

JULY 1992

COMMISSION DECISIONS

07-02-92	Jim Walter Resources, Inc.	SPECIAL 92-01	Pg. 1113
07-09-92	Paul Shirel	KENT 92-73	Pg. 1115
07-14-92	Peabody Coal Company	KENT 91-1231	Pg. 1117
07-28-92	Eagle Nest, Inc.	WEVA 91-293-R	Pg. 1119
07-03-92	Warren Steen Construction, etc.	LAKE 89-68-M	Pg. 1125

ADMINISTRATIVE LAW JUDGE DECISIONS

07-01-92	Ronny Boswell v. National Cement Co.	SE 90-112-DM	Pg. 1135
07-06-92	UMWA, Local 2244 v. Mathies Coal Co.	PENN 91-108-C	Pg. 1138
07-07-92	Young Brothers Incorporated	CENT 91-221-M	Pg. 1139
07-07-92	Ramar Coal Company, Inc.	VA 91-69	Pg. 1145
07-10-92	Hickory Coal Company	PENN 92-16	Pg. 1160
07-15-92	Garratt Company	WEST 91-27-M	Pg. 1163
07-15-92	Roger Vogt v. N.A. Degerstrom(Partial Dec.)	WEST 92-225-DM	Pg. 1177
07-20-92	Shannopin Mining Company	PENN 91-1398	Pg. 1178
07-24-92	Mid-Continent Resources, Inc.	WEST 91-580	Pg. 1197
07-30-92	ZCA Mines, Incorporated	YORK 92-40-M	Pg. 1199

ADMINISTRATIVE LAW JUDGE ORDERS

07-09-92	Contests of Respirable Dust Samples	No. 91-1	Pg. 1203
07-17-92	Contests of Respirable Dust Samples	No. 91-1	Pg. 1210
07-31-92	Energy Fuels Coal Inc.	WEST 92-102	Pg. 1223

JULY 1992

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

Secretary of Labor, MSHA v. S & H Mining Inc., Docket No. SE 91-32.
(Judge Fauver, May 26, 1992)

BethEnergy Mines, Inc. v. Secretary of Labor, MSHA, Docket Nos. PENN 89-277-R,
PENN 89-278-R. (Judge Fauver, May 27, 1992)

Secretary of Labor, MSHA v. Paul Shirel, Docket No. KENT 92-73. (Default
Order of June 17, 1992, Chief Judge Merlin -- not published)

VP-5 Mining Company, Inc. v. Secretary of Labor, MSHA, Docket Nos.
VA 92-112-R through VA 92-115-R. (Judge Melick, June 22, 1992)

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

Charles Smith v. KEM Coal Company, Docket No. KENT 90-30-D. (Judge Fauver,
May 28, 1992)

Contest of Respirable Dust Samples, Master Docket No. 91-1. (Judge
Broderick, Interlocutory Review of May 22, June 12, and June 18, 1992 Orders)

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1992

JIM WALTER RESOURCES, INC.	:	
	:	
v.	:	Docket No. SPECIAL 92-01
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

On June 25, 1992, counsel for Jim Walter Resources, Inc. ("JWR"), submitted for filing with the Commission's Office of Administrative Law Judges a document entitled "Notice of Contest and Motion for Partial Relief from Final Order." A corrected cover page to the motion, submitted on June 26, 1992, makes clear that the motion is intended to be lodged with the Commission itself. Essentially, the motion seeks to reopen an unspecified number of uncontested and closed cases in which JWR paid civil penalties proposed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The asserted grounds for relief are that the penalties were proposed, in part, on the basis of MSHA's Program Policy Letter No. P90-III-4 (May 29, 1990), which the Commission concluded could be "accorded no legal weight or effect" in Drummond Co., 14 FMSHRC 661, 690 (May 1992), and related cases.

Subsequent to JWR's submission, the American Mining Congress ("AMC") submitted a motion to participate in this matter as an amicus curiae on the side of JWR. Counsel for the Secretary of Labor then submitted an unopposed motion requesting an enlargement of time in which to file a statement in opposition to JWR's motion.


For administrative purposes only, this matter, which involves unique issues possibly affecting a large number of closed penalty matters, will be assigned the docket reference "No. Special 92-01." The parties' various papers are hereby accepted for filing under that docket number. The assignment of a docket number and acceptance for filing does not mean, nor is meant to suggest, that the Commission has determined that it possesses jurisdiction in this matter or is thereby ruling on any issues raised in the parties' papers.

The Commission has determined administratively that counsel for the Secretary of Labor has no objection to the AMC's amicus participation. The AMC's motion adequately sets forth the basis of its interest in this matter and why its participation would be desirable. Cf. Fed. R. App. P. 29. Upon consideration of the AMC's motion, it is granted and the AMC is hereby

permitted to participate as amicus in this proceeding.

Upon consideration of the Secretary's motion for enlargement of time, it is granted and the Secretary has until July 27, 1992, to file her statement of opposition in this matter.

For the Commission:


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Chairman

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July 9, 1992

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

v.

PAUL. SHTREL.

Docket No. KENT 92-73

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On June 17, 1992, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default, finding respondent Paul Shirel ("Shirel") in default for failure to answer the civil penalty proposal of the Secretary of Labor ("Secretary") and the judge's order to show cause. The judge assessed the civil penalty of \$1,000 proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

The judge's jurisdiction over this case terminated when his decision was issued on June 17, 1992. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a).

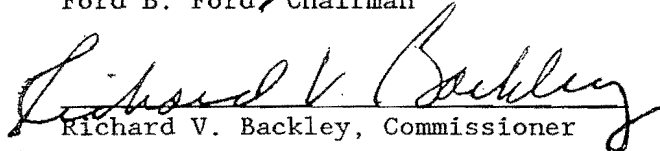
Shirel filed a timely petition, with supporting affidavits, with the Commission on June 29, 1992, seeking relief from the judge's default order. He petitions for review on the grounds that neither he nor his counsel had received the petition for civil penalty or the judge's order to show cause. Shirel further asserts that he had placed the Commission and the Office of the Solicitor of Labor ("Solicitor") on notice of his contest of the proposed civil penalty, and of his representation by counsel, by filing an answer prior to the Secretary's filing of the petition for civil assessment. A certificate of service attached to the answer indicates that it was served by Shirel's counsel on the Commission and on the Solicitor's Office in Arlington,

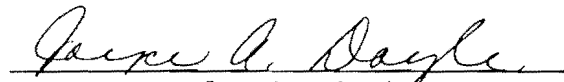
Virginia, in early November, prior to the filing of the Secretary's civil penalty petition.


On the basis of the present record, we are unable to evaluate the merits of Shirel's position. In the interest of justice, we will permit him to present his position to the judge, who shall determine whether final relief from the default order is warranted. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867 (December 1986).


Accordingly, we vacate the judge's default order and remand this matter for further proceedings.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 14, 1992

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

PEABODY COAL COMPANY

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Docket No. KENT 91-1231

ORDER

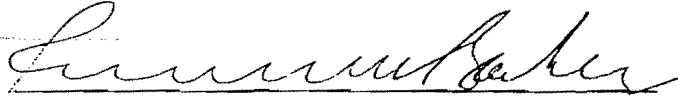
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) and involves an alleged violation of 30 C.F.R. § 75.301 by Peabody Coal Company ("Peabody"). After an adverse decision by the Commission administrative law judge, Peabody filed a Petition for Discretionary Review, which the Commission granted. Subsequently, the Secretary filed a Notice of Intent to Vacate Citation and Request Dismissal and a subsequent Motion to Dismiss Appeal. In the Notice of Intent, the Secretary explained that the Department of Labor's Mine Safety and Health Administration ("MSHA") promulgated a final rule, scheduled to take effect on August 16, 1992, that will effectively moot the issues raised in the instant case and that continued litigation of this case risks confusion and a waste of resources. On June 15, 1992, MSHA vacated the disputed citation. Peabody has indicated that it has no objection to the granting of the Secretary's motion.

We conclude that adequate reasons have been presented supporting vacation of the underlying citation and dismissal of this proceeding, and grant the motion. See, e.g., Climax Molybdenum Co., 2 FMSHRC 2748, 2750 (October 1980); Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985); BethEnergy Mines, Inc., 12 FMSHRC 1751, 1753-54 (September 1990).

Accordingly, the citation involved in this proceeding and the assessed civil penalty are vacated with prejudice. The Commission's direction for review is vacated and this proceeding is dismissed.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 28, 1992

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

v.

EAGLE NEST, INCORPORATED

:
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Docket No. WEVA 91-293-R

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). At issue is whether a violation by Eagle Nest, Incorporated ("Eagle Nest") of 30 C.F.R. § 75.305, for water accumulations in a longwall tailgate return entry, was significant and substantial in nature ("S&S").¹ Commission Administrative Law Judge Avram Weisberger concluded that Eagle Nest violated the regulation but that the violation was not S&S. 13 FMSHRC 843 (May 1991)(ALJ). We granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we vacate the judge's finding that the violation was not S&S and remand for further proceedings consistent with this decision.

¹ 30 C.F.R. § 75.305 provides, in part, as follows:

[E]xaminations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas.... The person making such examinations and tests shall place his initials and the date and time at the places examined, and if any hazardous condition is found, such condition shall be reported to the operator promptly. Any hazardous condition shall be corrected immediately....

I.
Factual Background and Procedural History

Eagle Nest's underground coal mine is located in Boone County, West Virginia. The mine has had a history of water accumulation problems. Although Eagle Nest has taken measures to address these problems, water accumulation at the mine has nonetheless persisted.

In the context of the present proceeding, water accumulated in the tailgate return entry of longwall panel A. Eagle Nest had placed four water pumps at locations where it was anticipated that water would collect. The pumps were connected to ten inch water lines that carried the water away from the entry.

On March 14, 1991, accumulations in the entry of water four feet deep were reported in the mine's weekly examination book. The following day, mining began in longwall panel A. On March 19, 1991, Eagle Nest's longwall coordinator traveled the entry to conduct an examination and experienced accumulations of water up to his shirt-pocket (about four feet high).

On March 20, 1991, Mine Safety and Health Administration ("MSHA") Inspector Ronnie Joe Dooley made a spot inspection of the longwall A panel. Dooley traveled along the tailgate return entry outby the face, with union representative Franklin Miller and the general mine foreman Jim Lambert. Dooley wanted to see whether the entry was safe for travel by the examiner conducting the weekly examination required under section 75.305. After travelling approximately 600 to 700 feet in the tailgate entry, Dooley, Miller, and Lambert encountered an area of water accumulation extending from rib to rib (approximately 20 feet).²

At spad No. 3777, the water reached the top of Dooley's 16 inch boots. Dooley stopped, concluding that it was not safe to proceed. The water hole extended as far as Dooley could see, at least 200 feet outby where he stopped. Dooley asked Lambert whether it was possible to reach the other side of the water accumulation by traveling up the entry from the mouth end, but was told that there were other water accumulations that would prevent the inspection party from reaching that point.

Dooley concluded that the weekly examiner traveling the entry would be exposed to slipping, stumbling, and falling hazards due to water accumulations. His task would be made more difficult by submerged lumps of coal, rocks, remnants from concrete stoppings, the ten inch water line, and pieces of wood from cribs and pallets. According to Dooley, the water was murky and the bottom could not be seen. Dooley was additionally concerned about slick mud, cracks in the bottom of the entry (hooving), and accumulations of mud where the examiner's boots could become stuck. Dooley emphasized that the examiner traveling through the entry would be at the same time inspecting for hazardous conditions, such as entry blockage, ventilation hazards, and methane, as well as observing the condition of the roof and ribs. Tr. 28.

² The travelway itself was reduced to approximately five feet in width because there were cribs on each side of the entry.

Accordingly, Dooley issued Eagle Nest a section 104(a) citation for violation of section 75.305 as follows:

At least one entry of the longwall tailgate return entry could not be made safely in its entirety. Water has accumulated in depth exceeding 16 inches at Survey Spad [N]o. 3777 and various locations outby. This condition creates a hazard to those persons required to make weekly examinations.

S. Exh. 2. Dooley also found the violation to be S&S.³

On March 21, 1991, Eagle Nest attempted an examination of the entry but the presence of water prevented the examiner from proceeding beyond the No. 14 stopping. According to Dooley, the No. 14 stopping was approximately 2,000 feet outby spad 3777.⁴

Judge Weisberger found that the accumulation of water presented a hazard to those miners who would have to traverse it to make an examination. 13 FMSHRC at 846. He also found that this hazardous condition had been initially observed on March 14, 1991, again on March 19, 1991, and had not been corrected as evidenced by its continued existence on March 20, 1991. Id. The judge consequently found that Eagle Nest violated section 75.305 as alleged. Id.

The judge found, however, that the violation was not S&S. 13 FMSHRC at 847. He concluded that the Secretary had failed to establish a reasonable likelihood that an injury due to falling or slipping would occur. Id. Although a stumbling or falling hazard was present due to the depth and murky nature of the water accumulation, according to the judge, the hazard could be mitigated by walking cautiously to feel for submerged objects so that they could be avoided. Id.

II.

Disposition of Issues

On review, the Secretary submits that the judge erred in concluding that the violation was not S&S. The Secretary argues that the judge erred in finding that the water hazard was not reasonably likely to result in slipping, stumbling, or falling as the examiner attempted to make his way through the

³ The term significant and substantial is taken from section 104(d) of the Mine Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." 30 U.S.C. § 814(d)(1).

⁴ The citation was terminated on April 12, 1991, after the water had been pumped down to a safe level and Eagle Nest had built wooden bridges over two places where the water was more than 16 inches deep. It appears that one of the bridges was built in the area of accumulation that Dooley observed. See Tr. 244.

travelway. The Secretary disputes the judge's conclusion that the hazard could be mitigated by exercising caution. We vacate the judge's finding of non S&S for legal error.

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

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

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). The Secretary is not required to present evidence that the hazard actually will occur. Thus, in Youghiogeny & Ohio Coal Co., 9 FMSHRC 673 (April 1987), the Commission held that:

In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. The Commission has consistently held that proof that the injury-causing event is reasonably likely to occur is what is required. See, e.g., U.S. Steel Mining Co., 7 FMSHRC at 1125; U.S. Steel Mining Co., 7 FMSHRC 327, 329 (March 1985).

9 FMSHRC at 678. The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

With regard to the first and second elements of the Mathies test, the judge's findings of a violation of section 75.305 and of a discrete safety hazard, i.e., a hazard of slipping or falling, are not in issue. With respect to the fourth element of the Mathies test, the likelihood that a resulting injury would be reasonably serious in nature, that element is also not in dispute.

As to the third element of the Mathies test, whether there was a reasonable likelihood that the hazard of slipping or falling would result in an injury, the judge concluded that, although a stumbling or falling hazard was present due to the depth and murky nature of the water accumulation, the hazard could be mitigated by walking cautiously to feel for submerged objects so they could be avoided. 13 FMSHRC at 847.

We reject the judge's conclusion that the "exercise of caution" may mitigate the hazard. In effect, the judge seeks to add another element to the Mathies test, i.e., that the exercise of substantial additional caution can be presumed and then considered in determining whether there is a likelihood of injury. Consistent with Commission precedent, it is the likelihood of injury that must be evaluated in considering whether a violation is S&S. The hazard continues to exist regardless of whether caution is exercised. The judge therefore erred when he concluded the hazard could be mitigated by caution. We assume that the judge meant that the likelihood of injury could be mitigated by caution. While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions.

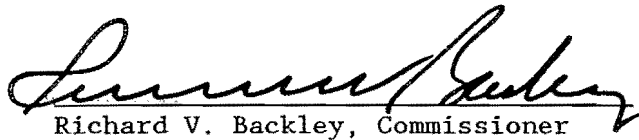
The judge, in resting his decision on the possibility of mitigation by the use of caution, failed to address comprehensively the evidentiary record in determining that the Secretary did not establish a reasonable likelihood that an injury would occur. The substantial evidence standard of review requires a weighing of all probative record evidence and an examination of the fact finder's rationale in arriving at the decision. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951); Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977). A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. Anaconda Co., 3 FMSHRC 299, 299-300 (February 1981). Accordingly, we vacate the judge's decision and remand for further analysis and determination of the S&S issue without consideration of whether the hazard could be mitigated by the use of caution.

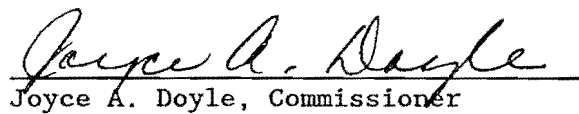
III.
Conclusion

We conclude that the "exercise of caution" is not an element in determining whether a violation rises to the level of S&S, and we direct the judge on remand to conform to the Mathies test to substantively analyze the evidence of record and to set forth his rationale in his reconsideration.

Accordingly, we vacate the judge's conclusion that Eagle Nest's violation of section 75.305 was not S&S and remand for further proceedings consistent with this decision.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 1992

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

v.

Docket Nos. LAKE 89-68-M
LAKE 89-93-M

WARREN STEEN CONSTRUCTION, INC.,
AND WARREN STEEN, Employed by
Warren Steen Construction, Inc.

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The issues are: (1) whether Warren Steen Construction, Inc. ("W.S.C.") violated 30 C.F.R. § 56.12071¹ when it operated a stacker-conveyor² near energized high-voltage power lines and, if so, whether that violation was caused by its unwarrantable failure to comply with the standard; (2) whether Warren Steen ("Steen") is individually liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for authorizing the alleged violation; and, (3) whether the civil penalties assessed against W.S.C. and Mr. Steen are supported by substantial evidence. Following an evidentiary hearing, Commission Administrative Law Judge James A. Broderick concluded that W.S.C. had violated section 56.12071, that the violation had been caused by its unwarrantable failure, and that Steen was individually liable for the violation. 13 FMSHRC 256 (February 1991)(ALJ). The judge assessed an \$8,000 civil penalty against W.S.C. for the violation

¹ 30 C.F.R. § 56.12071, a mandatory safety standard applicable to surface metal and nonmetal mines, provides, "[w]hen equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

² A stacker-conveyor is an adjustable piece of equipment that can be raised or lowered with a hydraulic system located on the "stacker"; it was used by W.S. Construction to convey sand and gravel up to stockpiles. Tr. 13.

of section 56.12071 involving the stacker-conveyor³ and assessed a civil penalty against Steen in the amount of \$5,000. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

At all times relevant to this case, W.S.C. operated the Steen Pit Mine, a sand and gravel mine located in Moose Lake, Minnesota, and Steen was the president and owner of W.S.C.⁴ On July 1, 1988, W.S.C. employees, Jack Hufford and Gary Jobe, attempted to move an 80-foot Nordberg stacker-conveyor in order to make a new row of gravel piles. The stacker-conveyor was first attached with a chain to a front-end loader's bucket. Mr. Hufford, who operated the front-end loader, and Mr. Jobe, who walked along beside it in order to give Hufford directions, then began to move the stacker-conveyor by pulling it with the front-end loader. Hufford testified that they "started swinging [the stacker-conveyor] to the side to start a row of piles" and, as the stacker-conveyor swung back and forth, it passed near the power lines. Tr. 49, 50-51.

In an attempt to stop the stacker-conveyor, Jobe threw a plank on the ground at the desired location, pulled the wheel up on it, and then placed a second piece of lumber perpendicular to the plank under the wheel and motioned for Hufford to stop.⁵ Tr. 20, 49. The stacker-conveyor continued to roll over the wood, gaining momentum. Jobe pushed against the frame in an attempt to stop it, but the stacker-conveyor contacted the overhead power lines. Jobe was electrocuted as a result.

The overhead power lines, owned by Minnesota Power & Light ("MP&L"), ran approximately 12,000 volts of current, and were 19 feet-9 1/2 inches above the ground at their lowest point. Tr. 19, 57. At the point of contact, the power line contacted was approximately 22 feet-1/4 inch above the ground. Tr. 19. The height of the stacker-conveyor at its discharge point was 23 feet. Tr. 18.

On July 5, 1988, the Occupational Safety and Health Administration, which had been informed of the accident, contacted the Department of Labor's Mine Safety and Health Administration ("MSHA") about the matter. Later that day, MSHA Inspector Jim King visited the mine and spoke with Mark Belich, an assistant engineer for MP&L, and with Steen's son, and took photographs. Inspector King testified that Mr. Belich informed him that, prior to the

³ The judge also assessed a separate \$8,000 civil penalty for another violation of the same standard.

⁴ Steen sold the mine on May 1, 1989.

⁵ The planks used by Jobe measured 2x4 inches, and approximately four to five feet long, and 4x4 inches, and approximately four feet long, respectively. Tr. 41, 49. Jobe did not use the chock blocks that came from the manufacturer with the stacker. Tr. 75-76.

accident, Steen had discussed with MP&L representatives the possibility of relocating the power lines so that they would not interfere with ongoing work at the mine. Tr. 12-13, 43. Inspector King returned to the mine on July 6, 1988, to continue his investigation and found that the stacker-conveyor had been moved to a location approximately 75 feet from the power lines. Tr. 28. Inspector King spoke with Steen, Hufford, and another MP&L representative about the accident. Based upon his investigation, Inspector King issued to W.S.C. a section 104(d)(1) citation alleging a significant and substantial ("S&S") violation of section 56.12071, caused by the operator's unwarrantable failure to comply with the standard.

During his investigation on July 6, Inspector King noticed that a feeder-conveyor was operating close to the power line.⁶ Tr. 25, 28-29. After receiving authorization to conduct a regular inspection of the mine, Inspector King determined that the clearance between the feeder-conveyor and the power line was approximately eight feet. Inspector King then spoke with Steen about moving the feeder-conveyor. Steen replied that he had a few more weeks of work remaining at that location, and that he would move the equipment after he finished it. Tr. 27, 36, 82. Inspector King then issued to W.S.C. a section 104(d)(1) order, alleging a second S&S violation of section 56.12071, caused by the operator's unwarrantable failure. The order was terminated after the feeder-conveyor was shut down and moved away from the power line. S. Exh. 4.

The Secretary proposed that civil penalties be assessed against W.S.C. in the amount of \$7,000 for the alleged violation involving the stacker-conveyor, and \$8,000 for the alleged violation involving the feeder-conveyor. The Secretary also proposed that a civil penalty in the amount of \$4,000 be assessed against Steen individually under section 110(c) of the Mine Act because, she alleged, he knowingly authorized, ordered, or carried out a violation of section 56.12071 involving the stacker-conveyor.

