assumed that maintenance work was done on the vehicles parked in the "garage area" (Tr. 180).

I conclude and find that the actual "shop" covered by section 57.4761, was not as large as the area marked in blue, and was probably the actual size of the area marked by Mr. Walker, and confirmed by inspector Baker. In any event, regardless of the size of the shop area, I find that the credible evidence adduced by the petitioner establishes the existence of an underground shop that was subject to the requirements of section 57.4761, when the citation was issued in this case.

The record reflects that Inspector Baker issued the citation after concluding that in the event of a fire in the underground shop area, none of the means enumerated in section 57.4761, were in place or available to confine or prevent the spread of toxic gases resulting from a shop fire.

Section 57.4761, requires that one of the four enumerated measures be taken to confine or prevent the spread of toxic gases from a fire in the shop. I find no evidence that the underground shop area was provided with doors or bulkheads to confine or prevent the spread of toxic gases in the event of a shop fire.

Although the underground mine area had designated escape routes, I find that there was no automatic fire suppression system in place or available in the shop area that could be used in conjunction with an escape route. I reject the respondent's suggestion that a portable fire extinguisher constitutes an automatic fire suppression system within the meaning of the standard.



With regard to the existence of any mechanical ventilation reversal system, I find that section 57.4761(c)(1) requires the existence of a main mine fan that provides a mechanical means for ventilating the mine. If the main fan is located underground it must comply with the following:

- (i) The cable or conductors supplying power to the fan shall be routed through areas free of fire hazards; or (ii) The main fan shall be equipped with a second, independent power cable or set of conductors from the surface. The power cable or conductors shall be located so that an underground fire disrupting power in one cable or set of conductors will not affect the other; or (iii) A second fan capable of accomplishing ventilation reversal shall be available for use in the event of failure of the main fan;
- (2) Provide rapid air reversal that allows persons underground time to exit in fresh air by the second escapeway or find a place of refuge; and
- (3) Be done according to predetermined conditions and procedures.

Inspector Baker, who has 25 years of mining experience, including work as a mine superintendent, testified that the mine is naturally ventilated, rather than mechanically ventilated, and that the required air quality is maintained through natural air ventilation that is induced through several mine openings that allow air to enter the mine naturally rather than through any mechanically operated main fan. He believed that the ventilating air needed to be forced into the mine with a fan capable of being reversed to pull the air and smoke out in the event of a fire.

Mr. Baker was of the opinion that the three free-standing fans that were in operation at the locations shown on the mine map were not "boxed in" or bulkheaded to provide positive ventilation, and that they simply blew the air around the general vicinity of the fan locations and did not constitute a mechanical ventilation reversal system in compliance with section 57.4761(c). He believed that section 57.4761, requires a separate and distinct ventilation system for an underground shop area where maintenance work is performed on mobile equipment in order to confine or prevent the spread of toxic gases from a shop fire.

Inspector Walker, who has 35 years of mining experience, including work experience in limestone mining, was of the opinion that the three free-standing mine fans on the floor were inadequate to control the natural air currents ventilating the mine in order to direct it down the drifts and around the beams, and that the three fans were simply blowing and circulating the air around the immediate area where they were located. Inspector Walker did not believe that the three floor fans in question constituted a mechanical ventilation reversal system in compliance with section 57.4761(c), because they were not bulkheaded or equipped and installed to operate in reverse in order to push or pull air in or out of the mine.



Respondent's representative Lyle Walker, a civil engineering college graduate, with some 30 years of mining experience, disagreed with the inspectors, and he relied on the fact that the air quality of the mine has always been within MSHA's requirements and that he has never been cited for a violation in this regard. He was of the opinion that the three mine fans in question met the requirements for mechanical ventilation reversal. He testified that each of the fans was 8-feet in diameter with variable pitch fan blades that were capable of air reversal, and that the fans have always been adequate to ventilate the mine.

After careful consideration of all of the testimony and evidence in this case, I find the testimony of the inspectors to be credible, and supports their opinion that the three free-standing fans in question did not constitute a mechanical ventilation reversal system that was in compliance with the criteria stated in section 57.4761(c)(1). Although the inspectors were not shown to be ventilation experts, taking into account their many years of mining experience, including work as a mine superintendent (Baker), and work in a limestone mine (Walker), I find them to be credible and knowledgeable with respect to the requirements of section 57.4761.

Although respondent Lyle Walker has a civil engineering college education, he did not qualify himself as a ventilation expert. Although I find him to be an experienced and knowledgeable mine operator, I conclude and find that the evidence and testimony adduced by the petitioner through its inspectors is credible and reasonably plausible in establishing the absence of a mechanical ventilation reversal system pursuant to section 57.4761, when the citation was issued.

Finally, for these same reasons, I conclude and find that the petitioner has established the absence of an air ventilation exhaust system in place and capable of routing the air from the mine shop directly to a mine exhaust system in the event of a shop fire. Inspector Baker's credible smoke tube test of the air in the shop area established that the air ventilating that area went directly to the working face and circled back to the shop area and was not exhausted to the outside. Inspector Baker concluded that the localized fans were not ventilating the air to the outside and he found that they were inadequate to exhaust toxic gases out of the shop area in the event of fire.

Inspector Walker testified credibly that the three free-standing fans that were in place were not structured or installed so as to enable them to exhaust any toxic gases from a shop fire directly out of the mine. Although Mr. Walker indicated that some of the natural air ventilation traveled through the shop area, he indicated that the shop was located in a "deadheaded" area where there are no fans, and that the mine had no structured ventilation exhaust system in compliance with section 57.4761(b).

Respondent Lyle Walker's assertion that the absence of any prior air quality violations, and the fact that the air ventilating the mine has always been in compliance with MSHA's air quality standards, is proof that the mine has an exhaust system in place in compliance with section 57.4761(b), is rejected. Notwithstanding the mine's "clean air" history, I cannot conclude

that the respondent had a distinct or separate ventilation system in place for routing any mine shop exhaust air directly and completely out of the mine through a clearly defined mine exhaust system in the event of a fire in the shop area.

Inspector Baker agreed that given the mine history of good natural air ventilation, one could conclude that the mine is adequately ventilated under normal mining conditions. However, he further testified credibly that a shop fire is not a normal mining condition, and that an additional ventilating system is required because the natural air ventilation is insufficient to quickly remove toxic gases from the mine in the event of a shop fire.

Based on the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of section 57.4761, by a preponderance of the credible evidence and testimony adduced in support of its case. Accordingly, the contested citation IS AFFIRMED.

#### Significant and Substantial Violation

A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated S&S "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 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" 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.

