JULY 1993

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 1993

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

Jerry Ike Harless Towing, Inc. v. Secretary of Labor, MSHA, Docket No. CENT 92-276-RM. (Judge Feldman, June 2, 1993)

Secretary of Labor, MSHA v. Mullins and Sons Coal Company, Inc., Docket No. KENT 92-669. (Judge Feldman, June 3, 1993)

Energy West Mining Company v. Secretary of Labor, MSHA, Docket Nos. WEST 92-216-R, WEST 92-421. (Judge Lasher, June 21, 1993)

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

Secretary of Labor, MSHA v. Martin Sales and Processing, Docket Nos. WEVA 92-1008, etc. (Judge Koutras, June 7, 1993)

Secretary of Labor, MSHA v. Quarto Mining Company, Docket No. LAKE 92-309. (Judge Fauver, June 7, 1993)

Secretary of Labor, MSHA v. The Harriman Coal Corporation, Docket No. PENN 92-648. (Judge Maurer, June 16, 1993)

Clifford Meek v. Essroc Corporation, Docket No. LAKE 90-132-DM. (Judge Fauver, June 22, 1993)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1993

ASARCO MINING COMPANY	:	
	:	
v.	:	Docket No. WEST 92-624-RM
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)(the "Mine Act" or "Act"), involves a citation issued by the Secretary of Labor to ASARCO, Inc. (hereafter "Asarco"), alleging a violation of 30 C.F.R. § 57.3360.[1] Following an expedited evidentiary hearing, Administrative Law Judge John J. Morris upheld the citation and dismissed the proceeding. 14 FMSHRC 1468 (August 1992)(ALJ).

Asarco timely filed a petition requesting expedited review of the judge's decision. The Commission granted Asarco's petition for review,[2] which raises the following issues: (1) whether the citation met the particularity requirement of the Mine Act; (2) whether the judge improperly shifted the burden of proof to Asarco; and (3) whether the evidence

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[1] 30 C.F.R. § 57.3360, "Ground support use," provides:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

[2] In its order granting review, the Commission denied Asarco's request to expedite.

established a violation of the cited regulation.[3] For the reasons that follow, we uphold the judge's conclusion that Asarco violated section 57.3360.

I.
Factual and Procedural Background

Asarco operates an underground silver and copper mine in Troy, Montana. The mine, which is 1½ miles long and 1/3 mile wide, utilizes the room-and-pillar method.[4] Asarco developed drifts, or underground haulage areas, to transport men and materials to and from the ore bodies being mined.

The UQ 1 drift, so named for the geological formation, upper quartzite, served as a haulage area and, together with the UQ 2 drift, functioned as part of the air intake and exhaust system for the mine. The UQ 1 drift was 18 to 20 feet wide, 22 feet high, and approximately 900 feet long.

On July 11, 1992, a roof fall occurred in the UE 158 production area, resulting in the death of an equipment operator. On July 13, Seibert Smith, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), took part in an inspection of the area where the fatality occurred. Smith and the other inspectors traveled the length of the UQ 1 drift to reach the accident area. 14 FMSHRC at 1469.

Thereafter, Smith left the accident investigation and returned to the UQ 1 drift, where he had observed loose ground. Smith directed that several tons of rock be scaled down from the ribs at the intersection of the drift and the entry to the UE 158 area. Smith noticed roof bolts protruding two to three feet from the roof. He also observed small loose rock in the ribs, a condition he had not seen in his previous inspections of other sections of the mine. 14 FMSHRC at 1470.

Upon completion of his inspection, Smith conferred with other MSHA personnel about conditions in the drift and contacted MSHA's Technical Support

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[3] In its petition for review, Asarco also asserts that the judge failed to address whether section 57.3360, as applied, was "vague and unenforceable." Pet. 3-5. Asarco did not refer to this issue in its brief or at oral argument. Consequently, we do not address it.

[4] "Room-and-pillar" mining is described as follows:

> A system of mining in which the distinguishing feature is the winning of 50 percent or more of the coal or ore in the first working. The coal or ore is mined in rooms separated by narrow ribs or pillars. The coal or ore in the pillars is won by subsequent working, ... in which the roof is caved in successive blocks....

Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral and Related Terms 941 (1968).

Center in Denver for engineering and geological assistance. On July 29, 1992, Smith returned to the mine with two representatives of the Denver Support Center, mining engineer Sid Hansen and geologist Jerry Davidson. Accompanied by a Montana state mine inspector and two Asarco employees, they walked the length of the drift and, with a high intensity light, inspected its left side from the floor to the roof. They found that the rock was fractured, making it only marginally stable. Clay seams in the bedding planes of the rock further reduced its stability. Hansen pulled off several rocks from the weakened bedding planes and, with his fingers, dug out white clay from seams. Conditions were similar the length of the drift. 14 FMSHRC at 1470, 1471-73, 1479.

The following day, the MSHA representatives held a close-out conference with Asarco and discussed their concern about rib and roof conditions in UQ 1 and the need for ground support. Asarco's unit manager, Doug Miller, disagreed with MSHA's assessment that ground support was needed. 14 FMSHRC at 1472.

Following the conference, Hansen and Davidson submitted their ground stability evaluation of the UQ 1 drift to the MSHA district manager. Their memorandum noted that the drift was driven through a shear zone, resulting in "an intensely jointed rock mass." Sec. Ex. 7. In addition, the rock mass had undergone geochemical alteration, causing white clay to be deposited between rock pieces and further weakening. Id. Secondary ground support for the roof was inadequate and none had been provided for the ribs. Hansen and Davidson "strongly recommended that additional rock reinforcement be installed." Id. (emphasis in original); 14 FMSHRC at 1472.

On August 6, 1992, Inspector Smith issued a citation to Asarco alleging a violation of section 57.3360 based on ground conditions in the UQ 1 drift. Asarco filed a notice of contest and requested an expedited hearing, which was held on August 13 and 14. The parties waived post-hearing briefs and requested an expedited decision. The judge issued his decision on August 25. He found that the ground in the UQ 1 drift was unstable, concluded that there was a violation, and dismissed the proceeding. 14 FMSHRC at 1479-81.

II.
Disposition of Issues

A. Particularity of the Citation

Asarco challenges the citation on the grounds that it did not meet the particularity requirements of the Mine Act. Pet. 3. Asarco further asserts that the judge failed to address this issue. In response, the Secretary argues that the citation was specific as to the nature of the violation and that Asarco was not prejudiced in its ability either to defend the citation or to abate the violation. Br. 18, 19. The judge, by considering the merits of

the alleged violation, implicitly rejected Asarco's argument.[5]

Section 104(a) of the Mine Act requires that each "citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a). The Commission has recognized generally that this requirement for specificity allows the operator to ascertain what conditions require abatement and to prepare adequately for a hearing on the matter. See Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993), and cases cited.

The citation states that "[g]round support was not provided and installed on the ribs of the UQ 1 haulage drift to prevent ground fall"; that "[a] ground support system shall be installed and maintained throughout the UQ 1 haulage drift"; and that "ground support shall be installed approximately (5) feet from the floor of the drift and up into the back area." Thus, the citation was specific as to the nature of the violation and the need for and extent of corrective action. Further, the MSHA inspection team met with Asarco officials following the July 29, 1992, inspection and discussed conditions in the UQ 1 drift and the need for ground support. Accordingly, we conclude that the citation was sufficiently specific to provide Asarco with notice of the conditions that were alleged to be in violation and of the fact that corrective action was necessary to bring Asarco into compliance with the regulation.

Finally, Asarco counsel's extensive examination and cross examination of witnesses concerning the condition of the ribs and roof in the UQ 1 drift demonstrate that Asarco had been able to adequately prepare for trial and knew the condition it was required to abate. Thus, Asarco's actions at the hearing do not substantiate ambiguity, or lack of specificity, in the citation. Accordingly, we reject Asarco's challenge to the citation based on particularity grounds.

B. Burden of Proof

Asarco argues that the judge improperly shifted the burden of proof in this contest proceeding. The judge stated at the beginning of the hearing that "the burden of proof rests with the Contestant, Asarco, with respect to the issues in contest." Tr. 5.[6] Asarco asserts that, as a matter of law, the judge shifted the burden and that this burden shifting had an effect that was adverse to Asarco. The Secretary responds by acknowledging that he bears the burden of establishing a violation and that it is obvious from the conduct of the hearing and judge's decision that the burden of proof was with the Secretary.

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[5] At the hearing, Asarco's reference to the particularity issue consisted of one sentence in its opening argument asserting that the requirements were not met. Tr. 8. Thus, the judge's treatment of the issue is consistent with its development in the record.

[6] Counsel for Asarco failed to object to the judge's statement.

The record shows that, in his opening statement, counsel for the Secretary described the theory of his case and the proof he would offer in support of the citation. Tr. 9-10. The judge required the Secretary to proceed first with his case. Tr. 5, 11. Counsel for the Secretary then examined, as his primary witness, the inspector who issued the citation. Asarco responded by presenting expert witnesses to rebut the Secretary's evidence. Asarco's counsel, in presenting his closing argument, cited a Commission case to support his statement that "it's MSHA's burden to demonstrate ... that the operator's actions are inconsistent with ... a standard." Tr. 364-65. The judge's decision adheres to the same analytical approach in requiring the Secretary to carry the burden of proving the validity of the citation.

The judge misstated the law concerning which party bore the burden of proof. The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." Jim Walter Resources, Inc., 9 FMSHRC 903, 907 (May 1987). Accord: Wyoming Fuel Co., 14 FMSHRC 1282, 1294 (August 1992). We conclude, however, that the judge's conduct of the hearing and the analysis in his decision are consistent with proper allocation of the burden of proof in this proceeding.

C. Evidence

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

Testimony by the MSHA inspectors that ground conditions were unsafe constitutes substantial evidence where the judge determines, as he did here, that their testimony is reliable. Inspector Smith testified that, while in the mine investigating an accident, he became concerned about conditions in the drift because he observed ground conditions different from those in other areas he had seen in more than 100 inspections of the mine. At that time, he directed the scaling down of several tons of loose material. 14 FMSHRC at 1469-70. With the assistance of two MSHA specialists, Smith later re-inspected the drift and concluded that it was dangerous to miners because of the fractured condition of the ground. Tr. 34-36, 42-43. MSHA mining engineer Hansen, who joined in the investigation with Smith, testified that he saw extensive clay deposits that had filled joints vertically and horizontally and had weakened the ground. Tr. 117, 123-25, 140-41. MSHA geologist Jerry

Davidson testified that he also found that the clay deposits in the drift further weakened rock that was already fractured due to the fault conditions in the drift. Tr. 333-35. Given this testimony, which he found credible, the judge reasonably concluded that there was a "lack of stability of the ribs." 14 FMSHRC at 1481.

Asarco challenges the judge's credibility determinations, arguing, inter alia, that the MSHA inspectors failed to adequately investigate conditions in the drift and that Asarco's expert witness was better qualified than the MSHA inspectors. As the judge recognized, "The principal credibility issue ... is whether the rock in UQ 1 is stable." 14 FMSHRC at 1480. In resolving this issue, the judge "generally credit[ed] MSHA's evidence." Id.

The judge acknowledged the conflicting opinions of Hansen and Dr. William Hustrulid, who testified as an expert for Asarco. The Commission has recognized:

> Expert witnesses testify to offer their scientific opinions on technical matters to the trier of fact. If the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert's opinion.

Asarco, Inc., 14 FMSHRC 941, 949 (June 1992). The judge noted that Hansen's experience in performing rock surveys in other mines qualified him to speak on the stability of ribs in the UQ 1 drift. The judge recounted that Hansen was able to scrape out clay from the seams. Dr. Hustrulid confirmed the presence of clay in the drift. 14 FMSHRC 1480. Further, the judge discounted Hustrulid's reliance on the absence of popping noises in the drift, reasoning that such noises are present when working ground is exerting pressure on pillars but would not be present with problems involving small pieces of rock falling off the rib. 14 FMSHRC at 1480-81. Finally, the judge did not find that Hansen's credibility was diminished by his failure to observe a crosscut in the drift or because he had limited his inspection to one side of the drift.[7] We find no circumstances in this case warranting the unusual step of rejecting the judge's determination that the testimony of MSHA's expert witnesses should be credited over the testimony of Asarco's expert witness. See generally Ranger Fuel Corp., 12 FMSHRC 363, 374 (March 1990).

Based on the foregoing, we conclude that substantial evidence supports the judge's findings that ground conditions in the UQ 1 drift required ground support under section 57.3360, and we affirm the judge's conclusion that Asarco violated that section.

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[7] Hansen limited his inspection to one side of the drift because, as the evidence indicates, the rock mass was the same on both sides of the drift. Tr. 174.

Asarco's argument to the contrary rests in part on the method of ground control required to abate the violation. The regulation is silent on the particular means of ground support to be used, stating rather that it be "designed, installed, and maintained to control the ground...." 30 C.F.R. § 57.3360. The preamble to the final regulation states: "The standard does not specify the type of ground support system to be used, only that it control the ground." 51 Fed. Reg. 36192, 36195 (October 8, 1986). Asarco asserts that MSHA required, as the means of abatement, rib bolting with wire mesh throughout the drift. However, the record is clear that MSHA did not undertake design of an acceptable ground support system for abatement of the violation or insist on a particular means of abatement. 14 FMSHRC at 1481; Tr. 53-54, 141. In any event, the method of abatement is not before us. As we have previously held, "The only question before the Commission is whether the particular conditions of the cited area required roof support, not which type of roof support." White Pine Copper Div., Copper Range Co., 5 FMSHRC 825, 835 n. 19 (May 1983).

III.
Conclusion

For the foregoing reasons, we affirm the judge's findings and his conclusion that Asarco violated section 57.3360. Therefore, the dismissal of Asarco's contest proceeding was proper.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 7 1993

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

DECISION

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

Before: Judge Fauver

Petitioner seeks a civil penalty for an alleged a safety violation under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

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

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

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

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

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

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

DISCUSSION WITH FURTHER FINDINGS

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

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

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3332171 is AFFIRMED.

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

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 6 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 92-332-M
	:	A.C. No. 09-00889-05513
v.	:	
	:	American Blue Mine
WILLIS DIMENSION STONE, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

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 three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violations.

The parties now have decided to settle the matter, and they have 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:

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3603281	4/2/92	56.15002	$119	$60
3603282	4/2/92	56.5003	$157	$79
3603283	4/2/92	56.12025	$157	$78

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size, ability to continue in business and history of previous violations. The parties emphasize the violations were due to the Respondent's moderate negligence and they note the Respondent's small size and good faith abatement.

CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the suggested reductions in the penalties assessed for the subject violations is warranted and that the proposed settlement disposition is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is **APPROVED**.

ORDER

Respondent IS ORDERED to pay civil penalties 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 the date of this proceeding and upon receipt of payment, this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 7 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 92-712 A.C. No. 15-16801-03509
v.	:	No. 1 Mine
WOODLAND HILLS MINING COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 93-170 A.C. No. 15-15637-03541
v.	:	No. 1 Mine
BROKEN HILL MINING COMPANY, Respondent	:	

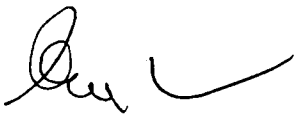
DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
Mr. Hobart W. Anderson, Broken Hill Mining Company, and Woodland Hills Mining, Ashland, Kentucky for Respondent.

Before: Judge Weisberger

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The cases were scheduled for hearing on June 16, 1993, in Huntington, West Virginia. At the hearing, the parties appeared and advised that they had reached a settlement covering the matters at issue. Petitioner made a motion to approve settlement agreements and to dismiss these cases. A reduction in penalty from $486 to $200 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay penalty of $486 within 30 days of this order.



Avram Weisberger
Administrative Law Judge

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JUL 7 1993

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF GARY PRICE, BILLY L. WILKINSON, JR. AND ALL SIMILARLY SITUATED MINERS, Petitioners	:	COMPENSATION PROCEEDING Docket No. WEVA 91-1949-C V C No. 8 Preparation Plant
v.	:	
VALLEY CAMP COAL COMPANY, AND SHREWBURY COAL COMPANY Respondents	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

It is ORDERED that the Stay Order of June 23, 1992 is hereby lifted.

The parties previously filed a settlement agreement which I find is a fair disposition of the issues presented in this case. Petitioner's Motion to Dismiss is granted based on representations that payments have been made in accordance with the settlement agreement.

It is ORDERED that these cases be DISMISSED.

Avram Weisberger
Administrative Law Judge

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JUL 8 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-574
Petitioner	:	A.C. No. 15-16567-03501 EHB
v.	:	
	:	MINE: No. 2 TIPPLE
C G & G TRUCKING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Amchan

This case is before me upon petition for assessment of a civil penalty under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties have filed a motion to approve a settlement agreement and to dismiss the case. The terms of the settlement are as follows:

Citation	Standard	Proposed Penalty	Settlement
3215760	77.1607(a)(a)	$400	$100*

*The citation has also been recharacterized as "non-significant and substantial."

I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty of $100 within 30 days of this decision. Upon such payment this case is DISMISSED.

Arthur J. Amchan
Administrative Law Judge
703-756-4572

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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 8 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 92-106-M
	:	A.C. No. 30-02790-05512
v.	:	Docket No. YORK 92-107-M
	:	A.C. No. 30-02790-05513
W. J. BOKUS INDUSTRIES, INC. Respondent	:	High Peaks Asphalt

DECISION

Appearances: William G. Staton, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York, for Petitioner;
W. J. Bokus, President, W. J. Bokus Industries, Incorporated, Greenfield Center, New York, for Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary of Labor, (Petitioner) filed petitions for assessment of civil penalty, alleging violations by the Operator (Respondent), of various mandatory standards set forth in volume 30 of the code of Federal Regulations. Pursuant to notice, the cases were scheduled and heard on February 16 and 17, 1993, in Saratoga Springs, New York. At the hearing, Randall Gadway testified for Petitioner. James E. McGee, Patrick Durkin, Laura Mace, Thomas W. Barss, and William John Bokus testified for Respondent. Subsequent to the hearing, the parties filed post-hearing briefs on June 21, 1993.

On June 16, 1993, the Secretary filed and served Respondent with a Motion for Leave to Supplement Memorandum. Respondent did not file any reply to this motion and it is granted. The Secretary's Supplemental Post-Hearing Memorandum was filed June 30, 1993.