Following an evidentiary hearing, the judge found that W.S.C. had violated section 56.12071 in both instances, and that the violations were S&S and caused by the operator's unwarrantable failure. He first determined that W.S.C. had violated the standard through its operation of the stacker-conveyor within 10 feet of an energized high-voltage power line, "so that the conveyor came in contact with the line," without the power line having been deenergized or other precautionary measures taken. 13 FMSHRC at 260. The judge found that the violation was S&S because a miner had been electrocuted as a result of the violation. Id. In addition, the judge concluded that the violation was unwarrantable and resulted from the operator's "reckless disregard" for the safety of miners, because the operator had been cautioned about working too close to the power lines before the accident, and because the operator should have recognized that operation of a large metal machine under a high voltage line is inherently dangerous. Id. The judge assessed a civil penalty in the amount of \$8,000 against W.S.C., rather than the \$7,000 penalty proposed by the Secretary.

⁶ The feeder-conveyor was used by W.S.C. to transport material from a portable crushing and screening unit to a stacker-conveyor. Tr. 13-14.

The judge also sustained the citation alleging a violation of section 56.12071 involving the feeder-conveyor because he found that W.S.C. operated "the conveyor" directly below energized high-voltage power lines at a distance of 8 to 8 1/2 feet. Id.⁷ He determined that the violation was S&S because it "was extremely serious and was likely to result in serious injury if mining had been allowed to continue." Id. He noted that the operator had experienced a fatal accident five days earlier as a result of the same condition and that, therefore, the operator had unwarrantably failed to comply with the standard. 13 FMSHRC at 260-61. He then assessed the proposed civil penalty of \$8,000 against the operator. 13 FMSHRC at 261.

Concerning Steen's individual liability under section 110(c) of the Act, the judge found that Steen exhibited a reckless disregard for safety and knowingly authorized operation of the equipment close to high-voltage power lines. 13 FMSHRC at 261. The judge assessed a civil penalty in the amount of \$5000 against Steen, rather than the \$4,000 penalty proposed by the Secretary.

The Commission subsequently granted W.S.C.'s and Steen's petition for discretionary review, in which they dispute the stacker-conveyor violation, whether that violation was caused by the operator's unwarrantable failure, whether Steen is individually liable, and the amount of the three civil penalties assessed by the judge.⁸

II.

Disposition of Issues

A. Citation involving stacker-conveyor

The judge found that W.S.C. violated section 56.12071 when its stacker-conveyor was operated near energized high-voltage power lines, clearance was less than 10 feet, and the power lines had not been deenergized, or other adequate precautionary measures taken. The petitioners argue that these

⁷ In his findings of fact, the judge stated that on July 6, 1988, "the stacker-conveyor was still below the energized 12,000 volt power line. It was approximately 8 feet directly below the line." 13 FMSHRC at 258 (emphasis added). The operator argues that this finding of fact is not supported by the evidence. P. Br. at 2. The record reveals that, in fact, the stacker-conveyor had been moved to a location 75 feet away from the power line but on July 6, 1988, the feeder-conveyor was operating approximately eight feet from the power line. Tr. 28-29. Although the judge misspoke as to the particular conveyor, we conclude that his error was harmless. In this case, the specific piece of equipment operating near the energized power line in violation of section 56.12071 is irrelevant.

⁸ The Secretary maintains that the petitioners have not sought review of the finding that the stacker-conveyor violation was caused by W.S.C.'s unwarrantable failure. S. Br. at 5 n.5. In fact, W.S.C. has sought review of this issue by disputing the judge's fourth conclusion of law, in which the judge determined that the stacker-conveyor violation occurred as a result of the operator's unwarrantable failure. P. Br. at 2; 13 FMSHRC at 260.

findings are contrary to law and are not supported by substantial evidence. P. Br. at 2. We disagree.

The evidence is undisputed that, as the stacker-conveyor swung back and forth while it was being moved, it passed near the energized high-voltage power lines. Tr. 24, 50-51. Clearance between the stacker-conveyor and the power lines was less than 10 feet. The height of the power lines was approximately 19 feet-9 1/2 inches at the lowest point and 22 feet-1/4 inch at the contact point, while the stacker-conveyor's discharge height was approximately 23 feet. Tr. 18-19. The power lines were not deenergized, and Inspector King testified that Jobe's use of wooden planks to control movement of the stacker-conveyor was an inadequate precautionary measure. Tr. 21. No other precautionary measures were taken. We conclude that the foregoing evidence constitutes substantial evidence in support of the judge's findings, and we affirm his determination that W.S.C. violated section 56.12071 in its operation of the stacker-conveyor.

Substantial evidence also supports the judge's finding that the stacker-conveyor violation was caused by W.S.C.'s unwarrantable failure to comply with section 56.12071. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghioghenny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987).

W.S.C.'s actions resulting in the stacker-conveyor violation were properly characterized by the judge as aggravated. It is common knowledge that power lines are hazardous, and the standard itself provides notice that precautions are required when working near power lines with heavy equipment. In addition, W.S.C. had been warned by MP&L representatives before the accident that it was operating too close to the lines. Tr. 59. The evidence reveals that Steen knew that the stacker-conveyor would be operated near energized power lines and that the clearance would be less than 10 feet. Tr. 18-19, 24, 50-51, 79. Steen testified that the stacker-conveyor had been set up in the cited location since the previous September 1987. Tr. 79. In fact, he helped move it to that location. Tr. 75. The record also discloses that W.S.C. was actually aware, through Steen, of the dangers involved in working around energized power lines. Steen testified that he had discussed with employees how to move the stacker-conveyor so as to avoid contact with the power lines. Tr. 72-73. Hufford also testified that he knew about the dangers associated with power lines from personal experience, although Steen had never discussed those dangers with him. Tr. 54.

W.S.C. also had sufficient knowledge, through Steen, that adequate precautionary measures were not being taken, in that Steen knew that the power lines had not been deenergized or relocated and that no steps had been taken to prevent contact between the stacker-conveyor and the energized power lines. Tr. 16, 24, 50-51. Even if the use of chock blocks were assumed to constitute an adequate precautionary measure, W.S.C. did not ensure that the miners were trained regarding their use. Jobe, who had been employed at the mine for two months before the accident, had never received formal training, and used wooden planks rather than the chock blocks, in an attempt to control the

movement of the stacker-conveyor. Tr. 40-41, 52, 75-76.⁹

Although the operator knew of the dangers involved in operating large metal machinery near energized power lines, it directly exposed its miners to such hazards without regard for their safety and without taking precautions. Such conduct is aggravated, and constitutes more than ordinary negligence. Accordingly, we affirm the judge's finding that W.S.C.'s violation of section 56.12071 was caused by its unwarrantable failure to comply with the standard.

B. Section 110(c) liability

In relevant part, section 110(c) provides:

Whenever a corporate operator violates a mandatory health or safety standard ..., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, ... shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c). The judge found that Steen had sufficient knowledge of the dangers associated with operating equipment near energized high-voltage power lines to support a finding of individual liability under section 110(c) of the Mine Act. 13 FMSHRC at 261.

Preliminarily, the evidence is undisputed that at all times relevant to this case, W.S.C. was a corporation, and Steen was its president. Tr. 5, 68; S. Exh. 2. As we concluded above, substantial evidence supports the judge's finding that W.S.C. violated section 56.12071 through its operation of the stacker-conveyor. Steen challenges whether substantial evidence supports the judge's finding that he "knowingly authorized" W.S.C.'s violation within the meaning of section 110(c). We conclude that it does.

Steen argues that the judge's conclusion that he "knowingly authorized the violations in reckless disregard for the safety of his employees is without any factual basis whatsoever." P. Br. at 2. Steen maintains that he was not at the pit at the time of the accident and played no part in the actual events that led to the death of Jobe. P. Br. at 4. He also asserts that the mine had previously been inspected, apparently when the equipment was set up in the same location, and that no violations had been cited. P. Br. at 5. He also argues that his discussions with MP&L centered around "some piles of gravel that might constitute a hazard if a front-end loader were operated on the piles" and that they did not discuss the stacker-conveyor. P. Br. at

⁹ It should be noted that since October 1, 1979, Congress, through the appropriations process, has prohibited MSHA from enforcing safety training regulations at certain types of surface nonmetal mines, including the Steen Pit Mine.

2, 4. Steen further contends that he was not aware of the standard requiring 10 feet clearance from the power line, and that he did not knowingly and intentionally tell his employees to position the equipment in such a fashion that it would be in violation of federal law. Tr. 73, 77; P. Br. at 5. We reject Steen's arguments.

In order to establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. See, e.g., United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). Steen's claimed ignorance of the law is not a viable defense. Id. at 563. Further, the fact that Steen was not present at the mine at the time of the accident is no defense to the finding that he had knowingly authorized the moving of the stacker-conveyor. Hufford testified that on the day of the accident, Steen would have been the individual who gave the orders to move the stacker-conveyor in order to construct new stockpiles. Tr. 50. As noted earlier, Steen was aware that the stacker-conveyor would be operated near energized power lines and that the clearance would be less than 10 feet. Thus, it is clear that Steen knowingly authorized miners to move large metal machinery near energized high-voltage power lines, yet failed to ensure that adequate precautionary measures were taken to prevent the hazards associated with that procedure.

The fact that MSHA may not have previously taken enforcement action with respect to the set-up of the stacker-conveyor does not obviate finding liability against Steen. The Commission has recognized that prior instances of inconsistent action by MSHA do not constitute a viable defense to liability. See, e.g., King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981). Finally, Steen's argument that he had not been forewarned that the cited conduct was hazardous, because the MP&L representative did not specifically mention the stacker-conveyor, is unavailing; MP&L's warning was broadly directed to working near power lines. More importantly, the standard gives clear notice that operation within 10 feet of a power line requires precautionary measures. Accordingly, we affirm the judge's finding that Steen knowingly authorized W.S.C.'s actions in violation of section 56.12071, within the meaning of section 110(c) of the Act.

C. Assessment of civil penalties

W.S.C. and Steen argue that the civil penalties assessed against them are not supported by evidence or by law. P. Br. at 2. They emphasize that the record shows no prior violations, that the violations were promptly abated, and that the accident was not caused by reckless actions of Steen but occurred as a result of Jobe's negligence.

When a judge's penalty assessment is at issue on review, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). See, e.g., Westmoreland Coal Co., 8 FMSHRC 491, 492 (April 1986). Within this framework, we examine the civil penalties assessed by the judge against the petitioners' arguments pertaining to its history of previous violations, its negligence, and its good faith in attempting to achieve rapid compliance after notification of a violation. See

30 U.S.C. § 820(i).

Between July 6, 1986, and July 5, 1988, W.S.C. was cited for one violation of a mandatory health or safety standard, which did not involve section 56.12071. S-Exh. 10; Tr. 22, 74, 86. The judge found that the operator's history of previous violations was such that an otherwise appropriate penalty should not be increased because of it. 13 FMSHRC at 257. The judge's findings with respect to the operator's history of previous violations are supported by substantial evidence.

Substantial evidence also supports the judge's negligence findings. The judge found that the violations committed by W.S.C. and Steen resulted from their "reckless disregard" for the safety of miners. 13 FMSHRC at 260-61. With respect to the feeder-conveyor violation, the record reveals that Steen knew that the feeder-conveyor was operating below an energized power line, and that an electrocution of one of his employees had occurred five days earlier when another conveyor had been moved near the power line. Tr. 26-27, 29, 51. Such evidence supports the judge's characterization of W.S.C.'s conduct as involving a high degree of negligence.

The judge also properly characterized the petitioners' violative conduct involving the stacker-conveyor as involving a high degree of negligence. As discussed above, the operator's conduct involving the stacker-conveyor violation was unwarrantable, i.e., amounted to aggravated conduct constituting more than ordinary negligence.

The petitioners also argue that the stacker-conveyor accident was caused by an employee's negligence and that the accident was unintentional. The Commission has found that, in some instances, an operator may be found negligent, even though the violation was committed by a non-supervisory employee. In A.H. Smith Stone, 5 FMSHRC 13 (January 1983), the Commission set forth the following guidelines:

The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC at 15.

We apply the A.H. Smith guidelines to the judge's findings and the record evidence involving the stacker-conveyor violation, and conclude that Jobe's actions were foreseeable. As discussed above, Jobe was required to move the stacker-conveyor near energized power lines, and the clearance between the power lines and the stacker-conveyor was less than 10 feet. Jobe's actions in using the planks to control the movement of the stacker-conveyor were foreseeable because miners had used the planks in such a manner

in the past. Tr. 53-54. Second, the risks involved in moving the stacker-conveyor near an energized power line were clearly serious. The stacker-conveyor swung near the power lines and there was no clearance between the top of the stacker-conveyor and the power lines at their lowest point. Contact between the energized power line and the stacker-conveyor resulted in electrocution. Third, the operator's supervision, training and discipline of its employees with respect to this standard were inadequate. No designated supervisor was on the premises at the time the stacker-conveyor was moved. Tr. 72. Jobe had been hired only two months before the accident and had not received any training, and no formal training had been provided to other employees. Tr. 52, 54, 83. There was no evidence that the operator disciplined employees in order to prevent violations of the standard. In sum, consideration of the foreseeability of Jobe's conduct, the risks involved, and the operator's lack of appropriate supervision, training and discipline leads us to conclude that the judge properly found W.S.C. negligent.

As to Steen's individual challenge to the penalty assessed by the judge, we refer to our earlier discussion of the section 110(c) violation. Further, we concur with the judge that Steen, an individual with 20 years of experience, who personally directed the operation, acted with a high degree of negligence in allowing the stacker-conveyor to be operated so near to the power lines. Thus, we disagree that the penalty imposed on Steen by the judge was too harsh and, we affirm it.


The judge did not make specific findings with respect to the demonstrated good faith of the petitioners in attempting to achieve rapid compliance after notification of the violations. In such circumstances, we may examine the record for pertinent undisputed evidence. Sellersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1153 (7th Cir. 1984). The record reveals that the petitioners abated the stacker-conveyor citation by moving the stacker-conveyor 75 feet from its previous location. Tr. 28. Although the petitioners did not unduly delay abatement of the stacker-conveyor violation, their operation of the feeder-conveyor in the same location weighs heavily against a finding of demonstrated good faith compliance. When he was notified that the feeder-conveyor was operating too close to the power lines, Steen asked for two or three weeks time before he would be required to move it so that he could finish work in that area. Such conduct does not support a decrease in the civil penalties assessed by the judge.

In sum, we conclude that the three civil penalties assessed by the judge against W.S.C. and Steen are consistent with the statutory criteria and are supported by substantial evidence. Accordingly, we affirm the civil penalties of \$16,000 assessed against W.S.C., and \$5,000 assessed against Steen.

III.
Conclusion

For the reasons set forth above, we affirm the judge's findings that W.S.C. violated section 56.12071 through its operation of the stacker-conveyor and that this violation resulted from its unwarrantable failure. We also affirm the judge's determination that Steen is individually liable under section 110(c) of the Act for knowingly authorizing W.S.C.'s violation of section 56.10271 involving the stacker-conveyor. Finally, we affirm the civil penalties assessed by the judge against W.S.C. and Steen.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


Arlene Holen, Commissioner


L. Clair Nelson, Commissioner

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Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 1 1992

RONNY BOSWELL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. SE 90-112-DM
	:	
NATIONAL CEMENT COMPANY,	:	SE-MD-90-04
Respondent	:	
	:	Ragland Plant

DECISION ON DAMAGES

Appearances: Mr. Larry G. Myers, Union Representative, United Paperworkers International Union, Odenville, Alabama, for Complainant; Thomas F. Campbell, Esq., Lange, Simpson, Robinson & Somerville, Birmingham, Alabama, for Respondent.

Before: Judge Maurer

My Decision Upon Remand, issued on April 3, 1992, found respondent, National Cement Company, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, and liable to complainant for damages. Since the parties cannot agree on what the appropriate measure of damages should be, a supplemental hearing was held in Birmingham, Alabama on June 15, 1992.

In the first instance, respondent argues that the "adverse action in this case" and the "damages issue" are not properly before me because I exceeded the scope of the Commission's remand order to me when I revisited those issues in my Decision Upon Remand, and reopened the record to take additional evidence regarding complainant's claimed back pay. Furthermore, respondent disagrees that multiplying the loss in base pay rate by the number of hours Boswell worked is the proper measure of damages in any case. Respondent instead argues that the proper measure of damages would be found by comparing Boswell's actual pay received to the pay of a miner working as a utility laborer over the same period of time. The difference being Boswell's proper measure of damages (assuming of course, that it is a positive number). The problem with taking this tack again at this late stage of the proceedings is that the Commission has already stated otherwise.

The Commission discussed "adverse action in this case" and the "damages issue" at 14 FMSHRC 259-260 and held:

National Cement argues that no adverse action was taken against Boswell because he earned more in the job to which he transferred than he would have earned as a utility laborer. We disagree. The Report specifically states that Boswell was disqualified as a utility laborer due to unsatisfactory performance and that he was reprimanded. It states further that, in order to avoid discharge, the employee should review his work performance history. This Report clearly constitutes an adverse action subjecting Boswell to discipline or detriment in his employment.

Further, although Boswell earned \$920.04 more in his new job than he would have in his previous one, his job transfer from a utility laborer to payloader operator reduced Boswell's base pay by \$1.08 per hour. The annual difference in earnings found by the judge was due to additional hours worked by Boswell and premium pay received for Sunday and holiday work, shift differential, and overtime. Thus, the evidence shows that Boswell earned more because he worked more, but that he nevertheless suffered a loss in his base pay rate. We conclude that Boswell suffered an adverse action. (Citations omitted).

The parties at the supplemental hearing corrected the above-referenced \$1.08 per hour pay differential between the utility laborer and payloader operator position to \$0.945 per hour. This is the only piece of evidence that the parties have stipulated to in this entire case and I eagerly accepted it (Tr. 27). Thus, 94 1/2 cents per hour was the base rate differential that Mr. Boswell used for all his back pay computations admitted into the record as Complainant's Exhibits Nos. 1 and 2. These computations cover the period from January 11, 1990 through May 30, 1992, and take into consideration all the hours Boswell worked including the overtime premiums due Boswell, figured from the base rate differential of 94 1/2 cents per hour. It appears to me to be a diligent and credible effort and I do credit it. For the time period between January 11, 1990, and May 30, 1992, the computations establish that he is due back pay in the amount of \$6094.28.

As a result of the testimony adduced at the Supplemental Hearing, I find the complainant's accrued back pay for the period from January 11, 1990 through May 30, 1992, to be \$6094.28, based on a base rate differential of \$0.945 per hour for each hour he worked. And because complainant has not yet been reinstated to his position of utility laborer, that aspect of his damages will

continue to accrue as well as interest on that award at the appropriate rate until such time as it is finally calculated and paid subsequent to his reinstatement, whenever that might be. Presumably this case will go up on appeal.

ORDER

Respondent IS ORDERED:

1. To pay Ronny Boswell back pay through May 30, 1992, in the amount of \$6094.28, within 30 days of the date of this order.

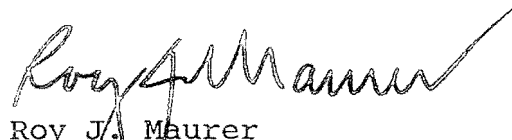
2. To pay Ronny Boswell interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMW v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990).

3. Within 30 days of this order, to reinstate complainant to the same position, pay, assignment, and with all other conditions and benefits of employment that he would have had if he had not been disqualified from his previous position as a utility laborer on January 11, 1990, with no break in service concerning any employment benefit or purpose.

4. To completely expunge the personnel records maintained on Mr. Boswell of all information relating to the January 11, 1990 "disqualification."

5. To pay Ronny Boswell additional back wages in the amount of \$0.945 per hour for every hour he has worked from May 31, 1992, until the date of reinstatement to the utility laborer position, with interest thereon computed in accordance with the Commission's Decision in UMWA v. Clinchfield Coal Co., supra, until the date of payment.

This Decision on Damages together with my prior Decision Upon Remand constitutes my final disposition of this proceeding.


Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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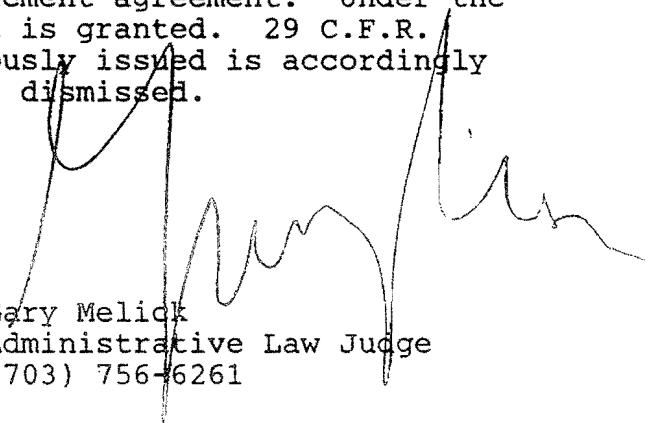
JUL 6 1992

UNITED MINE WORKER OF AMERICA, : COMPENSATION PROCEEDING
ON BEHALF OF MEMBERS OF LOCAL :
UNION 2244, : Docket No. PENN 91-108-C
Complainants :
v. : Mathies Mine
: :
MATHIES COAL COMPANY, :
Respondent :

ORDER LIFTING STAY AND DISMISSING PROCEEDING

Before: Judge Melick

Complainants request approval to withdraw their complaint in the captioned case on the grounds that compensation has been received pursuant to a settlement agreement. Under the circumstances herein, the request is granted. 29 C.F.R. § 2700.11. The Stay Order previously issued is accordingly lifted and this case is therefore dismissed.


Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mary Lu Jordan, Esq., UMWA, 900 15th Street, N.W., Washington, D.C., 20005 (Certified Mail)

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

THE FEDERAL BUILDING

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

(303) 844-5266 / FTS 564-5266

JUL 7 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-221-M
Petitioner	:	A.C. No. 41-03142-05520
	:	
v.	:	
	:	Atkins Pit
YOUNG BROTHERS INCORPORATED,	:	
CONTRACTORS,	:	
Respondent	:	

DECISION

Appearances: Olivia Tanyel Harrison, Esq., Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Richard C. Baldwin, Waco, Texas for Respondent.