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

The question of whether any particular violation is S&S 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); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). Further, any determination of the significant nature of a

violation must be made in the context of continued normal mining operations. Natural Gypsum, supra, 3 FMSHRC 327, 329 (March 1985). Halfway, Incorporated, 8 FMSHRC 8 (January 1986),

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

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

The Commission reasserted its prior determinations that as part of his "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. Peabody Coal Company, 17 FMSHRC 508 (April 1995); Jim Walter Resources, Inc., 18 FMSHRC 508 (April 1996).

The respondent does not dispute the existence of an underground shop, nor does it dispute the fact that mobile equipment repair and maintenance work did in fact take place in the shop. Further, the respondent has not rebutted the credible testimony of Inspector Baker with respect to his observations of oil, electrical outlets, hydraulic hoses, rubber tired mobile equipment with fabric covered seats, and evidence that a torch had been used to cut metal materials, and the observations by Inspector Walker of the presence of a compressor, stored oxygen and acetylene tanks, used oil storage tanks, and lighting and extension fixtures in the shop.

Both of the inspectors expressed their concern that the maintenance and repair work taking place in the shop in the presence of flammable materials and potential ignition sources posed a safety hazard in the event a fire erupted in the shop and spread toxic gases or smoke from the shop area to the working face. Inspector Baker, whose smoke tube test established that the air in the proximity of the shop coursed the smoke directly to the working face and then simply circulated back to the shop area, was concerned that toxic gases resulting from a shop fire, which he believed could happen at any time in the normal course of mining, would follow the same route to the working face. In the absence of any existing means of exhausting such gases directly out of the mine, or the use of any of the other regulatory alternatives to confine or prevent the spread of toxic gases from a shop fire, Inspector Baker believed that the miners working at the face would be exposed to hazardous levels of carbon monoxide or other toxic chemical smoke or gases, as well as the hazard of possible asphyxiation before they were aware of the gases or before they could use their self rescuers.

Although Inspector Baker agreed that underground blasting results in smoke and toxic fumes that are dissipated through the natural air ventilation, he pointed out that they are not released in harmful quantities, and consist primarily of dust. He distinguished blasting from a shop fire which he believed would likely release carbon monoxide and harmful chemicals from burning vehicle tires and seat fabric materials. He further pointed out that blasting is a normal and planned event, and that a shop fire could occur at any time.

I have concluded that a violation of section 57.4761, has been established. I further conclude and find that the intent of the standard is to provide a way to confine or prevent the spread of toxic gases from a fire originating in an underground shop. Accordingly, I conclude that any determination as to whether or not a violation of this standard is "significant and substantial" must necessarily and logically be made in the context of the existence of a shop fire, or the assumption that such a fire will occur in the normal and routine course of shop maintenance work in the presence of flammable materials and ready sources of ignition such as those described by the inspectors. To do otherwise, in my opinion, would render the regulation meaningless.

I conclude and find that the failure by the respondent to provide any of the required precautionary methods found in section 57.4761, to confine or prevent the spread of toxic gases from a shop fire presented a discrete hazard to miners at the working face areas in that such gases would likely travel directly to those locations as shown by Inspector Baker's credible and un rebutted smoke tube test, and would expose the miners to any toxic gas hazard. If this were to occur in the normal course of mining operations, I conclude and find that it would be reasonably likely that any miner exposed to such toxic gases would suffer injuries of a reasonably serious nature, including asphyxiation. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

I reject the respondent's suggestion that any affected miners could use their self rescue devices and exit the mine quickly before any toxic gases reach them. As credibly stated by Inspector Baker, toxic gases may not give advanced warnings, and miners could be overcome before they could use their self rescuers.

I have rejected the respondent's suggestion that a shop portable fire extinguisher qualifies as an "automatic fire suppression system" pursuant to section 57.4761. Further, although a portable fire extinguisher may be available to deal with a small localized shop fire, I accept as credible the inspector's belief that such a device is inadequate to deal with a "raging" shop fire that it is out of control.

#### History of Prior Violations

Petitioner's Exhibit G-6, is a computer print-out of the respondent's history of paid violations for the period March 27, 1994, to March 26, 1996. The information provided reflects that the respondent paid penalty assessments of \$1,469, for 19 of the 20 prior violations noted in



section 104(a) citations. Eight of the prior violations are listed as non-"S&S" single penalty citations, and there are no prior violations of section 57.4761. I conclude and find that respondent's prior compliance record does not warrant any additional increase in the penalty assessment that I have made for the violation that has been affirmed in this case.

#### 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 sized mine operator, and absent any evidence to the contrary, I further conclude and find that the penalty assessment that I have made for the violation will not adversely affect the respondent's ability to continue in business.

#### Gravity

Based on my "S&S" findings, I conclude and find that the cited violation was serious.

#### Negligence

In its post hearing brief, the petitioner asserts that although Inspector Baker found that the level of negligence for the violation was moderate, he would have found that it was "high" based on information he obtained later. Included with the brief is a motion to amend the section 104(a) citation to a section 104(d) "unwarrantable failure" citation, and to increase the level of negligence from moderate to "high". In support of these arguments, the petitioner states as follows at pgs. 15-17, of its brief:

Inspector Baker told the superintendent and the safety director about the safety violative condition in October and December 1995, prior to issuing the citation in March 1996 (Tr. 31-33; 41-43).

The testimony at the hearing establishes that the operator, his safety director, and the mine superintendent knew of the violative condition prior to the issuance of the citation, and that the operator refused to correct it because of the expense involved (Tr. 55). The operator admitted that he looked at the regulations (Tr. 162). Based on the knowledge of the operator and the operator's representatives prior to the issuance of the citation and the operator's negative attitude toward abatement of the violation (Tr. 50), the Secretary requests that the level of negligence be amended to "high" and that the citation be amended to reflect issuance pursuant to Section 104(d), in that there was an "unwarrantable failure" to comply with the regulatory requirements.

Inspector Baker testified that when he initially visited the mine in October, 1995, he spoke with the safety director about the means used to control any toxic gases in the shop area,



and "they really didn't seem to know what I was talking about" (Tr. 33). Mr. Baker further explained that he advised the safety director about the requirements of section 57.4761, and the alternatives, and informed him that if the area was in fact a shop, he would have to comply. He confirmed that the safety director informed him that "they really didn't consider it to be a shop at that time" (Tr. 33).

Mr. Baker testified that he next returned to the mine in December, 1995, for a regular inspection, and after visiting the area, he concluded that it was indeed a shop. He stated that he spoke with safety director Karl Riley, and later spoke with superintendent Donny Colbin, and informed them that they needed to comply with section 57.4761. However, the inspector confirmed that he did not issue a citation at that time because "I'm thinking maybe there's still some doubt that this is a shop" (Tr. 42; Emphasis added).