Findings Facts and Discussion

I. Background

In 1983, William J. Bokus, Respondent's President, purchased the subject property consisting of 65 acres, "for the sole purpose of having an asphalt plant there" (Tr. 130). A stream bisects the property, and a road connects the portion of the property on the east side of the river, with that located on the west side.

In 1984, an asphalt plant was erected on the east side of the river. The asphalt plant is owned by High Peaks Asphalt ("High Peaks") and is leased to Pallette Stone ("Pallette"). High Peaks and Pallette are corporate entities separate from W.J. Bokus Industries. Until 1990, the raw minerals used in the production of asphalt at the plant were obtained from mines not located on the subject site.

In October 1991, W. J. Bokus Industries, commenced operating a mine on the west side of the property mining sand, and gravel. A screen that is located on the east side of the property separates gravel from the mine by size. This material is crushed by a crusher, which is a non-permanent installation, but on the dates in issue, was located on the east side of the property. The crusher also crushes material from other mines. Also on the east side of the property are two stockpiles containing sand, stone, and "rubble", a by-product of crushed recycled concrete and asphalt. Some of these materials were previously mined at the subject mine. Approximately 20 to 50 percent of the material in these two stockpiles is sold as a final product, and the balance goes to the asphalt plant on the subject site.

In addition, there are two other stockpiles on the east side, one of which contains piles of old concrete and asphalt returned by Respondent's customers, and the other contains processed concrete products. The items in the latter two stockpiles are sold to customers.

Also on the east side of the property is a garage that contains electrical services, and repair parts for the asphalt plant. The garage is owned by High Peaks, and is leased to Pallette. According to Bokus, the garage is used "primarily for the support of the black top (asphalt) plant" (Tr.133). (Emphasis Supplied) He said that "its primary purpose was for the repair of trucks" (Tr. 196). However, the garage is also used as a site for the repair of crusher and screen equipment. Stored in the garage are some oxygen and acetylene cylinders owned by Respondent. Also Respondent's employees at times work in the garage.

An office staffed by Respondent's employee is also located on the east side of the property. Truck drivers transporting material from the subject site weigh their trucks at a weighing station, and then report the results to Respondent's employee in the office.

On October 22, 1991, MSHA Inspector Randall Gadway inspected the subject site. He issued a number of orders pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, ("the Act",)[1] alleging violative conditions concerning a loader which loads sand from a stockpile, equipment located in the garage, and a walkway near the office. Essentially, it appears to be Respondent's position that the stockpiles and equipment located in the garage, are not within Petitioner's jurisdiction.

II. Cylinders in the Garage(Order Nos. 3593041 and 3593042)

Gadway cited a total of seven cylinders[2] in the garage that were not secured, in violation of 30 C.F.R. § 56.16005. He also cited the same cylinders as lacking covers in violation of 30 C.F.R. § 56.16006.

In general, oxygen and acetylene cylinders are used in welding. Cylinders such as those cited are used in the garage by Respondent's mechanic. Respondent's other employees as part of their duties, also work in the garage. Also, repairs to a crusher and a screen used in the preparation of gravel, are performed in the garage. Both Respondent and Pallette store oxygen and acetylene cylinders in the garage.

Section 3(h)(1) of the Act defines a mine as, inter alia "...lands, structures, facilities, equipment, machines, tools, ...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits...or used in, or to be used in, the milling of such materials, or the work of preparing coal or other minerals, ..." The legislative history of the Act, as summarized with approval in Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984), indicates a clear intent for the Act to be given a broad interpretation. Nonetheless, it is manifest, based upon the clear language of Section 3(h)(1), supra, that structures, facilities, machines, tools, or equipment are considered a mine and within the jurisdiction of Petitioner, only if they are used in, or to be

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[1]Prior to the issuance of these orders, a citation prusuant to Section 104(d)(1) of the Act, supra, had been issued to Respondent on October 22, 1991.

[2]4 or 5 of the cylinders contain oxygen, and the rest contained acetylene.

used in, or resulting from, either the extraction, milling, or preparation of minerals.

There is no evidence indicating that the specific oxygen and acetylene cylinders that were cited were used in connection with the repair or manufacture of tools or equipment specifically used in the milling or preparation of the minerals mined at the subject site. Further, even if it is inferred that the cylinders were so used, and hence were subject to MSHA jurisdiction, there is insufficient evidence to conclude that Respondent was an operator vis-a-vis the cited cylinders. In this connection, Section 3(c) of the Act, defines an operator as an "owner, lessee, or other person who operates, controls, or supervises a coal or other mine... ." Hence, in order for Respondent to be properly cited for the allegedly violative conditions of the specific cylinders cited, it must be established that it either was the owner, or lessee of the cylinders, or in some other fashion exercised control over them. There is no evidence with regard to the ownership of the cylinders in question. The garage was used to store cylinders that belong to either Pallette or Respondent. To further complicate matters, Pallette's employees were allowed to use the cylinders owned by Respondent, and Respondent's employees were allowed to use the cylinders owned by Pallette. Since Respondent's employees worked at times in the garage, and at times used acetylene or oxygen cylinders, it is possible that they used or would be using these cylinders. However, due to the lack of evidence, I cannot conclude that it is more likely than not that the cylinders at issue were either used by Respondent's employees, or would be used by them in the ordinary course of Respondent's operation. Hence, Order Nos. 3593041 and 3593042 issued to Respondent concerning violative cylinders are to be vacated.

III. Grinding Machines in the Garage (Order No. 3594752)

Gadway also cited a grinding machine located in the garage that did not have a hood, in violation of 30 C.F.R. § 56.14115. In general, Gadway testified with regard to the hazards relating to the violative condition. He also testified that James E. McGee, an employee of Respondent, told him that he had reported to William Bokus the lack of a hood, but Bokus did not do anything about it.

There is no evidence in the record as to the specific use of the grinder in question, especially as it pertains to the preparation or milling of stone. Since the grinder was located in the garage, and Respondent's employees worked there, it is possible that it might have been used in the milling or preparing of stone. However, I find that Petitioner failed to adduce sufficient evidence that would support such a conclusion. In other words, due to the lack of adequate evidence, I cannot conclude that it was more likely than not that the grinder was

used in milling or preparing stone or other mine materials. For these reasons, Order No. 3594752 regarding the grinder is to be dismissed.

IV. Metal Stove in the Garage (Order No. 3594756)

Gadway also cited exposed wires connected to a fan that was mounted on the side of a metal stove in violation of 30 C.F.R. § 56.12030. Gadway testified to the hazards inherent in this condition, but did not adduce any testimony with regard to the manner, if any, in which this stove is used in the milling or preparation of minerals. Thus, I conclude that it has not been established that the stove was subject to the Act, and regulations promulgated pursuant to the Act. Accordingly, Order No. 3594756 is to be dismissed. For the same reasons, the Section 107(a) order (Order No. 3594756) issued by Gadway for an alleged imminently dangerous condition regarding the wires "feeding" the stove, is to be vacated.

V. Hole in a Walkway (Order No. 3593043)

A. Violation of 30 C.F.R. § 56.11012

On October 22, 1991, Gadway indicated that there was a hole measuring 2 feet by 3 feet in wooden planks located in front of the scale house (office) entrance. He indicated that the hole was 3 feet deep. Essentially, he indicated that the hole was within 3 feet of the walkway traversed by truckers when walking between the scale where trucks are weighed, and the office where the weight of the trucks is recorded. Gadway issued a Section 104(d)(1) order alleging a violation of 30 C.F.R. § 56.11012.

As part of its mining operation sand and gravel are loaded by Respondent onto its customer's trucks. Thus, I conclude that the cited area in question is an integral part of Respondent's mining operation. Hence, I find that this area is considered mine property.

Laura Mace, Respondent's employee who works in the office in question, estimated the size of the hole as 6 inches by 2 1/2 feet. She estimated that it was a distance removed from the walkway equal to at least her height, which she indicated as 5 feet 4 inches. I accord more weight to Gadway's testimony regarding the dimensions of the hole, inasmuch as it was based upon actual measurements that he had taken. Also, based upon my observations of the demeanor of the witnesses, I accord more weight to the testimony of Gadway with regard to the distance the hole was removed from the walkway.

Section 56.11012 supra, provides, that "openings near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is

nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

Southern Ohio, supra at 916-917.

Since Gadway's opinion that the violation herein was significant and substantial, was not based upon the proper test as set forth in Mathies, supra, and U.S. Steel, supra, I have not accorded it any weight. The only evidence before me on this issue is Gadway's opinion that a truck driver could fall into the hole. Clearly this hazard did exist. However, considering the fact that the hole was not in the travelway, but was approximately three feet away, and considering the lack of any other evidence on this point, I conclude that it has not been established that the hazard contributed to by violation, i.e., a person falling into the hole or tripping on it, was reasonably likely to have occurred. Hence, I conclude that the violation herein was not significant and substantial.

D. Penalty

Considering the obvious nature of the hazard presented by the violative condition, the fact that the condition could have resulted in an injury such as a broken leg or hip, the fact that the hole had been in existence for at least a week prior to the

time that it was cited, and considering the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of $450 is appropriate for this violation.

VI. Loader Loading from Stockpiles (Order Nos. 3594753 and 3594754)

On October 22, 1991, a loader was being used by Respondent's employee, Tom Barss, to remove sand from a stock pile on the east side of Respondent's property, and load it onto customers' trucks. The stockpile contained sand and other minerals mined from the west side of the property in question.

Gadway asked Barss if the horn and back-up alarm were functioning, and he indicated that they were not. Gadway did not observe them to be functioning. Gadway issued an order alleging a violation of 30 C.F.R. § 56.14132, which, as pertinent, provides that horns or other audible warning devices on self-propelled mobile equipment "shall be maintained in functional condition."

Respondent argues that MSHA does not have jurisdiction over stockpiles. In this connection, Respondent refers to a statement made by an MSHA engineer, John Montgomery, who was one of the speakers at an MSHA seminar in Albany, New York, in the fall of 1992. James McGee, Respondent's employee who was at the seminar, testified that Montgomery, in response to a question from the audience after he had made his presentation on electrical matters, stated that MSHA jurisdiction regarding gravel operations did not extend to stockpiles. Clearly this statement cannot be considered to be a statement of MSHA policy, but is rather a statement of an individual not involved with policy. (See, Lancashire Coal Co., 13 FMSHRC 875, 888, (1991).

I find that the use of the loader in question, loading mined stocks onto customer's trucks, was an integral part of Respondent's mining operation, and hence the loader was within MSHA jurisdiction. Since the horn and backup alarm were not working, I find Respondent violated Section 56.14132, supra.

Gadway opined that as a consequence of this violation, an injury was reasonably likely to have occurred, since truck drivers in the area could have been hit by the loader when it backed up. Should this have occurred, a fatality could have resulted.

Certainly, a person could have been hit and injured by the loader when it backed up. Gadway indicated that the operator of the loader would not have known that a person was behind the loader. However, the record does not indicate the specific position of the loader operator on the loader, whether the loader had a rear view mirror, whether the operator would have had good

visibility of the area behind the loader, and whether there were any blind spots when the operator looked to the rear of the loader. Within the framework of this record, I conclude that it has not been established that the hazard contributed to by the violation herein i.e., the possibility of a person being hit by the loader, was reasonably likely to have occurred. I thus conclude that it has not been established that the violation herein was significant and substantial.

According to Gadway, Barss indicated to him that the horn and alarm were not functioning, and said that the loader in question had been brought onto the subject property a week prior to the date the Order was issued, "in this condition". (Tr. 231). Gadway testified that Barss told him that Bokus operated the loader, and "he should have known" (Tr. 231). Barss, who testified later on at the hearing, did not rebut this testimony, nor did Bokus testify in rebuttal to rebut this testimony. Hence, since a loader is operated both forward and reverse, and since Respondent's employees operated the loader for a week knowing the horn or backup alarm did not function, I conclude that the violation herein was as a result of more than ordinary negligence, and constitued an unwarrantable failure. (See, Emery, supra).

Taking into account the statutory factors in Section 110(i), of the Act, and especially noting the degree of Respondent's negligence as discussed above, I conclude that a penalty of $500 is appropriate.

VII. Order No. 3594754

On October 22, 1991, Barss informed Gadway that the parking brakes on the loader were not working. Gadway had Barss test them, and he concluded that the parking brakes were not working. Gadway issued a Section 104(d)(1) order alleging a violation of 30 C.F.R. § 56.14101 which provides, as pertinent, that "...parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." Based on the testimony before me, I conclude that this standard has been violated as alleged by Gadway.

Gadway indicated that there was no engine shut-off, and thus an injury, as a consequence of the violation herein, was reasonably likely to have occurred. He said that the area where the loader loads the trucks is not completely level, but that there are "small ups and downs". (Tr. 240) He said that there are grades where the loader could roll to the stockpile. There is no evidence with regard to the specific terrain in the immediate area where the loader would have stopped, and remained stopped in its normal operation. Within this framework, I conclude that it has not been established that the violation was significant and substantial.

When Barss was asked by Gadway if the alarm horn and parking brake were functioning, Barss indicated, in essence, that the loader had been brought on the property a week ago in this condition, and everybody had operated it, including Bokus. For the reasons set forth above, VI, infra, I conclude that the violation herein resulted from more than ordinary negligence and constituted an unwarrantable failure.

Taking into account the factors set forth in Section 110(i) of the Act, and considering the degree of Respondent's negligence, I find that a penalty of $500 is appropriate.

VIII. Citation No. 3594758

Gadway indicated that on October 22, 1991, he had explained to Barss that he was issuing an Order requiring that the loader not be used until repaired, and that MSHA should be notified by the Operator (Respondent) that repairs have been done before the Operator would be allowed to use it.

Subsequent to the issuance of the 104(d)(1) Orders discussed above, VI, and VII, infra, Barss ordered parts to repair the parking brakes, and replaced the fuses for the horn and back-up alarm on October 22. However, MSHA was not informed.

On October 23, 1991, at approximately 9:00 a.m., Gadway returned to the subject property. He observed the same loader that had been cited the day before, loading crushed stone from the stockpile, and transporting it to the asphalt bin. According to Gadway, he left the premises after Bokus had told him that MSHA did not have jurisdiction over the asphalt plant, and the stockpiles. Gadway subsequently returned at approximately 11:40 a.m. At that time, he asked Bokus how many trucks had been loaded. Gadway indicated that Bokus informed him that three trucks had been loaded with the loader.

Mace, who works in the office, indicated that she heard all of Bokus' conversation on October 23 with Gadway, and that Bokus did not say that he loaded three trucks with the loader. In rebuttal, Gadway explained that upon his arrival at the site at approximately 11:40 a.m., he spoke to Bokus who informed him that he had loaded trucks with the loader. Gadway said that this conversation took place at the right side of the garage, which is not within the line of sight of the office where Mace works. Bokus did not contradict this testimony. I therefore accept it.

On October 23, 1991, Gadway issued a Citation alleging a violation of Section 104(d)(1), of the Act which, as pertinent, provides that once an Order has been issued under section 104(d)(1), persons in the affected area shall be withdrawn, and be prohibited from entering such area until an authorized representative of the Secretary determines that such violation

has been abated.

Within the framework of the above discussed evidence of record, I find that the loader in issue was subject to two Section 104(d)(1) Orders, and yet Respondent operated it prior to a determination by Gadway that the violative conditions had been abated. Accordingly, I find that the Citation issued by Gadway was properly issued and is to be affirmed.

The record indicates that Respondent was made aware that the loader should not have been operated until it had been repaired, and MSHA was notified of that fact. Respondent's belief that MSHA had no jurisdiction over the stockpile is insufficient to mitigate its non-compliance with the Orders at issue. The proper course was to have complied with the Orders, and then to have filed a Notice of Contest to challenge the issuance of the Orders. Thus, the violation herein resulted from a high degree of Respondent's negligence. I find that a penalty of $1,000 is appropriate for this violation.

ORDER

It is **ORDERED** that: (1) The following Orders are to be vacated and dismissed: Orders No. 3593041, 3593042, 3594752 and 3594756; (2) The following Orders are to be amended to reflect the fact that the violations alleged therein are not significant and substantial: Orders No. 3593043, 3594753, and 3594754; and, (3) Respondent shall pay, within 30 days of this decision, a civil penalty of $2,450 for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 13 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-290
	:	A.C. No. 15-15637-03537
v.	:	
	:	Mine No. 1
BROKEN HILL MINING CO., INC., Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Hobart W. Anderson, President, Broken Hill Mining Company, Inc., Ashland, Kentucky, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for six (6) alleged violations of certain mandatory safety and health standards found in Parts 70 and 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and a hearing was held in Pikeville, Kentucky. The parties were afforded an opportunity to file posthearing briefs. The petitioner filed a brief, but the respondent did not. I have considered the oral arguments made by the parties in the course of the hearing, as well as the brief filed by the petitioner, in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) whether several of the alleged violations were "significant and substantial" (S&S), and (3) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act, particularly the respondent's ability to continue in

business. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

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

Discussion

Section 104(a) non-"S&S" Citation No. 9876024, July 16, 1991, cites an alleged violation of mandatory health standard 30 C.F.R. § 70.207(a), and the cited condition or practice states as follows (Exhibit P-1):

> The mine operator did not take five valid respirable dust samples during the bimonthly sampling cycle of May through June on MMV 001-0 for the designated occupation of 036, continuous miner operator, shown in the attached advisory number 0001. No valid respirable dust samples were received and credited to this bimonthly sampling period.

Section 104(a) non-"S&S" Citation No. 9876034, July 30, 1991, cites an alleged violation of mandatory health standard 70.508, and the cited condition or practice states as follows (Exhibit P-2):

> The operator of this mine failed to report and certify to MSHA the results of the periodic noise exposure survey to which each miner is exposed. This survey was due no later than 6-6-91. The last reported survey was conducted 12-6-90, which exceeds the intervals of at least every six months.

Section 104(a) "S&S" Citation No. 3807424, August 29, 1991, cites an alleged violation of mandatory health standard 30 C.F.R. § 70.101, and the cited condition or practice states as follows:

> Based on a valid respirable dust sample collected by an MSHA inspector on August 28, 1991, the respirable dust concentration in the working environment of the designated area 901-0 in mechanized mining unit 001-0 was 3.5 mg/m^3 which exceeded the 1.3 mg/m^3 standard. Management shall make available approved respiratory equipment to affected miners, take corrective action to lower the respirable dust, and sample each production

shift until five valid respirable dust samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory.