Before: Judge Lasher

In this matter, MSHA, proceeding pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeks assessment of civil penalties (\$20 each) for two alleged violations of 30 C.F.R. § 56.14107(a).¹

The issues are whether violations occurred and, if so, the amount of appropriate civil penalties therefor.

The two Section 104(a) non-"Significant and Substantial" Citations involved were issued by MSHA Inspector Mike Sanders on May 29, 1991.

¹ This standard provides:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Citation No. 3895441 describes the allegedly violative condition as follows:

The guard provided to cover the Self-Cleaning Tail pulley pinch points on the C-12 conveyor did not extend a sufficient distance to cover all exposed areas.

Based on the preponderant reliable and probative evidence introduced at hearing the following findings of fact are made.

The violation as described by the MSHA Inspector in the Citation did occur. The Inspector clearly and credibly testified that a violation was observed and the citation was issued because the C-12 conveyor, which did have guards on both sides of the tail pulley, was not properly guarded in the back section thereof. There was not a guard surrounding all of the pinch points. (T. 24). The Inspector testified:

The back section of the tail pulley was not guarded, in that an employee in the area could easily gain access to the area of the tail pulley." (T. 25).

The Inspector credibly testified that in addition to the back section of the tail pulley, the "top section thereof" just directly above the tail pulley" was also unguarded. (T. 24, 31).² The hazard was an employee's becoming caught in the pinch points while the tail pulley was in operation. Employees were able to walk into the area where they would incur exposure to such hazard. (T. 25-26, 55). Occurrence of such an accident was possible but not likely. If it did occur, it could result in loss of a limb. (T. 25-28).

The guarding in question was personally installed by Plant Manager Torgerson. (T. 44, 52). He conceded that a miner has to get underneath the tail pulley "frequently" in order "to clean out," (T. 46, 49-50, 51, 55) and that the miner "would be standing right next to the conveyor" when he did so. (T. 55).

² Respondent's Plant Manager, Hans Torgerson, denied that the top portion was unguarded. I find the Inspector's testimony more trustworthy and it is accepted on this point. In any event, the record is clear that the rear of the tail pulley was not adequately guarded, that this was the Inspector's primary concern, and that such constitutes a violation.

He also admitted being familiar with the regulation requiring rear guarding on these conveyors. (T. 56). Accordingly, it is found that this is a serious violation which occurred as a result of the Respondent's negligence. (See also T. 57-58).

It is noted that in Respondent's post-hearing brief, Inspector Sanders' testimony is seriously misquoted. This misrepresentation, constitutes Respondent's defense. The Brief, at page 3, states: "On cross-examination, Mr. Sanders states clearly that, 'if the conveyor had had a top guard, no citation would have been issued'." ³ It is thus necessary to examine what Inspector Sanders' testimony, at page 31 of the transcript, actually was:

- Q. You indicated in testimony that there were guards on the side of the conveyors.
- A. Yes, sir.
- Q. Was there a guard on the top of the conveyor at that time?
- A. No, sir. If there were, I would not have cited that condition.
- Q. But your notes do not indicate one way or the other, do they?
- A. They indicate that it was not guarded--pinch point--tail pulley did not completely cover the pinch points at the rear of the self-cleaning tail pulley. So the rear of the self-cleaning tail pulley was not totally covered. (Emphasis added). (T. 31).

Further explanation is unnecessary; Respondent's defense is **REJECTED**.

Turning now to Citation No. 3895442 it describes the allegedly violative condition as follows: "The guard provided at the tail pulley of the C-11 conveyor were [sic] constructed of rubber belting and could not be properly secured into place."

³ Respondent's presentation of this evidence, without citation to the transcript, could have been seriously misleading.

Inspector Sanders testified that the rubber guarding used on the C-11 conveyor in question "has never" been acceptable to MSHA (T. 64-65) ⁴ since the tail-pulley operation cannot be clearly seen without removing or lifting the guard as is the case with "expanded metal or screen cloth" guards which permit the tail pulley to be serviced through small holes and grease fittings without lifting the guard. (T. 64). The Inspector said the hazard would be "someone lifting the rubber belting up simply to observe a condition which could be a build-up of material, a noisy bearing, just to examine the general area and the condition of the tail pulley." (T. 66). He pointed out that it would be necessary for miners to come into the area to do shoveling and maintenance (T. 66) and stated there was a "possibility" that an incident could thus occur (Tr. 66), meaning that a miner could be caught in the pinch points and suffer injuries such as loss of limbs, broken bones, cuts, bruises, and abrasions. (T. 66).

The Inspector conceded that if someone fell against the rubber guarding, which was 3/8 of an inch thick rubber "conveyor belting" (T. 73-74), he would not reasonably expect such person to go through the guarding. (T. 71).

Respondent's witness, Plant Manager Torgerson, testified that if someone fell against the guard he would not pass through to the pulley and that if someone were to hit the guard as hard as possible with a shovel it would not penetrate the guarding material. (T. 74). Torgerson also established that the pulley in question was guarded from the top, both sides, and the rear, and that cleaning was normally accomplished by use of a front-end loader or small loader, rather than having an employee on the ground lifting up the guard to clean. (T. 75).

The preponderance of the evidence indicates that there was only a remote possibility that any miner or other person would

⁴ The Inspector pointed out that MSHA's interpretation is based on its "guarding book," which is entitled "MSHA's Guide to Equipment Guarding," Ex. P-2. Significantly, rubber guarding is not specifically banned by this document, which on page 4 thereof states, inter alia: "Materials for guards should be carefully selected. For most installations, guards of bar stock, sheet metal, perforated metal, expanded metal, or heavy wire mesh are more satisfactory than those of other materials. It is also noted that the regulation allegedly infringed does not specifically or absolutely bar the use of rubber as a guarding material.

come into contact with the pinch points of the tail pulley. In any event, I conclude, that to the extent MSHA's Guide to Equipment Guarding heavily relied upon by the Inspector to formulate his opinion as to the inadequacy of the guard, creates a presumption or inference that metal or non-rubber guarding material was required, such inference or presumption is rejected. Such Guide is an informally promulgated handbook containing guidelines to aid inspectors in enforcing the Mine Act and such guides are not equivalent to safety regulations or rules of law binding on the Commission in all cases. Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1981).

In the instant matter I find no evidentiary basis to support a conclusion that there existed a reasonable possibility of anyone contacting the tail pulley in question. Thompson Brothers Coal Company, 6 FMSHRC 2094 (September 1984). Accordingly, Citation No. 3895442 will be **VACATED**.

Penalty Assessment - Citation No. 3895441

Respondent, a medium to a large Texas construction company (T. 51-53), is the operator of the Atkins Pit, a very small surface limestone mine consisting of a quarry and a primary and a secondary crusher. It had a history of 43 previous violations (T. 81) during the two-year period immediately preceding the issuance of the citation. The parties stipulated that the violation was abated in "a timely fashion" and that payment of penalties would not affect Respondent's ability to continue in business. The violation described in this citation was above determined to be serious and to have resulted from Respondent negligence. Accordingly, a penalty of \$150 is **ASSESSED**.

ORDER

1. Citation No. 3895442 is **VACATED**.
2. Respondent **SHALL PAY** to the Secretary of Labor within 30 days from the date of issuance of this decision the sum of \$150 as and for a civil penalty for Citation No. 3895441.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 7 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 91-69
Petitioner	:	A.C. No. 44-03441-03520
v.	:	
	:	Ramar Tipple No. 1
RAMAR COAL COMPANY,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor,
U.S Department of Labor, Arlington, Virginia, for
the Petitioner;
James Ashby, President, Ramar Coal Company, Inc.,
Oakwood, Virginia, pro se, for the Respondent.

Before: Judge Koutras

STATEMENT OF THE CASE

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Parts 71 and 77, Title 30, Code of Federal Regulations. The respondent filed a timely answer and contest, and a hearing was held in Grundy, Virginia. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made in the course of the hearing in my adjudication of this matter.

ISSUES

The parties settled two of the violations (Citation Nos. 9975365 and 9975366), and the settlement was approved from the bench. With regard to the remaining contested violation, the issues presented include the fact of violation, the appropriate civil penalty assessment for the violation taking into account the civil penalty criteria found in section 110(i) of the Act, and whether or not the inspector's S&S finding is supportable. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. 30 C.F.R. § 77.1607(c).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Section 104(a) non-"S&S" Citation No. 9975365, issued on October 11, 1990, cites an alleged violation of 30 C.F.R. § 71.208(a), and the cited condition or practice states as follows:

The operator did not take one valid respirable dust sample from designated work position 004-0 347 for the bimonthly sampling period of August-September 1990. Required sample is to be collected and submitted to the Richlands MSHA Lab.

Section 104(a) non-"S&S" Citation No. 9975366, issued on October 11, 1990, cites an alleged violation of 30 C.F.R. § 71.208(a), and the cited condition or practice states as follows:

The operator did not take one valid respirable dust sample from designated work position 005-0 374 for the bimonthly sampling period of August-September 1990. Required sample is to be collected and submitted to the Richlands MSHA Lab.

The respondent confirmed that it did not wish to contest the two respirable dust citations and agreed to pay the full amount of the proposed civil penalty assessments (Tr. 3).

The remaining alleged violation, section 104(a) "S&S" Citation No. 3352852, issued by MSHA Inspector Clifford F. Lindsay on October 4, 1990, cites an alleged violation of 30 C.F.R. § 77.1607(c), and the condition or practice cited is described as follows:

The operating speed of a large hauler was not prudent and consistent with conditions of the roadway. The large refuse hauler almost collided with my vehicle as he was descending a rain-slick steep section of the haul road returning from the refuse area. The hauler operator could not bring the vehicle to a stop even after locking the rear wheels until he was well past my vehicle. He avoided colliding with my vehicle by only

the smallest of margins and largest of luck. Imminent danger Order No. 3352853 is issued in conjunction with this citation, therefore no termination date is set.

Stipulations

The parties agreed to the following (Tr. 5-9):

1. The respondent (James Ashby) is the owner and operator of the Ramar Tipple No. 1, which is a small mine operation.
2. The respondent is subject to the Act and agrees that the presiding judge has jurisdiction to hear and decide this case.
3. The contested citations were duly served on the respondent by MSHA Inspector Clifford F. Lindsay, an authorized representative of the Secretary of Labor, while acting in his official capacity.

Bench Ruling

The record reflects that Inspector Lindsay issued a section 107(a) Imminent Danger Order No. 3352853, in conjunction with the contested Citation No. 3352852. A copy of the order was included as part of the pleadings filed by the petitioner and it states that it was issued "to close all of the refuse haul road until such time as all refuse hauler operators can be instructed to maintain safe speeds under all conditions of the roadway".

The parties were under the impression that the respondent had contested the validity of the imminent danger order and that it was in issue in this civil penalty proceeding (Tr. 17). However, I take note of the fact that the petition for assessment of civil penalty seeks a civil penalty assessment only for the contested section 104(a) citation, and the respondent conceded that it did not timely contest the validity of the imminent danger order (Tr. 16).

Commission Rule 21, 29 C.F.R. § 2700.21(a), requires a mine operator to file an application for review of a section 107(a) imminent danger order within thirty (30) days of its receipt. In this case, there is no evidence that the respondent sought timely review of the validity of the order. Under the circumstances, I issued a bench ruling that the validity of the order was not an issue in this case and that I would not decide the validity of the order (Tr. 16-19). My bench ruling is herein REAFFIRMED.

Petitioner's Testimony and Evidence

Clifford F. Lindsay testified that he is employed by MSHA as an impoundment pile specialist. He is a mining engineer and an

authorized representative of the Secretary of Labor and he has regularly inspected the respondent's waste impoundment and refuse area to insure compliance with MSHA's regulations. He holds a BS degree in chemistry from William and Mary College, and an MS degree in mining engineering from Virginia Tech.

Mr. Lindsay confirmed that he was at the mine on October 4, 1990, to inspect the waste pile and the entry gate off the county road was open. The gate was routinely opened when the facility was in operation but it would otherwise be locked. There were three signs posted around the gate area, and one of the signs stated "keep right-do not pass".

Mr. Lindsay stated that he stopped at the plant office as required to contact a representative of the respondent and to review the plant inspection records. There was no one in the office, which was not unusual, and he left to drive to the impoundment area. It was an overcast rainy day and he was driving a standard government Cherokee jeep. The haulage road conditions were "wet and messy" and refuse spillage from the trucks was on the roadway, and it was similar to "black mud". The roadway surface consisted of a combination of dirt, gravel, and refuse.

Mr. Lindsay stated that as he proceeded along the haulage road up to the impoundment site he observed no other traffic on the road. The roadway was not as wide as a standard 2-lane road, and he was driving "slightly to the right". As he proceeded to enter the "sharp hairpin" turn on the right inside curve he heard the truck air horn sounding steadily and he turned his jeep as close as he could to the right inside portion of the roadway next to the berm. He saw the truck coming down the roadway in a partial slide with its wheels locked. The truck was approximately two-feet away from his jeep when it passed him and he was looking half-way up the truck tires as the truck passed him.

Mr. Lindsay was of the opinion that the truck driver was not in full control of his vehicle. Although the driver was able to steer the truck, he could not slow it enough to bring it to a stop in a timely manner. If he had not seen the truck or heard the driver sound his horn, which prompted him to move his jeep out of the way and to the right side of the road, there was no doubt that an accident would have occurred and the truck would have struck the jeep and run over it.

Mr. Lindsay stated that after the truck passed by he immediately turned the jeep around to block and control access to the roadway because he did not at that time know who else may have been using the roadway and he was afraid that an accident would occur.

Mr. Lindsay identified five photographs of the haulage road which he took on May 4, 1992, (Exhibits P-1-a through P-1-e). He confirmed that exhibits P-1-d and P-1-e show the location of the incident of October 4, 1990. He also identified exhibit P-3, as a copy of the notes which he made on that day.

Mr. Lindsay confirmed that he issued the contested citation in question (Exhibit P-2), and cited a violation of mandatory safety standard 30 C.F.R. § 77.1607(c). He stated that the fact that the truck nearly collided with his vehicle led him to conclude that it was being operated at an unreasonable speed given the wet conditions of the roadway. He confirmed that the roadway was well-bermed, and he assumed that the truck brakes were in good working condition since they locked when the driver applied them and he eventually stopped the truck after it passed by him.

Mr. Lindsay stated that he based his "S&S" finding on the fact that he had a near collision with the truck. He also considered prior MSHA accident reports which he has reviewed concerning vehicle collisions under similar conditions, vehicles colliding with trees, boulders, and other objects in the roadway, and accidents resulting from truck drivers driving too fast. Although such prior incidents have not occurred at the respondent's mine, he considered the fact that he could have been run over by the truck in question, and that in the course of normal mining operations, a driver operating his truck too fast could collide with another truck, with resulting serious injuries. He confirmed that the roadway was normally traveled by other inspectors, contractor vehicles, other company service vehicles, and refuse hauling trucks.

Mr. Lindsay stated that during a subsequent mine inspection visit on November 28, 1990, Mr. Ashby discussed the citation with him and informed him that the only solution to the problem was to post signs restricting access to the haulage road. Mr. Ashby also mentioned the fact that he had a recent "problem" with a tanker truck which was on the roadway without the knowledge of the haulage truck drivers, but he did elaborate further as to what the "problem" was all about. Mr. Lindsay identified Exhibit P-4, as a copy of his notes documenting his conversation with Mr. Ashby.

Mr. Lindsay confirmed that he based his "moderate" negligence finding on the fact that the respondent may not have been aware that the truck driver was driving too fast for the existing road conditions. He also considered the fact that the drivers need to maintain and complete their haulage cycle in a timely manner in order to keep up with the refuse haulage trip from the storage bins to the waste impoundment pile.

Mr. Lindsay believed that the haulage truck operating procedures at the time of his inspection were typical of the procedures followed under dry roadway conditions. However, he believed that the drivers needed to adjust their travel speed when the road conditions are wet and slippery. He confirmed that on subsequent mine visits he has observed that the drivers are operating at slower speeds than the speed of the cited truck on the day of his inspection.

Mr. Lindsay stated that he issued a section 107(a) imminent danger order to temporarily block access to the roadway until he could contact the respondent's representative to instruct the drivers to slow down. He also considered the fact that he did not know who else might be using the roadway and he was concerned that an accident would occur if normal mining operations were allowed to continue before he could speak to the respondent and take further corrective action (Tr. 24-68).

On cross-examination, Mr. Lindsay confirmed that he has inspected the respondent's operation since 1985, and although he has "dodged" and "backed up" away from trucks from time-to-time, he was never involved in any prior "near collisions" and was not aware of any prior haulage road accidents. He also confirmed that he was aware of the steep grade over which the cited truck in question was travelling on the day in question, and he agreed that people should be careful on slick roadways.

Mr. Lindsay confirmed that he was not familiar with the "mechanics" of haulage trucks and that he did not know the speed at which the truck was travelling on the day of the incident in question. He has since "clocked" the trucks at 20-25 miles per hour under dry road conditions. He believed that it was the respondent's responsibility to establish safe truck operation speeds for the haulage roads on its property. He confirmed that a 25 m.p.h. speed limit sign is posted on the level roadway portion (Exhibit R-1-C), but did not see one posted on the "high road". He also stated that he has never had to pull over to the left side of the road to allow a truck to pass him.

Mr. Lindsay stated that he had no knowledge as to whether or not the respondent had ever instructed the truck drivers about safe travel speeds prior to his inspection on October 4, 1990, and although he saw a bulletin board in the mine office he saw no roadway safety rules or procedures posted. He confirmed that he did not initially see the truck in question because of the angle of the road, but that he did hear the air horn (Tr. 68-91).

Respondent's Testimony and Evidence

Bobby Joe Austin testified that he is employed by the respondent but is currently laid off and receiving unemployment compensation. He stated that he served in the army as a heavy

equipment operator and has worked in strip mining operating heavy equipment and 10-ton trucks since 1968. He confirmed that he was driving the empty truck in question on October 4, 1990, and that Inspector Lindsay was driving in the center of the road and then moved to the right after he sounded the truck air horn. Mr. Austin stated further that all of the other MSHA inspectors who travel the roadway usually drive to the left at the curve in question so they can look up the incline to see any traffic coming down the road.

Mr. Austin confirmed that he applied his truck brakes when he saw Mr. Lindsay and that the transmission retarders automatically lock the wheels. He stated that large trucks and other vehicles have passed each other at the location where he encountered Mr. Lindsay's vehicle. Mr. Austin denied that he was operating the truck in a reckless manner. He stated that he was aware of the fact that he should drive slower under wet road conditions, and he believed that he had the truck under control on the day in question.

Mr. Austin stated that the respondent has conducted regular safety talks with all truck drivers and has instructed them to drive carefully, particularly under wet road conditions. He stated that he and Mr. Ashby cautioned Mr. Ashby's son about driving too fast on the roadways, and Mr. Ashby confirmed that he fired his son for driving too fast. Mr. Austin believed that the respondent's safety record and procedures, as compared to other mine operators, was "pretty high". He stated that no one has ever instructed him to drive fast or to hurry so that he could keep up with the refuse cycle (Tr. 92-104).

On cross-examination, Mr. Austin explained that his job was to drive the haulage trucks back and forth from the plant refuse bins to the refuse impoundment pile. He has also trained new drivers pursuant to the respondent's 8-hour training program. He stated that the refuse tipple has a daily 5 or 6 truck capacity and that the haulage cycle consists of a continuous loading, haulage, and dumping cycle. He confirmed that he has never been disciplined for allowing too much refuse material to accumulate in the bins or for violating any company driving safety rules.

Mr. Austin stated that he was operating the truck in third gear while descending the roadway in question, and that the truck can go 20 miles per hour in third gear. However, he never "hits the curve wide open", and he could not have driven any slower on the day in question (Tr. 104-118).

Inspector Lindsay was recalled and he testified that he was not aware of any company rule or policy stating that he was to stay on the left side of the road when approaching a curve or an incline. He confirmed that he has never driven on the left side of the road in any of his visits to the mine site and he believed

that the company practice and rule was "right side traffic all of the time". He confirmed that he drives at a slow rate of speed and listens for any haulage trucks on the roadway.

Mr. Lindsay stated that based on his observations of the truck at the time of the incident in question he believed that the driver could have driven much slower given the conditions of the roadway so that he could bring the truck to a stop within a reasonable distance to avoid a collision. Mr. Lindsay stated that he instinctively drives inside the curve because of his belief that a large vehicle coming at him around the curve would have an easier time going to the outside broad radius of the curve. He stated that "I still can't picture a large hauler with its rear wheels locked and sliding being able to negotiate a tighter turn as opposed to a broader turn" (Tr. 121).

Mr. Lindsay stated that from his subsequent observations of haulage trucks using the haul road in question, the trucks traveled at a slower rate of speed on dry days than the speed the truck was travelling on the wet day when he issued the citation (Tr. 122). In his opinion, in order for a driver to be driving prudently and consistently with the road conditions "the vehicle should be driven slowly enough so that in negotiating this curvy, steep road, the operator could bring the vehicle to a stop in a reasonable length to avoid colliding with any object in the road" (Tr. 123).

Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1607(c), which states as follows:

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

Truck driver Austin testified that he had the truck under control, and he denied that he was operating it in a "reckless manner" on the day in question. He further testified that he had the truck in "normal" third gear while coming down the inclined roadway in question approaching the curve where Mr. Lindsay's vehicle was located. Although Mr. Austin initially stated that in third gear "no matter how much fuel you give it, it will go a certain speed" (Tr. 108), he later confirmed that the speed of the truck can reach 20 miles an hour in third gear, and that if he wanted to "slide the truck" around the curve in question he could "hit it at twenty". However, he denied that he would ever do this because "you show that curve respect" (Tr. 115).

Inspector Lindsay did not allege that Mr. Austin was operating the truck in question in a reckless manner. The inspector's credible testimony reflects that he issued the citation after observing the truck coming down the haulage road in a partial slide with its wheels locked. The day in question was rainy and overcast, and the roadway surface was wet and consisted of a combination of dirt, gravel, and refuse, and the inspector described this material as "black mud". He also indicated that it was raining hard enough so that "I wouldn't want to stand out in it very long", and "the water on the road would make it slippery" (Tr. 31, 34).