Mr. Baker stated that Mr. Riley and Mr. Colbin then informed him that they had discussed the installation of some control doors or bulkheads, and that they would try to see how to install them. Mr. Baker then stated "I don't care what you do, but you need to do something to comply with the standard and that's generally the way we left it" (Tr. 42).

Based on all of this testimony with respect to Inspector Baker's initial visits in October and December 1995, I cannot conclude that he reached any definitive opinion or conclusion that a violative condition actually existed at that time. If he had, he should have issued a citation. He admitted that there was some doubt, and Mr. Riley apparently informed him of his opinion that the area was not a shop.

The burden of proof here is on the petitioner. I note however, that the respondent's safety director and superintendent did not testify, and they were not summoned by the petitioner to testify under oath, subject to cross-examination. Based on the inspector's testimony, I can only conclude that he spoke with these individuals and generally discussed the requirements of section 57.4761, and he never spoke with mine operator Lyle Walker at any time during his initial visits. Under the circumstances, I find no credible evidentiary basis to support any reasonable conclusion that these initial mine visits and discussions establish any calculated or aggravated conduct by any of these mine management individuals, or credible support for the petitioner's assertion that they knew of the violative condition prior to the issuance of the citation on March 27, 1996.

Inspector Baker further testified that when he next returned to the mine for his March 27, inspection, he issued the citation after determining that no shop changes had been made, and after making a "smoke tube" test which indicated that the smoke trailed to the working face. He confirmed that he did not speak with Lyle Walker at that time. Thus, in the course of three mine visits, the inspector never spoke with Mr. Walker.

Mr. Baker further testified that when he issued his citation, he found moderate negligence based on his belief that the violation was not deliberate. Indeed, he stated that "at the time I

didn't think it was high negligence" (Tr. 50). Mr. Baker further conceded that the respondent may not have realized that it needed to comply after working the area for a number of years (Tr. 48), and he specifically testified in the present tense that "I still don't think that they really thought that they should have to comply with the law", and "I don't know whether they realized it, so I just went ahead and made it moderate, because, you know, I didn't think at that time it was deliberate" (Tr. 49).

Inspector Baker confirmed that he extended the abatement time during a subsequent inspection after "they" (I assume the safety director and superintendent) informed him that a fire suppression company representative "was going to look it over and see what it would take to bring them in compliance", and they needed more time (Tr. 51).

Inspector Baker next returned to the mine on July 22, 1996, and met with Lyle Walker for the first time. He stated that Mr. Walker informed him that the fire suppression company had indeed come to the mine and that the cost for a suppression system was "absolutely too much, that he couldn't do it" (Tr. 52). They also discussed the use of bulkhead doors or exhausting or routing the shop air to direct exhaust ventilation, and the use of fire suppression in conjunction with an alternate escapeway (Tr. 52-53). Mr. Baker did not state that Lyle Walker refused to comply, but that he simply "didn't commit to either way" (Tr. 52). In view of Mr. Walker's failure to make any commitment at that time, Mr. Baker issued the section 104(b) order (Tr. 52-55). The petitioner characterizes this as "the operator's negative attitude" toward compliance.

The petitioner further states that Lyle Walker "admitted that he had looked at the regulations (Tr. 162)." Mr. Walker confirmed that he reviewed the standard after the citation was issued, and he believed the mine was adequately ventilated to meet the required ventilation alternative (Tr. 162-165). He stated that he inquired about the installation of a fire suppression system because his superintendent was of the opinion that the inspector wanted it. Mr. Walker produced a copy of a July 10, 1996, proposal for the installation of a sprinkler system at a cost of \$85,432, and a June 7, 1996, letter from the sprinkler company confirming its search for a system to meet the respondent's needs (Exhibit R-1). Mr. Walker confirmed that additional people were called, and the names and phone numbers are listed on the June 7, letter (Tr. 164). He further stated that "I never did really understand why we were being cited under the circumstances as I knew them" (Tr. 125).

Mr. Walker pointed out that his safety director and superintendent have received MSHA training, and that he has always fully cooperated with MSHA and has formally protested approximately 10 violations over the many years that he has been in business. He stated that he took exception to the inspector's interpretation of section 57.4761, and considered it "a judgment call" that he disagreed with (Tr. 159). He further explained as follows at (Tr. 167).

I would like to think that I have reasonable grounds to think there might be circumstances that might prove our case. So based on that fact, that's why I

protested it. And there were conversations, I don't deny them, about fire suppression systems and everything else.

The record reflects that the shop was in use since 1972, but it was never cited for a violation of section 57.4761, until Inspector Baker cited it on March 27, 1996. The inspectors, and the petitioner's counsel did to know why the shop had never previously been cited (Tr. 148-149). Although the absence of any prior violations is no excuse or defense to the citation, I can understand why mine operator Walker was somewhat agitated over a price tag of \$85,432, to install an extensive fire suppression system to abate a condition that had never before been cited by any inspector, and a condition that I find he could have reasonably concluded was not a violation.

Based on the foregoing, and after a careful review of all of the testimony in this case, the petitioner's suggestion that the violation was the result of the respondent's unwarrantable failure to comply with the cited standard IS REJECTED. I am not persuaded that the testimony of the inspectors supports the petitioner's position, nor have I found any "information later obtained", by inspector Baker to support his contention that he would have found "high" negligence based on this information. I conclude and find that Inspector Baker's initial "moderate" negligence finding was appropriately based on the respondent's failure to exercise reasonable care, and that initial finding IS AFFIRMED.

The petitioner's posthearing motion to amend the section 104(a) citation to a section 104(d)(1), unwarrantable failure violation IS DENIED as untimely and lacking in any credible or reliable evidentiary support. Further, I have serious due process and fair notice reservations in connection with the proposed posthearing amendment, particularly in light of this relatively small mine operator's pro se non-lawyer status.

#### Good Faith Compliance

The parties have not addressed the merits of the section 104(b) withdrawal order issued by Inspector Baker, and there is no evidence that the respondent timely contested the order pursuant to Commission Rule 20(a), 29 C.F.R. § 2700.20(a). The record reflects that the proposed civil penalty assessment took into account the issuance of the order in the context of good faith abatement, one of the six statutory penalty criteria found in section 110(i) of the Act. I conclude that the validity of the uncontested order is not in issue in this case. However, in assessing a penalty in this case, I have considered the respondent's abatement efforts in the context of good faith compliance.