Section 104(a) "S&S" Citation No. 3807425, August 29, 1991, cites an alleged violation of mandatory health standard 30 C.F.R. § 70.101, and the cited condition or practice states as follows (Exhibit P-6):

> Based on 5 valid respirable dust samples collected by an MSHA inspector on 8/28/91, the respirable dust concentration in the working environment of the occupations was (1)036, 3.8 mg m^3, (2) 035, 3.3 mgm^3, (3) 073, 14.2 mgm^3, (5) 050, 2.8 mgm^3. The average concentration amounted to 5.2 mgm^3 on the 001-0 mmu which exceeded the 1.2 mgm^3 standard. Management shall take corrective action to lower the respirable dust and sample each production shift until five valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory on the (036) designated occupation (mmu 001-0).

Section 104(a) "S&S" Citation No. 3809256, November 15, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.400, and the cited condition or practice states as follows (Exhibit P-8):

> Combustible materials in the form of a unmeasurable coat of float coal dust has accumulated over the previously rock dusted area of the No. 1 belt entry starting at the No. 2 portal and extending inby to the No. 2 head drive a distance of approximately 1,800 ft. The float coal dust is from gray to dark in color.

Section 104(a) "S&S" Citation No. 3809258, November 15, 1991, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.400, and the cited condition or practice states as follows (Exhibit P-9):

> Combustible material in the form of a thin unmeasurable coat of float coal dust has accumulated at numerous locations in the No. 2 belt entry, starting at the No. 2 head drive and extending inby to the No. 2 tail piece a distance of approximately 1,800 ft. The combustible material is from gray to dark in color.

Petitioner's Testimony and Evidence

Citation No. 9876024

MSHA Inspector John C. Smallwood testified that he issued the citation after receiving an "Advisory" (Attachment to Exhibit P-1), stating that the respondent had not submitted valid respirable dust samples for the bi-monthly period May-June 1991. He confirmed that he made a finding of non-"S&S" because he believed an injury was unlikely, and he terminated the citation after the violation was abated by the submission of five valid samples (Tr. 28-30).

Citation No. 9876034

MSHA Inspector James H. Osborn testified that he issued the citation concerning the periodic noise survey because MSHA had not received the results of a survey from the respondent. He had no knowledge as to whether a survey was actually taken and stated that "it was a matter of paper, administrative". He confirmed his low negligence and non-"S&S" findings and stated that an injury was unlikely because of a lack of a prolonged period of noise exposure (Tr. 33-38).

On cross-examination, Mr. Osborn confirmed that the citation was served on the respondent by certified mail, but he did not know who may have received it and he did not see the return postal receipt (Tr. 39, 42-43).

MSHA Inspector Buster Stewart testified that he issued section 104(b) Order No. 3809822 (Exhibit P-3), on November 19, 1991, because MSHA had not received the results of the noise survey which prompted Inspector Osborn to issue citation No. 9876034. Mr. Stewart stated that he did not know when the abatement of the citation was due, and he served the order on mine superintendent R.B. Hughes who confirmed that the survey had not been taken. Mr. Stewart stated that continuous violative noise exposure can lead to hearing loss, and that six months elapsed after the first six-months when the survey was due. He believed that the respondent had ample time to take the survey, and he modified the order to allow mine production to continue so that the survey could be taken. The survey was submitted on December 3, 1991, and the citation was not terminated until October 30, 1992, because the mine was shut down and he had no earlier opportunity to abate the violation (Tr. 46-50).

On cross-examination, Mr. Stewart could not recall whether Mr. Hughes was aware of the citation nor whether he (Hughes) had called MSHA's office about the matter (Tr. 50). Mr. Stewart confirmed that the results of the noise survey submitted by the respondent were acceptable, and at no time during 1991 was there any excessive noise exposure (Tr. 51). He confirmed that the

survey of valid samples reflected compliance with MSHA's noise standards (Tr. 52).

Citation No. 3807424

MSHA Inspector Foster I. Justice testified that he issued the citation after the respirable dust sample for the designated roof bolter operator reflected noncompliance with the acceptable standard. He confirmed that the mine had a quartz problem and he explained the methodology for computing the acceptable dust exposure levels when there is such a problem (Tr. 55-57). He stated that the acceptable level of exposure is lower because quartz dust exposure causes silicosis. He confirmed that he took the sample on which the citation is based, and he indicated that the exposure exceeded the 1.3 milligrams per cubic meter of air established for the roof bolter. The test results indicated an exposure of 3.5 milligrams per cubic meter of air (Tr. 59).

Mr. Justice confirmed his moderate negligence finding, and he stated that he based his "reasonably likely" gravity finding on the fact that the dust exposure for the one person exposed was twice the amount allowed by the standard. He stated that he based his "S&S" finding on the fact that "it has been proven that with that high of dust concentration on a sample, that they're going to end up permanently disabled in the long run" (Tr. 61).

Citation No. 3807425

Inspector Justice stated that he issued the citation after the dust sampling which he conducted for the continuous miner operator, the offside shuttle car operator, the scoop operator, and the standard side shuttle car operator reflected noncompliance with the established 1.2 milligrams per cubic meter of air standard which is based on the amount of quartz present in the samples. He explained that the sampling was done during the regular mining cycle, and he indicated that the standards for the tested occupations were different from those established for the roof bolter because they are working in different mine strata and the standard for compliance for everyone except the roof bolter is established at the level allowable for the high risk continuous miner occupation (Tr. 62-65).

Mr. Justice confirmed his moderate negligence finding, and he based his "highly likely" gravity finding on the test results which showed high levels of dust exposure and because "It's been proven that silicosis, black lung, and so forth, can be caused with an excessive amount of dust" (Tr. 66). He believed the violation was "S&S" because "if it would have kept on , the dust level had kept on at what it is--and it has been proven that, definitely, they would have ended up with black lung, silicosis" (Tr. 67).

Mr. Justice confirmed that he fixed the abatement time for both of the dust citations he issued after considering the fact that ventilation adjustments had to be made to lower the dust exposure, further sampling had to be done, and the samples had to be submitted to MSHA's Pittsburgh laboratory for analysis to allow for abatement and termination of the citations (Tr. 61, 67). Mr. Justice explained why he issued separate citations for the roof bolter and the other occupations on the designated mining unit in question (Tr. 67-68). Petitioner's counsel stated that pursuant to the cited standard, the inspector could have issued separate citations for each of the designated occupations that were out of compliance, but that MSHA's policy is to issue separate citations for the roof bolter and the rest of the individuals on a working shift (Tr. 70).

On cross-examination, Mr. Justice agreed that cutting rock in low coal will result in the generation of more dust and quartz, and that there is no likelihood of someone contracting black lung in one day rather than over a longer period of time (Tr. 72). Mr. Justice believed that the respondent's most recent test samples in February still reflected noncompliance with the quartz dust standard, and he agreed that the respondent changed its ventilation each time in an attempt to come into compliance and that it is attempting to comply but is experiencing problems with quartz. He further agreed that each time the respondent is in compliance, the standard is lowered to that compliance level, and that it is difficult for the respondent to continually stay in compliance as the standard is adjusted and lowered after each sampling cycle and after ventilation changes are made (Tr. 75-78).

Mr. Justice further explained the differences for sampling and establishing the acceptable dust exposure levels for the roof bolter and the remaining crew members (Tr. 79-81). He confirmed that the respondent made respirators available to the miners at the mine and the respirators could have been used by the miners working in dusty areas. He also confirmed that he would consider the wearing of respirators when weighing the gravity of a violation if it could be shown that the respirators were "fit tested". He confirmed that the respirators met MSHA's standards, and stated that "I've never seen no fit tested ones over there" (Tr. 82).

Mr. Justice confirmed that during his two visits to the mine it has been out of compliance with the dust requirements, and the mine bi-monthly sampling has reflected noncompliance. However, he disagreed that it was impossible for the mine to stay in compliance because of low coal and rock problems, and he believed that the installation of scrubbers and wetting agents would help bring the mine in compliance even though it would be costly (Tr. 86-87).

MSHA Inspector Buster Stewart testified that he issued section 104(b) Order No. 3809821, on November 19, 1991, because of the respondent's failure to timely abate Citation No. 3807424 issued by Inspector Justice on August 29, 1991. Mr. Stewart stated that he visited MSHA's laboratory and determined that MSHA had not received any roof bolter samples from the respondent to abate the citation. Mr. Stewart stated that he spoke with mine superintendent Hughes about the matter and that Mr. Hughes was "in limbo" about taking any samples because "we were having some problems with all white centers, and he was, I guess, a little bit scared about that" (Tr. 90).

Mr. Stewart believed that the respondent had ample time to take and submit samples to abate the citation, and that it did not request any extension of the abatement time. He confirmed that the citation was terminated on September 17, 1992, and he explained that the mine was down for three or four months and that another inspector took over from him. He also indicated that the mine was in retreat mining pillars and roof bolters were not being used at that time (Tr. 91-92).

Mr. Stewart confirmed that he also issued section 104(b) Order No. 3809260, on November 19, 1991, (Exhibit P-7), because of the respondent's failure to timely abate Citation No. 3807425, issued by Inspector Justice. He believed that there was a continuing quartz exposure hazard, but he did not consider extending the abatement time because he believed the respondent had ample time to take and submit samples and to make ventilation adjustments. He confirmed that he modified the order to allow mining to continue so that sampling could be done, and that he terminated the violation on August 31, 1992, after the mine had been out of production for sometime and after the respondent submitted five valid samples (Tr. 93-95).

On cross-examination, Mr. Stewart confirmed that in his prior dealings with the respondent it has always abated citations in a timely manner. He acknowledged that superintendent Hughes informed him that he was worried about an ongoing respirable dust tampering investigation involving other mine operators. Mr. Stewart stated that he informed Mr. Hughes that he was still required to take samples and suggested that he maintain a log detailing each step taken in the sampling process (Tr. 96). Mr. Stewart agreed that Mr. Hughes was under some apprehension about the "adverse white centers" publicity and investigation (Tr. 98).

Citation Nos. 3809256 and 3809258.

The respondent stipulated and admitted that the cited coal accumulations existed as charged in the two citations and that violations of section 75.400 occurred as noted on the face of the

citations issued by Inspector Buster Stewart on November 15, 1991 (Tr. 101-102).

Inspector Stewart confirmed his negligence and gravity findings, and he stated that the accumulations presented a fire hazard and that ignition sources such as belt drives, belt boxes, and numerous electrical sources were present in the cited areas, and that a piece of draw rock falling from the roof or a cable short were potential ignition sources. He based his "S&S" findings on his belief that an accident could reasonably be expected to happen if the accumulations were allowed to continue. He described the extent of the accumulations and indicated that "it was just a thin coat of float dust over the area" which he could not measure and that it was "from grey to dark in color". He terminated the citations on November 19, 1991, after the accumulations were cleaned up and the areas were re-rock dusted. Mr. Stewart stated that the affected areas were travelways and he concluded that the foreman and superintendent traveled the belt areas and should have been aware of the conditions, but waited for a later time, or possibly an "off shift" to clean the accumulations (Tr. 102-106).

On cross-examination, Mr. Stewart stated that cleanup should be done "as needed", and he agreed that the area had previously been rockdusted. He did not check the belt head drive units and did not know if water was provided to control the dust (Tr. 106-108). He also indicated that re-rock dusting can be done to render the coal dust incombustible (Tr. 112). Mr. Stewart did not check all of the electrical components present in the cited areas and did not know whether they were out of compliance (Tr. 119). He did not believe that the accumulations had existed for more than two days, and the preshift reports which he reviewed did not reflect any of the accumulations that he cited (Tr. 120).

Respondent's Testimony and Evidence

Hobart W. Anderson, respondent's president, testified that the Broken Hill Mining Company is a wholly owned subsidiary of Hobart Energy Corporation. He stated that although Hobart Energy has owned several other operating coal mines in the past, Broken Hill is the only operating mine at the present time. Mr. Anderson asserted that Hobart Energy and Broken Hill are in "severe financial positions", and he produced copies of Federal and state income tax returns filed by Hobart Energy Corporation and Broken Hill Mining Company, financial income statements for Broken Hill, an affidavit concerning the financial condition of Broken Hill and two other mining companies controlled by Hobart Energy, a Federal IRS Notice of Levy filed against Broken Hill, and a Broken Hill financial balance sheet, and he explained the information contained in these documents (Exhibits R-1 through R-7, Tr. 131-138).

Mr. Anderson stated that Broken Hill was at one time a contract mining company for Island Creek Coal Company, but that Island Creek sold the property to A.T. Massey on January 31, 1992. Broken Hill lost its contract rights to mine the property, and the mine was shut down for brief periods in 1991 because of the Island Creek negotiations. However, Broken Hill was able to reopen in early July, 1992, but was having problems since 1990 because of the decreasing mining heights and rock problems. These problems resulted in a production decrease of saleable coal and an increase in the rejection rate of the mined coal because of the rock which had to be removed. At the present time, for each 100 tons of raw material mined, Broken Hill is paid for approximately 45 tons. Mr. Anderson confirmed that in 1992, A.T. Massey contracted with Broken Hill to mine the No. 3 Mine, and he stated that this mine "seems to be, so far, and appears to be, a good operation". He also indicated that A.T. Massey has also subsidized the mine and has contributed $10,000, since February, 1993, to compensate Broken Hill for its losses due to the high coal rejection rate, and that Broken Hill had to finish mining the marginal old mine before contracting to mine the new No. 3 Mine (Tr. 133-136).

Mr. Anderson alluded to several outstanding liens on Broken Hill's mine equipment, including a $250,000 lien held by the First National Bank of Louisville. He also indicated that Broken Hill has agreed to pay the IRS $5,000 a month for a tax lien, and that Hobart Energy also has liens in excess of $250,000, and cannot borrow any more money. He stated that Hobart Energy, Inc., "is in a substantially worse state and shape than Broken Hill" (Tr. 138). He also confirmed that Broken Hill owes MSHA for previous penalty assessments in excess of $10,000, and has agreed to pay MSHA $250 a month over three years as part of a consent judgment to satisfy that debt. Mr. Anderson stated that because of the financial condition of Broken Hill, he would have liked to pay "fifty cents on the dollar" for the penalty assessments in this case and could not understand why MSHA has rejected any settlement offer, particularly in light of a past settlement in July, 1992, concerning Broken Hill which was accepted by MSHA and approved by another Commission Judge (Tr. 139-140; Exhibit R-8).

Mr. Anderson stated that in the recent proceedings concerning the Spurlock Mining Company and the Sarah Ashley Mining Company which were heard in September or October, 1992, MSHA submitted a brief taking his testimony out of context and contending that all of Hobart Energy mining companies should be considered and combined as one whole operation. Mr. Anderson stated that each mine had its own operation, with separate superintendents, and that he did not intermingle purchases, and loans between companies were covered by notes (Tr. 140). He stated that "if the court rules it is an aggregate unit, we're saying Hobart Energy is in worse financial shape and consolidated

than Broken Hill, because Broken Hill was our only operating company" (Tr. 141). He further indicated that Hobart Energy has more liabilities and less assets, has no other mining operations, and no sources of income (Tr. 141). He was of the opinion that the petitioner would not agree to settle the instant case "because I wouldn't agree to settle Ashley and Spurlock and I took them to hearing. . . . So now, I guess, they've taken the position that we're going to go to court on every one, which is fine" (Tr. 142).

Mr. Anderson stated that the IRS has given him until May 15, 1993, to file Broken Hill's 1991 tax return "knowing that there will be a loss" (Tr. 142). He also indicated that Broken Hill owes the accounting firm over $50,000, and that Hobart Energy, in the aggregate, owes over $300,000, to the accounting firm. In view of his personal relationship with the CPA firm where he was a former partner, the firm has agreed to do his work at reduced rates (Tr. 142).

On cross-examination, Mr. Anderson confirmed that he is president of Broken Hill Mining Company, and that one-hundred percent of the stock in that company is owned by Hobart Energy Inc. He stated that he owns twenty-five percent of the stock in Hobart Energy, and he identified three individuals who each own twenty-five percent of that company. He further confirmed that he serves as president of the board of directors of Broken Hill, and that seven other individuals serve as officers. He stated that he receives no salary from Broken Hill but is paid $75,000 annually by Hobart Energy which he currently receives regularly (Tr. 152-153).

Mr. Anderson stated that Broken Hill started operations with a capitalization of $5,000, and a $250,000 bank loan personally guaranteed by the four owners of Hobart Energy. Current bank loans amount to $250,000 to $300,000, guaranteed by personal notes of the owners of Hobart Energy. Broken Hill owns the mining equipment that it uses, and it was purchased from equipment venders. Broken Hill does not use any equipment owned by any other corporation (Tr. 154-155).

Mr. Anderson explained several payments and assets reflected in the financial records he produced (Tr. 156-157). With regard to the 1990 Income Tax return for Hobart Energy, which includes an Affiliations Schedule and Schedule of Subsidiary Income and Loss, Mr. Anderson confirmed that Hobart Energy owned all of the mining companies listed at that time, but that at the present time, the only company that is in operation is Broken Hill (Tr. 158). He stated that although some of the companies listed have mining permits, he considers the permits to be a liability rather than an asset, and he confirmed that none of these companies own any coal leases or other property (Tr. 159).

Mr. Anderson stated that Summit Processing, Inc., one of the companies listed on Hobart Energy's tax return, is in bankruptcy and is no longer owned by Hobart, and that Hobart only received $5,000 of the $75,000 due from Summit. He confirmed that Broken Hill does not own the property that it mines, and that when it is mining, it does so as a contract mining company for Island Creek and A.T. Massey Mining Companies, the owners of the property. Mr. Anderson stated that White Cloud has a judgment in its favor for two million dollars as the result of a lawsuit. However, the judgment is on appeal, and the matter will go through the bankruptcy court, and White Cloud's debts and lawyer's fees would have to be paid. Mr. Anderson anticipates that it will take two or three years for this litigation to conclude. If the matter is settled, he does not anticipate that White Cloud will receive all of the two-million dollars (Tr. 161-162).