Mr. Lindsay testified that he had no doubt that Mr. Austin did not have full control of the truck even though he was able to steer it some. Mr. Lindsay stated that he observed the truck in a partial slide with its rear wheels locked up coming down the road towards the curve where he was located. He concluded that Mr. Austin had apparently applied the brakes after seeing his vehicle in the curve, but instead of the truck slowing down or coming to a stop, the rear wheels were simply locked up and sliding (Tr. 36). Mr. Lindsay stated further that the driver's side left rear very large wheel, which was locked up and sliding, missed the front of his vehicle by approximately two feet, and he was looking up at it as the truck passed by "very close". If the truck had slid slightly sideways towards him it would have collided with his vehicle (Tr. 37).

Mr. Lindsay testified that Mr. Austin could not have stopped the truck even if he had wanted to because the wheels were locked and sliding, and as the truck passed by, it was sliding and not stopping at any significant rate. Mr. Lindsay believed that if he had driven a little further around the curve in the roadway he would have been in the direct path of the truck, and it would have been difficult for Mr. Austin to avoid colliding with his vehicle. Mr. Lindsay stated that if a collision had occurred, "he very likely could have absolutely run over me" (Tr. 39). Under all of these circumstances, and given the prevailing wet and slippery road conditions, Mr. Lindsay concluded that the truck was being operated at an unreasonable speed. He issued the citation and charged the respondent with a violation of section 77.1607(c), because of his belief that the truck was being operated at a speed which was not prudent or consistent with the existing wet and slippery conditions of the roadway.

There is no direct evidence as to precisely how fast Mr. Austin was driving on the day in question. Inspector Lindsay testified that he has "clocked" the trucks traveling at 20 to 25 miles an hour coming down the grade in question under normal dry road conditions, but that after the incident in this case, the drivers drive slower (Tr. 74, 82). Mr. Ashby agreed that there is a potential for an accident or a fatality when the trucks are on the road in question and that he has cautioned drivers to go

slower on wet days (Tr. 141). Mr. Austin confirmed that after the incident in question, he was cautioned to drive slower, but that he continued "in a manner" to drive "at a normal speed" (Tr. 108). He believed that his speed on the day in question was typical of his speed on any other "normal rainy day" (Tr. 111-112).

Mr. Austin conceded that there was a need to drive slower under wet road conditions, and he confirmed that when driving at a "normal rate of speed" he can "judge the rock trucks", but he acknowledged the need to be aware of the presence of other vehicles that are normally not on the roadway (Tr. 97). Mr. Austin asserted that he was operating the truck "in a normal safe capacity", and he stated that the truck cannot travel slower than five (5) miles an hour and that it would have been impossible for him to go any slower "without plumb stopping the truck and just barely letting the wheels turn at a degree that would take me all day to move" (Tr. 111).

Mr. Austin's suggestion that he was travelling at a slow rate of speed and that if he travelled any slower, the truck would probably have come to a stop if it reached five miles an hour is rejected as less than credible. Based on the credible testimony of the inspector, I conclude and find that Mr. Austin was probably travelling in excess of 20 to 25 miles an hour down the slippery and wet inclined roadway in question and that when he initially observed the inspector's vehicle heading uphill approaching the curve in the road, he applied his brakes. This sudden braking action, which caused the wheels to lock, coupled with the automatic stopping action of the transmission retarder, resulted in the truck going into a slide, and it was sliding as it passed dangerously close to the inspector's vehicle, nearly colliding with it before slowing down or stopping after it was well past the inspector's vehicle.

Mr. Austin testified that he sounded his air horn when he initially observed the inspector's vehicle in the middle of the roadway coming up the hill before the inspector moved completely to the right hand side of the road as far as he could (Tr. 93-94). If Mr. Austin were travelling as slow as he suggested, I believe that one can reasonably conclude that he should have been able to at least slow down his empty truck, or at least control it from sliding and nearly colliding with the inspector's vehicle which was "tucked in" on the right inside of the roadway curve next to the berm. However, this was not the case. Under all of these circumstances, I conclude and find that the preponderance of the credible evidence presented by the petitioner establishes that the cited truck in question was being operated at a speed which was not prudent or consistent with the existing grade, traffic, and roadway conditions. Accordingly, I

further conclude and find that the petitioner has established a violation of 30 C.F.R. § 77.1607(c), and the contested citation IS AFFIRMED.

Significant and Substantial Violation

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

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

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

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

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

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine

involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Lindsay based his "S&S" finding on the fact that he had a near collision with the truck being operated by Mr. Austin. He testified that Mr. Ashby told him that he "was lucky" that he was not run over by the truck, and Mr. Ashby alluded to a prior incident involving another truck on the same haulage road under circumstances similar to the instant case (Tr. 51-55). Mr. Lindsay also took into consideration prior MSHA accident reports, the fact that other vehicles, such as contractor and service vehicles, and inspectors vehicles, used the roadway, and he was concerned that in the normal course of mining operations, a truck driver operating a truck too fast for the prevailing road conditions would be involved in an accident. Under the circumstances, Mr. Lindsay concluded that "there was a pretty good probability that at some point an accident of this kind could happen", and that if it did, it could result in serious and fatal injuries (Tr. 47).

After careful review and consideration of all of the evidence in this case, I conclude and find that a measure of danger to safety was contributed to by the violation, and that it is reasonably likely that the operation of a truck on an inclined roadway which is wet and slippery at a speed which not prudent or consistent with the prevailing road conditions, and with the presence of other vehicles on the roadway, would reasonably likely result in an accident or collision. If this were to occur, I further conclude that it is reasonably likely that it would result in injuries of a serious or fatal nature. Under all of these circumstances, I conclude and find that the inspector's "S&S" finding was reasonable and justified, and IT IS AFFIRMED.

History of Prior Violations

An MSHA computer print-out reflects that for the period beginning on October 3, 1990, the respondent paid civil penalty assessments totally \$2,036, for 49 violations, all of which were issued as section 104(a) citations. Thirty-seven (37) of the citations were assessed under MSHA's "regular formula" assessment procedures, and twelve (12) were assessed under MSHA's "single penalty" procedures. None of the violations were "specially assessed".

I take note of the fact that the respondent's compliance record does not include any prior violations of 30 C.F.R. § 77.1607(c). I cannot conclude that the respondent's history of prior violations is such as to warrant any additional increase in the civil penalty assessment which I have made for the contested violation in this case.

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

The parties have agreed that the respondent is a small coal tippie operator (Tr. 5). The pleadings filed in this case include an MSHA proposed assessment Form 1000-179, which reflects "2,161 production tons or hours worked per year" and the size of the mine as "0 production tons or hours worked per year". A copy of a "Proposed Assessment Data Sheet" (Exhibit P-7), reflects that for the calendar year 1989, the respondent's total "Hrs/tonnage" was 2,161, and no hours or production for calendar year 1990.

Respondent's owner and operator James Ashby stated that any civil penalty assessments in this case would have to be paid from his personal funds and that the company has no money to pay. He stated that he currently employs fourteen people and operates one-to-three days a week processing 7,500 to 23,000 tons of coal through the preparation plant and tippie. However, the coal has been stockpiled awaiting shipment to the Pittston Coal Company which is his only customer at this time. Although the haulage trucks drivers are employed by his company, the Pittston Company permits him to use their trucks. He confirmed that he does not own or operate any other mining operations, and that when he is in full production he processes approximately 45,000 to 50,000 tons a month (Tr. 12-13; 134-137).

Mr. Ashby further indicated that he had previously agreed to pay the two \$500 civil penalties for the respirable dust violations and that he advised an MSHA official that "I've got no problem with that. I'll pay it" (Tr. 11). In response to a question as to whether or not the payment of the full amount of civil penalties assessed for the three citations in question would put him out of business, Mr. Ashby replied "It would be tough. It would hurt a lot" (Tr. 9).

After careful review and consideration of all of the evidence in this case, I cannot conclude that the payment of the civil penalty assessments in this case will put the respondent out of business. However, I have considered the respondent's unrebutted assertions with respect to his current mining operation and have adjusted the initial proposed civil penalty assessment for Citation No. 3352852.

Negligence

The evidence establishes that Mr. Ashby had posted some speed limit and other signs on his property and that he had cautioned Mr. Austin to be careful and to keep his truck under control while driving the haulage roads (Tr. 114). Mr. Ashby confirmed that he fired his own son for driving too fast on the property, and Mr. Austin confirmed that Mr. Ashby conducted

regular safety meetings with drivers and instructed them to drive carefully. Inspector Lindsay confirmed that he based his "moderate" negligence finding on the fact that the respondent may not have been aware of the fact that Mr. Austin was driving too fast for the existing road conditions. Under all of these circumstances, I conclude and find that the cited violative condition was the result of a moderate-to-low degree of negligence on the part of the respondent and I have taken this into consideration in the civil penalty assessment which I have made for the violation.

Gravity

Based on all of the testimony and evidence adduced in this case, including my "S&S" findings, I believe that the inspector was most fortunate in avoiding a collision with the truck in question. Accordingly, I conclude and find that the violation was very serious.

Good Faith Compliance

The evidence establishes that the respondent timely abated the violation in good faith, and the inspector confirmed that the respondent responded in a positive and cooperative manner by instructing all truck drivers to maintain safe speeds under all roadway conditions. I have taken this into consideration in this case.


Civil Penalty Assessments

As noted earlier, the respondent agreed to settle the two respirable dust violations by paying the full amount of the proposed civil penalty assessments. With respect to the remaining citation, which I have affirmed, and on the basis of the foregoing findings and conclusions concerning the civil penalty criteria found in section 110(1) of the Act, I conclude and find that a civil penalty assessment of \$125 is reasonable and appropriate.

ORDER

The respondent IS ORDERED to pay the following civil penalty assessments within thirty (30) days of this decision and order. Payment is to be made to MSHA, and upon receipt thereof, this matter is dismissed.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
9975365	10/11/90	71.208(a)	\$500
9975366	10/11/90	71.208(a)	\$500
3352852	10/4/90	77.1607(c)	\$125


George A. Koutras
Administrative Law Judge

Distribution:

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Mr. James Ashby, President, Ramar Coal Co., Inc. P.O. Box 622,
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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 10 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-16
Petitioner	:	A. C. No. 36-07783-03523
v.	:	
	:	Docket No. PENN 92-171
HICKORY COAL COMPANY,	:	A. C. No. 36-07783-03524
Respondent	:	
	:	Docket No. PENN 92-172
	:	A. C. No. 36-07783-03525
	:	
	:	Docket No. PENN 92-304
	:	A. C. No. 36-07783-03526
	:	
	:	Slope No. 1 Mine

DECISION APPROVING SETTLEMENT

Appearances: Joseph T. Crawford, Esq., Anthony G. O'Malley, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Mr. William Kutsey, Hickory Coal Company, for Respondent.

Before: Judge Maurer

At the hearing of these cases, which was held on June 17, 1992, in Jenkintown, Pennsylvania, the parties jointly moved for approval of a settlement after the testimony of the first two government witnesses.

Docket No. PENN 92-16 involves a single section 104(d)(1) citation, Citation No. 2933291. The parties requested a 50 percent reduction in the \$400 assessed penalty based on the respondent's limited ability to pay and the current nonproducing character of the mine.

Docket No. PENN 92-171 contains three section 104(a) citations assessed at a total amount of \$162. Settlement is proposed to reduce the penalty for Citation No. 2933297 from \$20 to \$12; and Citation Nos. 2934879 and 3079884 by 50 percent to \$71. The same rationale for the settlement reductions prevails throughout this decision.

Docket No. PENN 92-172 involves five section 104(a)-104(b) citations. It is proposed to reduce Citation Nos. 2934803 and 3079392 from \$140 to \$84, respectively. With regard to Citation Nos. 2933292, 2934801, and 3079391, a 50 percent reduction to \$245 is proposed.

Lastly, Docket No. PENN 92-304 contains a single section 104(a) citation. It is proposed to reduce the assessment thereon from \$750 to \$334.

This leaves the respondent with a total civil penalty to pay of \$1030. It is proposed that the initial \$180 be paid within 90 days of the date of this decision, while the remaining \$850 may be paid in \$50 monthly installments, beginning no later than 90 days after the date of this decision.

Furthermore, there are nonmonetary aspects of the settlement agreement. Mr. Kutsey has agreed that on the day that he intends to reopen his mine, he will contact MSHA's Pottsville office. At that time, MSHA inspectors will accompany Mr. Kutsey in an inspection of his mine. Any citations that are issued will not, however, be assessed. Abatement will be required, of course. In addition, any outstanding section 104(b) orders pertaining to this mine will be fully abated before coal is mined. Finally, Mr. Kutsey has agreed that he will not impede the MSHA inspection of his mine in any way, forever.

I granted this motion on the record at the hearing as I do believe that the proffered settlement, in toto, is appropriate under the criteria set forth in section 110(i) of the Act and in the best interest of both the parties to these cases and the public.


ORDER

It is hereby ORDERED that:

1. Citation Nos. 2933291, 2933297, 2934879, 3079884, 2934803, 3079392, 2933292, 2934801, 3079391, and 2934258 ARE AFFIRMED.

2. Respondent, Hickory Coal Company, IS ORDERED TO PAY civil penalties in the total amount of \$1030. Of that amount, \$180 is due within 90 days of the date of this decision. The remaining \$850 will be paid in \$50 monthly installments also beginning within 90 days of the date of this decision, and continuing for 17 months or until paid in full.

3. Respondent shall also fully comply with all the nonmonetary aspects of the settlement agreement approved herein as more fully set out earlier in this decision.



Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
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JUL 15 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 91-27-M
Petitioner	:	A.C. No. 02-02497-05502
	:	
	:	Lake Juniper
v.	:	
	:	Docket No. WEST 91-170-M
	:	A.C. No. 02-02497-05503
GARRATT COMPANY,	:	
Respondent	:	Lake Juniper (Portable)

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Mr. Richard L. Neal, Owner, GARRATT COMPANY, Kingman, Arizona, pro se.

Before: Judge Morris

These cases are civil penalty proceedings initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act"). The civil penalties sought here are for violations of the Act as well as violations of mandatory regulations promulgated pursuant to the Act.

A hearing on the merits was held in Kingman, Arizona, on April 21, 1992. The parties filed post-trial briefs.

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

FINDINGS OF FACT

1. COVY LUMPKINS, JR., now retired, was a federal mine inspector for 14 years. (Tr. 12-14).

2. Mr. Lumpkins is an individual experienced in mining. (Tr. 14).

3. Mr. Lumpkins' initial inspection of the Garrett Company was a C.A.V. complimentary assistance visit. (Tr. 16).

4. In this visit to the site, Mr. Lumpkins explained the regulations to Mr. Neal.

5. Mr. Neal's property has a double gate. There was no buzzer, guard, or guard shack at the entrance.

6. Since the gate was unlocked, Mr. Lumpkins drove in to the plant.

7. Mr. Lumpkins keeps first aid material as well as safety equipment in the car. (Tr. 20).

8. If there is no guard, the inspector will usually go directly to the mine or safety office. (Tr. 20).

9. Mr. Neal's company did not have a guard or a safety office. (Tr. 20).

10. Subsequently, on his first regular inspection no citations were issued. Mr. Neal was very cooperative and he was in the process of correcting the violations previously noted at the time of the C.A.V. inspection. (Tr. 21).

11. The first regular MSHA inspection was in January 1990. (Tr. 23).

12. Mr. Lumpkins testified he would not walk under any conveyor belts if that would create a hazardous situation. (Tr. 24).

13. It was at the first inspection when the Inspector moved his car at Mr. Neal's request. After the request, he parked opposite the cleanout pit. (Tr. 25, 26).

14. The place where he parked was out of the way of the machinery. (Tr. 25). Mr. Lumpkins parked where Mr. Neal designated and he doesn't recall Mr. Neal's correcting him after that. (Tr. 25, 63).

15. In the course of the inspections, Mr. Neal never again complained concerning the place where the Inspector parked his car. (Tr. 26).

16. In April 1990, the second regular MSHA inspection resulted in the issuance of three citations. (Tr. 26, 27).

Citation No. 3600335

17. Citation No. 3600335 ¹ was issued when the Inspector observed the electric power cables were not properly bushed and connected at the switch station. (Tr. 28).

18. The Inspector testified as to gravity, likelihood of an accident, and severity of any injury (Tr. 28-30) and the operator's negligence.

19. The Inspector considered it a non-S&S violation. The cables themselves were well insulated. (Tr. 28, 29).

DISCUSSION

I agree, as Mr. Neal's brief states, that this condition was abated before the plant was operated. However, the Inspector's uncontroverted testimony establishes a violation. Abatement of a violative condition does not excuse the original violation.

Citation No. 3600335 should be affirmed.

¹ This Citation alleges Respondent violated 30 C.F.R. § 56.12008. The regulation provides as follows:

§56.12008 Insulation and fittings for power-wires and cables.

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Citation No. 3600336

20. Citation 3600336 ² was issued when the Inspector observed there was no cover for the junction box on an electric motor. The junction box was 8 or 10 feet off the ground. (Tr. 31, 57). If a person was servicing the motor, he could contact the box. (Tr. 57).

DISCUSSION

The uncontroverted testimony of Inspector Lumpkins establishes the operator violated the regulation. Mr. Neal did not testify, but in his post-trial brief he states that no one saw the cover fall off the electrical box.

Assuming there was evidence to support this view, it cannot prevail as a defense. It is well established that the Mine Act imposes liability without fault. See Asarco, Inc. - Northwestern Mining v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989 at 1197-1198); 8 FMSHRC 1632 (1986), Western Fuels Utah, Inc. v. FMSHRC, 870 F.2d 711 (D.C. Cir. 1989).

21. A similar sort of penalty rating on the same basis as discussed in the prior citation would result in a low civil penalty. (Tr. 31).

Citation No. 3600336 should be affirmed.

² This Citation alleges Respondent violated 30 C.F.R. § 56.12032 which provides as follows:

§ 56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Citation No. 3600339

22. Citation No. 3600339 ³ was issued when the Inspector found the automatic reverse alarm was not working on the operator's front-end loader. (Tr. 32). Mr. Neal stated the buzzer had been working the morning of the inspection. (Tr. 60).

23. The failure to have an alarm on the vehicle could result in someone being killed or injured when the vehicle backs up. (Tr. 32).

24. The Inspector's penalty factors would result in a low penalty. (Tr. 33).

25. Until this point in time, Mr. Neal's and Inspector Lumpkins' relationship was fairly cordial; Mr. Neal never expressed any concern that the Inspector was creating a safety hazard. (Tr. 33).

DISCUSSION

Mr. Neal did not testify in these proceedings and his statement that he was unaware of the failure of the signal is contained in his post-trial brief. Even so, as previously stated, an operator's failure to know of a violative condition does not relieve him of liability under the Mine Act.

Citation No. 3600339 should be affirmed.

³ This Citation alleges 30 C.F.R. § 56.14132(a) which provides as follows:

§ 56.14132 Horns and backup alarms.

(a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

Citation No. 3600491

26. Citation No. 3600491 ⁴ was issued on May 22, 1990, when Inspector Lumpkins conducted a follow-up type inspection on the operator's property. (Tr. 38).

⁴ This Citation alleges Respondent violated Section 103(a) of the Mine Act which provides as follows:

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

Sec. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

27. Mr. Lumpkins found the prior violations had been corrected. (Tr. 35).

28. Mr. Campa, Mr. Neal's employee, did not express any concern that the Inspector was violating any safety rules or creating any safety hazards. (Tr. 35).

29. Mr. Neal appeared at the job site and "jumped into the middle" of the Inspector. Mr. Neal said the Inspector was trespassing and that he had no business on the property. (Tr. 35, 36).

30. The Inspector tried to explain the right of entry to Mr. Neal. He further tried to show him his photo identification. (Tr. 36).

31. The identification shows that Mr. Lumpkins is the authorized representative of the Secretary of Labor. (Tr. 37).

32. After their confrontation, Mr. Lumpkins stood by his car until the deputy sheriff arrived. Upon his arrival the Inspector showed him his I.D. and Section 103(a) of the Mine Act. (Tr. 37, 38).

33. Sergeant Hayes of the sheriff's office arrived. He said it was necessary for the parties to appear before the Justice of the Peace in Kingman, Arizona. (Tr. 40).

34. Mr. Lumpkins identified a document shown as a "Summons" and a "Criminal Complaint." Also attached was "A Motion to Dismiss for Lack of Evidence." These documents were served by mail on Mr. Lumpkins. (Tr. 44, Ex. P-1).

35. Mr. Neal did most of the talking at the site. He claimed the Inspector was trespassing and that he had no right to be on the operator's property. (Tr. 40).

36. The Judge in Kingman wanted Mr. Neal and the Inspector to resolve their differences privately, but Mr. Neal refused. (Tr. 41).

37. The Court bailiffs finally advised Mr. Lumpkins that he was free to leave the Court facilities.

38. The following day, Mr. Lumpkins communicated with his supervisor at the MSHA office in Phoenix. (Tr. 46).

39. The Sheriff's department set up a procedure to assist the Inspector in serving a denial of entry Citation on Mr. Neal. (Tr. 49).

40. Sergeant Hayes accompanied Mr. Lumpkins when he returned to Mr. Neal's property. (Tr. 49).

41. The Inspector parked his automobile in the area where Sergeant Hayes parked. (Tr. 50).

42. The Citation on May 24 was for a denial of entry that occurred on May 22. (Tr. 50).

43. Mr. Neal did not comply and in the 30 minutes given to him to abate, he remarked to Sergeant Hayes that he was afraid Mr. Lumpkins was going to hurt himself, but no other comments were made why he had refused entry. (Tr. 53).

44. After the 30-minute period expired, Deputy Hayes handed the denial of entry citation to Mr. Neal because he refused to accept it from Mr. Lumpkins. (Tr. 54).

45. Mr. Lumpkins recalled that Mr. Neal told him the safety policy of the plant was not to get within 25 feet of operating belts. However, Mr. Lumpkins doesn't recall Mr. Neal's shutting down at any time when the Inspector came on the property. (Tr. 63).

46. The plant was shut down for repair or servicing when Mr. Lumpkins inspected. It seemed like it was normally shut down when the Inspector entered the property. (Tr. 63).