The respondent's assertion that it could not install a fire suppression system because the \$85,000, price tag was unreasonably high, is no defense to the violation. Although I recognize the economic impact of such an expenditure on a relatively small mine operator, the respondent has apparently opted to spend approximately \$12,000 to \$15,000, to purchase a mobile maintenance truck for servicing its mobile equipment "on location" where they may be working,

rather than in the shop. The respondent has at least made an effort to mitigate the hazard of working on mobile equipment in the shop, as well as reducing its compliance costs.

I have considered the fact that the respondent initially made an effort at timely compliance when it pursued the installation of an automatic fire suppression system, only to abandon it when it learned of the high costs of such a system. However, considering the fact that a fire suppression system is only one of the regulatory alternatives, I find that the respondent was obliged to timely pursue the other alternatives, or to request additional time to do so when he discussed the matter with Inspector Baker before he issued the section 104(b) order. However, the respondent did not do so at that time, and according to the un rebutted and credible testimony of Mr. Baker, respondent Lyle Walker did not commit to taking any remedial measures. Under the circumstances, I cannot conclude that the respondent made a good faith compliance effort subsequent to the issuance of the order.

I take note of the fact that the section 104(b) order is still in effect and the citation has not been terminated. Further, according to Inspector Walker, during a mine visit in January, 1997, he found that the shop was not closed down, and he observed some of the same equipment that had previously been there (Tr. 109-111). The respondent did not believe that it was obligated to dismantle the shop and remove all of the equipment, as long as it did not use the shop for maintenance work on its mobile equipment. This is a matter that I believe is best left to the petitioner and the respondent to resolve.

#### Civil Penalty Assessment


On the basis of the foregoing findings and conclusions, and my de novo consideration of the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$1,200 is reasonable for the violation that I have affirmed in this matter.

#### ORDER

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

1. Section 104(a) "S&S" citation No. 4304716, March 27, 1996, 30 C.F.R. § 57.4761, IS AFFIRMED.
2. The petitioner's motion to amend the section 104(a) citation to a section 104(d)(1) "unwarrantable failure" citation IS DENIED.
3. The petitioner's request for a civil penalty assessment of \$3,000, IS DENIED.

4. The respondent shall pay a civil penalty assessment of \$1,200 for the violation. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter IS DISMISSED.

  
George A. Koutras  
Administrative Law Judge

**Distribution:**

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 30 1997

|                        |   |                           |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : |                           |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 97-65     |
| Petitioner             | : | A.C. No. 15-02502-03708   |
|                        | : |                           |
| v.                     | : | Shamrock No. 18 Series    |
|                        | : |                           |
| SHAMROCK COAL COMPANY, | : |                           |
| Respondent             | : |                           |

## DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee and Tommy Lee Frizzell, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Barbourville, Kentucky for Petitioner;  
Neville Smith, Esq., Attorney at Law, Manchester, Kentucky for Respondent.

Before: Judge Weisberger

### Statement of the Case

This case is before me based upon a petition for assessment of penalty filed by the Secretary of Labor (Petitioner) alleging a violation by Shamrock Coal Company (Shamrock) of 30 C.F.R. § 75.211(c). Pursuant to notice the case was heard in Corbin, Kentucky on April 9, 1997. William H. Sharp Jr., testified for Petitioner, and Jeffrey Stephen Shell, Charles Alvin Morgan, and Douglas Wayne Adams testified for Shamrock. Subsequent to the hearing the parties filed briefs on June 9, 1997.

### I. Findings of Fact and Discussion

#### A. Violation of 30 C.F.R. § 211(c)

##### 1. Petitioner's evidence

On July 22, 1996, William H. Sharp Jr., an MSHA ventilation specialist, inspected Shamrock's No. 18 Series mine. Sharp traveled by mantrip inby in the No. 2 entry which was utilized as the main travelway. At a point six crosscuts from the surface, Sharp exited the mantrip, and proceeded on foot. He observed an area 50 to 70 feet long, and 20 feet wide that

contained fractures in the roof. He did not detect any roof bolts that had broken or shifted position. However, he observed that some of the supporting crib blocks were broken and others were "squeezed down" (Tr.20). He also noted that the cap wedges used to tighten the blocks against the roof were being squeezed. In addition, he noted that some steel I-beams, placed length-wise along the surface of the roof, and supported by a set of crib blocks, one at either end of the steel beam, were twisted and bent. He noted the existence of roof falls in adjoining crosscuts.

According to Sharp, men travel through the area in a man-trip entering and exiting the work area. He noted that it was not "dangered off or barricaded" (Tr.22). Sharp issued a citation alleging a significant and substantial violation of 30 C.F.R. § 75.211(c) which provides as follows:

When a hazardous roof, face or rib condition is detected, the condition shall be corrected before there is any other work or travel in the affected area. If the affected area is left unattended, each entrance to the area shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel into the area.

According to Sharp, he concluded that the roof in the area was hazardous. This conclusion was based upon the following: the occurrence of a roof fall in an adjoining crosscut; fractures in the roof; bent and twisted steel beams; broken and squeezed crib blocks; and squeezed cap wedges. According to Sharp, those conditions indicated that the roof was heavy.

## 2. Respondent's evidence

Shamrock does not contest Sharp's testimony that men travel in the area, but maintains that the roof was not hazardous. Jeffrey Stephen Shell, Shamrock's Safety Director, indicated that initially in 1985 the area was bolted with five-inch resin bolts. Sometime around 1987 or 1988 the area in question was re-bolted with six-foot and seven-foot point anchor bolts. On June 17, 1996, a roof fall occurred in a crosscut between the track entry in question, and the adjacent No. 1 entry approximately 80 to 90 feet from the cited area. Shell explained that the roof that fell was supported only by five-foot bolts, and neither cribs, additional bolts, nor jacks had been utilized to support the roof. As a consequence of this roof fall, 12-foot bolts were added in the cited area, and steel I-beams, between 17 to 18 feet long and four to five inches wide, pressured against the roof by hardwood cribs placed at either end, were added for support. In addition, approximately six 16-foot bolts were added for support between the beams.

Shell indicated, in essence, that the fact that the steel I-beams were bent does not indicate a hazardous condition, as they were supported by blocks at each end and were designed to bend. However, no facts were adduced to provide a basis for his opinion that the I-beams were designed to yield.

Shell opined, in essence, that cribs may have shifted or broken as a result of being bumped by large pieces of equipment that were hauled in and out of the area. However, this testimony is too speculative to be relied upon.