Mr. Anderson confirmed that Hobart Energy had income of over $4,000,000 million in 1990, but had expenses of $4,650,000, and in 1991 its income was less because Broken Hill was the only company in operation that year. He explained that Hobart Energy contracted with Island Creek to mine under the name of Spurlock Mining and Sarah Ashley Mining, and although those ventures were profitable at one time, they shut down in 1990, and were not in operation in 1991 (Tr. 161). Mr. Anderson confirmed that Hobart Energy engages in no activities other than managing the mining companies that it owns, but that the only one currently in operation is Broken Hill Mining Company (Tr. 161).

Findings and Conclusions

Fact of Violation

Citation No. 9876024

Mr. Anderson did not dispute the fact that the required valid respirable dust samples were not submitted as required by the cited mandatory health standard (Tr. 30-31). In defense of the citation, Mr. Anderson asserted that because of an ongoing industry-wide investigation concerning "adverse white centers" and industry-wide respirable dust sampling programs the individual certified to submit the samples for his mine "was afraid he was going to get in trouble even though he had tried to do it right" (Tr. 31).

The respondent's asserted defense is rejected. The respondent was obliged to comply with the law and to submit the required samples in question. Its failure to do so constitutes a violation of the cited standard, and the citation IS AFFIRMED.

Citation No. 9876034

The citation was issued and served on the respondent by certified mail because MSHA did not receive the results of the periodic noise survey required to be submitted by the cited standard. The respondent has not rebutted the presumption that the survey was not taken and submitted as required.

In its answer, and in the course of the hearing, Mr. Anderson took issue with the amount of the civil penalty assessment of $195 for the violation. Mr. Anderson asserted that the assessment "is too high and overstated", and he pointed out that the violation was cited as a non-"S&S" violation, with a low degree of gravity and negligence.

In defense of the respondent's untimely abatement of the violation, Mr. Anderson asserted that "we probably didn't terminate this on time because my mine operation was not aware of it" (Tr. 43). He explained that the noncompliance notice was probably mailed to his CPA office rather than to the mine, and that it did not come to his attention right away (Tr. 43-44).

Mr. Anderson did not dispute the fact that the valid samples were not submitted or received by MSHA. Under the circumstances, I conclude and find that the cited violation has been established by a preponderance of the evidence. I have considered the mitigating circumstances advanced by Mr. Anderson, but I cannot conclude that they may serve as a defense to the violation. Under the circumstances, the citation IS AFFIRMED.

Citation Nos. 3807424 and 38007425

With regard to the respirable dust violations concerning the working environment of the cited designated mechanized mining unit and the cited individual occupations, the credible unrebutted testimony and evidence adduced by the petitioner establishes that the results of the samples indicated that the unit in question, as well as the individual occupations, were out of compliance. Accordingly, I conclude and find that the violations have been established, and the citations ARE AFFIRMED.

In the course of the hearing, and in his answer filed in this case, Mr. Anderson took the position that the cited violations "are only one violation and should not have been written twice". Mr. Anderson's argument is rejected. It seems clear to me from the credible testimony of the inspector that pursuant to the requirements of the cited standards, the cited area and occupations were separate and distinct violations. The issue raised by Mr. Anderson has been raised and rejected by the Commission. See: El Paso Rock Quarries, Inc., 3 FMSHRC 35 40 (January 1981), and Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 378 (March 1993), where the Commission stated in relevant part

that "although Cyprus' violations may have emanated from the same event, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator".

Citation Nos. 3809256 and 3809258

The credible testimony of the inspector establishes the existence of the cited accumulations of combustible float dust over two rather extensive areas in the No. 1 and No. 2 belt entries. Indeed, Mr. Anderson did not deny that the cited accumulations existed, and he stipulated and admitted that the accumulations existed as described by the inspector in his citations (Tr. 101-102). Mr. Anderson's dispute lies with "the effort or the confusion on dust control" in connection with the respondent's abatement efforts (Tr. 21-23). However, these matters may not serve as a defense to the existence of the violations, and the citations ARE AFFIRMED.

Significant and Substantial Violations

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

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

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

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

> We have explained further that the third element of the Mathies formula "requires that the Secretary

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

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

Citation Nos. 3807424, 3807425.

Inspector Justice presented credible testimony in support of his "S&S" findings with respect to the two respirable dust citations that he issued (Citation Nos. 3807424 and 3807425). He stated that exposure to excessive levels of respirable dust in the presence of quartz rock which is being cut is particularly hazardous to miners and exposes them to silicosis (Tr. 58). The allowable exposure levels are reduced because of the presence of quartz which is more hazardous than coal dust. He believed it was reasonably likely that unabated exposure to the levels of respirable dust as determined by the samples "would more than likely if it kept on at this rate, that at some time or other, this man is going to have a problem" (Tr. 60). He pointed out that the sampled designated roof bolter was exposed to over twice the allowable standard, and he believed that such a high exposure level in any period of time would be permanently disabling (Tr. 60-61).

Inspector Justice reiterated that the excessive levels of dust exposure affecting the five miners on the designated MMU, as reflected by the samples, exposed the designated miner occupations to a silicosis hazard. He stated that the "silicon like" quartz dust "cuts your lungs and so forth more than what the coal dust does", and that if the conditions are allowed to exist, it was highly likely that the individuals exposed to the dust would end up with silicosis "somewhere down the road," particularly if mining were allowed to continue with the conditions unabated (Tr. 71-74).

The respondent presented no credible evidence to rebut the inspector's "S&S" findings. Indeed, Mr. Anderson conceded that even during a "short term", exposure to excessive levels of respirable dust, in the presence of quartz rock, made it reasonably likely that the affected miners would be exposed to a silicosis hazard (Tr. 74). Further, Mr. Anderson conceded that the mine has a quartz problem that consistently keeps the mine out of compliance even though ventilation changes are made periodically (Tr. 77-78). Although respirators were available, there is no evidence that they were being used, and Mr. Anderson was not aware that a wetting agent was being used to control the dust (Tr. 87).

In Consolidation Coal Co., 8 FMSHRC 890 (June 1986), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071 (D.C. Cir. 1987), the Commission held that all respirable dust violations exceeding the allowable regulatory limits are presumptively "S&S" violations. See also: Consolidation Coal Company, 13 FMSHRC 1076 (July 1991), decided by Chief Judge Paul Merlin affirming a respirable dust "S&S" violation on the basis of the Commission's June 1986 decision, and the recent Commission decision of June 22, 1993, in Twenty mile Coal Company, Docket No. WEST 91-449, reaffirming its Consolidation Coal Co., holding. Under the circumstances, and based on the unrebutted and credible testimony of the inspector, I conclude and find that the petitioner has established that the two violations in question were significant and substantial (S&S), and the findings of the inspector ARE AFFIRMED.

Citation Nos. 3809256 and 3809258

With regard to the two float coal dust accumulation violations, Inspector Stewart testified that the cited areas served as travelways and considering the ignition sources which were present, and with the belt running, it was reasonably likely that a fire would occur through the creation of an arc or a grounded out power wire caused by a rock fall along the belt line or the belt rubbing against the stand (Tr. 103). Inspector Stewart identified the potential ignition sources as the 220 volt control lines, electrical belt drives and boxes, and "numerous electrical sources" that could be shorted out by draw rock falling from the roof (Tr. 104). Mr. Stewart also believed that if the float coal dust which was present over previously rock dusted areas were placed in suspension, it could result in a coal dust explosion that "is probably the most violent explosion there are, and if you should have one, then it would affect everybody in that mine" (Tr. 110). He also believed that the cited accumulations had existed for at least two days (Tr. 120). Mr. Anderson conceded that the cited coal and float coal dust accumulations were present over a rather extensive distance of 1,800 feet (Tr. 112).

Inspector Stewart testified that the thin unmeasurable float coal dust that he observed was deposited over previously rock dusted surfaces and that it was "grey to dark" in color. There is no evidence or testimony that any of the dust was deposited on any of the potential ignition sources identified by the inspector, and his citation simply reflect that the deposits were at "numerous locations". The inspector conceded that if the cited areas were wet, a violation would still exist, but that an accident would have been unlikely (Tr. 117). Although he confirmed that the respondent's ventilation plan required that water be maintained on the belt drive units to control excessive dust, he admitted that he did not inspect the belt drives and did not know whether there was any water on the belts (Tr. 108). The citations do not reflect whether or not the cited areas were wet or dry, and there is no testimony by the inspector in this regard, or any evidence that he cited the respondent for a violation of its ventilation plan for the lack of water.

Although Inspector Stewart confirmed the presence of potential ignition sources in the cited areas, he admitted that he did not inspect any of the electrical components to determine whether they were defective or out of compliance (Tr. 119), and there is no evidence of any defective belt parts or belt conditions that would have sparked a fire had normal mining operations continued. Further, although the inspector alluded to a piece of falling draw rock sparking a fire, there is no evidence that he inspected the roof areas, nor is there any evidence of any roof conditions that would have made it likely that a piece of rock would fall and spark a fire had normal mining operations continued.

The respondent has admitted that the cited accumulations constituted violations of the cited section 75.400, and I conclude and find that the accumulations presented a discrete fire hazard. I also conclude and find that it was reasonably likely that a mine fire, if one had occurred, would reasonably likely result in injuries of a reasonably serious nature. However, in order for a fire to occur, with resulting injuries, there must first be an ignition resulting from the cited accumulations in question. On the facts of this case, and on the basis of the aforementioned testimony of the inspector, I cannot conclude that the petitioner has established that the conditions at the cited locations presented a reasonable likelihood of an ignition that would spark or result in a fire had normal mining operations continued. See: Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988); Eastern Associated Coal Corporation, 13 FMSHRC 178, 184 (February 1991). Under the circumstances, I conclude and find that the cited conditions did not constitute significant and substantial (S&S) violations and the inspector's "S&S" findings ARE VACATED. The citations ARE MODIFIED to reflect non-"S&S" violations, and I have taken this into account in the civil penalty assessments that I have made for the violations.

Size of Business

Inspector Justice testified that the respondent's mine superintendent, R.B. Hughes, informed him during a dust survey on February 24, 1993, that the mine produces 350 tons of coal a shift during two working shifts (Tr. 68-69). Mr. Anderson testified that the mine had an annual production rate of 80,000 tons of "clean coal", and that 14 to 15 miners, including a superintendent, work at the mine site (Tr. 128). The petitioner's counsel stated that MSHA's inspectors consider the mine to be a small mining operation (Tr. 127-218). Under all of these circumstances, I conclude and find for purposes of civil penalty assessments the respondent is a small mine operator, and I have taken this into consideration in this case.

History of Prior Violations

An MSHA computer print-out reflects that for a two-year period beginning August 28, 1989, and ending August 27, 1991, the respondent was assessed civil penalties totalling $5,024, for thirty (30) violations, and that it paid $1,045.11, for eight of the violations and was issued delinquency letters for non-payment of the remaining violations. The print-out reflects no prior violations of mandatory standards 30 C.F.R. § 70.207(a), 70.508, or 70.101, but does show ten (10) prior violations of section 75.400. Although I cannot conclude that the respondent has a particularly bad history of prior violations, it would appear to have a problem with controlling and cleaning up coal and coal dust accumulations. I also note the number of delinquency letter reflecting non-payment of prior penalty assessments. However, I consider this a "debt collection" matter and I assume that the petitioner is taking the necessary steps to seek payment from the respondent.

Good Faith Compliance

With regard t the two respirable dust citations issued by Inspector Justice (Nos. 3807424 and 3807425), and the noise citation issued by Inspector Osborn (No. 9876034), the record reflects that during a subsequent inspection on November 19, 1991, Inspector Stewart issued three section 104(b) orders because of the respondent's failure to timely abate the previously issued citations. Although the validity of the orders are not in issue in this civil penalty proceeding, I agree with the petitioner's assertion that the respondent failed to timely abate the citations and has not advanced any reasonable evidence to rebut Inspector Stewart's credible testimony as to why the orders were issued. Further, I find no justifiable mitigating circumstances excusing the respondent's failure to timely abate the citations. Under the circumstances, I conclude and find that the respondent failed to demonstrate good faith in timely abating the conditions cited by Inspectors Justice and Osborn. With

regard to the remaining citations (Nos. 9876024, 3809256, 3809258), I conclude and find the cited conditions were timely abated in good faith by the respondent.

Negligence

The inspectors found a low degree of negligence associated with Citation Nos. 9876024 and 9876034, and a moderate degree of negligence with respect to the remaining citations (3807424, 3807425, 3809256, 3809258). I agree with these negligence findings by the inspectors and adopt them as my findings and conclusions on this issue.

Gravity

Based on the inspector's Non-"S&S" findings with respect to Citation Nos. 9876024 and 9876034, I conclude and find that these violations were nonserious. Based on my findings and conclusions concerning Citation Nos. 3809256 and 3809258), I conclude and find they were nonserious. Based on the "S&S" findings made by the inspectors regarding Citation Nos. 3807424 and 3807425, I conclude and find that these citations were serious.

The Effect of the Proposed Civil Penalty Assessments on the Respondent's Ability to Continue in Business

In a contested civil penalty case the presiding judge is not bound by the penalty assessment regulations and practices followed by MSHA's Office of Assessments in arriving at initial proposed penalty assessments. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. § 820(i), and the information relevant thereto developed in the course of the adjudicative hearing. Shamrock Coal Co., 1 FMSHRC 469 (June 1979); aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company; 5 FMSHRC 287, 292 (March 1983).

As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). Conversely, the size and documented financial condition of a mine operator is required to be considered in any determination as to whether or not the payment of civil penalties will adversely impact on a mine operator's ability to continue in business.

In several early decisions pursuant to the 1969 Coal Act, the former Interior Board of Mine Operations Appeals held that Congress intended a balancing process in arriving at an

appropriate civil penalty assessment in any given case, including consideration of the size of the mine and the ability of a mine operator to stay in business. See: Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (May 1972), 1 MSHC 1024; Newsome Brothers, Inc., 1 IBMA 190 (September 1972), 1 MSHC 1041 1041; Hall Coal Company, 1 IBMA 175 (August 1972), 1 MSHC 1037.

In several cases adjudicated by me pursuant to the 1977 Mine Act, I followed and applied the Robert G. Lawson Coal Company, line of decisions, supra, and concluded that the reduction of the initial penalty assessments were justified because the mine operators were small and in serious financial difficulties, and that the initial assessments in the aggregate would effectively put the operators out of business. See: Fire Creek Coal Company of Tennessee, 1 FMSHRC 149 (April 1979), I MSHC 2078; Fire Creek Coal Company of Tennessee, 2 FMSHRC 3333 (November 1980); Davis Coal Company, 4 FMSHRC 1168, 1192-1196 (June 1982); G & M Coal Company, 2 FMSHRC 3327 (November 1980) and 3 FMSHRC 889 (April 1981); Faith Coal Company, 14 FMSHRC 1907 (November 1992). See also: Davis Coal Company, 2 FMSHRC 619 (March 1980), where he Commission reviewed and affirmed several settlement decisions approving proposed civil penalty reductions based on the detrimental effect that assessment of the originally proposed penalties would have had on the mine operators ability to remain in business.

In the course of the hearing in this matter, petitioner's counsel took the position that the respondent's ability to pay the proposed civil penalty assessments should be based on the total assets available to Mr. Anderson, and not simply the assets of the respondent Broken Hill Mining Company. Counsel asserted that Mr. Anderson's ownership interests in other mining companies, including the degree of any interrelationships among those companies, including the intermingling of funds and equipment, should be considered in any determination as to whether or not the payment of the proposed civil penalties in the instant case will adversely affect the respondent's ability to continue in business (Tr. 17-19).

Petitioner's counsel cited several prior consolidated civil penalty cases heard by Judge Gary Melick on September 4, 1992, concerning two other coal companies controlled by Hobard Energies Inc., (Spurlock Mining Company, Inc., and Sarah Ashley Mining Company, Inc.) and counsel requested that I take judicial notice of the testimony by Mr. Anderson in those proceedings, as well as the brief filed by the solicitor representing MSHA in those cases (Tr. 17; 146).

The petitioner's counsel offered a copy of the brief filed in the prior cases, (Exhibit ALJ-1), and it was accepted "not as evidence, but as information and background" (Tr. 143-144). Counsel's request that I take notice of the transcript of the

prior cases was taken under advisement, and counsel was advised to file a motion or further request that I consider the transcript, as well as the brief, when he filed his posthearing brief in the instant case (Tr. 147-148).

Mr. Anderson took the position that his testimony in the Spurlock and Sarah Ashley cases are not relevant to this case involving the Broken Hill Mining Company. He testified that only four of the purported 12 or 13 coal companies that MSHA's prior counsel argued were under his control were actually operating coal companies during the time the prior cases were adjudicated, and that the remaining companies "were dormant or very inactive companies" (Tr. 147).

Mr. Anderson stated that he would file a copy of his reply brief in the Spurlock and Ashley Mining cases, but he has not done so (Tr. 149). Petitioner's counsel stated that he "would advise the court if I felt the need to do any further discovery regarding the financial situation" (Tr. 166). However, counsel has not done so, and his posthearing arguments with respect to the respondent's financial ability to pay the proposed civil penalty assessments in this case simply repeat his requests made during the hearing that I take notice of the transcript of the prior proceedings. Counsel also states that he is incorporating by reference the arguments advanced in the brief filed in those prior cases.

In the Spurlock and Sarah Ashley cases, the respondents conceded that the violations occurred as charged, but contended that payment of the proposed civil penalty assessments would affect their ability to remain in business. It was established that the respondents were subsidiaries of Hobart Energy, Inc., and Mr. Anderson was the only witness testifying on behalf of the respondents. None of the inspectors who issued the citations testified. Judge Melick issued his decisions on April 2, 1993, 15 FMSHRC 629 (April 1993), and rejected Mr. Anderson's arguments concerning the adverse affect of the penalties on the ability of Spurlock and Sarah Ashley to remain in business. Judge Melick held that since those companies were no longer in business, "the proffered excuse is no longer relevant" and that their financial condition was "only an issue of collection and while the Secretary may have to stand in line with other creditors this is no longer an issue under Section 110(i) of the "Act", 15 FMSHRC 630-631.

Judge Melick questioned the reliability of the financial evidence presented by Mr. Anderson in support to his claim (state and Federal corporate tax returns, unaudited balance sheets, notices of tax and other liens, and court pleadings apparently involving litigation by creditors against the respondent companies and Mr. Anderson personally), and found that this evidence was too limited in scope. Judge Melick held that "the

equities of this case support piercing the corporate veil" under an "alter ego" theory because there was a complete merger of ownership and control of the Spurlock an Sarah Ashley companies with Mr. Anderson personally. On May 12, 1993, the Commission granted Spurlock and Sarah Ashley's petitions for review of Judge Melick's decision, and the matters are still pending before the Commission for adjudication.