47. An MSHA inspector is not supposed to jeopardize himself during an inspection. (Tr. 63). If he did so, the plant safety manager could notify Mr. Lumpkins' supervisor. (Tr. 64).

48. Garratt Company is a small operation, a simple screening plant with three belts. (Tr. 66).

49. Jack Sepulveda, an MSHA federal mine inspector, was Mr. Lumpkins' acting supervisor. (Tr. 71). Mr. Lumpkins accompanied Mr. Sepulveda on the Wesapi Mining property. (Tr. 71).

50. A business card submitted in evidence indicates William C. Vanderwall is an Arizona State Mine Inspector. (Tr. 74; Ex. R-1).

51. Larry Nelson is Mr. Lumpkins' supervisor. David Park is MSHA's District Manager. (Tr. 75).

52. Mr. Neal told Mr. Lumpkins that he didn't object to the plant's being inspected but the Inspector would have to get Mr. Neal's permission before entering the property. (Tr. 80). Mr. Lumpkins said he could not accept such an arrangement. (Tr. 79, 80).

53. In the Inspector's opinion, signing in at a mine gate is not a pre-condition of entry. (Tr. 80, 81).

54. Other mining operations have designated parking areas. (Tr. 82).

55. Mr. Lumpkins recalled Officer Hayes' saying that Mr. Neal had rescinded his position of criminal trespass and that Mr. Lumpkins could inspect the plant. (Tr. 83). Mr. Lumpkins nevertheless wrote the restraint of entry because Mr. Neal required prior notice of any inspection. (Tr. 83, 84).

56. In July, after the previously discussed inspections, Mr. Lumpkins and Jack Sepulveda made a non-inspection visit to Mr. Neal's property. At that time Mr. Neal again stated Mr. Lumpkins could not come on the property unless his conditions stated earlier were met. (Tr. 87, 89).

57. The conditions sought to be imposed by Mr. Neal were that the Inspector be accompanied by a Deputy Sheriff, that Mr. Neal be notified in advance, and that he consent to the entry. (Tr. 90).

58. LEE DURWOOD HAYES, as an employee of the Mojave County Sheriff's office, accompanied Mr. Lumpkins to Mr. Neal's small screening plant. (Tr. 93, 94).

59. Sergeant Hayes didn't understand that Mr. Neal had a civil action against Mr. Lumpkins. (Tr. 94).

60. Sergeant Hayes emphasized he was on the Garrett property only to "keep the peace." (Tr. 94).

61. Mr. Neal claimed the Inspector and the Sergeant were guilty of criminal trespass. However, he did not prevent the two men from walking around the property. (Tr. 95).

62. Mr. Neal stated that the local Kingman, Arizona, Judge should rule on whether Mr. Lumpkins had the right to enter the property. (Tr. 95, 96).

63. Sergeant Hayes heard Mr. Neal explain to Mr. Lumpkins that he wasn't restraining him and he was free to inspect the

plant. However, it seemed to Sergeant Hayes that the whole problem was that Mr. Lumpkins was to get permission from Mr. Neal to enter the property. (Tr. 96).

64. Sergeant Hayes recalled that Mr. Neal told Mr. Lumpkins he could go ahead and conduct an inspection. (Tr. 97).

65. Sergeant Hayes did not recall any physical restraints or conditions put on Mr. Lumpkins. (Tr. 98).

66. During the 30-minute abatement period, the parties involved stood by the police car. (Tr. 99).

67. Sergeant Hayes saw no physical or verbal abuse while he was on the site. (Tr. 99).

68. Sergeant Hayes described Mr. Neal as adamant that Mr. Lumpkins was trespassing. He kept insisting he had to return to the gate and get Mr. Neal's permission. (Tr. 100-101).

69. Mr. Neal told Sergeant Hayes that Mr. Lumpkins was a safety hazard and that he had parked his car in an improper place. (Tr. 103).

70. Sergeant Hayes identified an audiotape as well as a transcription of his statement to the Secretary's counsel. (Tr. 104-107; Ex. P-2, P-2-A). The Judge reviewed the tape [Ex. P-2(a)] and, while there are frequent background noises, the transcription (Ex. P-2) is reasonably accurate.

71. Sergeant Hayes believed the proper course of action was for Mr. Neal to file a complaint with the Arizona Court. (Tr. 115-116).

72. The declaration of Jack Sepulveda was received in evidence by agreement of the parties.

On July 19, 1990, Mr. Sepulveda inspected the Wesapi Portable Mine which is located on the property of Mr. Neal. Mr. Neal advised Mr. Sepulveda that Mr. Lumpkins could not inspect the mine unless he was accompanied by a deputy sheriff. His reason was that he was afraid Mr. Lumpkins might be injured. If he walked under a conveyor belt, rocks could fall on him. [Tr. 121; Ex. P-3, P-3(a)]

DISCUSSION

Mr. Neal in his post-trial brief, initially asserts that Mr. Lumpkins knew the company's parking and safety rules; nevertheless, he failed to follow them. Specifically, Mr. Neal cites

the transcript at page 75, lines 10-12, as well as the testimony of witnesses Campa, Riccardi, and Hanson.

The portion of the transcript apparently relied on by Mr. Neal reads:

Q. Did Larry Nelson ever discuss the fact that you may have been parking your vehicle in a hazardous position and entering under dangerous belts?

A. No. The only thing I remember is the parking business, and you told me where you wanted me to park, and that's where I parked. And--

Q. Okay, but Larry Nelson never discussed any of that with you, right?

A. Offhand I can't remember. He could have, but I, I don't recall.

(Tr. 75, lines 7-16).

I am aware of the testimony of Mr. Neal's witnesses.

SHANE CAMPA, a loader operator, testified he observed Mr. Lumpkins park behind the loader. (Tr. 147, 149). Further, more than once he saw Mr. Lumpkin walk under the feeder belt. (Tr. 150).

RICHARD S. RICCARDI, a loader and screening plant operator, on one occasion observed Mr. Lumpkins park his car in the line of travel of the loader. Further, on one occasion he observed Mr. Lumpkins walk under the No. 1 feeder belt which carries heavy rock material. (Tr. 131).

LLEWELLYN HENRY HANSON, experienced in the operation of heavy equipment, discussed with Jack Sepulveda that the Inspector was parking his vehicle in a hazardous location. Further, he could be struck by rocks when walking under the conveyor belts. (Tr. 166).

Inspector Lumpkins also stated he was nearing retirement and was concerned he would lose his job. (Tr. 167, 170).

The principal focus of Mr. Neal's evidence and arguments are directed at the activities of Inspector Lumpkins. However, that evidence and arguments are not relevant to the denial of entry Citation.

The right of entry is provided by the Mine Act itself. Section 103(a) alleged in the Citation to have been violated here by the operator in its pertinent part provides:

Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines ... In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided ... [and the authorized representatives] shall have a right of entry to, upon, or through any ... mine.

The U.S. Supreme Court, in construing the Mine Act, has explicitly recognized the fundamental importance of the right of entry provisions, as discussed in the case of Donovan v. Dewey, 452 U.S. § 593, 69 L.Ed.2d 262 (1981)). In Dewey, the Supreme Court stated that:

... Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

See also Tracey & Partners, et al., 11 FMSHRC 1457 (August 1989), wherein the Commission held that Section 103(a) of the Mine Act confers on MSHA a broad right of entry to mines for the purposes of inspection and investigation. (11 FMSHRC at 1461).

Mr. Neal, in his brief, states that at no time did he stop the Inspector from entering the property and performing his inspection. If the evidence supports Mr. Neal, the Citation should be vacated.

The issuance of a criminal trespass charge on the complaint of Mr. Neal against the MSHA Inspector constituted, as a matter of law, a restraint of the Inspector from entering the mine property. (See Ex. P-1). It is further uncontroverted that Mr. Neal's restraint conditions were that the Inspector be accompanied by the deputy sheriff, that Mr. Neal be advised in advance, and that he consent to the entry. (Tr. 90).

Mr. Neal also insisted that the Inspector return to the plant entrance and request his permission to conduct an inspection. In effect, Mr. Neal claims he is entitled to prior notice of the Inspector's visit. However, such prior notice would run directly contrary to Section 103(a), which specifically states that "no advance notice of an inspection shall be provided to any person... ."

FURTHER DISCUSSION

It was also claimed at the hearing that an inspection of the "Wesapi" Mine (apparently located on Mr. Neal's property) was more stringent than the instant inspection. However, Mr. Neal did not raise this issue in his brief and the evidence (Ex. P-4) shows the "Wesapi" inspection was at least equally as stringent as the inspection in contest.

For the foregoing reasons, Citation No. 3600491 should be affirmed.

CIVIL PENALTIES

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Mine Act.

The evidence establishes that Respondent is a small operator and the penalties contained in the order of this decision are appropriate in relation to the company's size.

The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I find the payment of penalties will not cause the Respondent to discontinue in business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 226 (1973).

The operator was negligent in that the first three violative conditions were open and obvious. The company was further negligent as to the 103(a) Citation, inasmuch as it should have known of the Inspector's right of entry.

There was no evidence showing any adverse prior violations.

I agree with the Inspector's evaluation that the gravity as to the first three violations was low. However, the right of entry is a Keystone to the Mine Act. Accordingly, I consider the denial of that right to present a situation of high gravity.

The operator showed statutory good faith in abating the four Citations.

On balance, I believe the penalties assessed in the order of this decision are appropriate.

Accordingly, I enter the following:

ORDER

1. Citation No. 3600335 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

2. Citation No. 3600336 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

3. Citation No. 3600339 is AFFIRMED and a civil penalty of \$20 is ASSESSED.

4. Citation No. 3600491 is AFFIRMED and a civil penalty of \$250 is ASSESSED.


John J. Morris
Administrative Law Judge

Distribution:

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

July 15, 1992

ROGER VOGT,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 92-225-DM
v.	:	RM MD 92-02
	:	
N.A. DEGERSTROM, INC., and	:	
ZORTMAN MINING, INC.,	:	Zortman Mining
Respondent	:	

ORDER OF PARTIAL DISMISSAL

Before: Judge Morris

Complainant Vogt and Respondent N.A. Degerstrom, Inc., reached an amicable settlement on the merits and moved that the complaint herein be dismissed between said parties.

Accordingly, I enter the following:

ORDER

1. The complaint is DISMISSED with prejudice as to Respondent N.A. Degerstrom.
2. The complaint will remain pending as to Zortman Mining, Inc., and the hearing will proceed as scheduled on August 19, 1992, in Kalispell, Montana.


John J. Morris
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

JUL 20 1992

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

v.

SHANNOPIN MINING COMPANY,
Respondent

: CIVIL PENALTY PROCEEDING
:
: Docket No. PENN 91-1398
: A.C. No. 36-00907-03763
:
: Shannopin Mine
:
:

DECISION

Appearances: Theresa C. Timlin, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Joseph A. Yuhas, Esq., Shannopin Mining Company,
Barnesboro, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations. The respondent filed an answer contesting the alleged violations, and a hearing was held in Washington, Pennsylvania. Three of the violations were settled, and testimony and evidence was received with respect to the remaining violation. The parties filed posthearing briefs, and I have considered their respective arguments in 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. 30 C.F.R. § 75.1725(a).
4. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented are (1) whether the cited conditions or practices constitute a violation of the cited standard; (2) whether the alleged violation was 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.

Stipulations

The parties stipulated to the following (Tr. 6; Exhibit (ALJ-1)):

1. The Shannopin Mine is owned and operated by the respondent and it is subject to the jurisdiction of the Act.
2. The presiding judge has jurisdiction in this proceeding.
3. The citation and termination in this case were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the date and place stated therein and may be admitted into evidence for the purpose of establishing that they were issued.
4. The parties stipulated to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.
5. The alleged violation was abated in a timely fashion.
6. The respondent's history of assessed violations for the two year period prior to the issuance of the subject citation was 764.
7. The imposition of the proposed civil penalty will have no affect on the respondent's ability to remain in business.
8. The respondent's annual coal production is approximately 1,246,799 tons.

Discussion

The parties decided to settle three of the contested citations and they filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30(c), seeking approval of their proposed settlements. Testimony and evidence was received with respect to the following citation which the parties were unable to resolve by settlement (Exhibit P-A).

Section 104(a) "S&S" Citation No. 3702139, issued on May 24, 1991, by MSHA Inspector Ronald E. Hixson cites an alleged

violation of mandatory safety standard 30 C.F.R. § 75.1725(a), and the cited condition or practice is described as follows:

Shuttle car serial No. 6024 located in the 2 West section was not being maintained in safe operating condition. The canopy was bent forward and there were 2 broken welds where the standards were previously attached to the shuttle car. The shuttle car was immediately removed from service. There were 4 citations issued under 75.1725(a) during the inspection period 10/2/90 to 2/5/91.

Petitioner's Testimony and Evidence

MSHA Inspector Ronald E. Hixson testified as to his experience and training and he confirmed that he conducted a mine inspection on May 24, 1991, and that he issued the contested citation after finding that the cited shuttle car canopy was damaged. Mr. Hixson stated that the canopy appeared to be striking the mine roof or some other object in the mine, and he observed two broken welds on the inside standards or legs that support the canopy and the canopy was leaning in a forward position. He believed that there was a danger for anyone to operate the car in that condition. The car was available for operation and it was not locked out or tagged. If a piece of equipment is not safe, it should be locked and tagged out, or as a minimum, tagged out. The car was located in the working section and he had requested the section foreman to have someone tram the car down the intake escapeway so that he could examine it for permissibility. The power was off when Mr. Hixson examined the machine (Tr. 7-13).

Mr. Hixson identified a copy of his inspection notes, including a sketch of the canopy, and he confirmed that it was supported by four legs, or standards, one in each corner. He stated that the two broken welds were located on the two legs closest to the inside of the car and that the canopy was leaning in a forward direction towards the front of the car. The standards were approximately 24 to 30 inches long, and they are welded to the frame of the car to provide support for the canopy. The broken welds were approximately "a couple of inches off" the bottom of the standards. He found nothing wrong with the welds at the base of the standards and at the canopy roof. If the welds were intact the canopy would be "in a straight up and down position". However, with the broken and damaged welds, the canopy was pushed forward. He took no measurements and did not know the degree of lean of the canopy, but "it was clearly visible to the naked eye" (Tr. 13-18).

Mr. Hixson confirmed that he cited a violation of section 75.1725 (a), but could have cited a violation of

section 75.1710. However, he decided that section 75.1725(a) was more appropriate because he was concerned about someone operating the machine and he wanted to take it out of service. He believed that the broken welds rendered the machine unsafe because the canopy was obviously striking something very hard and he feared that the canopy might fall into the operator's compartment and injure the operator. He was also concerned that the canopy would not withstand the pressure that it was designed and certified to take in the event of a roof fall. The fact that the mine has a lot of reportable roof falls which have occurred above the roof support anchorage zone added to his concern that the canopy was not in a safe condition. He identified copies of MSHA Form 7000-1, submitted by the respondent during the period March 14, 1991 to March 11, 1992, reporting roof falls in the 1, 2, and 3 West sections of the mine, and he identified the areas where the falls occurred on a mine map used in the course of the hearing (Tr. 19-24; Exhibit P-D).

Mr. Hixson stated that he based his "significant and substantial" hazard finding on the following (Tr. 25-26):

A. I've got a canopy that's damaged through striking something very hard. I've got a situation where a canopy could fall on somebody and hurt them, of which it has happened in the past.

I've got a situation where I've got a canopy that is supposed to withstand so many pounds of pressure in a vertical position, and now I have one leaning in, not totally horizontal, but it's leaning forward and the standards are not straight up and down. And I have no idea to know now whether it can withstand the pressures that the certified engineer certified it will withstand.

Mr. Hixson stated that his "S&S" hazard finding was also influenced by the fact that he did not know who might be operating the shuttle car at any given time. Although an operator who was aware of the fact that the damaged canopy was striking the roof might avoid that particular route of travel, someone assigned to drive that machine who was not aware of the tramming route of travel or that the canopy was striking the roof might take a hazardous route causing enough additional damage which might result in the collapse of the canopy. If the damaged canopy collapsed and fell on the machine operator, it was reasonably likely that he would be injured. In the event of a roof fall, and the canopy did not hold the roof material, the operator could be killed (Tr. 26-27). Mr. Hixson was aware of past incidents where a canopy has collapsed and injured an operator, but not at the respondent's mine (Tr. 28-29; Exhibit P-E).

Mr. Hixson confirmed that he found a moderate degree of negligence and that he based this finding on the fact that the canopy was going to be repaired on an idle shift or over the weekend (Tr. 29). However, he also believed that the canopy was unsafe and that it should have been repaired immediately. A new canopy was installed and the citation was terminated (Tr. 30).

On cross-examination, Mr. Hixson confirmed that he opted to cite a violation of section 75.1725 rather than 75.1710, because he believed that the shuttle car was unsafe to operate and that it would have endangered anyone who operated the car if he had not taken it out of service. He did not believe that citing section 75.1725 was contrary to the MSHA policy manual instructions that section 75.1725 is only to be cited if no other regulation applies. He did not believe that section 75.1710, was applicable because the canopy, as originally installed, was proper, and that section does not address canopy maintenance (Tr. 31-32).

Mr. Hixson confirmed that he did not issue an imminent danger order because he observed no one under the canopy and the car was parked in the cross cut. In support of his "reasonably likely and fatal" injury gravity finding, Mr. Hixson explained that since the damaged canopy was striking something very hard, he believed that it could happen again and that further damage could cause it to topple in on the operator. Further, with the two broken welds and the canopy leaning, he did not know whether it would withstand or hold the weight as it was originally certified by an engineer. Although he believed that he was qualified to determine if the canopy was unsafe at the time he observed it, he was not qualified at that time to determine whether or not it would withstand 1800 pounds (Tr. 32-33).

Mr. Hixson confirmed that he made no measurements, and he estimated that the roof of the canopy would be three to five inches above the head of the operator, but that this would depend on the particular operator. The average mining height in the 2 West section averaged six to seven feet and he had no trouble walking anywhere in the section (Tr. 32-33).

Mr. Hixson explained his understanding of the meaning of "reasonably likely to occur" as follows: ". . . the continued presence of the situation, it's reasonably likely that it could occur. . . that if I continue to let it run that there's the possibility that somebody could be hurt" (Tr. 33). He further explained that the 2 West section was a relatively new section, and that the large number of falls in the 1, 2, and 3 West sections led him to believe that "If you plot the falls across there, the likelihood of a fall occurring is reasonably likely to occur in that area. That's a large number of falls for an area of that size" (Tr. 34).

Mr. Hixson agreed that a person walking next to the shuttle car and the miner helper are not required to have a canopy over their heads, but that section 75.1710, requires that face haulage equipment have a canopy for the operator. He pointed out, however, that most fall problems occur inby the last open crosscut where equipment operators spend most of their day at the edge of unsupported roof and that the regulations were written to provide them with as much protection as possible since they are disturbing the roof and causing most of the vibration (Tr. 35-36).

Mr. Hixson conceded that he had no way of testing the canopy underground as an engineer would to determine whether it was sufficient to hold its certified load. He stated that the canopy is designed to hold a vertical load rather than a horizontal load, and he believed that the broken welds on two of the canopy legs affected the integrity of the canopy. If the welds were intact, the legs would have been straight up and down, and they would not have been damaged even if the canopy struck the roof. He stated that the canopy was leaning forward, and although he could not state where the legs were bent, he believed that "something had to be bent" since the canopy was tilting forward (Tr. 38).

Mr. Hixson confirmed that he assumed that the canopy involved in the accident at another mine operation (Exhibit P-E) was a substantial canopy. He agreed that a new canopy which is perfectly intact could fall on someone. He did not know whether the two shuttle cars were similar, but believed that the mining conditions were likely similar (Tr. 41). He confirmed that one "canopy save" occurred at the Shannopin Mine when a miner operator was covered up and had to be dug out, but he was not aware of any rock falls on shuttle car canopies, and would only know about such an incident if it is a reportable fall or someone is entrapped (Tr. 42).

Mr. Hixson stated that he detected no problems with the welds on the legs of the canopy where they attached to the shuttle car. The welds were covered with paint and he had no idea what was under the paint. He did not know whether the damaged canopy would sustain any kind of load and stated that "possibly one more hit and it could come down" (Tr. 43). However, he believed that the canopy would have deflected smaller pieces of rock that might cause injuries (Tr. 43-44). He confirmed that after observing the broken welds and the canopy leaning, he concluded that it would not do the job that it was engineered to do. He also confirmed that he did not grab and try to shake the two legs with the broken welds, and that the welds were completely broken and not simply cracked. Based on the condition of the canopy, he concluded that "it had to be striking something on the mine roof or some other piece of equipment fairly hard". He was not certain whether the welds were part of

the canopy installation or the support, but confirmed that the welds hold the standards in an upright position. The purpose of the canopy is to protect the operator from rock falls or falling materials (Tr. 45-50). Mr. Hixson confirmed that he did not determine how long the damaged canopy condition had existed and that he did not seek out the person who operated the car on the prior shift (Tr. 52).

Respondent's Testimony and Evidence

Joseph K. Caldwell, respondent's safety director, testified that he was very familiar with the roof conditions at the mine. He confirmed that roof falls have occurred "in a certain way", and that 90 percent of the falls have occurred when everyone on the section has moved 10 to 15 rooms inby. Several weeks might pass before the roof deteriorates, sags, and then eventually falls out. He described the overall roof conditions as "good, decent" (Tr. 53-54).

Mr. Caldwell agreed with the inspector's description of the overall construction of the canopy. It was his understanding that the base of the canopy legs were substantially welded, and that approximately 18 inches up the legs the welds were broken on the braces. He stated that the canopy legs fit inside the standards and that the broken welds were on the standards (Tr. 54-56).

On cross-examination, Mr. Caldwell confirmed that he did not accompany the inspector during his inspection on May 24, 1991, was not present when he examined the shuttle car and the canopy, and that he did not examine the car or the canopy that day (Tr. 59-60). A new canopy was immediately installed to abate the citation, but Mr. Caldwell did not inspect the damaged canopy after it was replaced. He agreed that a canopy with two support legs or standards in a bent condition could present a problem. However, based on his knowledge of a canopy that is substantially constructed, and the fact that everything else was basically intact, he did not believe it was unsafe (Tr. 61-62). He stated that there are bolts that fasten the legs to the canopy and that "there is a certain degree of play in the bolt where it's attached to the standard" and that it "could appear to be bent looking" (Tr. 64).