On June 17, 1996, Shell marked three different jack sets in the cited area in a fashion that would clearly indicate if a jack would be subject to an increase in pressure from the roof above it. Shell checked the marks eight to ten times from then to July 22, and did not observe that the jacks had shown any downward movement. Similarly, Charles Alvin Morgan, Shamrock's General Foreman, opined that the area was not hazardous as he checked the marks on the jacks two times a week from June 17, to July 22, and observed that there was no evidence that the roof was pressing down on the beams. On July 22, the date the area in question was cited, Shell checked the jacks, and none evidenced any movement. Morgan made the same observation on July 23.

Shell indicated that in the six week period subsequent to July 22, no additional support was provided to the cited area, and it did not experience any falls. Nor was movement detected in the jacks.

Shell opined that the roof in the cited area did not constitute in a hazardous condition. He indicated that MSHA inspectors traveled through the area in a mantrip on July 1, July 9, July 10, July 16, July 17, July 18, July 22, 1996, but none of these inspectors cited the area in question. However, the record is not clear as to whether these inspectors merely traveled through the area from a mantrip, or actually walked and inspected the area in question on foot as Sharp did. Thus, the fact that other inspectors did not issue citations is insufficient to rebut Sharp's testimony regarding his observations.

### 3. Discussion

None of Respondent's witnesses contradicted the testimony of the Inspector that the roof in the area in question was fractured. Also, there was no impeachment or contradiction of the Inspector's testimony that the cap wedges used to tighten the blocks against the roof were being squeezed. Further, it was not controverted that some cribs were broken, I-beams were bent, and most significantly, there was a roof fall, on June 17, in an adjacent cross cut approximately 80 to 90 feet from the cited area. For these reasons I find that when cited, the roof was hazardous. Although additional supported had been provided on June 17, the hazardous conditions was not fully corrected, and miners still traveled in the area. For these reasons I find that it has been established that Shamrock did violate Section 75.211(c) supra.

## B. Significant and substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant 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 Sypsum 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 be 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 'required that the Secretary establish 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 continuation 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 Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

It is clear, as discussed above, that Shamrock did violate Section 75.211(c) supra, and that this violation contributed to the hazard of a roof fall. Hence, the first two elements set forth in Mathies, supra have been met. It remains to be resolved whether the evidence establishes the third and fourth elements set forth in Mathies supra.

According to Sharp, given continued mining and continued travel in the area, a roof fall causing fatalities would have been reasonably likely to have occurred, as evidenced by the roof fall on June 17 in an adjacent crosscut, and the condition of the cited roof. Sharp asserted that

the roof fall in an adjacent crosscut indicated the existence of adverse roof conditions which could deteriorate in minutes.

There was no actual observable deterioration in the roof, as evidenced by the lack of pressure on the jacks between June 17, and six weeks later when the area was supported by additional cribs. However, even Shell admitted on cross-examination that roof conditions can deteriorate quickly "in an area such as this" (Tr.76).

I have considered Shamrock's evidence that, when cited, there remained only approximately two hours of work to complete the installation of tracks in the adjacent entry No. 1, in order to transport miners by entry No. 1, rather than subject them to hazardous of travel through entry No. 2. However, I place most weight on the existence of uncontraverted indicia of adverse roof including fractures in roof, bent I-beams, squeezed cap wedges, and most significantly a roof fall that had occurred in a crosscut only 80 to 90 feet from the cited area. Shamrock also has not controverted the Inspector's testimony that, since eight men regularly traversed the area in question going in and out of mine, if the violative condition would not have been corrected, it would have been likely that a roof fall would have resulted in eight fatalities. Within this context, I find that the third and fourth elements set forth in Mathies, have been met. I conclude that it has been established that the violation was significant and substantial.


### C. Penalty

In assessing a penalty under the criteria set forth in section 110(i) of the Act, I note that it has been stipulated that a reasonable penalty will not affect Shamrock's ability to remain in business. In addition, I find that, as discussed above, the violation herein was of a high level of gravity. However, the history of Shamrock's violations in the two year period ending July 21, 1996, is not excessive. It is significant that in this two year period there were not any violations issued for Section 75.211(c). Further, the record establishes that Shamrock exercised a high degree of care in decreasing the hazard of a roof fall once it became aware of adverse conditions on June 17, when the roof fell in an adjacent entry. I note that Shamrock commenced to work on laying track in an adjacent entry so that miners would no longer have to travel through entry No. 2. Also, Shamrock added additional support to the roof in the cited area by way of 12 foot and 16 foot bolts, cribs, and I-beams. I find that Shamrock's negligence to have been only minor, and as a consequence the penalty to be assessed should be mitigated to a high degree. For all the above reasons I find that a penalty of \$500 is appropriate.



**ORDER**

It is ordered that Shamrock pay a civil penalty of \$500 within 30 days of this decision.

  
Avram Weisberger  
Administrative Law Judge

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## ADMINISTRATIVE LAW JUDGE ORDERS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**JUN 9 - 1997**

|                            |   |                              |
|----------------------------|---|------------------------------|
| LAUREL RUN MINING COMPANY, | : | CONTEST PROCEEDINGS          |
| Contestants                | : |                              |
|                            | : | Docket No. WEVA 94-347-R     |
| v.                         | : | Citation No. 3964761; 8/1/94 |
|                            | : |                              |
| SECRETARY OF LABOR,        | : | Docket No. WEVA 94-348-R     |
| MINE SAFETY AND HEALTH     | : | Order No. 3964762; 8/1/94    |
| ADMINISTRATION, (MSHA),    | : |                              |
| Respondent                 | : | Docket No. WEVA 94-349-R     |
|                            | : | Order No. 3964763; 8/1/94    |
|                            | : |                              |
|                            | : | Docket No. WEVA 94-350-R     |
|                            | : | Order No. 3964764; 8/1/94    |
|                            | : |                              |
|                            | : | Holden 20-DB Mine            |
|                            | : | Mine ID No. 46-07770         |
|                            | : |                              |
|                            | : |                              |
| SECRETARY OF LABOR,        | : | CIVIL PENALTY PROCEEDING     |
| MINE SAFETY AND HEALTH     | : |                              |
| ADMINISTRATION, (MSHA),    | : | Docket No. WEVA 96-177       |
| Petitioner                 | : | A. C. No. 46-07770-03575     |
|                            | : |                              |
| v.                         | : | Holden 20-DB Mine            |
|                            | : |                              |
| LAUREL RUN MINING COMPANY, | : |                              |
| Respondent                 | : |                              |
|                            | : |                              |
|                            | : |                              |
|                            | : |                              |
|                            | : | CIVIL PENALTY PROCEEDING     |
| SECRETARY OF LABOR,        | : |                              |
| MINE SAFETY AND HEALTH     | : |                              |
| ADMINISTRATION, (MSHA),    | : | Docket No. WEVA 96-176       |
| Petitioner                 | : | A. C. No. 46-07770-03576A    |
|                            | : |                              |
| v.                         | : | Holden 20-DB Mine            |
|                            | : |                              |
|                            | : |                              |
| ERNIE WOODS, Employed by   | : |                              |
| Laurel Run Mining Co.,     | : |                              |
| Respondent                 | : |                              |



**ORDER GRANTING RESPONDENTS'**  
**MOTION TO STRIKE**

These matters are scheduled for hearing on June 17, 1997, in Charleston, West Virginia. By Order dated May 28, 1997, I granted the respondents' motion to compel the Secretary's immediate disclosure of witnesses that are not currently miners. The May 28 Order compelling disclosure rejected the theory advanced by the Secretary that the "miner" witness privilege in Rule 62, 29 C. F.R. § 2700.62, should be broadly applied to include witnesses that are not employed as miners.