The petitioner's request that I take notice of the transcript of the hearing held in the prior proceedings before Judge Melick on September 2, 1992, and the posthearing brief filed by the petitioner IS GRANTED, and I have reviewed the transcript and the brief in the course of my adjudication of the instant case. Mr. Anderson's unrebutted testimony in the prior matters reflected that his only compensation was a $75,000, salary that the received from Hobart Energies, Inc., the controller company in which he has a 25% stock ownership stake (Tr 60. 69). Hobart Energies owned all of the equipment used at the Sarah Ashley operation, some of the equipment used at the Spurlock operation, and equipment was interchanged between the two operations as needed (Tr. 64-65). Mr. Anderson confirmed that both of these operations mined coal on a contract basis, but that they were inactive and no longer in business. However, he stated that the equipment was still at the mine sites, and he hoped to go back into business at those operations (Tr. 74-75). He also indicated that Hobart Energies may lease the equipment to other mine operators, but that any lease proceeds will go to the IRS to satisfy personal liens against him and Hobart Energies for nonpayment of payroll and unemployment taxes (Tr. 78-79).

In the prior proceeding, Mr. Anderson testified that the Broken Hill Mine was opened in late July, 1992, and coal was mined on a contract basis for A.T. Massey Coal Company. That company purchased some belt equipment from Broken Hill who in turn used the proceeds to make payments to the bank that held a lien on the equipment (Tr. 84-85). Mr. Anderson confirmed that he served as president and chief operating officer of Broken Hill Mining Company, as well as several other companies held by Hobart Energies, the controller company owning 100% of the stock of these companies (Tr. 87-91). Mr. Anderson further testified that Broken Hill "had been shut down for six months and just got back on its feet. And hopefully it can turn around but to date has been losing money" (Tr. 106). He also stated that none of his coal mine companies were dong well and that "anything that we have to pay is a struggle" (Tr. 106).

In the posthearing brief filed in the prior proceedings (Exhibit ALJ-1), MSHA's counsel took the position that Mr. Anderson's "general, unsupported, and self-serving" testimony about the financial condition of Sarah Ashley and Spurlock was insufficiently probative of those respondents inability to pay the assessed penalties without adversely impacting on their

ability to remain in business. I take note of the fact that during the course of the hearing in the prior proceedings, MSHA's counsel offered in evidence the financial data supplied by Mr. Anderson with respect to Sarah Ashley and Spurlock, and counsel expressed agreement with the information presented, and she did not challenge the balance sheets prepared by Mr. Anderson or his accountants, the authenticity or the accuracy of the information, or the supporting affidavits reflecting the opinions of the CPA's who prepared Mr. Anderson's tax returns, and Mr. Anderson, who is also a CPA. All of this documentary financial evidence was received without objection (Tr. 21-24).

In the prior proceedings, MSHA's counsel noted that Mr. Anderson chose not to submit financial data for ten other companies under his management, and since these corporations were not dissolved and their assets liquidated, counsel argued that it was reasonable to conclude that they were still producing coal and that money was coming from somewhere to pay the costs of the corporations controlled by Mr. Anderson and to maintain a continuing banking relationship with his business lenders. Under the circumstances, counsel concluded that Sarah Ashley and Spurlock did not establish that payment of the assessed penalties would have an adverse affect on the ability of all of the Hobart Energies subsidiaries to remain in business, and that Mr. Anderson and the corporate entities that he managed should be held jointly and severally liable for these penalties.

After careful review and consideration of the aforementioned record in the prior Sarah Ashley and Spurlock cases, I decline to adopt the "alter ego" findings and conclusions made by Judge Melick, as well as the arguments advanced by MSHA. I conclude and find that there is sufficient evidence of a more current nature in the instant proceeding to enable me to make a decision on the issue of whether or not the payment of the penalties proposed by the petitioner, or the payment of the penalties which I have assessed for the violations which have been affirmed, will adversely affect the respondent Broken Hill Mining Company's ability to continue in business.

Mr. Anderson's unrebutted testimony in this case reflects that with the exception of the Broken Hill Mining Company, the other corporate mining ventures controlled by Hobart Energy Inc., are no longer viable and productive mining operations. Insofar as Broken Hill is concerned, Mr. Anderson testified that the company was resurrected in July, 1992, and that although one of its mines was experiencing problems with rock, which impacted adversely on production, the mine was nonetheless producing coal. This is consistent with Mr. Anderson's testimony in the prior proceedings that Broken Hill "was back on its feet" and was again producing coal, although Mr. Anderson claimed the company was losing money and that it "was a struggle" to pay bills.

In the instant case, Mr. Anderson further testified that due to the high rate of coal rejection at the Broken Hill No. 1 Mine, A.T. Massey has paid subsidies to Broken Hill as compensation. He also testified that Broken Hill's new No. 3 mine, which started coal production in November, 1992, is still producing coal and that it is "a good operation" (Tr. 135-136). There is no evidence that this operations is troubled, and although the mine equipment is secured by a bank lien, which I do not find to be particularly unusual, the equipment is owned by Broken Hill Mining Company. Further, the evidence in the instant proceeding reflects that Mr. Anderson receives a salary of $75,000, a year, on a regular basis, from Hobart Energy Inc., Broken Hill's parent company, and that Broken Hill has consented to pay MSHA $250 a month for past civil penalty assessments, and is paying $5,000 a month to the IRS for past tax liens.

In view of the foregoing, and notwithstanding the testimony and evidence presented by Mr. Anderson with respect to the financial state of the respondent Broken Hill Mining Company, which reflects several liens and other outstanding debts, which I have taken into consideration, I am not convinced that the payments of the penalties assessed in this proceeding against Broken Hill Mining Company will adversely affect its ability to continue in business. I conclude and find that if the respondent Broken Hill Mining Company can pay $250 a month to MSHA, $5,000 a month to the IRS, and at the same time continue to mine coal at its newly opened No. 3 mine, producing revenue for Broken Hill, and I assume Hobart Energy Inc. as well, which in turn pays Mr. Anderson a $75,000 annual salary, it can afford to pay the civil penalties assessed in this case. Further, given Mr. Anderson's financial acumen, and his CPA background, I am confident that the respondent will find the funds to pay the penalty assessments. Accordingly, the arguments advanced by the respondent that it cannot pay any civil penalties ARE REJECTED, and I conclude and find that the respondent has failed to establish that payment of the penalties that I have assessed will adversely affect its ability to continue in business.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
9876024	7/16/91	70.207(a)	$20
9876034	7/30/91	70.508	$150
3807424	8/29/91	70.101	$200

3807425	8/29/91	70.101	$350
3809256	11/15/91	75.400	$65
3809258	11/15/91	75.400	$65

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above for the six (6) violations which have been affirmed in this case. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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JUL 13 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 92-505-M
	:	A.C. No. 26-01488-05532
v.	:	Docket No. WEST 92-532-M
	:	A.C. No. 39-01488-05534
BONANZA MATERIALS INC., Respondent	:	Docket No. WEST 92-576-M
	:	A.C. No. 39-01488-05535
	:	Docket No. WEST 92-602-M
	:	A.C. No. 39-01488-05536
	:	Bonanza Materials

DECISION

Before: Judge Lasher

These four penalty proceedings arose upon the filing by Petitioner of four penalty proposals covering a total of 10 Citations and Withdrawal Orders pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820 (herein "the Act").

By my Order dated January 15, 1993, the matter was deemed to be submitted for decision on the basis of stipulated facts and briefs and, the sole issue being one of jurisdiction, it was determined inter alia that should jurisdiction lie the penalties proposed by Petitioner would be assessed.

As set forth in the Joint Response To Prehearing Order filed herein, Respondent does not contest the factual bases for the violations alleged by Petitioner and concedes the substance of the said violations. Respondent asserts that MSHA has no jurisdiction over the physical area in which these violations were located and defends solely on that basis.

FINDINGS

The parties having stipulated to all the relevant facts in their Joint Response to Prehearing Order, I find as follows:

1. The instant violations, as set forth in Exhibits A to the Proposals on file herein, were all located in the mechanic's shop at Bonanza Materials Inc. ("Bonanza") in Henderson, Nevada.

2. The said Proposals were duly filed against the Respondent Bonanza in accordance with the Rules of the Federal Mine Safety and Health Review Commission published in Title 29, Code of Federal Regulations, Section 1700.27.2, and duly contested by Respondent.

3. Bonanza is a sand and gravel operation which consists of an open pit, a sand and gravel plant, cement batch plant, hot batch plant, and general construction operations. The mining activities conducted by Bonanza include traditional extraction and processing of sand and gravel minerals.

4. The mechanic shop is located on mine property, directly between the open pit and the and gravel plant. There are no fences or barriers separating the shop from these areas.

5. The access road which is used to transport materials from the pit to the plant is the same road used to access the mechanic shop.

6. The shop is operated by Bonanza employees, which particular employees are not considered by the company to be miners.

7. The mechanic shop services and maintains approximately 295 units of equipment belonging to Bonanza. Approximately 12 of these units, or between 3 and 4 percent of this total, are units (generators/vehicles) which are used directly by Bonanza in its mining operations. These mining vehicles include approximately six front-end loaders used in the mine pit. The said mining vehicles also include approximately two water trucks which are used in mining operations to reduce dust. The balance of the units serviced in the shop are not used in any mining activity whatsoever.

8. Work performed on the mining equipment is not performed in any physically distinct area of the mechanic shop.

9. The shop is the equipment-leasing arm of the company that maintains equipment for a variety of Bonanza's operations, the least significant of which is mining.

10. The cement batch plant and the hot batch plant are both located adjacent to the mining operations.

11. MSHA has previously cited the operator for violations occurring in the said mechanic shop. In these previous instances, the Respondent did not contest MSHA's jurisdiction to cite in the mechanic shop.

12. The Respondent has contested the instant violations on the basis of MSHA's alleged lack of jurisdiction over the mechanic shop and sought a formal legal opinion to that effect. The Office of the Solicitor, on behalf of the Secretary of Labor and after consultation with MSHA and a review of the facts of the case, issued an opinion that MSHA did have jurisdiction over the mechanic shop in the instant case and that the Citations were valid.

13. OSHA is not asserting jurisdiction over the subject mechanic shop and has issued no citations regarding same.

14. Bonanza Materials, Inc., is a mine subject to the Act in that its products enter into or affect interstate commerce.

DISCUSSION

Upon consideration of the evidence presented and the arguments and briefs submitted by the parties, it is concluded that Petitioner's position is meritorious and it is here adopted.

1. The Broad Statutory Definition of Mine Includes Functionally Related Structures, Such As The Subject Mechanic Shop

The mechanic shop is a "facility" or "structure" within the meaning of Section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) of the Act, because it is directly "used in ... the work of extracting ... minerals," and is therefore under MSHA jurisdiction. [Section 3(h)(1)(C)]. Section 3(h)(1) defines MSHA's jurisdiction expansively, as including not only the actual extraction of minerals, but also other peripheral activities which are functionally integrated to any degree to the mining and milling operations, as well as facilities and structures used therein. Further, as remedial legislation, the Act's already wide definition of "mine" must be read broadly and inclusively. Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (1979), cert. denied, 444 U.S. 1015, 100 S. Ct. 665 (1980); Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1554 (1984); Cyprus Industrial Minerals Co., (9th Cir. 1981), 2 MSHC 1554; Oliver M. Elam, Jr., Co., 4 FMSHRC 5, 6 (January 1982). The subject mechanic shop services mining vehicles such as front-end loaders and pit haulage trucks, which are an integral part of Respondent's mining operations. This functional integration brings the shop within the broad definitional scope of Section 3(h)(1).

2. **MSHA's Jurisdiction Over Mechanical Maintenance Facilities is Clear**

MSHA's jurisdiction over mechanical maintenance facilities has been expressly confirmed in Martin Marietta Aggregates Central Division, 2 FMSHRC 2163 (ALJ Koutras, Sept. 1980). In the latter case, the facility was not even located on the mining property, in contrast to the instant case where the mechanic shop is on Bonanza's mining property. Similarly, in the case of W.R. Saunders & Sons, 1 FMSHRC 2130 (ALJ Melick, Feb. 1980), a storeroom which held parts, most of which were used in non-mining operations and only a small portion of which were parts used on mining vehicles, was held to be a mine under the Act: "(i)t is immaterial that some of the equipment and machinery, or even most of it, may have been used in areas that may not have been under the Secretary's jurisdiction."

3. **The Interagency Agreement Confirms MSHA's Jurisdiction**

The administrative Interagency Agreement between MSHA and OSHA, on which Respondent seeks to rely, takes as its starting point the broad statutory jurisdiction of MSHA, then carves out specific areas over which OSHA is given jurisdiction. Interagency Agreement, Mine Safety and Health Administration, Occupational Safety and Health Administration, Federal Register, Vol. 44, No. 75. Significantly, these exceptions to MSHA jurisdiction neither expressly nor impliedly exclude equipment servicing facilities, nor facilities in which the majority of the servicing is directed to non-mining operations. Finally, the Interagency Agreement reiterates the congressional mandate that any doubts regarding jurisdiction are to be decided in favor of MSHA jurisdiction. For all of these reasons, the said Interagency Agreement does not serve to limit the scope of the Act, as argued by Respondent, so as to render Respondent immune from prosecution thereunder.

4. **Respondent's Position is Inconsistent with the Act and Case Law**

Respondent argues that the statutory definition of "mine" in the Act does not expressly mention the term "mechanic shop." Petitioner submits that the broad wording of Section 3(h)(1) is sufficiently inclusive on its face to cover the mechanic shop in issue here. The case law interpreting this definitional and scope section of the Act, as discussed above, has consistently mandated that the section be given a broad reading as befits the remedial nature of the 1977 Act. Moreover, this language, also as noted above, has been interpreted to cover a mechanic shop such as Respondent's.

Respondent further argues that because only a small percentage of the vehicles worked on in the mechanic shop are used in the mining operations they should be ignored in assessing whether MSHA has jurisdiction over the shop. However, the Act offers no support for such a de minimus argument. To the contrary, as discussed above, the governing jurisprudence has held that any activity which is functionally integrated with the mining activity necessitates the imposition of MSHA jurisdiction even where that activity is minor or removed from the mining site.

Respondent also observes that the mechanics working in the shop are not considered miners by either themselves or the company, while the practice in nearby sand and gravel operations in the vicinity is that mechanic shops have not been inspected by MSHA. For these reasons, the Respondent argues, MSHA jurisdiction should be avoided here. However, the views of the mechanics as to their own classification as miners as a term of art under the Act is irrelevant. Similarly, the material facts regarding other operators in the vicinity are unknown and not part of the determination here.

MSHA's jurisdiction to cite violations occurring in the mechanic's shop, where mining vehicles are serviced, is **AFFIRMED.** The Citations and proposed assessments are **AFFIRMED.**

The following penalties are **ASSESSED:**

1. **Docket No. WEST 92-505-M**

Citation No.	Penalty
3922399	$903

2. **Docket No. WEST 92-532-M**

Citation No.	Penalty
3922392	$903
3922393	$903
3922395	$903
3922396	$ 50
3922397	$ 50
3922398	$ 50
3922401	$ 50

3. **Docket No. WEST 92-576-M**

Citation No.	Penalty
3922407	$1,298

4. **Docket No. WEST 92-602-M**

Citation/ Order No.	Penalty
3922406	$7,500

ORDER

Respondent **SHALL PAY** to the Secretary of Labor within 40 days from the date of issuance of this decision the total sum of $12,610.00 as and for the civil penalties herein assessed.

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

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JUL 19 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-100 A.C. No. 05-02820-03605 A
v.	:	Golden Eagle Mine
DONALD L. GIACOMO, employed by WYOMING FUEL COMPANY, Respondent	:	
UNITED MINE WORKERS OF AMERICA, LOCAL 9856, DISTRICT 15, Intervenor	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

William C. Erwin, Esq., ERWIN & DAVIDSON, P.C., Raton, New Mexico, for Respondent;

Mike J. Romero, United Mine Workers of America, Local 9856, District 15, Trinidad, Colorado, for Intervenor.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Donald L. Giacomo, an employee of Wyoming Fuel Company ("WFC"), with violating the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act").

Order No. 3240616 was issued on May 14, 1990, under Section 104 (d)(1) of the Act. The order was issued as a result of activities that had taken place the evening of May 10, 1990, and continued into the morning hours of May 11, 1990.

The Order states:

> Persons were required by management to operate equipment that was not maintained in safe operation condition, in that based on statements received from both labor and management, the Joy continuous miner in NW 010-0 Headgate was being operated on the 05-11-90 a.m. shift by the following methods[:]
>
> The remote control would not function to raise the miner head while mining coal. A man was placed in the cab to operate this function while the miner was being operated by remote control. This practice was dangerous due to two persons subject to being on opposite sides of the operating machine and accidental error. Also dangerous due to the fact that neither person had complete control at all times. Both the shift foreman and safety manager were present and had instructed the crew to proceed by this method. This is unwarranted action.

The regulation allegedly violated provides as follows:

> **§ 75.1725 Machinery and equipment; operation and maintenance.**
>
> (a) 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.

As a threshold matter Respondent contends 75.1725(a) is unconstitutionally vague.

The cited regulation is broadly worded; it requires all machinery and equipment to be maintained in a safe operating conditions. The Commission in Ideal Cement Company, 11 FMSHRC 2409.2416 (November 1990) stated that in interpreting and applying broad-worded standards, the appropriate test as whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing Canon Coal Co., 7 FMSHRC 6676, 668 (April 1987), Quinland Coal, Inc., 1614, 1617-1618 (September 1987).

On the basis of the evidence presented in this case, a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the Joy miner should be equipped with a functioning solenoid. The non-functioning solenoid prevented the remote control operator from operating the cutter heads. (Tr. 46). The general mine foreman recognized the problem and he gave specific instructions not to operate the Joy miner with a man in the cab "due to

safety reasons." (Tr. 113). The manufacturer of the Joy miner in a service bulletin issued after the fact (September 24, 1991), also recognized the hazard here. (Ex. G-8). The manufacturer stated as follows:

> **D. OPERATION FROM WITHIN THE MACHINE**
>
> Many continuous miners have both remote control and on-board controls (i.e., inside the operator's platform). While it may be possible to operate a continuous miner which has on board controls from inside the operator's platform using the remote station, Joy strongly recommends against this practice. Instead, if the machine is to be operated from inside the operator's platform, the remote control should be discontinued or de-energized, and the on-board controls utilized. Of course, when on-board controls are utilized they must be used in a manner consistent with applicable government regulations, e.g., the operator must be under a supported roof.