Inspector Hixson was recalled, and he confirmed that he did not measure to determine how far forward the two standards with the broken welds were bent but that "it was obvious to the eye whenever I first glanced at it that it was damaged . . . and that's when I discovered that the welds were broken" (Tr. 64-65). He agreed that a canopy does have "some inherent play" and that

there is a slight tilt. In such a situation he would not cite it. However, if he "feels that it's been damaged by being struck or that there's a problem, then I'm going to look a lot closer" (Tr. 64).

Mr. Hixson was of the opinion that the intent of section 75.1725 is to insure that the equipment is safe for anyone who operates it, but it does not require that equipment be maintained exactly as it was when it was placed in operation underground. He was not aware of any canopy testing conducted underground, or any MSHA studies concerning damaged canopies, or canopies with broken welds. His understanding of section 75.1710, is that it requires an engineer to subject a canopy ready for use to certain load pressures stated in the regulation (Tr. 69).

MSHA's Arguments

With regard to the application of the canopy regulations found at 30 C.F.R. § 75.1710 and 75.1710-1, MSHA takes the position that these regulations address only the conditions under which canopies are required, and the initial configuration required so that a canopy may be certified as "substantially constructed". MSHA states that the parties are in agreement that canopies are required in the respondent's mine and that the canopy installed on the cited shuttle car was initially certified as substantially constructed.

MSHA asserts that no cases have construed section 75.1710 and 75.1710-1 to impose a requirement that operators maintain cabs or canopies, and that in general, the case law discussing violations of §75.1710 or §75.1710-1 have addressed whether canopies are required either in a particular mine, Eastover Mining Co., 4 FMSHRC 1207 (July 1982); or on a particular piece of equipment, Peabody Coal Co., 11 FMSHRC 4 (January 1989); Sewell Coal Co., 5 FMSHRC 2026 (December 1983); or whether operating a piece of equipment without a canopy is a significant and substantial violation, Voughiogheny & Ohio Coal Co., 10 FMSHRC 603 (May 1988).

MSHA confirms that its 1990 Program Policy Manual, Volume V, Part 75, pg. 158, instructs that section 75.1725(a) "in no way affects enforcement of other mandatory safety standards and should be used only where such condition is not covered by any other regulation". MSHA concludes that since the cited condition is not covered by any other regulation the inspector appropriately cited a violation of section 75.1725(a), and that the issue presented in this case is whether or not the shuttle car canopy, "which had sustained extensive damage", was in a safe operating condition.

MSHA acknowledges that in order to establish a violation of section 75.1725(a), it must establish the equipment's use or availability for use. (Explosive Technologies International, Inc., 14 FMSHRC 59, 64-65 (January 1992)). However, MSHA asserts that a violation can occur even if the equipment is not in actual use at the time the citation is issued, Explosive Technologies International, Inc., 14 FMSHRC at 65, citing Mountain Parkway Stone, Inc., 12 FMSHRC 960, 962-963 (May 1990). In the instant case, MSHA relies on the inspector's testimony that the shuttle car was located on a working section and was available for operation as it was not locked out or tagged out and that the car operator trammed it down the intake escapeway so that the inspector could inspect it.

Citing Peabody Coal Company, 1 FMSHRC 1494, 1495 (October 1979), MSHA asserts that section 75.1725(a) required the respondent to maintain the shuttle car canopy in safe operating condition and to remove the unsafe canopy or car from service. MSHA concludes that derogation of either duty constitutes a violation of the cited section. Citing Consolidation Coal Company, 11 FMSHRC 2279, 2282 (November 1989), quoting Webster's Third New International Dictionary, 1986 Edition, MSHA points out that "safe" has been defined as "free from damage, danger or injury, secure . . ." MSHA asserts that section 75.1725(a) is a recognized broad safety standard aimed at preventing hazardous conditions as well as correcting them, that it is not necessary for the hazard to fully materialize before remedial action is required, and that if unsafe equipment is operated, a violation exists whether or not the operator knew of the unsafe condition. Secretary v. Alabama By-Products, 4 FMSHRC 2128, 2131 (December 1982); Peabody Coal Company, supra at 1 FMSHRC 1495; Peabody Coal Company, 2 FMSHRC 1683, 1684 (June 1980).

Relying on the Commission's decision in the Alabama By-Products case, supra, at 4 FMSHRC 2129, MSHA points out that the standard for determining whether machinery is in "safe operating condition" is "whether a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation". MSHA also cites Secretary v. Ideal Cement Co., 13 FMSHRC 1346, 1348 (September 1991), a case in which the "reasonably prudent person" test was applied to an alleged violation of 30 C.F.R. § 56.9002, requiring that equipment defects affecting safety be corrected before equipment is used.

MSHA maintains that the respondent violated section 75.1725(a) by its failure to maintain the canopy in a safe operating condition. MSHA concludes that the inspector was correct in his conclusion that a violation existed based upon the results of his investigation. In support of this conclusion,

MSHA relies on the testimony of the inspector that the canopy was leaning forward, its legs were bent, and that the welds which held the inner legs upright were completely broken. MSHA points out that the respondent presented no testimony disputing the inspector's factual testimony regarding the condition of the canopy at the time of the issuance of the citation, but instead, presented only the testimony of Safety Director Joseph Caldwell, who did not view the canopy either before or after the issuance of the citation.

Although Mr. Caldwell was of the opinion that the broken welds were not on the canopy legs but on the standards attached to the shuttle car, which the canopy legs fit inside of, MSHA asserts that if these "standards" (which Mr. Caldwell suggests were not a part of the canopy but were attached to the shuttle car) were bent, simply putting a new canopy on would not solve the problem because the canopy would still be leaning forward. Alternatively, if the canopy legs were bent, as the inspector testified, and the welds held the legs to the frame of the shuttle car, MSHA concludes that placing a new canopy with straight legs on the shuttle car and rewelding the legs, would alleviate the problem. MSHA asserts that there is no dispute that the violation was abated by replacing the old canopy with a new one and no attempt was made to correct the problem by simply repairing the broken welds. MSHA points out that Mr. Caldwell admitted that the damage to the canopy involved the "integrity of the structure" which the respondent's maintenance employees will not attempt to repair (Tr. 63).

MSHA believes that it is clear that given the factual circumstances surrounding the damaged canopy, including the history of roof falls peculiar to the mine, a reasonably prudent person should have recognized the danger of allowing a shuttle car with a visibly leaning canopy to continue to operate. In support of this conclusion, MSHA asserts that the inspector recognized two possible hazards in allowing the shuttle car to continue in use. One hazard was that the canopy would not be able to protect the shuttle car operator in the event of a roof fall. The inspector testified that the canopy is designed to hold a vertical load, and when it is leaning, and the legs are bent, he believed that it was questionable that the canopy would be able to withstand the pressures it is designed and certified to take.

MSHA further points out that the inspector was aware that the mine had a significant history of roof falls, particularly in the West sections of the mine, where the shuttle car was operating. MSHA concludes that a reasonably prudent person, familiar with the significant history of roof falls in the Mine, should have recognized that the visibly leaning canopy with broken welds where the canopy legs should have been attached to the frame of the shuttle car was unsafe and presented a hazard that warranted

corrective action. MSHA further concludes that the condition of the canopy itself presented a hazard, in that the canopy was likely to collapse in on the operator of the shuttle car. MSHA believes that this was not a situation where the canopy shuttle car had scratches or minor dents from striking the roof or deflecting falling objects, but rather, the shuttle car had become damaged by striking something particularly hard and that hitting the mine roof would cause further damage to the shuttle car, which could be enough to cause it to collapse.

Finally, MSHA asserts that it is clear that a reasonably prudent person, familiar with the fact that a canopy on a shuttle car is obviously leaning; that the ability of the canopy to withstand the amount of pressure which it is certified to withstand in the event of a roof fall is seriously compromised by its leaning position; that although canopies are designed to withstand some damage from bumping the mine roof, the extent or degree of this canopy's decline, as well as the bent legs on this canopy, indicated that the canopy had stricken something hard, most likely area(s) of the roof; that operators of face equipment such as shuttle cars are more frequently exposed to unstable roof and roof falls; and that there was a significant history of roof falls in the West section of Shannopin Mine; would recognize a hazard warranting immediate corrective action.

Respondent's Arguments

The respondent asserts that MSHA has failed to prove that the condition of the cited canopy in question caused the shuttle car to be in an unsafe operating condition, and that it has no proof to support the alleged violative conditions described in the citation. In support of its argument, the respondent maintains that MSHA's case rests primarily, if not solely, on the inspector's visual examination that the canopy was leaning and two welds were broken. The respondent relies on the frequent admissions by the inspector (Tr. 26, 32, 37), that he did not know whether the canopy would withstand the pressures it was required to withstand, and it concludes that these admissions alone support a conclusion that MSHA has failed to prove the shuttle car was in an unsafe operating condition.

The respondent states that a close look at the evidence in this case shows that the inspector's allegations in the citation have no reasonable foundation. In support of its conclusion, the respondent points out that the canopy legs fit into additional legs or standards which were welded onto the shuttle car, and that these additional legs or standards were intact and there were no defects where the legs of the canopy were attached to the canopy itself (Tr. 17, 43, 55, Gov't Exh. B). Conceding that there were two broken welds on the inner two legs of the canopy, the respondent points out that the welds on the outer legs were intact and that the inspector was not aware of the purpose of the

broken welds and admitted that the tilt on the canopy posed no problem (Tr. 15, 17, 65). Respondent further asserts that the canopy could not have been tilted to any great degree because the two outside welds were intact indicating that there was very little tilt to the canopy.

The respondent points out that Mr. Caldwell and the inspector confirmed that there is some "play" in the canopy where the leg fits into the standard (Tr. 64-65). Respondent asserts that the canopy legs, placed in the standards, provided the required support for the legs. Respondent suggests that the welds were apparently only an attempt to eliminate some of the play or looseness where the legs fit into the standards, even though the play itself did not present a hazard (Tr. 64, 65). Respondent also suggests that the welds may have been applied to prohibit adjustment of the canopy, given the fact that it had been scraping the roof at some time in the past. Respondent asserts that the evidence indicates that the welds were not even necessary to maintain the canopy, and it submits that a complete absence of all four welds where the canopy legs entered the standards would have no significant impact on the integrity of the canopy. The respondent further concludes that the evidence fails to show that the inspector's basis for issuing the citation, the tilt in the canopy and the two broke welds, rendered the equipment unsafe.

The respondent argues further that the fact that the inspector did not issue a citation alleging a violation of 30 C.F.R. § 75.1710, which requires the shuttle car to be provided with a substantially constructed canopy, indicates that the shuttle car was provided with a substantially constructed canopy. In support of this argument, the respondent cites MSHA's policy manual under section 75.1725, which states that "This section in no way affects enforcement of other mandatory safety standards and should only be used where such condition is not covered by any other regulation". The respondent concludes that since the essence of the alleged violation is that the canopy was not substantially constructed, the inspector, according to the MSHA manual, should have cited section 75.1710 rather than the "catch all" section 75.1725(a). The respondent further concludes that the inspector's explanation that section 75.1725(a) is the appropriate standard is contradictory and unsupportive of his position, and since he stated that section 75.1710 did not apply, this indicates that the canopy was substantially constructed. Finally, since the inspector indicated that section 75.1710 does not address maintenance, and that maintenance of the canopy was adequate at the time (Tr. 31), respondent concludes that the inspector was concerned that the canopy may be unsafe at a future time, hardly a basis for issuing a citation for the present condition.

Findings and Conclusions

Fact of Violation. Citation No. 3702139.

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 75.1725(a), which states as follows:

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

In construing an identical mandatory safety standard applicable to surface coal mines (30 C.F.R. § 77.404(a)), the Commission in Peabody Coal Company, 1 FMSHRC 1494, 1495 (October 1979), held that the regulation imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. The Commission concluded that derogation of either duty constitutes a violation.

In Alabama-By-Products Corporation, 4 FMSHRC 2128, 2129 (December 1982), the Commission upheld a violation of section 75.1725(a), and stated as follows:

[I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Section 75.1710 authorizes the Secretary to require substantially constructed canopies on shuttle cars in order to protect the car operator from roof falls and from rib and face rolls. Section 75.1710-1 requires shuttle cars to be equipped with "substantially constructed" canopies located and installed in such a manner to protect the car operator from roof, face, and rib falls or rolls. Pursuant to section 75.1710-1(d), a canopy is considered to be "substantially constructed" if a registered engineer certifies that the canopy has the minimum structural capacity "to support elastically: (1) A dead weight load of 18,000 pounds, or (2) 15 p.s.i. distributed uniformly over the plan view area of the structure, whichever is lesser".

MSHA's policy manual interpretation of section 75.1725, cites examples of equipment defects which "could indicate that such machinery and equipment is not maintained in safe operating

condition", and it states that a violation of section 75.1725 "would exist if such defects render the equipment or machinery unsafe to operate" (Emphasis added).

The parties are in agreement that canopies are required for shuttle cars operating in the respondent's mine and that the canopy in question was initially certified as substantially constructed when it was installed on the shuttle car in question. MSHA's position is that sections 75.1710 and 75.1710-1 only address the mining conditions under which canopies may be required, and the initial configuration required of a canopy before it may be certified as "substantially constructed". MSHA believes that these regulations impose no obligation or requirement on a mine operator to maintain the canopy in a "substantially constructed" condition after it is initially certified and installed on a shuttle car.

I take note of the fact that MSHA's canopy safety standards do not include any requirements that canopies be maintained in a "substantially constructed" condition so as to continually meet the minimum structural criteria found in section 75.1710(d). In short, once a canopy is certified as capable of withstanding certain structural pressures to which it may be exposed in the event of a roof fall, there is no specific canopy standard to insure that a canopy which has been subjected to "wear and tear" in the actual mining environment has not been rendered less than "substantially constructed" after the passage of time. In the absence of such a canopy standard, an inspector necessarily must rely on a general "catch all" subjective standard such as section 75.1725(a), to determine whether or not an otherwise seemingly "substantially constructed" canopy is nonetheless in "unsafe condition" requiring its immediate removal from service. The inspector must also rely on a policy instruction which contains no guidance as to how one may make and support a determination that a particular piece of equipment is unsafe solely because of the presence of a damaged part.

The record in this case suggests that the inspector was rather unsure as to which regulatory standard to cite (Tr. 67-68). On direct examination, he testified that he had violations of both section 75.1710 and section 75.1725(a), but opted to cite section 75.1725(a), because he wanted to take the shuttle car out of service (Tr. 18). Although his inspection notes (Exhibit G-B), reflect that the canopy "was not being maintained safe", he testified that he considered the maintenance of the canopy as "adequate at the time", and that section 75.1710 did not apply (Tr. 30-31). I find the inspector's belief that an adequately maintained canopy is at the same time unsafe to be rather contradictory.

The respondent's arguments that the inspector should have cited section 75.1710, rather than section 75.1725(a), and that

his failure to cite section 75.1710, or to follow MSHA's manual instructions supports its contention that the canopy was substantially constructed and that the citation should be vacated on these grounds ARE REJECTED. In upholding a violation of section 75.1725(a), the Commission in Alabama By-Products Corporation, 4 FMSHRC 2128, 2132 (December 1982), held that MSHA's policy manual instructions are not officially promulgated rules binding upon the Commission and that the failure of the inspector to follow such instructions did not invalidate the citation.

The respondent's further suggestion that an inspector's concern that a canopy may be unsafe at some future time may not support a citation for its present condition is not persuasive and it is likewise REJECTED. In upholding a Commission Judge's decision affirming a violation of section 75.1725(a), the U.S. Tenth Circuit in Mid-Continent Coal and Colke Company v. FMSHRC and Secretary of Labor, September 24, 1981, 2 BNA MSHC 1450, observed that "It is clear that Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing". See also: Alabama By-Products Corporation, 4 FMSHRC 2128, 2131 holding that ". . . upon observing the defective equipment in issue, it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action".

The respondent in this case is charged with an alleged violation of section 75.1725(a), and the fact that the inspector opted to cite that regulatory standard, rather than another one is irrelevant. The selection of an appropriate standard to cite is within the discretion of the inspector, and he assumes the risk and possibility that he may not prevail when called upon to prove an alleged violation at trial. In the case at hand, the issue is whether or not the condition of the canopy, as observed by the inspector, rendered it unsafe for immediate and continued use within the meaning of section 75.1725(a), and whether there is a preponderance of credible probative evidence to support the inspector's belief that a tilted canopy with two broken welds was ipso facto unsafe. The burden of proof lies with MSHA, and "the fact of unsafeness, rather than the reason for the unsafeness, is relevant", Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8, 14 (January 1981), affirmed by the Sixth Circuit at 689 F.2d 632 (1982), Cert. denied, No. 82-1433, May 16, 1983. A lack of reliable and substantial evidence of an actual equipment defect affecting safety justifies the dismissal of a citation, B.K.S. Mining Co., Inc., 2 FMSHRC 998 (April 1980), final Commission order June 9, 1980. Both of these cases concerned alleged violations of 30 C.F.R. § 77.404(a), a surface mining standard containing language identical to section 75.1725(a).

In this case, the inspector primarily relied on two factors in concluding that the canopy was unsafe, namely, the tilt in the

canopy and the two broken welds. MSHA maintains that the ability of the canopy to withstand the amount of pressure which it is certified to withstand in the event of a roof fall is seriously compromised by its leaning position. However, on the evidence presented in this case, I cannot conclude that the tilt or lean observed by the inspector proves that the canopy was in an unsafe condition requiring its immediate removal from service. The inspector did not speak with anyone who may have operated the shuttle car while coal was being produced, nor did he ascertain when the car was last inspected or how long the condition in question may have existed. Further, although the inspector testified that he had taken a college class in "strengths and materials" and a physics class, that he "knew the equipment", and that a canopy is designed to hold a vertical load rather than a horizontal load (Tr. 37), there is no evidence that he had any particular engineering expertise.

The inspector candidly admitted that he had no idea whether the canopy would withstand the weight that it was certified to hold in the event of a roof fall and that he was not qualified to determine whether or not the canopy could "withstand the 1800 pounds or not" (Tr. 26, 32-33). (I take note that section 75.1710-1(d) requires a certified canopy weight load capacity of 18,000 pounds). Further, the inspector acknowledged that he took no measurements, and did not know the degree of lean of the canopy (Tr. 64). He also agreed that a canopy does have "some inherent play" and slight tilt, and that in such a situation, he would not cite it unless he "feels that it's been damaged by being struck or that there's a problem" (Tr. 65). He confirmed that he did not grab the support posts where the welds were located and attempt to shake them, and he indicated that even if he had done so, the canopy posts do have some "play" in them (Tr. 45). He could not say whether or not the support posts would have moved freely if he attempted to shake them with his hands, and he found no need to make this "hand test" (Tr. 46).

Contrary to MSHA's assertions that the canopy legs were bent, and that two of the welds which held the inner legs upright were completely broken, the citation, as written, fails to describe any bent legs or standards, nor does it state that the broken welds were located where the legs or standards attached directly to the canopy or the shuttle car. The citation states that the 2 broken welds were located where the standards were previously attached to the shuttle car. Although the inspector's notes include a notation that "the standards were bent forward", the diagram of the canopy made by the inspector does not depict any bent legs, and when he was asked to locate the bent legs on the diagram, he could not do so (Tr. 38). When asked whether or not the legs were bent, the inspector replied that "the legs were bent"; "the legs were leaning, the canopy itself was leaning forward"; "something had to be bent, for the canopy to be tilting forward" (Tr. 38). The inspector initially believed that the

canopy legs and standards were one and the same (Tr. 14), whereas the more credible and unrebutted testimony of Mr. Caldwell reflects that the canopy legs actually fit into the standards which were welded onto the shuttle car frame (Tr. 55-57).

Although it is true that Mr. Caldwell was not with the inspector during his inspection because he was not at the mine, and he did not view the canopy when it was cited or shortly thereafter when it was taken out of service, Mr. Caldwell nonetheless based his testimony on his knowledge of the shuttle cars and canopies, his observation of similar canopies before and after the citation, and the inspector's drawing of the cited canopy in question (Tr. 56-57). He also testified that he had previously seen the same canopy many times, and as late as "a couple of days" prior to the inspection in question (Tr. 60). It was Mr. Caldwell's understanding that the broken welds were on a piece of bracing material approximately 18 inches from the base of the standard, but that the base of the canopy legs were substantially welded (Tr. 54-55). I taken note of the fact that Mr. Caldwell has been employed by the respondent for 17 years, and his mining experience includes work as a safety inspector, section foreman, and the operation of shuttle cars, roof bolters, and continuous mining machines, and I find him to be a credible witness.

The inspector testified that the broken welds he observed were not at the point where the legs are welded directly to the canopy top and serve to support it, or at the base of the standards (Tr. 16). This testimony lends some credence to Mr. Caldwell's belief that the two broken welds may have been at one of the brace locations, rather than on the legs themselves. The inspector also testified that he found nothing wrong with any of the welds at the roof of the canopy where the legs are attached to support the canopy, or at the base of the supporting standards which were securely welded to the frame of the shuttle car and which served to support or house the canopy legs (Tr. 17, 43). He believed that the canopy would deflect smaller pieces or rock that might cause injuries (Tr. 17, 43).

MSHA's assertion that the cited canopy "had substantial extensive damage" is not supported by the evidence. The fact that the canopy top showed evidence that it was probably scraping the mine roof, standing alone, does not support a finding of "extensive damage", and the inspector acknowledged that it was not unusual to see evidence of roof scrapes on a canopy top (Tr. 48-49). At most, the evidence reflects the presence of two broken weld spots at a location up from the base of the two front canopy legs which were located inside of the four standards which were securely welded to the shuttle car frame. Under these circumstances, and after careful review and consideration of all of the testimony and evidence presented in this case, I cannot conclude that MSHA has proved that the cited canopy was unsafe,

or that the condition of the canopy, as observed by the inspector, rendered it unsafe and requiring its immediate removal from service. In short, I cannot conclude that MSHA's evidence that the canopy was unsafe, a conclusion which in the final analysis is based on the inspector's observation of a forward tilt in a canopy which has inherent "play", and two broken weld spots up the side of two of the canopy legs which are otherwise substantially welded to the base of the canopy, and which are inside support standards which are securely welded to the frame of the shuttle car, would lead a reasonably prudent person familiar with those circumstances to conclude that the canopy was unsafe and should have been immediately removed from service. In the absence of such proof, I conclude and find that a violation of section 75.1725(a), has not been established and that the contested citation should be vacated.