On May 30, 1997, the Secretary filed a motion, with this judge, for certification to the Commission of the May 28, 1997, Order. The Secretary also requested a stay of these proceedings pending Commission review. The Secretary's motion for certification and stay was denied on June 2, 1997. The June 2, 1997, Order once again required the Secretary's disclosure of her "former miner" witnesses.

Thereafter, on June 5, 1997, in accordance with Rule 76, 29 C.F.R. § 2700.76, the Secretary sought interlocutory review and a stay of these matters directly from the Commission. The Secretary's petition for interlocutory review and stay was denied by the Commission on June 6, 1997. The Secretary's request for relief was denied because she failed to demonstrate that "immediate review would materially advance the final disposition" of these cases. Although denying the Secretary's petition, the Commission noted that it took "no position on the question of the definition of 'miner' under Commission procedural Rule 62, 29 C.F.R. § 2700.62." The Commission's June 6 Order, in effect, left undisturbed this presiding judge's May 28 and June 2, 1997, Orders granting the respondents' Motion to Compel.

On the afternoon of June 6, 1997, shortly after the release of the Commission's Order denying interlocutory review, the Secretary filed a Response to the Court's Order compelling the Secretary to identify her non-miner witnesses. In her response, undaunted by the Commission's denial of the Secretary's Petition for Interlocutory Review on this disclosure issue, the Secretary stated she "respectfully refuses to disclose the identity of her *miner witnesses* until 9:00 a.m. on Friday, June 13, 1997 (emphasis added)." *Sec'y's Response*, p. 2.

The respondents filed a Motion for Sanctions on June 9, 1997, based on the Secretary's continued refusal to disclose her non-miner witnesses. The respondents seek the drastic relief of dismissal of these proceedings with prejudice. In the alternative, the respondents request that the Secretary's undisclosed witnesses be stricken. In addition, the respondents request that costs and expenses resulting from the Secretary's non-disclosure be imposed on the Secretary.

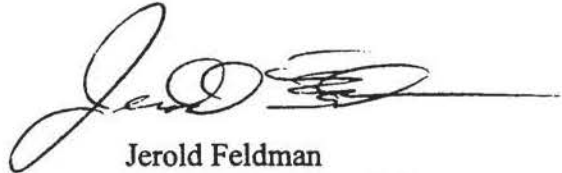
My ruling in this matter is, of necessity, based on undisputed facts that are unique to these proceedings. These matters concern events that occurred in July 1994, almost three years ago, and must not be further delayed. The respondent, Laurel Run Mining Company, closed its 20-DB Mine in August 1995, at which time all crew members involved with the fatal accident in issue were laid off. Thus, the Secretary's former miner witnesses, identified *in camera*, have not worked for the respondent company for approximately two years. Nor are they currently employed in mining. Moreover, Laurel Run attorneys have previously had the opportunity to depose these former miner employees during the discovery process in a related civil suit. Thus, although Laurel Run does not know which former employees will be called at the June 17, 1997, civil penalty hearing, it already knows the identity of the Secretary's potential witnesses. Under these circumstances, absent a showing of facts by the Secretary warranting invoking a privilege against witness disclosure because of potential intimidation, the Secretary is compelled to disclose.

Rule 59, 29 C.F.R. § 2700.59, authorizes the presiding judge "to make such orders with regard to [a failure to comply with an order compelling discovery] as are just and appropriate." In addressing the sanctions sought by the respondents, I note the Secretary's expressed motivation in this matter is primarily not dictated by a concern that her witnesses will be placed in jeopardy during the brief four day period which now precedes the Secretary's willingness to disclose on June 13, 1997. Rather, the Secretary is concerned that the subject ruling that Rule 62 only applies to witnesses employed as miners, which has no precedential value, "is likely to have implications making discovery in other cases pending before this Commission unmanageable." *Sec'y's May 30 Motion*, p.4; *see also Sec'y's June 5 Motion*, at n.5 (referring to the impact of this case on other cases). However, the Secretary's fears should have been quelled by the Commission's Order denying certification wherein the Commission stated that it took no position on the Rule 62 question.

While I recognize the Secretary's commitment to principle, such commitment must be subordinated to inviolateness of the judicial process. The Secretary's continued refusal to identify her former miner witnesses to the respondents cannot be excused, and provides me with no other alternative. **ACCORDINGLY**, the respondents' motion to strike Secretary Witnesses #1, #2 and #3, as enumerated in the Secretary's *in camera* submission, **IS GRANTED**. The respondents' alternative request for the drastic remedy of dismissal of these proceedings **IS DENIED**. I am deferring my ruling on the respondents' request for costs in this unusual matter. The parties should address the issue of costs claimed by the respondents in their post-hearing briefs.

The remaining issue is the Secretary's alternative request in her June 6, 1997, Response regarding an offer of proof pursuant to Rule 103 of the Federal Rules of Evidence. The Secretary seeks to call the stricken witnesses for the purpose of preserving their testimony on appeal. An offer of proof is discretionary, rather than a matter of right. *Fed. R. Evid.* 103 (*see note to 103 subdivision (b)*). Offers of proof enable an appellate body to analyze evidence deemed inadmissible in order to determine if it was properly excluded. Here, the subject witnesses'

testimony is admissible. It is the Secretary's own actions that preclude her from calling these witnesses. Receiving their testimony, under a characterization of an offer of proof, would permit the Secretary to do indirectly, what she refuses to do directly. Under such circumstances, the Secretary's request for an offer of proof **IS DENIED**.

A handwritten signature in black ink, appearing to read "Jerold Feldman", with a long horizontal line extending to the right.