Respondent contends two expert witnesses testified the method of on-board/remote operations was a safe procedure. Contrary to Respondent's view, I credit the statements of the actual Joy operators. Garcia, Shannon, and Wakefield were threatened with loss of their jobs and they settled for a conference with the mine foreman and Mr. Giacomo, the safety director. Respondent's claim of vagueness is **DENIED.**

There is ample evidence the operator, WFC, knew the Joy 12 continuous miner was unsafe due to a malfunctioning solenoid and a non-functioning deadman switch. Proof of WFC's knowledge was clearly indicated when Mr. Steve Salazar, the general miner foreman, gave explicit instructions at the beginning of the shift not to operate the Joy Miner from inside the cab. (Tr. 46, 73, 103, 113).

However, the pivotal issue is not WFC's knowledge and liability but rather the employee's liability under Section 110(c) of the Act. The relevant portion of the Act provides as follows:

> (c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Commission interpreted the term "knowingly" in Section 110(c) as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. 92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial nature of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Secretary v. Richardson, 3 FMSHRC 8, 16 (1981), 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); Roy Glenn, 6 FMSHRC 1583 (1984); Warren Steen Construction, et al., 14 FMSHRC 1125 (July 1992).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following findings of fact and the additional findings of fact in the Discussion below:

FINDINGS OF FACT

1. On May 10, 1990, prior to the beginning of the shift, Mr. Steve Salazar, the general mine foreman, gave a direct order that the Joy 12 Miner was not to be operated from inside the cab. For safety reasons, the miner had to be run with the remote control. (Tr. 46, 73, 113).

2. On the following shift, Messrs. Jim Sterns (face boss) and Wayne Shipe (maintenance) directed miners John Garcia, Eddie Shannon, and David Wakefield to operate the Joy 12 in a three-way effort. Garcia was to be in the cab, Shannon was on the remote control and Wakefield was to handle the trailing cable. (Tr. 25, 58, 72, 102).

3. Shannon, the remote control operator, was unable to both lower and raise the cutter heads with the remote control due to a malfunctioning solenoid. As a result, Garcia was to raise the cutter heads from inside the cab. (Tr. 46).

4. In addition, the deadman function had not been operating properly for approximately two weeks. The deadman is a safety feature. When the pedal is depressed, the continuous miner will tram and continue forward. (Tr. 45, 46).

5. Garcia, a mechanic, when inside the cab of the Joy Miner was to operate the raising of the cutter heads. Garcia had never mined coal before this shift. In addition, he had no task training on the machine. (Tr. 24, 25, 29).

6. Shannon, the continuous miner operator, was placed outside the miner to operate all other functions (except raising the cutter head) by remote control. (Tr. 24, 27).

7. Garcia, Shannon, and Wakefield felt this was unsafe. However, when threatened with the loss of their jobs, they did it "under protest." They further requested that they be permitted to talk to Mr. Pagnotta (superintendent on the graveyard production shift) and Mr. Giacomo (safety manager). (Tr. 68-79, 87-88).

Discussion and Further Findings

Mr. Donald Giacomo is the safety manager referred to in Order No. 3240616. Further, he is personally charged with knowingly authorizing, ordering, or carrying out an action that caused the cited violation.

I agree with Mr. Giacomo that to prove a violation of Section 110(c) of the 1977 Act, the Secretary must prove that the corporate operator committed a violation of the Act. This factor has been established. In fact, in the instant case, much of the evidence related to the corporate operator but only a minimal amount of this evidence was imputed to Respondent Giacomo.

The Secretary must further prove that Giacomo was an agent of the operator. This facet was established inasmuch as Mr. Giacomo indicated he was the WFC safety manager for the Golden Eagle Mine. (Tr. 183).

Finally, in a 110(c) case, the Secretary must prove the corporate agent knowingly authorized the action. The meaning given to the term "knowingly" has been described above.

The previous seven findings of fact establish the operator's violation but such facts are not necessarily imputed to Mr. Giacomo. However, Mr. Giacomo's testimony establishes a violation of 110(c). Specifically, he should have known the miner was defective and unsafe because the remote control would not raise the cutter heads. The transcript of Mr. Giacomo's testimony reads:

Q. Did you have any discussion with David Pagnotta during that drive? [to the working section]

A. Yes, I did.

Well, I asked him what the problem was. He said some of the men at the northwest headgate section had a problem with the miner, with the way they were instructed to run the miner.

I said, "What was that?" He said, "Well, the function on the head was not working; whereas, they placed the mechanic in the cab solely to lift the head back up once he was signaled by the operator." (Tr. 190).

* * * * *

I said [to David Wakefield], "How are things going?" He said, "All right." I said, "What's the problem, Dave?" The first words out of his mouth was, "We were told not to operate this machine from inside the cab."

And I said, "Well, what's the problem?" And he said, "Well, that's it. We were told not to operate this machine from inside the cab." I then proceeded to say, "Dave, you should understand why that was." He didn't acknowledge me.

I said, "The reason for you being told to operate that way was simply to get everybody to work together to train--to know how to operate the new miners when they come in." That was the main purpose for them being told to operate it from the remote control position.

Q. Did you have any further conversation with Mr. Wakefield?

A. As I was talking to Mr. Wakefield, Dave Pagnotta was a few steps behind me. As he approached my side, I noticed that--he noticed that Ed Shannon was on the opposite side of the miner, in complete disarray of what he had first told me what his positioning was supposed to be. (Tr. 192).

* * * * *

I said [to John Garcia], "Well, what's the real problem with the machine?" Why are they doing this? The function in the head would not sheer down with the remote control. And I said, "Well, were you instructed by someone where and how to communicate with each other?" He said, "I was."

Q. You said, "Sheer down," is that--

A. Well, the remote operator was sheered down, but it was his instruction to raise the head back up with signals by the operator.

Q. Okay. Go ahead. What conversation did you have then with Garcia?

A. Well, I asked him what function wasn't working. He told me it was the raising back of the head. And then I said, "Well,"--I said, "Well, what's the problem?" He said, "Well, we were

instructed not to operate this way, not by sitting in the cab." (Tr. 195).

* * * * *

Q. But on May 11th, '90, the machine was being operated with both the remote and the manual controls because the miner was malfunctioning and the remote wouldn't work to raise the cutter heads; isn't that correct?

A. No, it's not [according to Mr. Giacomo]. The machine was being run by the remote position and only the head was being raised by the man being instructed what to do.

Q. Okay. So only the cutter head was being operated by the man.

A. Yes.

Q. That's the reason he was inside the cab

A. Right.

Q. Because that was malfunctioning on the machine?

A. Yes. (Tr. 201).

* * * * *

Q. But you were aware on May 11th that the remote control did not function to raise the cutter heads?

A. When Mr. Pagnotta picked me up and told me. (Tr. 205).

* * * * *

Q. But you did state on direct that Mr. Garcia told you that he had been instructed not to operate the miner from inside the cab.

A. Yes.

Q. He told you that a couple times, like.

A. Yes, I believe it was.

Q. And he also told you that the remote wouldn't raise the cutter head?

A. Correct. (Tr. 206-207).

I agree that in the conversations between Messrs. Garcia, Shannon, Wakefield, and Pagnotta, no one expressed his concerns to Mr. Giacomo in terms of safety. Further, they did not use words such as "safety," "safety complaint," or feeling "unsafe [while] being inside the cab."

However, there are no magic words to require action under § 75.1725. If equipment is unsafe, it "shall be removed from service immediately."

Given the circumstances here, Mr. Giacomo should have known an unsafe condition existed. Mr. Giacomo knew the cutting head was not responding to the remote controls so Mr. Garcia was operating the head from inside the cab. The remote control operator and Garcia were signaling each other with lights. In short, two men were operating the miner with two different sets of controls. This was a dangerous method of mining as well as a violation of the regulation.

In addition, Mr. Giacomo, admits he has never seen a Joy miner being operated by the remote and manually at the same time. (Tr. 300).

In failing to remove the equipment from service, Mr. Giacomo violated the regulation and the Act.[1]

In his post-trial brief, Mr. Giacomo extensively attacks the credibility of the Secretary's witnesses, particularly Garcia, Shannon, and Wakefield. I find these witnesses basically support the Secretary's position.

The petition herein should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The order here was designated as "Significant and Substantial."

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

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

---

[1] There was no evidence that Mr. Giacomo knew or should have known that the deadman's switch was malfunctioning on the continuous miner.

6 FMSHRC at 3-4. See also, Austin Power Co. v. Secretary, 861 F.2d 99, 104-105 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

In this case, I credit the testimony of witness Roland Phelps. He identified the hazard as two miners operating the Joy Miner by remote and manual controls. This results in neither man being in full control. Someone could be seriously injured or killed. (Tr. 111, 112).

It is apparent there was an underlying violation of 30 C.F.R. § 75.1725(a). Further, there was a strong measure of danger that contributed to the violation. In addition, it is reasonably likely the hazard will result in an injury. Finally, the injury could be a fatality or a serious injury. (Tr. 123-137). (See Ex. G-7, a fatality involving a miner being crushed against a rib by a continuous miner at the Golden Eagle Mine).

UNWARRANTABLE FAILURE

The special finding of unwarrantable failure, as set forth in Section 104(d) of the Mine Act, 30 U.S.C. § 814(d), may be made by authorized Secretarial representatives in issuing citations and withdrawal orders pursuant to Section 104. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987) the Com- mission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation," 9 FMSHRC at 2003; Peabody Coal Co., 14 FMSHRC 1261 (August 1992).

In the instant case, I conclude the Order was properly designated as unwarrantable. Inspector Phelps regarded the Order as having high negligence. Mr. Salazar had given specific instructions not to engage in the practice. (Tr. 127). Mr. Giacomo was advised of Mr. Salazar's Order when he arrived in the section. Mr. Giacomo was also advised of the condition of the miner when he arrived in the section.

In favor of Mr. Giacomo is the fact that he was primarily involved in the positioning of Shannon and Wakefield in the section.

However, I agree with Mr. Phelps designation of this order as unwarrantable.

CIVIL PENALTY

At the commencement of the hearing, the Secretary moved to amend the amount of the assessed penalty from $900 to $700, the same amount charged against Mr. Pagnotta.

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

Mr. Giacomo is an individual and the size of the business, and the effect on the operator's ability to continue in business are not relevant in this case.

There is no evidence that Mr. Giacomo was cited for any previous violations.

However, Mr. Giacomo was negligent inasmuch as the relevant facts were made known to him. The gravity of this violation is high since miners Shannon and Wakefield could easily have been placed in a hazardous position.

The violative condition was abated.

The Secretary reduced this penalty to $700 and I concur that such a penalty is appropriate.

For the above reasons, I enter the following:

ORDER

Order No. 3240616 is **AFFIRMED** and a civil penalty of $700 is **ASSESSED.**

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 20 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. VA 93-3
	:	A.C. No. 44-05668-03608-A
v.	:	
	:	No. 1 Mine
DANNY OWENS, EMPLOYED BY J & T COAL INCORPORATED, Respondent	:	

DECISION

Appearances: Caryl L. Casden, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Louis Lee, Esq., McAfee, Bledsoe, Lovell & Lee, Norton, Virginia, for Respondent.

Before: Jerold Feldman

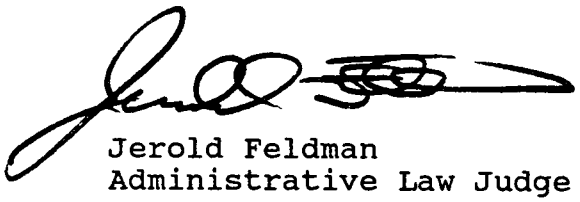
This proceeding is before me upon a petition for assessment of civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Act). The respondent, Danny Owens, is charged, as an agent of the corporate mine operator, with "knowingly authorizing, ordering, or carrying out" the actions which allegedly resulted in six alleged violations of mandatory safety standards. These violations are detailed in the Secretary's petition for assessment of civil penalty in which a penalty of $2,400 is proposed.

This matter was called for hearing in Big Stone Gap, Virginia, on June 15, 1993. At the hearing, counsel for the respondent presented a motion for the approval of settlement wherein Owens stipulated to the fact of the violations in issue and agreed to pay a total penalty of $1,200. The terms of the settlement agreement provide that Owens shall pay $600 immediately after the approval of settlement and $50 each month for twelve months thereafter. In support of this settlement, the respondent's counsel indicated that the respondent has recently become employed at a modest salary, that he has no liquid assets, and, that he must support a wife and several children. Thus, the reduction in the proposed penalty is predicated upon the respondent's current income and his ability to support his family. (Tr. 6).

In view of the respondent's stipulation to the fact of occurrence of the violations in issue and the information provided in support of the reduced civil penalty assessed in this matter, I concluded that the proposed settlement was in the public interest and granted the settlement motion from the bench. (Tr. 7).

ORDER

Accordingly, Danny Owens **IS ORDERED** to pay a civil penalty in the amount of $1,200 in full satisfaction for the six violations in issue. Payment is to be made in installments. The first payment of $600 is due within 30 days of the date of this decision. Beginning on September 1, 1993, on the first of each month, for twelve consecutive months, Owens shall pay $50 until the outstanding $600 of the $1,200 penalty is paid. Upon payment of the total sum of $1,200, this matter will be dismissed. If Owens fails to abide by this settlement decision, this proceeding will be reopened, and he will be subject to the full $2,400 penalty.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 22 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-636
Petitioner	:	A.C. No. 11-00586-03654
v.	:	
	:	Murdock Mine
ZEIGLER COAL COMPANY,	:	
Respondent	:	

REMAND DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

On February 12, 1992, I issued a decision in this case affirming a violation of mandatory safety standard 30 C.F.R. § 75.507, as a significant and substantial (S&S) violation, 14 FMSHRC 304 (February 1992). The respondent appealed my decision, and on June 22, 1993, the Commission issued its decision affirming my finding of a violation of section 75.507. However, the Commission vacated my determination that the violation was S&S and remanded the matter to me for further findings and analysis consistent with its opinion.

Discussion

Subsequent to the remand of this case, the petitioner filed a motion for my approval of a proposed settlement of the matter. The petitioner's trial counsel states that after further discussion the parties have agreed that the citation in question should be affirmed as a section 104(a) "S&S" violation with a penalty of $275 in accordance with my February 12, 1992, decision.

Conclusion

After due consideration of the motion, and pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, the motion IS GRANTED, and the proposed settlement disposition of this matter IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of $275, for the violation which has been affirmed. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 22 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-1049
	:	A.C. No. 46-01867-03929
v.	:	
	:	Blacksville No. 1
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three (3) alleged violations of the mandatory accident reporting requirements found in 30 C.F.R. § 50.11(b)(8). The respondent filed a timely answer and contest, and in response to a prehearing order, the parties informed me that they were unable to agree to a settlement of the contested citations and that a hearing would be required. Accordingly, the matter was consolidated with several other cases involving these same parties, and a hearing was held in Morgantown, West Virginia, on June 15, 1993.

Discussion

This case concerns three (3) section 104(a) non-"S&S" citations (Nos. 3718403, 3718404, 3718405), issued by MSHA Inspector Joseph A. Migaiolo on May 12, 1992, charging the respondent with alleged violations of mandatory accident, injuries, and illness reporting standard 30 C.F.R. § 50.11(b)(8). The citations were issued in the course of an audit of mine records conducted by the inspector when he found that three accident investigation reports prepared by the respondent concerning three lost workday accidents that occurred on January 1 and 19, 1989, and September 21, 1989, did not include

"a description of steps taken to prevent a similar occurrence in the future", as required by the cited section 50.11(b)(8).

In the course of the hearing the parties informed me that after further discussions and negotiations, they proposed to settle the disputed citations, and they presented arguments on the record in support of their proposals (Tr. 14-16).

In support of the proposed settlements, the parties incorporated by reference the previously submitted prehearing responses which included information concerning the six statutory civil penalty criteria found in section 110(i) of the Act, summaries of the testimony of their respective witnesses, jurisdictional stipulations, and summaries of the position taken by the parties with respect to the alleged violations.

In further support of the proposed settlement, petitioner's counsel agreed that the cited conditions were "technical violations" that occurred several years ago, but were only discovered in the course of the audit conducted by the inspector. Respondent's counsel pointed out that the required accident reports were in fact prepared, but he took the position that due to the repetitive nature of the reported injuries, it would have been repetitive and unnecessary to make recommendations concerning future preventive measures.

I take note of the fact that section 50.11(b), requires the submission of nine (9) items of information concerning each reportable occupational injury, and on the facts here presented the respondent was cited for failing to include information concerning item (8) which requires a description of the steps taken by the respondent to prevent similar occurrences. Upon review of the citations, and the pretrial submissions by the parties, I agree with the petitioner's characterization of the violations as "technical in nature", and although the required information was not submitted as part of the respondent's accident reports, I find the mitigating circumstances advanced by the respondent both plausible and reasonable.

The parties agreed that the citations should be affirmed as issued, and they agreed that the initial proposed civil penalty assessments of $50 for each of the non-"S&S" citations should be modified to $20 for each citation in compliance with the applicable MSHA penalty assessment criteria and procedures in effect at the time the citations were issued. The respondent agreed to pay the modified assessments.

Findings and Conclusions

After careful consideration of the pleadings, arguments, and submissions in support of the proposed settlement, and pursuant to the requirements of Commission Rule 31, 29 C.F.R. § 2700.31,

the proposed settlement was approved from the bench, and my decision is herein reaffirmed (Tr. 16).