As noted earlier, the parties agreed to settle the three remaining contested citations in this proceeding, and the petitioner filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3702086	5/13/91	77.1102	\$227	\$168
3702038	5/16/91	77.1102	\$227	\$50
3702134	5/16/91	75.220(a) (1)	\$350	\$227


In support of the proposed settlement dispositions of the three citations in question, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. The petitioner also submitted a full discussion and disclosure regarding the facts and circumstances surrounding the issuance of the citations, and a reasonable justification for the reduction of the original proposed civil penalty assessments. After careful review and consideration of the arguments in support of the motion to approve the proposed settlement, I conclude and find that the proposed settlement is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

IT IS ORDERED THAT:

1) The contested section 104(a) "S&S" Citation No. 3702139, May 24, 1991, citing an alleged violation of mandatory safety standard 30 C.F.R. § 75.1725(a), IS VACATED, and the petitioner's proposed civil penalty assessment is DENIED AND DISMISSED.

2) The respondent shall pay civil penalty assessments in the settlement amounts shown above in satisfaction of the violations in question. Payment is to be made to MSHA within thirty (30) days of this decision and order, and upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
THE FEDERAL BUILDING
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JUL 24 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 91-580
Petitioner : A.C. No. 05-00301-03782
: :
v. : Dutch Creek Mine
: :
MID-CONTINENT RESOURCES, :
INCORPORATED, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Tandra Leonard, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., DELANEY & BALCOMB, P.C.,
Glenwood Springs, Colorado,
for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by Petitioner against Respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil penalty sought here is for the violation of a mandatory regulation promulgated pursuant to the Act.

A hearing in this case and related cases was held in Glenwood Springs, Colorado, on February 26, 1992. The parties reached an amicable settlement on the record and subsequently filed a written Joint Motion to Approve Settlement.

Respondent further filed a suggestion of bankruptcy.

The Citation, the original assessment, and the proposed disposition are as follows:

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Amended Proposed Penalty</u>
3411282	\$950.00	\$570.00

In support of their motion, the parties submitted information relating to the statutory criteria for assessing civil penalties as contained in 30 U.S.C. § 820(i).

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. Citation No. 3411282 and the amended proposed penalty therefor are **AFFIRMED**.

2. Respondent filed a case under Chapter 11 of the Bankruptcy Code and is operating its bankruptcy estate as a debtor-in-possession. Accordingly, upon approval of the United States Bankruptcy Court in Case No. 91-11658 PAC, it is **ORDERED** that a civil penalty will be assessed against the Respondent in the amount of \$570.00 and Petitioner is authorized to assert such assessment as a claim in Respondent's Bankruptcy Case.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 30 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 92-40-M
Petitioner	:	A. C. No. 30-01688-05506
v.	:	
	:	Hyatt Mine
Z C A MINES, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor,
U.S. Department of Labor, New York, New York
for Petitioner;
Sanders D. Heller, Esq., Gouverneur, New York,
for Respondent.

Before: Judge Weisberger

This case is before me based on a Proposal for Assessment of Civil Penalty filed by the Secretary (Petitioner). Subsequent to a telephone conference call between the undersigned and counsel for both parties, a hearing in this matter was scheduled for June 30, 1992, in Watertown, New York. At the hearing, William L. Kobel, Jr., a Mine Safety and Health Administration (MSHA) Inspector, testified for Petitioner, and David C. Roberts, Douglas L. Beachard and Ronald P. Mashaw testified for the Operator (Respondent). The parties waived their right to submit written briefs and in lieu thereof presented oral argument subsequent to the hearing.

Findings of Fact and Discussion

On July 30, 1991, William L. Kobel, Jr., in inspecting Respondent's Hyatt mine, observed Ronald P. Mashaw operating a front-end loader. Although the loader was equipped with a functioning seat belt, Mashaw was not wearing it while operating the loader. Mashaw was in the process of operating the loader by picking up a load of coal from an ore pile, reversing, and then going forward to dump the load of ore in a truck. In continuing this operation, the loader would then be backed up and returned again to the ore pile where the process would be repeated. The distances traversed by the loader are depicted on Respondent's Exhibit No. 1. I find the depictions of these distances to be accurate, inasmuch as they are based upon actual

measurements taken by Respondent's witnesses David C. Roberts and Douglas L. Beachard. I find these measurements more credible than the estimates testified to by Kobel.

Kobel issued a citation alleging a violation of 30 C.F.R. § 57.14130. Respondent does not contest the fact of the violation, but seeks to challenge the finding made by Kobel that the violation was significant and substantial.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

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).

In essence, Kobel testified that he concluded that the violation was significant and substantial, inasmuch as there was a reasonable likelihood of an injury resulting in a loss of work. He indicated that, specifically, his conclusion in this regard was based on the fact that the main access road was nearby, and was used by at least two trucks travelling more than 10 miles an hour. He also indicated that trucks were going to the far side of the waste pile, and travelling 4 to 5 miles an hour. According to Kobel, should the loader go to the garage to obtain fuel as part of its normal operation it would have to cross a line of traffic. In essence, he indicated that due to the presence of this traffic there existed the possibility of a collision. He indicated that should the loader hit another object, it is "quite likely" that the operator, not wearing a seat belt, would be "tossed into one of the structures, or his knee would strike underneath the steering wheel." (Tr. 18)

He further indicated that the roadway on which the loader was operating was full of loose zinc ore with the largest material approximately 8 inches x 10 inches x 3 inches. He stated that this spillage adds to the chance that a tire will be blown. He indicated that should this occur when the bucket of the loader is raised as part of the normal operation, the loader could sway, or tip over. Should this occur an injury could occur to the operator as a result by his being tossed around, or ejected should the door of the loader be open.

I find the testimony of Kobel insufficient to establish a reasonable likelihood that, considering all the circumstances herein, the hazard contributed to would have resulted in an event in which there is an injury (See U.S. Steel Mining Company, 6 FMSHRC supra). Any other vehicular traffic in the area was not in the path or line of travel of the loader, which operated in a most circumscribed area travelling an extremely short distance as depicted in Respondent's Exhibit No. 2. The terrain was level, not elevated, and there were no berms in the areas. The surface itself consisted of crushed rock, packed fairly hard. The speed at which the loader was operating was estimated Kobel to be a little faster than a fast walk.

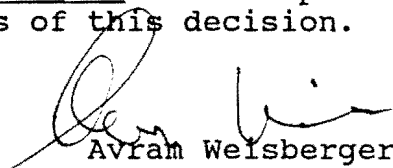
On cross-examination Kobel indicated that a lot of the loose zinc ore spillage was crushed. Further, although Kobel indicated that blowouts do happen, he indicated that the tires were reasonably well maintained. Also, Roberts, who has worked for Respondent 20 years, indicated that in his experience at Respondent's operation, there has not been any tire failure from the use of the roadway in question. Mashaw, who also has worked for Respondent 20 years, indicated that, in driving a front end loader, he has never known "of a tire to blow out". (Tr. 97) Beachard who has worked for Respondent 22 years, indicated that he never heard of a front end loader "blowing out a tire" at Respondent's premises. (Tr. 106). Further, Roberts and Mashaw operated the loader in question, and described it as being stable. In this connection Kobel indicated that the loader did not appear unstable when the bucket was raised, or when it dumped. Also it stopped fairly smoothly.

For all these reasons, I conclude that the third element set forth in Mathies supra., has not been met. Therefore I conclude that it has not been established that the violation herein was significant and substantial.

I find that there was only a small degree of negligence on the part of the Respondent herein, inasmuch as the credible testimony establishes that Respondent has a good safety record, and was diligent in instructing employees to use a seat belt. I find that a penalty of \$20 is appropriate for the violation herein.

ORDER

It is ORDERED that Citation No. 3592398 be amended to reflect the fact that violation cited was not significant and substantial. It is further ORDERED that Respondent pay a civil penalty of \$20 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
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JUL 9 1992

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

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL TESTIMONY OF ROBERT THAXTON

On October 7, 1991, Contestants Kentucky Carbon, et al. filed a motion for an order compelling Robert Thaxton to testify regarding certain matters at his reconvened deposition. Thaxton's deposition was taken in Washington, D.C. between July 24 and July 29, 1991. On October 18, 1991, Contestants Great Western, et al. filed a motion to compel Thaxton's testimony. On October 28, 1991, the Secretary of Labor (Secretary) filed a Memorandum in opposition to Contestants' motions. On October 28, 1991, the Office of Inspector General, U.S. Department of Labor (OIG) filed a motion for leave to file a special appearance to oppose the motion to compel. On October 29, 1991, I issued an order granting the OIG leave to enter a special appearance and I received its memorandum in opposition to the motion to compel. On November 12, 1991, Contestants Great Western et al, filed a reply to the OIG's memorandum. On November 20, 1991, I issued an order staying action on the motion to compel pending Commission action on interlocutory review of my order of October 7, 1991. On March 17, 1992, the OIG filed a motion to withdraw its motion to oppose Contestants' motions to compel on the ground that its employee integrity investigation involving MSHA employees has been closed. The OIG's motion is GRANTED.

On June 29, 1992, the Commission issued its decision on interlocutory review of my discovery orders of September 13, 1991, September 27, 1991, and October 7, 1991. Therefore my stay order is VACATED.

During the 4-day deposition of Robert Thaxton, counsel for the Secretary interposed 54 objections to questions and instructed Thaxton not to answer. The motion to compel in section VI, entitled Specific Instructions to Withhold Testimony, lists 19 (A through S) questions to which Contestants seek to compel answers. The objections to two of them (L and P) have been withdrawn by the Secretary and the OIG respectively. Of the 17 remaining questions, 13 are objected to because disclosure is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure, or the information is protected by the investigative

privilege; for some of the 13 and for the remaining four, the Secretary claims the attorney-client privilege, the deliberative process privilege, or the attorney work product doctrine.

I. Rule 6(e)/Investigative Privilege

Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides in part that "an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) ["such government personnel ... as are deemed necessary by an attorney for the government to assist ... in the performance of such attorney's duty to enforce federal criminal law"] shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules A knowing violation of Rule 6 may be punished as a contempt of court." The Secretary refers to Robert Thaxton as "an agent of the grand jury." Thaxton, in an affidavit attached to the Secretary's opposition, states that he has been an agent of grand juries since approximately March 1989, and that he has heard grand jury testimony, prepared analyses and data for presentation to the grand juries, and has learned the identity of witnesses before the grand juries. It is clear that he is a Government employee deemed necessary by a Government attorney to assist the attorney in enforcing federal criminal law. Therefore he is prohibited from disclosing "matters occurring before the grand jury." Such matters include transcripts of witness testimony, memoranda summarizing witness testimony or outlining future witness testimony, and information which would reveal what is expected to occur before the grand jury in the future. 8 Moore's Federal Practice 6.05[6] (2d ed. 1992) (citations omitted). The scope of the mandated secrecy is broader than the evidence presented to the grand jury and encompasses "the disclosure of information which would reveal 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'" Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 869 (D.C. Cir. 1981) (citing SEC v. Dresser Industries, Inc., 628 F.2d at 1382). However, the mere fact that material has been presented to the grand jury does not automatically exempt the material. "[T]he touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation'" Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987). See Nervi, F.R.Cr.P. 6(e) and the Disclosure of Documents Reviewed by a Grand Jury 57 U. Chi. L. Rev. 221 (1990).

There is a qualified common law privilege against disclosure of information in law-enforcement investigatory files. The privilege is qualified in that once it is established, the court must balance the public interest in nondisclosure against the need of the litigant for access to the privileged information. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336

(D.C. Cir. 1984); In re Dept. of Investigation of City of New York, 856 F.2d 481 (2d Cir. 1988).

As stated above, the motion to compel seeks to compel answers in 19 specific instances where Thaxton was instructed to withhold testimony. This order adopts the Contestants' listing (A through S) of the contested instructions to withhold.

A. The question (Tr. 93-94) asked whether the investigation that resulted in the plea by Peabody Coal Company "is ... an ongoing investigation?" Whether a criminal investigation is "ongoing" is protected by the investigatory privilege. Since the question relates to a company other than Contestants, they have not shown a need for the privileged information. The objection is sustained and the motion to compel is denied.

B and C. The questions (Tr. 98-103) first asked why the witness is maintaining the 6000 filters on which no AWC determinations have been made. Thaxton replied that he could not answer because of the ongoing investigative work. He was then asked in what districts the U.S. Attorneys worked who instructed him not to answer. The Secretary objected on the grounds of investigative privilege and the prohibition of Rule 6(e). Thaxton and the Secretary seem to be asserting that the reason for maintaining the 6000 non-cited filters is related to the criminal investigation. If so, it is privileged and Contestants have not shown a need for the information. In his affidavit Thaxton stated that the 6000 filters have been maintained for criminal investigative purposes. I accept this representation. If Contestants wish to compel further disclosure, their remedy is in the District Court where the grand jury sat. Rule 6(e)(3)(C)(i) and 6(e)(3)(D), F.R.Cr.P. The identification of districts in which the U.S. Attorneys are located is clearly privileged and probably protected by Rule 6(e). The objections are sustained and the motion to compel is denied.

D. The questions had to do with Thaxton's direct knowledge of the use of a dust pump by mine operators to create reverse air flow in filters in the cited dust samples. (Tr. 174-176). The witness replied that he was advised by the U.S. Attorney's office that he could not answer. The implied representation is that Thaxton's knowledge of the use of a dust pump by mine operators, if he has such knowledge, comes from matters occurring before a grand jury. Accepting his representation, I conclude that he is precluded by Rule 6(e) from answering the question. The motion to compel is denied.

F. The question was whether the witness shared information obtained during the course of his AWC investigation for MSHA with the grand jury or the U.S. Attorney's office. (Tr. 224-227). The Secretary objected on the basis of the 6(e) prohibition, and because of the investigatory privilege. Clearly whether Thaxton

"shared" information with the grand jury is subject to the 6(e) prohibition. Thaxton's disclosure to the U.S. Attorney's office is protected by the investigatory privilege and Contestants have shown no need for disclosure of such information. The motion to compel is denied.

G. The questions were how the witness knew whether any of the methods he described were used to create AWCs and whether he has any information "from witnesses" who have observed these methods used to create the appearance on the dust samples "that have been indicted." (Tr. 255-257). It is the Secretary's position that the information called for in the first question "could only have been obtained as an agent of a grand jury." I accept this representation, and therefore conclude that the witness is precluded from answering by Rule 6(e). The second question is not clear but seems to be seeking the same information. The motion to compel is denied.

I. The question was whether either of the studies and reports from West Virginia University or the Pittsburgh Health Technology Center were "prepared for the criminal investigation regarding Peabody Coal Company." (Tr. 340). The Secretary objected on the basis of the investigatory privilege. The question clearly seeks information concerning a criminal investigation. As such, the information is privileged. Contestants have shown no need for the information which would outweigh the Government's interest in non-disclosure. The motion to compel is denied.

J. The question was whether the reports referred to above were "made exhibits for the grand jury." (Tr. 341). The question clearly seeks to learn matters occurring before the grand jury. Disclosure is prohibited by Rule 6(e). The motion to compel is denied.

K. The question was whether a coal mine inspector who provided information concerning equipment which could be found on mine property which could cause air movement was "a coal mine inspector who had appeared in front of a grand jury." (Tr. 501-504). Again, this information clearly comes under the prohibition of Rule 6(e). The motion to compel is denied.

N. The question was what information MSHA was "gathering" which prevented it from notifying mine operators "of the validity (invalidity ?) of their samples." (Tr. 606). The Secretary asserts the investigative privilege. The privilege applies, but I conclude that it is outweighed by the Contestants' need for the information. The Contestants state that "the information gathered regarding the cited samples is the issue in this litigation." The motion to compel is granted. Thaxton will be required to answer the question in his rescheduled deposition.

Q. The question was which U.S. Attorney or Assistant U.S. Attorney requested Thaxton to perform certain work. (Tr. 572). This information is protected by the investigative privilege and Contestants have not shown any overriding need for it. The motion to compel is denied.

R. The questions were whether Thaxton "shared with the grand jury" information developed at the request of the U.S. Attorney's offices relating to AWCs, and whether he notified Peabody Coal prior to March 19, 1990, that the filters being submitted by them were being reviewed for AWC determination. (Tr. 712, 715). The Secretary objected to both questions on the ground that disclosure of the information was prohibited by Rule 6(e). The first question is obviously within the prohibition of 6(e). The motion to compel is denied. The second question is unrelated to the grand jury and not covered by 6(e). The motion to compel is granted, and Thaxton will be required to answer the question in the rescheduled deposition.

S. The question was why an Assistant U.S. Attorney needed to understand the characteristics of AWCs in dust samples. (Tr. 563-564). The Secretary asserted the investigative privilege and the deliberative process privilege. I sustain the objection related to the former and deny her claim of deliberative process privilege. The information sought was part of the criminal investigation. Contestants have not shown a need for the information which would outweigh the Government's interest in non-disclosure. The motion to compel is denied.

II. Attorney-Client Privilege/Work Product Doctrine

The attorney-client privilege protects from discovery confidential communications from client to attorney. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). The attorney work product doctrine protects from disclosure information gathered by or for an attorney in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495 (1947); Rule 26(b)(3) F.R.Civ.P. A party seeking disclosure of factual materials within a protected document or protected information may obtain them upon a showing of substantial need, but is not entitled to disclosure of "mental impressions, conclusions, opinions, or legal theories of an attorney." Rule 26(b)(3).

E. The question was whether the witness intends to do any additional testing with any of the 11,000 filters (viewed by Thaxton for "final determination on AWC phenomenon"). (Tr. 209-211). The Secretary objected on the grounds that the information sought was protected by the attorney-client privilege and the attorney work product doctrine. Since the question has no reference to a communication from client to attorney, it is clearly not covered by the attorney-client privilege. Thaxton's

intent to do further testing is not obviously related to anticipated litigation or to an attorney's work file. The objections are overruled, and Thaxton will be required to answer the question during the rescheduled deposition.

H. The question was what "things" (referring apparently to tests for AWC) have been referred for additional testing. (Tr. 301-303). The Secretary objected because of the work product doctrine, and argues that an answer would necessarily reveal the mental impressions, legal theories, and trial preparation of the Secretary's attorneys. I disagree. The witness may answer the question without in any way referring to or revealing such impressions and theories. The objection is overruled, and Thaxton will be required to answer the question during the rescheduled deposition.

III. Deliberative Process Privilege

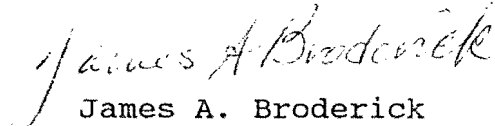
The deliberative process privilege protects deliberative communications between subordinates and supervisors within the government preceding the adoption and promulgation of an agency policy. Jordan v. U.S. Dept. of Justice, 591 F.2d 753 (D.C. Cir. 1978). It does not include purely factual material. Schwartz v. Internal Revenue Service, 511 F.2d 1303 (D.C. Cir. 1975).

M. The question was what was discussed at meetings with attorneys from the Solicitor's office and the U.S. Attorney's office concerning the rationale for not issuing citations in instances where Thaxton found violations. (Tr. 535-538). The Secretary objected on the ground that the information was protected by the deliberative process privilege. The question seeks information of meetings and discussions concerning agency action. I conclude that because of the breadth of the question, it necessarily seeks to learn of deliberations concerning agency policy. Contestants have not shown need for this information which would outweigh the Government's interest in non-disclosure. The motion to compel is denied.

C. The question was in what "cases" did Thaxton give information to Ed Hugler concerning the different classification of AWCs. (Tr. 565). The Secretary objected on the basis of deliberative process privilege. However, the question appears to ask for factual information and, to the extent it does, the information is not privileged. The objection is overruled and Thaxton will be required to answer the question during the rescheduled deposition.

ORDER

Accordingly, the motion to compel is granted in part and denied in part. The parties are directed to reschedule Robert Thaxton's deposition and he is directed to answer the questions in accordance with the above opinion.


James A. Broderick
Administrative Law Judge

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JUL 17 1992

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

ORDER GRANTING IN PART AND DENYING IN PART
CONTESTANTS' MOTION TO COMPEL PRODUCTION OF
EXCISED PORTIONS OF CERTAIN DOCUMENTS AND
DIRECTING THE SECRETARY TO SUBMIT CERTAIN
DOCUMENTS FOR AN IN CAMERA INSPECTION

On March 2, 1992, Contestants Kentucky Carbon, et al. filed a motion for an order to compel the Secretary to produce the full text of certain documents of Jerry L. Spicer, Ronald Schell, Paul S. Parobeck, Lawrence M. Beeman, Edward Hugler, and William J. Tattersall which Contestants sought in a request for production of documents. On March 16, 1992, the Secretary filed a memorandum in opposition to the motion. On March 26, 1992, I issued an order staying action on the motion pending Commission action on interlocutory review of my orders of September 13, September 27, and October 7, 1991.

On June 29, 1992, the Commission issued its decision on review of those orders. Therefore, the stay order of March 26, 1992, is VACATED.

The Discovery Plan, initially adopted on June 28, 1991, provided that the Secretary would create a document repository containing copies of all discoverable non-privileged documents in the Secretary's control relating to altered dust filter media, and would compile a list of documents deemed by the Secretary "not to be discoverable or . . . otherwise privileged" (II.A. 1, 3). The documents involved in this motion were not included in the repository, but were produced in response to Contestants' request for production of December 4, 1991. The Secretary responded in mid-January 1992, and the instant motion was filed March 2, 1992. In view of these circumstances, I reject the Secretary's argument that the motion should be denied as untimely filed and not in accordance with the Discovery Plan.

I.

Copies of the documents involved in the motion are attached as Exhibits A through F. Exhibit A contains the notes of Jerry Spicer; B the notes of Ronald Schell; C the notes of Paul Parobeck; D the notes and calendar entries of Lawrence Beeman; E the calendar entries of Edward Hugler; F documents (actually a single document) from the files of Assistant Secretary Tattersall.