Jerold Feldman  
Administrative Law Judge

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PREVIOUSLY UNPUBLISHED COMMISSION DECISION





# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 12, 1997

SECRETARY OF LABOR, : Docket Nos. KENT 94-1194  
MINE SAFETY AND HEALTH : KENT 94-1223  
ADMINISTRATION (MSHA) : KENT 94-1224

v. :

ROBERT HARDIN and DEWEY HUBBARD, :  
employed by ALPHA MINING :  
COMPANY, and ALPHA MINING :  
COMPANY :

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

## DECISION

### BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). The citations at issue charge Dewey Hubbard and Robert Hardin, both employed by Alpha Mining Company ("Alpha"), with violating section 317(c) of the Mine Act, and 30 C.F.R. § 75.1702,<sup>1</sup> pursuant to section 110(g)

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<sup>1</sup> Section 75.1702, 30 C.F.R. § 75.1702, is a mandatory safety standard; its statutory counterpart is section 317(c), 30 U.S.C. § 877(c). The section provides:

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

of the Mine Act, 30 U.S.C. § 820(g).<sup>2</sup> Administrative Law Judge Gary Melick vacated in part the citation against Hubbard, and vacated the citation against Hardin. 17 FMSHRC 773 (May 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's decision. For the reasons that follow, we reverse and remand the judge's decision with regard to Hubbard, and vacate and remand the judge's decision with regard to Hardin.

## I.

### Factual and Procedural Background

Alpha operates the No. 1 Mine, an underground coal mine, in Bell County, Kentucky. On May 19, 1994, the Mine Safety and Health Administration (MSHA) conducted an inspection to search for smoking materials at the No. 1 Mine. 17 MSHA at 775. When MSHA Inspectors Stanley Sampsel, Ted Phillips, and Joseph Grubbs arrived at the mine office, they secured the telephone in the mine office to prevent notification of the inspection to the miners underground. While Inspector Grubbs remained on the surface, Inspectors Sampsel and Phillips accompanied Alpha Mine Superintendent Michael Roark underground. *Id.*

Once underground, Inspectors Sampsel and Phillips gathered the miners to a central location in the working section. 17 FMSHRC at 775. As a group of two or three miners approached, Sampsel observed one miner, whom he was unable to identify because of darkness, empty his pockets. When Sampsel searched the area where he had observed the miners, he found a cigarette butt. He turned the butt over to Phillips, who placed it in an evidence bag. Tr. 42-43.

A total of seven or eight miners joined the MSHA inspectors. Tr. 43. At the inspectors' request, Foreman Dewey Hubbard searched the miners by checking their pockets, conducting a "pat-down," and checking the miners' socks and boots, which they had been asked to remove. 17 FMSHRC at 775; Tr. 44. Afterwards, MSHA Inspector Sampsel accompanied each miner back to his work station and asked him to open his lunch pail. Tr. 44-45. When Hubbard opened his lunch pail, Sampsel saw two Marlboro brand cigarette packs, one unopened, the other empty. 17 FMSHRC at 777.

At the hearing, Hubbard testified that he did not know that the unopened package of cigarettes was in his lunch pail until he opened it to eat. Tr. 198. Hubbard further explained that

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<sup>2</sup> Section 110(g), 30 U.S.C. § 820(g), states:

Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation.

his wife had packed his lunch and placed the pack of cigarettes in the lunch pail without his knowledge. 17 FMSHRC at 777. He stated that, when he found the pack, he was unable to locate a mantrip to take the cigarettes out of the mine, as required by Alpha's anti-smoking policy. *Id.* He asserted that he was still trying to get in touch with someone about the cigarettes when the federal inspectors arrived. *Id.*; Tr. 200-01. Hubbard further testified that, while he was eating lunch, he was asked to make a water line repair. Tr. 199. He claimed that, when he went to wipe his hands on rags, he came across the empty cigarette pack, which he put in his pocket and later in his dinner bucket. 17 FMSHRC at 777-78; Tr. 199-200. He acknowledged that he smoked Marlboro brand cigarettes. Tr. 203.

Inspector Sampsel escorted mechanic helper Robert Hardin back to a mantrip outby the face. 17 FMSHRC at 775. Along the way, Sampsel found a clean undamaged Bic lighter on the ground. Tr. 47-48. When he arrived with Hardin at his work station, Sampsel searched his jacket, which was lying on a mantrip that Hardin used. 17 FMSHRC at 775. Sampsel found a "Basic" brand cigarette butt in one of the jacket pockets. *Id.* Behind the operator's seat on the mantrip, Sampsel also found an empty, wadded-up "Basic" brand cigarette package. *Id.*

Hardin testified that, even though he carried the jacket in and out of the mine, he had not worn it for several days, that other miners sometimes wore the jacket, and that the cigarette butt in the jacket pocket was not his. *Id.* As to the empty cigarette package on the mantrip, Hardin said that other miners used the mantrip. *Id.* He denied that the empty cigarette package was his and stated that he smoked a different brand. Tr. 179.

Inspector Sampsel issued citations to Alpha, Hardin, and Hubbard. 17 FMSHRC at 774, 776, 778. The citation issued to Dewey Hubbard charged him with violating section 317(c) of the Mine Act and stated that he was "observed with a full pack of Marlboro cigarettes and an empty pack of Marlboro cigarettes in his dinner pail approximately 750 feet underground." *Id.* at 776. The citation issued to Robert Hardin similarly charged him with violating section 317(c) of the Mine Act and stated that he was "observed with one empty pack of Basic cigarettes and one Basic cigarette butt in his coat pocket . . . approximately 750 feet underground." 17 FMSHRC at 774. Both citations were subsequently modified to provide that "each item of smoking material is a separate violation and will recive [sic] a separate civil penalty . . ." 17 FMSHRC at 774, 776-77. Pursuant to section 110(g) of the Mine Act, the Secretary proposed that each miner be assessed a penalty of \$500 -- \$250 for each item of smoking material noted in the citations.

Alpha, Hardin, and Hubbard challenged the penalty assessments, and the consolidated case was assigned to an administrative law judge. Following an evidentiary hearing, the judge affirmed the citation against Alpha and imposed a penalty of \$10,000.<sup>3</sup> 17 FMSHRC at 778-82. With regard to Hardin, the judge held that the citation did not charge him with smoking underground. 17 FMSHRC at 774. Therefore, the judge would not consider whether the empty

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<sup>3</sup> The citation and penalty against Alpha were not appealed and are not before the Commission on review.

cigarette pack and cigarette butt were circumstantial evidence that Hardin had smoked in the mine. *Id.* at 774-75. The judge concluded that the empty cigarette pack and the cigarette butt, which had only traces of tobacco, did not constitute "smoking materials" within the meaning of the standard. Accordingly, the judge dismissed the citation in its entirety against Hardin. *Id.* at 776. The judge also concluded that the Secretary had elected to charge Hubbard only with carrying smoking materials. *Id.* at 776-77. For the reasons stated in relation to the citation against Hardin, the judge vacated that part of the citation charging Hubbard with carrying an empty Marlboro cigarette package, because it was not smoking material. *Id.* at 777. The judge discredited Hubbard's explanation as to the presence of the full Marlboro cigarette pack in his lunch pail and his explanation as to the possession of the empty pack. *Id.* at 777-78. The judge further noted that the presence of the empty pack was evidence that Hubbard willfully carried the unopened pack, that he had smoked, and that he intended to smoke additional cigarettes in the mine that day. *Id.* Accordingly, the judge affirmed the citation as to the full pack of cigarettes and assessed a penalty of \$250. *Id.* at 778.