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amount of sixty-dollars ($60), ($20 for each citation), in satisfaction of the violations in question. Payment is to be made to the petitioner (MSHA) within thirty (30) days of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-94-M A.C. No. 25-00282-05503
v.	:	Plant No. 11
LYMAN-RICHEY SAND & GRAVEL COMPANY, Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Steven D. Johnson, Esq., Kennedy, Holland, DeLacy & Svoboda of Omaha, Nebraska, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

In this proceeding the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA"), charges the Respondent, Lyman-Richey Sand & Gravel Company ("Lyman-Richey") with violating a mandatory safety standard promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., ("Mine Act" or "Act"). The violation is cited in Citation No. 2652922, a citation issued under section 104(a) of the Act, 30 U.S.C. § 814(a). The citation asserts that Lyman-Richey's violation of 30 C.F.R. § 56.12071 resulted in the death of one of the company's miners and in the severe injury of another miner when the boom of a rubber-tired crane was raised into high-voltage power wires.[1] The citation also sets forth the MSHA inspector's finding that

[1] Part 56 contains the Secretary's safety and health standards for surface metal and nonmetal mines. Section 56.12071 states:

> When equipment must be moved or operated near energized high-voltage power lines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken.

the alleged violation was a significant and substantial contribution to a mine safety hazard (a "S&S" violation).

The Secretary, instituting his special assessment procedures found at 30 C.F.R. § 100.5, proposed a civil penalty of eight thousand dollars ($8,000) for the alleged violation.[2] Lyman-Richey answered that the citation did not accurately reflect a violation of section 56.12071. A hearing on the merits was conducted in Omaha, Nebraska. At the close of the hearing, counsels presented helpful oral summations of their positions.

Section 104(a) Citation No. 2652922, 3/7/91, 30 C.F.R. § 56.12071

The citation states:

> An electrical accident occurred at the plant on March 5, 1991, at 1410 hours. The accident resulted in one employee being fatally injured, and another employee receiving serious burns. The injuries were the result of the boom of a rubber tired mobile crane being raised into bare high voltage conductors. The accident occurred at the top of inclined roadway leading from the stripping area to the main plant.
>
> The crane, a Link-Belt HC-98A, had been disabled due to a problem in the tramming engine while moving from the stripping area to the upper main plant pond. The two injured employees contacted the tramming frame of the crane while attempting to gain access to the engine compartment. The tramming engine compartment was located

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[2] Section 100.5 states in pertinent part:

> MSHA may elect to waive the regular assessment formula(§ 100.3) and the single assessment provision (§ 100.4) if the Agency determines that conditions surrounding the violation warrant a special assessment. Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of violations may be of such a nature of seriousness that it is not possible to determine an appropriate penalty under these provisions. Accordingly, the following categories will be individually reviewed to determine whether a special assessment is appropriate:
>
> (a) Violations involving fatalities and serious injuries[.]

directly under the boom of the crane while tramming. The crane operator had raised the boom to allow access to the tramming engine compartment. The boom of the crane contacted two phases of an energized three-phase 13.8 kilowatt circuit, which caused the frame of the crane to become energized.

A written company safety procedure had been established and was in effect prior to the accident. The procedure (policy) addressed the safeguards that must be taken when operating cranes near over-head power lines.

G. Exh. 7.

STIPULATIONS
AND
SEQUESTRATION OF WITNESSES

At the commencement of the hearing counsel for the Secretary, on behalf of herself and counsel for Lyman-Richey, stated that the parties agreed as follows:

1. Lyman-Richey is engaged in the mining and selling of sand in the United States, and its mining operations affect interstate commerce;

2. Lyman-Richey is the owner and operator of Pit No. 11, MSHA I.D. No. 25-00282;

3. Lyman-Richey is subject to the jurisdiction of the Mine Act;

4. The Administrative Law Judge has jurisdiction over this matter;

5. Citation No. 2652922 was properly served by a duly authorized representative of the Secretary upon an agent of Lyman-Richey on the date and place stated therein and may be admitted into evidence for the purposes of establishing its issuance but not for the truthfulness or relevancy of any statements asserted therein;

6. The exhibits to be offered by Lyman-Richey and the Secretary are authentic;

7. The proposed civil penalty will not affect Lyman-Richey's ability to continue in business;

8. Lyman-Richey demonstrated good faith in abating the alleged violation;

9. Lyman-Richey is a medium size operator with 215,416 tons of production in 1991;

10. The certified copy of the MSHA assessed violations reflects the relevant history of previous violations at this mine for the two years prior to the date of Citation No. 265292.

See Tr. 6-7.

Following the recitation of the stipulations and upon the agreement of counsels the witnesses were sequestered. Tr. 15-16.

THE SECRETARY'S EVIDENCE

JAMES SKINNER

James Skinner, the MSHA inspector who issued the subject citation, was the Secretary's sole witness. Skinner stated that prior to becoming an inspector he had worked for thirteen years in hard rock mining and that for eight of those years he was assigned to jobs relating to electricity. In addition, he testified he had worked for 1 1/2 years as an electrical line man for a power company and had three years experience as a journeyman electrician for a chemical company. Tr. 17-18. After joining MSHA in 1974, Skinner took specialized classes in electricity and he has had annual retraining. In his work for MSHA, Skinner has specialized in electricity. Tr. 17-19. In addition, Skinner is a member of the MSHA team that investigates fatal accidents in the agency's Rocky Mountain District.

Skinner explained that the Lyman-Richey sand and gravel operation located at Valley, Nebraska (Plant No. 11) is usually inspected out of MSHA's Topeka, Kansas office.[3] However, on March 5, 1991, Skinner, whose home office is in Salt Lake City, Utah, was notified that an electrocution had occurred at the Lyman-Richey operation and that he was to be a member of the MSHA investigation team. Skinner stated that although he had been

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[3] Skinner stated that the mine produces sand and gravel as the result of river bottom dredging. Tr. 20. The sand and gravel is also processed by Lyman-Richey.

part of MSHA teams that investigated approximately 10 to 12 fatalities, none of these prior accidents involved cranes and overhead power lines. Tr. 95.

Skinner testified that he arrived at the mine on March 6, 1991, in the company of Eldon Ramage, an MSHA inspector from the Topeka office. Once at the mine, Skinner and Ramage spoke with Walter L. Dryden, the mine superintendent, and Stanley E. Benke, Jr., the mine safety assistant, in order to obtain "a synopsis . . . of the accident." Tr. 22. Then, they proceeded from the office to the accident site, which was located several hundred feet from the office. Tr. 22-23.

The crane involved in the accident was still at the site. Skinner described it as a "large mobile crane with a large extended boom". Tr. 23. The crane was rubber tied and was diesel powered. The tramming engine was located at the front of the crane and the boom house was located at the rear. Id. In addition to viewing the crane, Smith stated that he interviewed employees of Lyman-Richey, as well as company officials. Tr. 24. He also went to the power company supplying electricity to the mine and interviewed power company officials "to get some pertinent facts on their substation as a supplier of the power." Id.

Skinner was shown and identified a copy of the MSHA accident report that sets forth the findings of the investigation. Tr. 25, G. Exh. 1. Skinner explained that he had prepared a rough draft of the report with some help from Ramage and that the report was then reviewed by his supervisor and the MSHA district manager for the Rocky Mountain District before it was issued. Tr. 24-25. He also explained that the report was based upon the notes, interviews and photographs that he and Ramage had gathered as the result of the investigation. Tr. 25.

Skinner was asked about conclusions he had reached regarding the cause of the accident. He stated that he believed the "direct cause" to be the physical contact of the boom of the crane with two phases of the high-voltage overhead power lines. The lines together carried approximately 13,800 volts of power or about 7,900 volts singly. Tr. 26-27, 39. According to Skinner, contributing factors included the victims' contact with the frame of the crane and damp ground in the area around the crane. Tr. 27. At the accident scene Skinner measured the distance from the ground to the power lines and found the lines to be 28 feet above the ground. Tr. 27-28, 29.[4] Skinner stated that when the

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[4] Skinner did not make a direct measurement, but rather determined the height of the lines by a "shadow cast factor." Tr. 99. Nonetheless, he was satisfied that a distance of 28 feet was accurate. Id.

boom was down and the crane was traveling there was more than 10 feet between the top of the crane and the power lines. Tr. 29.

Appendix I of the report is a sketch drawn by Skinner purporting to depict an overhead view of the accident scene.[5] Using Appendix I as a reference, Skinner described how he believed the accident had occurred. Skinner explained that the crane, which was being trammed from the lower stripping area of the mine, had stalled and the miner who would be fatally injured in the accident, Earl N. Johnson, was preparing to "troubleshoot," that is to find out why the crane had stalled. Johnson was standing on the ground on the right hand side of the crane (the side opposite the crane operator's tramming cab) about half way between the front and back of the crane. Next to Johnson, on Johnson's right as Johnson faced the crane, was Harold McGhee, the miner who would be severely shocked in the accident. Tr. 31; G. Exh. 1, App. I. The crane operator, Frank Jirovsky, told Skinner that he had tried to restart the engine several times without success.

Skinner believed that Johnson and McGhee were trying to determine whether the crane had stalled due to a malfunction of the fuel filter. Tr. 32-33. The fuel filter was accessible from where Johnson and McGhee were standing and Jirvosky was not required to move any part of the crane to provide the miners access to the filter. However, should the problem not be with the filter, the miners would have to continue looking for the cause of the stall by inspecting the engine.

In order to access the crane's engine compartment, the boom of the crane had to be raised. As Skinner put it, "[the boom] sits directly over the engine compartment." Tr. 75. Jirovsky began to raise the boom to a point where it would be high enough to allow Johnson and McGhee to gain access to the engine compartment. Tr. 33, 102, 122.

As Jirovsky activated the boom it rose toward the high voltage power lines that crossed above it and contacted two of the lines. Tr. 34. (The lines were strung on poles and there were four lines in all. One line was a grounded neutral line, and the other three carried power. The boom touched the two power carrying lines closest to the crane. Tr. 34-35, see

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[5] Under voir dire, Skinner stated that the wet areas he depicted on Appendix I were not drawn to scale but rather were meant to symbolize that "there were wet spots around the area." Tr. 44. Skinner amplified, "[T]he whole area was damp . . . and these were just some more . . . pronounced water." Id. However, Skinner was not certain whether there had been precipitation between the occurrence of the accident and his observation of the accident scene. Tr. 48. In addition, he did not know if water had been used to attempt to extinguish the fire that resulted when the rubber tires of the crane ignited. Tr. 72.

G. Exh. 1, App. I.) Contact was made about 2 feet from the end of the boom. Tr. 77.

Skinner testified that when the boom contacted the two lines, a phase-to-phase short-circuit resulted. Each of the lines had fuses providing them with short-circuit protection. As the boom touched the lines, one of the fuses functioned as it should and the line lost power. However, the other fuse failed. It did not open and the line remained energized. Tr. 37. Because the circuit for one of the power lines remained in operation, the current flowed through the metal frame of the crane seeking a ground. Tr. 39. Johnson and McGhee became conductors for part of the current. Johnson was electrocuted and McGhee was burned, especially on his feet. Tr. 30-41.

In the meantime, as Skinner recalled, Jirovsky had jumped from the cab of the crane. Tr. 54. Almost immediately, a call was made to "911" for emergency aid and the power company was contacted as well. Power company representatives shut off the power, but it was too late. Tr. 65.

Skinner described the boom's touching of the power lines as the direct cause of the accident. Contributing factors were the victims being in the area of the crane, the fuse malfunctioning and causing one of the power lines to remain energized, and the failure to check whether the boom was clear of the power lines before it was lifted, even though Lyman-Richey's written policies indicated that this should have been done. Tr. 104-106.

As a result of the investigation, Skinner issued Citation No. 2652922.[6] Skinner stated that he issued the citation as a result of the investigation and because "it was apparent that the crane had been operated in the vicinity of . . . high voltage lines and the boom was actually moved into contact position with the energized high voltage lines." Tr. 20-21. Skinner cited Lyman-Richey for a violation of section 56.12071 because he believed the standard required that when using equipment around high-voltage power lines, if the distance between the equipment and the lines was 10 feet or less, the lines had to be deenergized or other precautions had to be taken. Tr. 48-49. Here, the distance between the equipment and the power lines was less than 10 feet. Indeed, it was zero when the boom touched the lines. Tr. 52.

According to Skinner, MSHA regarded any line carrying over 650 volts of current as a "high-voltage power line" and thus the

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[6] Skinner stated that Lyman-Richey personnel were "very cooperative" throughout the course of the investigation. Tr. 98. They were forthcoming with information and Skinner could not think of anything he requested that was denied. Id.

lines contacted by the boom were definitely within that category. Tr. 49. The standard specifically applies to equipment that is being "moved or operated" and Skinner believed the crane was being "operated" in that the boom was being raised. Tr. 50. Skinner also stated that raising the boom to a point where it was within 10 feet of a high-voltage power line would not have violated section 58.12071 provided other precautionary measures had been taken. Skinner was asked if using a person to observe the relationship of the boom to the wires (a "spotter") would have constituted a "precautionary measure?" He indicated that when the power wires were overhead, the observer's perspective would have made it difficult to judge verticle distance and therefore this would not, in his opinion, have been an acceptable precautionary measure. Tr. 110-111. Skinner was asked his opinion as to the types of safety procedures the company could have undertaken? He observed that the power company should have been called and power should have been deenergized in the lines. Tr. 66.

Skinner stated that he had spoken with the superintendent, Walter Dryden, during the investigation and as Skinner recalled, Dryden said that he had gone to check on another crew before the accident and that he had just returned when the accident occurred. Skinner remembered Dryden telling him that immediately prior to the accident Johnson had come to Dryden's truck and requested a wrench. Tr. 101-102, 103.

When asked why he found the violation of section 56.12071 to be S&S, Skinner essentially responded his finding was based upon the fatality and the serious injury. Tr. 52-53.

With regard to his finding that the violation was due to Lyman-Richey's "moderate negligence," Skinner stated that the company had established written safety procedures for moving or operating equipment around high-voltage power lines, and he believed Lyman-Richey deserved credit for that. Specifically, he noted that the company safety manual instructed that all overhead power lines shall be considered energized unless the owner or electrical utility indicated otherwise. Tr. 58-60. However, he also believed that the company should have had management personnel evaluating the situation after the crane became disabled and while it was undergoing troubleshooting and possibly prior to moving the crane from the lower to the upper level. Tr. 56, 64-65, 114-115. With the exception of Dryden, who arrived on the scene just as the accident was about to occur, Skinner understood that no supervisory personnel were present. Tr. 116-117. Skinner also stated that he did not know whether the victims of the accident had been trained in proper procedures for operating a crane under energized power lines. Tr. 132.

LYMAN-RICHEY'S WITNESSES

JAMES WENDELL HOLMES

Holmes, who retired from the company less than one month after the accident, had a long history of involvement with Lyman-Richey. He began his career as a truck driver and dispatcher. He then was promoted to plant foreman, plant superintendent and safety director, the position from which he retired. As safety director, Holmes had responsibility for nine concrete plants and ten gravel pits. All of the gravel pits were similar to the pit at Plant No. 11, the pit where the accident occurred, in that all were places where sand and gravel was dredged, pumped, screened and shipped. Much, if not all, of the aggregate was shipped to the concrete plants. Tr. 138-141.

Holmes identified the company safety manual. Tr. 146, R. Exh. 1. He noted that pages 65-69 of the manual were in effect at the time of the accident. Tr. 148. He especially noted the manual provided that all power lines are to be considered energized unless someone says otherwise. Tr. 187, R. Exh. 1 at 66. Holmes testified that all of the manuals were numbered and that when a Lyman-Richey employee received a manual and read the part of the manual pertaining to the tasks and preventive maintenance for his or her particular job, the employee signed a statement to that effect. Tr. 149. (Holmes called it a "receipt." Id. [7])

Holmes identified several such receipts -- those of Dryden, the plant superintendent; of Jirovsky, the crane operator; of the victims, and of Rex Schmitz and Richard Frye, who were members of the crew at the pit and who were witnesses to many of the events connected with the accident. Tr. 150-151, R. Exh. 2. Compliance with the manual was enforced by what Holmes described as intermittent observance and monitoring. According to Holmes, in the case of the accident, the persons conducting such observance and monitoring were Dryden, and possibly, the deceased victim as well. Tr. 178.

Holmes also described "task training" at the mine. He stated that before a particular job was undertaken the individuals who were going to perform the task met and reviewed the procedures required. The meetings were lead by the plant superintendent or a "lead person," usually the plant manager or assistant superintendent. Tr. 153-154. Holmes stated "whenever there is a task, there's always a meeting, because we don't want

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[7] The "receipt" states: "I hereby solemnly state that I have read and understand the Lyman-Richey Corporation Safety Manual . . . and that I will comply with all regulations as set forth in the manual." Tr. 152, R. Exh. 2.

any . . . slip ups." Tr. 154. He described a "task" as "a different assignment than your normal routine." Id. He agreed that moving the crane on the afternoon of the accident was a "task." Id. Holmes did not know if task training in the movement of the crane had occurred before the accident, but he stated that he would be "very surprised" if it had not, because movement of the crane under high-voltage power lines was "dynamite." Tr. 174, 196.

He agreed that conversation between Dryden, Jirovsky and the deceased should have occurred prior to working on the crane when it stalled in the vicinity of the power lines. Tr. 175. He stated that he did not know whether such a conversation had occurred but that he "assume[d] there was a breakdown in communications." Id. He stated that if there had been such a conversation, "Maybe this wouldn't have happened." Id.

Holmes also described safety procedures employed at the pit when a crane was moved under power lines. A spotter walked beside of the cane and observed clearances, including clearance with respect to the power lines. In addition, the crane operator was responsible to watch for power line clearance. These procedures were set forth in the company safety manual. Tr. 195, R. Exh. 1 at 66.

The spotter and the crane operator communicated orally and by hand signals. Tr. 155-156. On the day of the accident, the person who acted as both lead person and spotter was the deceased, Johnson. Tr. 158. Holmes was not sure if Johnson had been assigned the job as spotter. He believed that someone else also could have been assigned the job as well. If so, the other person would have been assigned by Johnson. Tr. 180. Holmes also did not know if someone else took Johnson's place as spotter when Johnson went to work on the fuel filter of the crane. Id. However, Holmes agreed that the normal policy was to have someone checking for clearance every time the boom was operated or the crane was moved. Tr. 181-182.

In addition, Holmes did not know if Johnson had told Jirovsky to raise the boom. Only Jirovsky would know that, he stated. Tr. 182. Nonetheless, Holmes was sure that employees around the crane were aware that they were under high-voltage power lines because they had to go under the lines in order to reach the place where they were going to repair the dredge and because all of those involved had worked at the pit for a long time. Tr. 184-185, 187.

In addition, signs usually were posted both inside the crane operator's compartment and on the outside of the crane to warning against operating the crane within 10 feet of the power line. Holmes assumed, but did not know for sure, that such signs were on the crane involved in the accident. Tr. 162.