Where the documents contain blank areas or blacked-out or whited-out words or phrases, with no notation of a claim of privilege, counsel for the Secretary informed me and counsel for Contestants that these contain entries unrelated to the present litigation. I accept this representation and on this motion will concern myself only with the excised portions of documents for which a specific claim of privilege has been asserted.

With respect to the assertions of privilege, in instances where the Solicitor provides a factual description of the excised portion of the document, I will rule on the privilege claim, even though it is not supported by an affidavit or other formal claim of privilege. Where the assertion is merely conclusory, I will order the Secretary to submit the document for in camera inspection. The documents I am here concerned with are calendar entries and scattered short notes of six MSHA officials and employees. For such documents, it is unnecessary and inappropriate to require a "Vaughan index." See Commission decision, In Re Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC _____ (June 29, 1992), slip op. at 20.

II. Spicer Notes

Spicer's notes contain six pages for only one of which (the fourth page entitled 3/4/91 Coal Staff Mtg) the Solicitor claims privilege. The Secretary states that the excised portion of the document contains a notation about the timing and progress of criminal investigation. She asserts the investigative privilege and the work product doctrine. The notation is sufficiently factual for me to uphold the claim of investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel production is denied.

III. Schell Notes

Two pages of calendar notes made in February and March 1991 are included. The only excision for which privilege is asserted is on March 4. The work product doctrine is asserted and the excised portion of the document is described as follows: "Released information would reveal identity of scientific expert being consulted by attorneys in this litigation." I am not able to rule on the claim of privilege without more factual

information. The Secretary will be required to produce the document for in camera inspection.

IV. Parobeck Notes

Parobeck's notes consist of one page dated October 1, 1991, relating to various scientific tests that could be done. The Secretary claims the deliberative process privilege and the work product doctrine. They are described as "notes reflecting the thought processes and deliberations of an Agency representative in preparation for a report. This report was to be prepared in anticipation of litigation." The description is largely conclusory. I will order the document produced for in camera inspection.

V. Beeman Notes

The exhibit contains 19 pages of notes, 17 of which contain privilege claims (only pages 4 and 6 do not). The calendar contains 7 pages, September 1990 through April 1991. No privilege claims are made for calendar entries. (The entries are for the most part blacked-out, which indicates, as I noted above, that they are unrelated to the AWC litigation).

Page 1, entitled 9/17/90 staff meeting (the pages are not numbered; some are not dated; I am considering them in the order in which they appear in the exhibit), claims work product and deliberative process privileges for an entry described as "references discussion on litigation strategy and issues to be considered in developing enforcement strategy." A further notation claims investigative privilege for an entry described as "Discusses I.G. Investigation and use of MSHA personnel on other ongoing investigations." These notations are sufficiently factual for me to determine that the claimed privileges apply. No overriding need for the document has been shown by Contestants. The motion to compel is denied.

Page 2 is headed 9/17 Abnormal White Centers. The Secretary asserts the attorney-client, work product, and investigative privileges for an entry described as "U.S. Attorney discussion on litigation strategy and to release this information would reveal the thought processes of the U.S. Attorney and how the criminal case was developed." She asserts the attorney-client and work product privileges for another entry described as "Discussion of litigation concerns between Sol and MSHA." Each of these assertions contains sufficient factual material for me to uphold the privilege claims, the work product and investigative privileges in the first case; the attorney-client privilege in the second. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 3 is headed AWC continued. The Secretary asserts the attorney-client, work product, and deliberative process privileges. The deleted entry is described as "Discussions on contacts with U.S. Attorney regarding AWC litigation strategy, including thoughts and impressions of attorneys concerning the developments of the criminal case questions with MSHA officials present." I uphold the deliberative process and work product privileges. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 5 is entitled Peluso AWC. The Secretary claims the work product privilege for a deletion described as "Discussion of scientific opinion and possible report of Secretary's potential expert prepared in anticipation of litigation." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the page for my in camera inspection.

Page 7 is entitled 10/26 (cont). The Secretary asserts that lines 1 to 29 contain "[d]iscussion of strategy in ongoing criminal investigations with the U.S. Attorney and other MSHA officials. Discussions of legal strategy regarding AWC criminal enforcement and civil enforcement." She claims the investigative, deliberative process, and attorney-client privileges. I uphold her assertion of the investigative privilege. The description is not sufficient to support the other claimed privileges. Lines 30 to 39 are described as deliberations on other potential target companies for criminal investigation, and as to the role of special investigations for the U.S. Attorney's Office. The Secretary claims the investigative and work product privileges. I uphold her assertion of the investigative privilege, but not the work product claim. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 8 is headed 10/31 Leighton Farley. The Secretary claims the work product, attorney-client, and investigative privileges for an entry described as "Discussion of strategy for negotiating criminal plea agreement between MSHA, U.S. Attorneys, and Solicitor's Office attorneys." I uphold her claim of the investigative privilege. The description is not sufficient to support the other claimed privileges. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 9 is headed Mike Carey. The Secretary asserts the attorney-client, work product, and deliberative process privileges for an entry described as "Discussion of opinions and theories on U.S. Attorney negotiating plea agreement with Solicitor's Office attorneys and U.S. Attorneys participating and giving advice and opinion on such matter." I uphold her claim of

the attorney-client and work product privileges. The motion to compel is denied.

Page 10 is entitled AWC Jerry/Ed/Ron. The Secretary asserts the work product, attorney-client, and deliberative process privileges for a deletion described as "Discussion of Legal opinions and theories regarding U.S. Attorney negotiating criminal plea agreements with Solicitor's Office attorneys and expressing." Although this description appears to be incomplete, I find it sufficient to uphold the claim of work product privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 11 begins with the Secretary's assertion of the deliberative process, work product, and investigative privileges for a deletion described as "Discussions of possible legal strategy against other companies and how to proceed criminally and/or civilly." I uphold her claim of the work product privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied. In the middle of page 11, after the notation Ed Clair AWC, the Secretary asserts the attorney-client and work product privileges for a deletion described as "Discussions between Solicitor's Office and MSHA on U.S. Attorney's negotiations on plea agreements and development of ongoing criminal investigations." I uphold her claim of both these privileges. The motion to compel is denied. At the bottom of page 11, after the notation AWC-Clair, Hugler, Mascolino, Schell, White, the Secretary asserts the attorney-client privilege for a deletion described as "Discussions between Solicitor's Office and MSHA on U.S. Attorney's negotiations on plea agreements." I uphold her claim. The motion to compel is denied.

Page 12 is headed 11/8 (cont). The Secretary asserts the work product and attorney-client privileges for an entry described as "Discussions between Solicitor's office and MSHA on U.S. Attorney's negotiations on plea agreements and on further criminal case/investigation development." She also asserts the work product and attorney-client privileges for another entry described as "Discussions between Solicitor's Office and MSHA on U.S. Attorney's negotiations on plea agreements and on further criminal case development and procedures." I uphold these privileges for both entries. The motion to compel is denied.

Page 13 contains a notation dated 11/28 for which the Secretary claims the deliberative process privilege because it would reveal "Suggested and rejected computations regarding AWC civil penalties." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the page for my in camera inspection. Page 13 also contains a notation dated 11/29, for which the Secretary claims the work product privilege because it would reveal a "Request and

description of information needed in negotiating criminal plea agreement." I uphold her claim of the work product privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 14 is headed 12/7 Nelson Cohen - AWC Pittsburgh. The Secretary asserts the attorney-client, investigative, and work product privileges for an entry described as "Discussion of information needed by attorneys to be provided by MSHA for ongoing investigations and further assisting in the development and procedures of criminal investigations and litigation." I uphold her claim of the investigative and work product privileges. Contestants have not shown an overriding need for the document. The motion to compel is denied.

Page 15 is dated 2/25/91. The Secretary asserts the attorney-client privilege for an entry described as "Discussions between Solicitor's Office attorneys and MSHA on litigation strategy." I uphold her claim. The motion to compel is denied.

Page 16 is headed 3/4 Staff Meeting. The Secretary asserts the attorney-client, work product, and investigative privileges for a deletion described as "Discussion between MSHA employee and Asst. U.S. Attorney concerning the development and procedures of handling criminal actions on AWC cases." She asserts the same privileges for another deletion described as "Discussion with U.S. Attorney on strategy in proceeding against target company." For both entries, I uphold the Secretary's claim of the attorney-client and investigative privileges. The motion to compel is denied.

Page 17 contains a notation dated 3/5, for which the Secretary claims attorney-client and work product privileges because it would reveal "Discussion between MSHA and Solicitor's Office attorneys on strategy regarding AWC litigation involving certain companies." I uphold her claim of work product privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

Page 18 contains a notation dated 3/13, for which the Secretary claims attorney-client and investigative privileges because it would reveal "results obtained in ongoing criminal investigations and opinions on further developments with opinions and advice from U.S. Attorneys to MSHA." I uphold her claim of both these privileges. The motion to compel is denied.

Page 19 is completely deleted. The Secretary asserts the investigative privilege for an entry described as "Information which indicates discussions about developments in criminal investigations and might lead to information protected by 6(e) grand jury matters." I uphold the Secretary's assertion of the investigative privilege. Contestants have not shown an

overriding need for the document. The motion to compel is denied.

VI. Hugler Notes

The exhibit consists of pages from 1989, 1990, and 1991 calendars and identifies the excised portions by numbers which correspond to lists detailing the Secretary's claims of privilege.

1989 Calendar Entries

1. The Secretary asserts the investigative, attorney-client, and work product privileges for an entry reflecting conversation with the U.S. Attorney regarding the approach and progress of the on-going criminal investigation. I uphold the Secretary's claim of the investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

2. The Secretary asserts the work product privilege for an entry reflecting the concerns of the U.S. Attorney and information relating to the on-going criminal investigation. I uphold the Secretary's claim. Contestants have not shown an overriding need for the document. The motion to compel is denied.

3. The Secretary asserts the investigative, work product, attorney-client, and deliberative process privileges for notes of a meeting with the U.S. Attorney, MSHA, and the Solicitor's office revealing information pertaining to the on-going criminal investigation and potential criminal charges and civil enforcement action. I uphold the Secretary's claim of the investigative and work product privileges. Since the Contestants have not shown an overriding need for the document, the motion to compel is denied.

4. The Secretary asserts the investigative and deliberative process privileges for an entry reflecting development of the investigation and revealing the identity of a potential target. I uphold the Secretary's claim of the investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

5. The Secretary asserts the attorney-client, investigative, work product, and deliberative process privileges for notes of a meeting with the U.S. Attorney and Department of Justice reflecting development and coordination of investigations and MSHA's participation regarding criminal investigation and civil enforcement. I uphold the Secretary's claim of the investigative and work product privileges. Contestants have not

shown an overriding need for the document. The motion to compel is denied.

6. The Secretary asserts the investigative and deliberative process privileges for an entry reflecting discussion with MSHA special investigators regarding the on-going criminal investigation and the effect of expanding the criminal investigation upon MSHA's resources. I uphold the Secretary's claim of investigative privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

7. The Secretary asserts the deliberative process privilege for an entry described as "Notes reflect Hugler's thought-process for providing an appropriate MSHA response to hypothetical future events." This description is not sufficient to enable me to rule on the asserted privilege. I will order the document produced for in camera inspection.

8. The Secretary asserts the investigative, attorney-client, and work product privileges for notes of a report on a meeting between MSHA and U.S. Attorneys regarding development of the on-going criminal investigation, use of information, and evaluation of the case. I uphold the Secretary's claim of the investigative privilege, but not the attorney-client or work product privileges. Contestants have not shown an overriding need for the document. The motion to compel is denied.

1990 Calendar Entries

1. The Secretary asserts the investigative, attorney-client, and work product privileges for notes of a meeting with the Solicitor's office and MSHA regarding the criminal investigation and prerequisites for civil enforcement actions. I uphold the Secretary's claim of attorney-client privilege. The motion to compel is denied.

2. The Secretary asserts the investigative, attorney-client, and deliberative process privileges for notes of a meeting with the Solicitor's office and MSHA to discuss a decision regarding the on-going criminal investigation. I uphold the Secretary's claim of the investigative and deliberative process privileges, but not the attorney-client privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

3. The Secretary asserts the attorney-client, deliberative process, and investigative privileges for notes of a conference call between Hugler, MSHA personnel, the Solicitor's office, and U.S. Attorneys regarding the progress of on-going criminal investigations and possible action by MSHA. I uphold the Secretary's claim of the deliberative process and investigative

privileges. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

4. The Secretary asserts the investigative privilege for an entry reflecting a development in an on-going criminal investigation. I uphold her claim. Contestants have not shown an overriding need for the document. The motion to compel is denied.

5. The Secretary asserts the attorney-client, work product, and deliberative process privileges for an entry reflecting confidential discussions at a civil enforcement strategy meeting between Hugler and the Solicitor's Office. I uphold the Secretary's claim of all three privileges. The motion to compel is denied.

6. The Secretary asserts the attorney-client, work product, and deliberative process privileges for an entry reflecting confidential discussions at a meeting with Doug White involving possible civil actions and litigation strategy. I uphold the Secretary's claim of all three privileges. The motion to compel is denied.

7. The Secretary asserts the deliberative process and attorney-client privileges for an entry reflecting Hugler's concerns about a possible Peabody plea agreement and a related privileged communication to the Solicitor's office. I uphold the Secretary's claim of the attorney-client privilege. The motion to compel is denied.

8. The Secretary asserts the deliberative process, investigative, and attorney-client privileges for an entry reflecting consideration of MSHA's response to developments in an on-going criminal investigation and a privileged communication between the Assistant U.S. Attorney and MSHA. I uphold the Secretary's claim of the attorney-client and investigative privileges. The motion to compel is denied.

9. The Secretary asserts the attorney-client, investigative, and work product privileges for notes of a confidential discussion between MSHA and the Solicitor's office regarding plea bargain negotiations between the U.S. Attorney and Peabody. I uphold the Secretary's claim of the work product privilege. Contestants have not shown an overriding need for the document. The motion to compel is denied.

10. The Secretary asserts the deliberative process privilege for an entry reflecting "Hugler's thinking regarding issues and concerns that must be discussed and resolved prior to initiation of civil enforcement action by MSHA." This description is not sufficient to determine the claim of

privilege. I will order the document produced for in camera inspection.

11. The Secretary asserts the attorney-client, work product, and deliberative process privileges for notes of a confidential discussion between MSHA and the Solicitor's office regarding MSHA's civil enforcement options. I uphold the Secretary's claim of the attorney-client privilege. The motion to compel is denied.

12. The Secretary asserts the deliberative process privilege for notes reflecting Hugler's thoughts in preparation for a meeting with the U.S. Attorney regarding initiation of civil enforcement proceedings during on-going criminal investigations. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

13. The Secretary asserts the investigative, work product, and attorney-client privileges for notes of a meeting with the U.S. Attorney, Solicitor's office, and MSHA regarding the Peabody plea agreement and future conduct of criminal investigations. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

14. The Secretary asserts the deliberative process privilege for notes reflecting "Hugler's concerns and opinions during meeting with U.S. Attorney, Solicitor's office, and MSHA regarding Peabody plea agreement and future conduct of criminal investigation." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

15. The Secretary asserts the investigative, deliberative process, and work product privileges for notes of a telephone conversation with the U.S. Attorney concerning the future course of criminal investigations and potential evidence. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

16. The Secretary asserts the attorney-client, investigative, deliberative process, and work product privileges for notes of a confidential discussion with the U.S. Attorney concerning the Peabody case, information pertaining to criminal investigations, investigative techniques, and the effect of criminal investigations on civil enforcement proceedings. I uphold the Secretary's claim of the investigative and attorney-client privileges. The motion to compel is denied.

16A. The Secretary asserts the investigative privilege for a note indicating the potential target of criminal investigation. I uphold the Secretary's claim. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

17. The Secretary asserts the investigative privilege for an entry reflecting considerations given to the effect of the Peabody plea agreement language on pending DOL investigations. I uphold the Secretary's claim. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

1991 Calendar Entries

1. The Secretary asserts the deliberative process privilege for notes of "Hugler's preparation for meeting later that day to discuss the Peabody plea. These notes reflect Hugler's beliefs and advice relating to MSHA's public statement on the plea." I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

2. The Secretary asserts the attorney-client, work product, and deliberative process privileges for notes of a confidential meeting regarding preparation of the press release concerning the Peabody plea. The description is not sufficient to enable me to rule on the asserted privileges. The Secretary is directed to produce the document for my in camera inspection.

3. The Secretary asserts the deliberative process privilege for notes reflecting Hugler's thoughts and outlining his suggested organization of the proposed press release. I deny the Secretary's claim of privilege. The motion to compel is granted.

4. The Secretary asserts the deliberative process privilege for a note identifying an entity against which MSHA was considering initiating civil action prior to April 4, 1991. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

5. The Secretary asserts the deliberative process and attorney-client privileges for a note of a discussion regarding an entity and the timing of proposed civil action against that entity. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

6. The Secretary asserts the deliberative process, attorney-client, and work product privileges for notes of a meeting with the Solicitor's office to plan a briefing for the

Acting Secretary regarding AWCs and proposed enforcement actions. I am unable to rule on the asserted privilege with this description. The Secretary is directed to produce the document for my in camera inspection.

7. The Secretary asserts the deliberative process privilege for notes of a briefing for the Acting Secretary regarding AWCs and proposed enforcement actions. I uphold the Secretary's claim. Contestants have not shown an overriding need for the document. The motion to compel is denied.

8. The Secretary asserts the deliberative process and work product privileges for notes of discussions regarding proposed enforcement actions and assignments of responsibilities. I am unable to rule on the asserted privileges with this description. The Secretary is directed to produce the document for my in camera inspection.

9. The Secretary asserts the deliberative process, attorney-client, investigative, and work product privileges for notes of a "confidential discussion of progress of investigations and DOL position with DOJ regarding which types of cases should be pursued criminally. In preparation for discussions with U.S. Attorneys." I uphold the Secretary's claim of the investigative and work product privileges. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

9A. The Secretary asserts the investigative, work product, and attorney-client privileges for a note regarding a possible target of criminal investigation and an exchange of comments between MSHA and U.S. Attorneys. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

10. The Secretary asserts the investigative, deliberative process, and work product privileges for notes of a confidential briefing on an on-going criminal investigation. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

11. The Secretary asserts the investigative, work product, and attorney-client privileges for notes of a confidential report on on-going criminal investigations. I uphold the Secretary's claim of the investigative privilege. Since Contestants have not shown an overriding need for the document, the motion to compel is denied.

VII. Tattersall Document

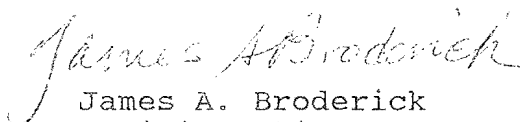
The exhibit consists of a single page and identifies two excised portions by numbers which correspond to a list detailing the Secretary's claims of privilege. The document is described as an unrelated, unsigned summary of the AWC investigations, marked "Confidential," prepared in early 1990.

1. The Secretary asserts the investigative and work product privileges for an entry revealing the techniques, timing, and pace of a criminal investigation and the strategy and opinions of government attorneys and investigators. The description is conclusory. I will order the document produced for in camera inspection.

2. The Secretary asserts the investigative privilege for an entry revealing the location and potential targets of possible criminal investigations. The description is conclusory. I will order the document produced for in camera inspection.

ORDER

In accordance with the above discussion, the Secretary is ORDERED to produce on or before August 3, 1992, the document denominated No. 3 in the Hugler Calendar-1991. She is further ORDERED to submit to me on or before August 3, 1992, for my in camera inspection the documents described in the above discussion. In all other cases, her claim of privilege is upheld, and the motion to compel is DENIED.



James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 1992

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	Master Docket No. 91-1
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-102
Petitioner	:	A. C. No. 05-03455-03597 D
	:	
v.	:	Southfield Mine
ENERGY FUELS COAL,	:	
INCORPORATED,	:	
Respondent	:	

DENIAL OF MOTION TO LIFT STAY

This case is a civil penalty proceeding filed by the Secretary under section 105(d) of the Act. The citation involved in this case dated June 7, 1991, charges the operator with a violation of 30 C.F.R. § 70.209(b) based upon the allegation that the weight of the subject respirable dust cassette had been altered and a portion of the dust removed.

On June 19, 1992, this case was stayed until a decision is issued in **IN RE: CONTEST OF RESPIRABLE DUST SAMPLES ALTERATION CITATIONS**, Master Docket No. 91-1 which is pending before Administrative Law Judge James A. Broderick. As stated in the June 19 order, the Secretary issued 4700 citations on April 4, 1991, which resulted in over 3000 notices of contest and over 700 penalty petitions all of which have been made a part of Master Docket No. 91-1. As noted above, the citation in this case was issued after April 4. All cases involving citations that were issued after April 4 have been stayed so that the limited resources of the Commission in resolving the several thousand dust cases arising from the April 4 citations are not unduly taxed.


On June 29, 1992, the operator filed a motion for relief of stay. The operator currently has two cases in the master docket, WEST 91-475 and 91-476. The operator argues that the stay will impose a great hardship and it will be prejudiced if this case remains on stay and the others move forward. According to the operator, the staying of this case will cause the doubling of the costs to litigate the cases, and there is a likelihood that those individuals involved with this case may no longer be employed by the operator by the time a hearing is held.

On July 10, 1992, the Solicitor filed a response to the operator's motion. The Solicitor states that the motion should not be acted upon until Judge Broderick determines the order of cases that will be brought to trial.

As pointed out by both parties, Judge Broderick conducted a prehearing conference in Master Docket 91-1 on July 17, 1992, to determine the order of cases. At the prehearing conference Judge Broderick stated that he will take under advisement how the cases will proceed and requested that the parties submit briefs on this issue.

I believe the most appropriate course here is to wait until Judge Broderick decides how to proceed in the Master Docket. If this operator's cases are not to be heard first, then it loses nothing by continuance of the stay. Were the operator's motion granted at this stage every citation issued after April 4, 1991, could be joined in the already unwieldy Master Docket. Accordingly, I conclude that this case should remain on stay.

In light of the foregoing, the operator's motion for relief from stay is **DENIED**.



Paul Merlin
Chief Administrative Law Judge

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