## II.

### Disposition

In his petition for discretionary review, the Secretary assigns two errors to the judge's decision. First, the Secretary asserts that the judge erred in concluding that the issue of smoking was not properly before him, and in failing to consider that the smoking items found near Hardin and Hubbard were circumstantial evidence of smoking. S. Br. at 9-11. Second, the Secretary argues that the judge erred in vacating citations against Hardin and Hubbard on the grounds that a cigarette butt and empty cigarette packages did not constitute "smoking materials" within the meaning of section 317(c) of the Mine Act, 30 U.S.C. § 877(c). S. PDR at 2. In support, the Secretary contends that his interpretation of the statute and regulation is entitled to deference and that the legislative history of the provision supports a broad interpretation. S. Br. at 12-18.

In response, counsel for Hardin and Hubbard argues that, if the Commission rules in the Secretary's favor, it would essentially be allowing the Secretary "to amend its pleadings after the decision," thereby denying the respondents due process by preventing them the opportunity to prepare a defense. Resp. Br. at 1.

The judge concluded that the cigarette butt found in Hardin's jacket pocket was not smoking material because it only had traces of tobacco and "'smoking material' clearly connotes a material that is capable of being smoked." 17 FMSHRC at 776. The judge rejected the Secretary's argument that the empty cigarette package was smoking material because it was used to convey cigarettes into the mine, thus facilitating smoking. *Id.* The judge noted that, under the Secretary's theory, anything that was used to hold or convey cigarettes, including a jacket pocket or dinner bucket, would constitute smoking material and that such an interpretation would lead to an absurd consequence. *Id.* at 776. We conclude that the judge's approach to enforcing the standard was too narrow and should be rejected.

The language of section 317(c) prohibits persons from smoking or “carrying smoking materials, matches, or lighters underground.” Neither the Mine Act nor the regulations define the term “smoking materials.” In the absence of a statutory definition or technical usage of the term in the standard, it is appropriate to use the ordinary meaning of the term. See *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) (citing *Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (September 1994)), *aff’d mem.*, No. 96-1205 (D.C. Cir. March 3, 1997). “Material” is defined as including “the apparatus (as tools or other articles) necessary for doing or making something.” *Webster’s Third New International Dictionary* 1392 (1986). It is evident that a cigarette butt and a cigarette package are items designed solely for cigarette consumption and used only in relationship to smoking. To conclude they are not smoking materials ignores their essential nature and the ordinary meaning of the term.

Further, the legislative history of the standard is consistent with its application to these items. See *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (December 1987). Section 317(c) of the Mine Act was based on an identical provision in the predecessor statute, Federal Coal Mine Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976). It was reenacted without comment during the 1977 passage of the Mine Act. However, the section-by-section analysis in the Committee Report that accompanied the passage of the 1969 Coal Act stated:

Subsection (c) prohibits smoking in all coal mines and in surface areas where smoking could cause a fire or an explosion. Also this section would require the operator to institute a program, approved by the Secretary, to insure that employees do not carry *smoking materials including matches, lighters, and so forth* underground.

H.R. Rep. No. 563, 91 Cong. 1st Sess. 56, *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 of 1969*, at 1086 (1975) (emphasis added). Thus, the Committee Report supports using the ordinary meaning of the term “smoking materials,” with lighters and matches being but several examples of smoking materials that were specifically included in the statute. Thus, the judge’s rationale that “smoking materials” connotes “a material that is capable of being smoked” (17 FMSHRC at 776) is inconsistent with the statutory language and its legislative history.

Based on the foregoing, we reverse the judge’s decision with respect to the empty cigarette package carried by Dewey Hubbard. We remand to the judge for consideration of the appropriate penalty, if any, under sections 110(g) and 110(i), 30 U.S.C. §§ 820(g) and (i). See note 4.


We vacate that portion of the judge’s decision that dismisses the citation against Robert Hardin, and remand to the judge to resolve credibility issues relating to Hardin’s denials that the cigarette butt found in his jacket pocket and the empty cigarette package found on the mantrip belonged to him. The judge must also address whether Hardin willfully violated the smoking standard, pursuant to 110(g), and consider the relevant penalty criteria under section 110(i).

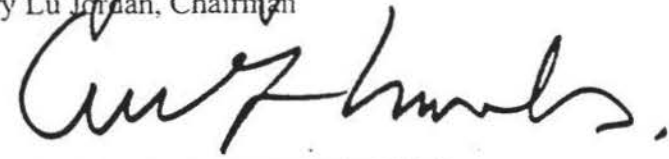


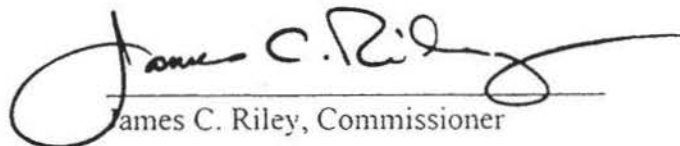
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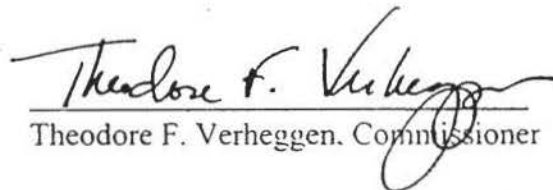
Conclusion

We reverse and remand the judge's decision with regard to Dewey Hubbard, and vacate and remand the judge's decision with regard to Robert Hardin.<sup>4</sup>

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

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<sup>4</sup> In light of our disposition of the citations, we do not reach the issue of whether the Secretary's citations were sufficiently broad so as to charge the miners with smoking and whether the judge therefore erred by failing to consider the smoking items associated with Hubbard and Hardin as circumstantial evidence of that act. In addition, the parties did not raise on review whether the separate smoking items constitute separate occurrences under section 110(g). Therefore, we do not address this issue but leave it for the judge to discuss in the first instance.

Distribution

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