Holmes described training that company crane operators received. The training was conducted with the assistance of outside companies who operated large equipment, and the training included safety training. Tr. 163. The company kept records of such training and Holmes identified Jirovsky's certificate of training for the operation and maintenance of motorized cranes. Tr. 164, R. Exh. 3.

In addition to its training program, Lyman-Richey had a cash incentive program to further safety at its installations. Under the program, if a miner was found chargeable with an accident, his or her monthly cash bonus was denied. Tr. 159. Holmes stated that he did not know whether any miner was found chargeable with the subject accident because he resigned shortly after it had occurred. Tr. 159.

Finally, Holmes testified that in the two years prior to the accident Lyman-Richey had been assessed for three violations at the pit. Two of these violations were assessed at twenty dollars ($20) and one was assessed at eighty-five dollars ($85). Tr. 188-192. He noted that none of the previous violations involved injuries. Tr. 192.

LARRY S. CAMPBELL

Larry S. Campbell testified that around 1975, when Jirovsky was first hired, Campbell was a plant superintendent for Lyman-Richey and around 1978, when Jirovsky was first trained to run a crane, Campbell was the general superintendent. Tr. 202.

Campbell stated that Lyman-Richey has had its present facilities at Plant No. 11 since 1956. The power lines that run through the property provide electricity to the dredge, the pumps, and the preparation facilities on the property. The power lines are exclusively devoted to the Lyman-Richey operation. According to Campbell, 13,800 volts come into the preparation plant where the voltage is stepped down to make it usable by the equipment at the facility. Tr. 204. The lines are located away from the areas where activity is highest. The company chose to employ overhead lines rather than buried lines because it believed the overhead lines were safer. Tr. 205.

Campbell was in charge of deciding where the power lines would be located and he also was in charge of determining how high they would be. Campbell stated that he wanted them to be at least 30 feet above the ground. Tr. 209. All newly hired employees at the plant were shown where the power lines were located and advised that "they are hot." Id.

In addition, Campbell was on the Lyman-Richey safety committee at the time of the accident and he testified the

committee had concluded the accident was chargeable to Jirovsky because, "Frank raised the boom of the crane into the wires." Tr. 206. No other employees were charged. Id. Campbell believed that Jirovsky raised the boom so that the victims could get into the engine compartment and that Jirovsky simply forgot the wires were there. Tr. 210-211.

STANLEY E. BENKE, JR.

Benke, who succeeded Holmes as safety director for Lyman-Richey, stated that he had been with the company about five and one-half years. At the time of the accident, Benke was the assistant safety director. Benke stated that the company initiated its own investigation of the accident immediately after it occurred. In addition, the company prepared a report (R. Exh. 7) based on information Benke obtained at the accident site and in discussions with those involved. Tr. 215. Benke also participated in conferences with MSHA concerning the accident, including the March 7 closing conference.

As Benke remembered it, MSHA representatives, including Skinner, had told him at the conference that they did not believe the penalty for violations connected with the accident would be "real severe" because of the company safety program. Tr. 216. He agreed, however, that Skinner never had indicated an amount that would be assessed. Tr. 222. Benke also mentioned that the MSHA officials were impressed by the fact that Lyman-Richey offered immediate counseling to employees who had witnessed the accident. Tr. 217.

Benke was asked if, based upon his investigation, he had an opinion regarding the cause of the accident? He replied that "what it really seems to boil down to is the fact that there was a serious breakdown in communication between [Johnson], who was acting as a spotter, and [Jirovsky], so that breakdown in communications is actually what caused the accident." Tr. 218. Benke believed that Jirovsky was looking at Johnson while the boom was going up. He stated that Jirovsky noticed an electric arc from the crane to Johnson and that Jirovsky thought that Johnson had touched an electrical device on the crane itself.

Benke was of the opinion that Jirovsky should have been watching Johnson and have been waiting for a hand signal from Johnson indicating that it was alright to raise the boom. Tr. 221. Benke speculated that Jirovsky did not realize the boom was under the wires dues to the angle of his vision and that he raised the boom without communicating with Johnson. He believed that the two may have been preoccupied with trying to find out what was wrong with the crane. Tr. 221-222. As Benke put it, "somewhere something happened in . . . that there was no

communication." Tr. 222.[8] Benke was asked if Jirovsky could have been looking to Johnson for a signal to stop raising the boom and Benke replied, "That's possible too, but actually he shouldn't be lifting the boom without being so instructed to do so." Id.

Benke stated that he knew that there were decals inside the cab of the crane warning about the danger of operating within 10 feet of high-voltage power lines. He emphasized that because of obstructed vision a crane operator should never lift materials with the boom without a spotter and that this also applied to raising the boom. Tr. 220.

Benke was sure that Dryden had instructed everyone about the job they were expected to do in moving the crane. However, from the time the crane had broken down until the time the accident occurred, Benke did not believe there had been any instruction or task training. He observed that while the crane was being moved Dryden had gone to another job site to evaluate the work situation at that site. Tr. 223-224. Dryden returned to the area where the crane had malfunctioned shortly before the accident. Once the crane had broken down Johnson, who had been acting as spotter, ceased functioning in that capacity, because as Benke explained, the crane was no longer being moved. For the same reason no one replaced Johnson as spotter. Tr. 229.

As Benke described it, Johnson and Jirovsky had a discussion (Benke did not know what it was about) and following the discussion Johnson went to Dryden's truck to get a wrench and mentioned to Dryden that he and McGhee were going to check the fuel filter. Then, Jonson returned to the crane. Meanwhile, Jirovsky had climbed into the cab of the crane and had begun to lift the boom. Benke stated that he was not certain what Dryden was doing at that time. Tr. 225.

WALTER L. DRYDEN

Walter Dryden testified that he has been the superintendent of Plant No. 11 for the past twelve years. He stated that he had twenty-one years of experience in total with the company. Tr. 231-232.

Dryden described the safety training that usually preceded a particular job. "We usually get together and talk over how we are going to go about doing each job and, of course, then safety is entered into." Tr. 232. He also verified that employees are

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[8] When asked whether he knew if there had been any communication between Jirovsky and Johnson regarding raising the boom Benke replied, "I'm not absolutely sure; and when I talked to [Jirovsky], he was not really sure himself." Tr. 224. Benke speculated that trauma may have caused Jirovsky's imperfect memory. Id.

trained annually in operating equipment and in this regard identified Jirovsky's certificate of training for the crane. Tr. 233-234. According to Dryden, the training consists of the employee reading literature and training materials and safety procedures for the particular piece of equipment involved and of Dryden asking the employee if he or she has any suggestions or questions. Tr. 235. Dryden stated that the information given Jirovsky would have included a discussion of the safe operation of cranes around energized power lines. Tr. 236. Jirovsky also had on-the-job training in the operation of a crane from an already experienced crane operator. Tr. 237-238.

Dryden was asked about Lyman-Richey's policy regarding the safe operation of cranes in the vicinity of power lines. He stated that when a crane is being trammed, a "point man" or spotter goes ahead of the crane and when a crane is being operated the rule is no operation within 10 feet of power lines. "In other words," he added, "if we have equipment to work on, we don't do it anywhere near power lines." Tr. 239. In addition to the spotter, other members of the crew in the vicinity where the crane is being moved have a responsibility to watch for, among other things, clearance when the crane moves past power lines. Tr. 240. In Dryden's opinion, Jirovsky was well aware of the policy. Tr. 251.

Dryden stated that on the morning of the accident he had a discussion with the work crew about the jobs to be done that day. While he did not specifically recall discussing safety procedures to be undertaken in connection with the jobs, he was certain they were discussed because "that's just . . . normal procedure." Tr. 242. Later in the morning, Dryden discussed moving the crane with the victims, Jirovsky and one other employee. Tr. 243. The crane was to be moved to another part of the plant to repair some pumps. Dryden explained to the crew that he was going to that area to determine where to position the crane once it arrived and, according to Dryden, Johnson volunteered to act as spotter while the crane was moved. Tr. 244.[9] Dryden then left in his truck for the other site. (It was located approximately 300 yards from where the crane then was located. Tr. 245.)

After surveying the scene, Dryden returned to where the crane had been moved. He saw that the crane had stopped and he drove approximately 30 to 40 feet past the crane and parked his truck, facing away from the crane. Tr. 246. Johnson walked to Dryden's truck and told him the crane had stalled, that Johnson thought something might be wrong with the fuel filter and that he needed to get a wrench from Dryden's tool box. Dryden responded

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[9] Dryden estimated that during the previous four years the crane had been moved approximately 20 times under the particular portion of the high-voltage power lines involved in the accident. Tr. 252.

he would call on the truck radio and try to get a replacement fuel filter for Johnson. The weather was cool and after Dryden finished his discussion with Johnson he left the window down only about 6 inches. At no time did Johnson indicate to Dryden that the boom was going to be raised. Tr. 248. Dryden stated that the crane involved was an older model and that he assumed the fuel filter was in the front part of the crane. He said, that is where most filters are located on the older models. Tr. 248. Dryden understood that the boom would not have to be raised to gain access to the filter. Tr. 249.

Dryden then called to see if he could obtain a fuel filter and the next thing he heard was Jirovsky yelling. Tr. 249. Dryden estimated that this was two to three minutes after Johnson had talked to him. Tr. 250. He did not see Jirovsky raise the boom. Nor did he caution Johnson that someone needed to act as a spotter if he was going to be working on the fuel filter. Tr. 255. Dryden stated, Johnson "was familiar with equipment and motors on equipment and so forth." Tr. 260.

When Dryden heard Jirovsky yelling he turned. Jirovsky had already jumped from the crane. The boom was in the wires. Dryden could not see McGhee but he could see Johnson. Dryden described what he saw and explained that there was nothing he could do to help Johnson. Tr. 257.

RICHARD L. FRYE

Richard Frye is a dispatcher at Plant No. 11. He has worked for Lyman-Richey for twelve years. At the time of the accident Frye was working as a welder and member of the maintenance crew. Frye described the training that he had received as a welder and member of the maintenance crew. Tr. 262-263. He felt that safety was a "very prevalent" part of that training; and he believed the training was ongoing, in that the company safety manual was undated periodically, and he had read the updates. Tr. 262-263.

Frye stated that on the morning of the accident he was part of a crew that was lifting parts off of the dredge with the crane. The crew knew that the crane would have to be moved to a different job site and there was only one route it could take, the same route it had traveled to reach the dredge. Tr. 266. The route passed under the power lines. Because the crane would have to travel up a 5 to 6 foot rise as it moved away from the dredge, and because the power lines ran above the edge of the rise, the crew knew the crane should be backed up rather than driven forward so that boom would not rise into the air under the lines as the crane traveled up the rise. Tr. 267. Frye believed that he had participated in previously moving the crane under the same power lines 10 to 15 times. Tr. 268.

As Frye watched, the crane backed away from the dredge area and Johnson, acting as spotter, walked next to the crane. The crane backed up to level ground where it stopped. Frye explained that he thought the crane had stopped because it was on level ground and Jirovsky and others were going to have more discussions about what they were going to do next. Therefore, Frye left and went to the welding truck to get some materials he needed. He testified that the next thing that happened was that he heard Jirovsky yell. Tr. 269-270.

HAROLD L. McGHEE

Harold McGhee stated that he had worked for Lyman-Richey for approximately 18 years and that he had started as a laborer. About six or seven years ago, he was assigned to operate a bin complex, a job that he has held since. Tr. 272-273. McGhee explained that the morning of the accident he was one of a crew working at the dredge. The work was concluded around noon after which a decision was made to move the crane to another work area. As the crane moved up the incline, McGhee stated that he was concentrating on looking out for any obstacles that would be in its way. Tr. 275. He testified that his concern was with things on the ground and that he "wasn't even thinking about power lines." Tr. 275. At the top of the incline the crane stalled, McGhee did not know why. However, a decision was made to change the fuel filter. McGhee testified that he did not approach the crane until Johnson started working on the filter. He stated that he was there to assist Johnson if he needed any help. Tr. 276. McGhee explained that he usually worked with Johnson. Tr. 281.

McGhee was on Johnson's right and he testified that Jirovsky was watching Johnson. Tr. 279. McGhee recalled that Johnson was holding a wrench with one hand and his other hand was on what McGhee thought was the filter. McGhee had his left forearm and both hands on the crane. McGhee stated that he heard the crane's engine start and he thought "what's he starting the engine for when we're taking this filter off[?]" Tr. 277. The electric current hit McGhee and then it subsided and he slid backward away from the crane. Tr. 277. (McGhee also described what happened to Johnson. Id.)

McGhee testified that except for the sound of the engine starting he had no warning that the boom was going to be raised and that while he was with Johnson he never saw Johnson give a hand signal of any kind to Jirovsky. Tr. 278, 283. McGhee was airlifted to the hospital where he underwent about three weeks of treatment for the burn injuries. Tr. 280.

FRANK J. JIROVSKY

Jirovsky stated that he had been an employee of

Lyman-Richey for seventeen years. During the period he had worked repairing, maintaining and operating equipment, including cranes. He was initially assigned to operate cranes during his first or second year of employment. He was trained by the then main crane operator and served as a backup operator. Tr. 288-289. He described the training he had received as "an apprenticeship" and stated it included training regarding the operation of cranes in the vicinity of power lines. Tr. 288. When he started working with cranes he began by signaling to the main crane operator, an assignment that required him to watch out for power lines. Jirovsky explained that "when he taught me how to run the crane, I was already aware of [power lines and their relationship to of the crane] because I had been watching for him as he ran it." Tr. 289. For as long as Jirovsky could recall, all of the equipment at the plant that had "height capabilities" carried stick-on signs stating that the equipment should not be operated within 10 feet of power lines. Tr. 290.

Jirovsky identified the Lyman-Richey safety manual (R. Exh. 1) and recalled receiving it. He also identified a receipt he had signed indicating that he had been given possession of the manual and had read it. Tr. 292, R. Exh. 2. Moreover, he noted the specific reference to the manual barring the operation and transit of cranes within 10 feet of power lines. Tr. 291.

In addition, Jirovsky stated that there usually was a discussion among Dryden and the crew regarding the bigger jobs that had to be done at the plant and that if there was an obvious hazard involved the discussions would include safety. Tr. 295. He identified the presence of power lines as an obvious hazard. Id.

Jirovsky described the day of the accident, how the crew had been working at the dredge, how the work had been finished after lunch and how the crew began moving its equipment, including the crane, to a new area to start a different job. Tr. 296. The route the crane had to travel passed under the power lines and, according to Jirovsky, they were the very same power lines he had passed under when he brought the crane to the dredge area. Tr. 297. He believed that he had trammed the crane to the dredge area the previous day. Id. The crane was taken into the dredge area by driving it forward -- that is with the boom pointing ahead of the crane toward the dredge. This was done in order to have clearance under the power lines. Therefore, the crane was also backed out -- with the boom pointing toward the dredge. Again, this was done to ensure clearance under the lines. Tr. 297-298.

As the crane began to move away from the dredge area Johnson acted as spotter. Tr. 299. Johnson was walking directly alongside, guiding Jirovsky as he backed away from the dredge

area. Jirovsky and Johnson were in oral and visual contact as the crane moved. Tr. 299-300. Jirovsky also believed that Frye was watching from a distance. The crane approached another piece of equipment and Johnson had Jirovsky stop, drive it forward and then resume backing up to clear the equipment. When the crane reached level ground, the tramming motor ceased operation. Tr. 300. Jirovsky stated that the power lines were at the edge of the level ground and that the crane had traveled "quite a ways" after it reached level ground. Tr. 302. Therefore, Jirovsky thought that the boom was clear of the power lines. Id.

According the Jirovsky, when the engine stopped Johnson asked what was wrong and Jirovsky said he did not know but that it might be the fuel. Johnson then took off the engine's fuel cap and checked the fuel level. He told Jirovsky that there was plenty of fuel. Then Johnson noticed the fuel filter and thought that it might be plugged so he went to Dryden's truck to get a tool to take the filter off.

Meanwhile, Jirovsky thought that the problem might be in the tramming engine itself, and he climbed back into the crane and started the engine that operated the boom. (In order to get into the engine compartment the boom had to be raised "a short distance." Tr. 301.) Jirovsky stated: "I was going to raise the boom to check . . . the engine compartment, because I figured that we would probably have to look in there to figure out what was going wrong with it; and at the same time Earl was going to take the filter off, and at some point in that period of time [the boom] came in contact with the power lines." Id.

Jirovsky stated that he knew the lines were there but that he believed that the crane was far enough away from them. Tr. 308. "It was," said Jirovsky, "a misjudgment in distance." Tr. 302. He estimated that from the time he started the boom's engine until the boom contacted the power lines perhaps fifteen to twenty seconds elapsed. Tr. 304. He did not recall whether or not he had looked at the lines prior to raising the boom. Tr. 308.

While the boom was being raised, Jirovsky looked at Johnson. He saw a spark fly off the wrench Johnson was holding. Jirovsky stated he realized that something had gone terribly wrong and that he jumped from the crane in order to try to help Johnson. Tr. 305.[10]

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[10] It was difficult for all of the witnesses, especially Jirovsky, McGhee, and Dryden, to testify about what had occurred to Johnson. All had known and worked with him for several years. Counsels are commended for their sensitivity in questioning the witnesses regarding the specifics of the accident.

Jirovsky stated that he could not recall having any conversation with Johnson or with anyone else for that matter about raising the boom; and that Johnson did not give him a signal or speak with him about raising the boom. Tr. 302-303.

THE VIOLATION

Lyman-Richey is charged with a violation of section 56.12071. The standard requires that when equipment is operated within less than 10 feet of energized high-voltage power lines, the lines must be deenergized or other precautionary measures must be taken. "High-voltage" is not defined in Part 56 of the regulations. However, Skinner testified that MSHA regards any lines carrying over 650 volts as high-voltage lines. Tr. 26-27, 39. This appears to be the general understanding in the mining industry as well.[11] Skinner's testimony that the lines carried well over 650 volts was not disputed and I conclude that the power lines in question were high-voltage lines. Further, it is clear from the testimony of all of the witnesses that Jirovsky raised the crane's boom into the lines, thus operating the crane within less than 10 feet of them. The fact that the lines were not deenergized nor other precautionary measures taken is all too evident from the events that followed. I therefore find that Lyman-Richey violated section 56.12071 as charged.

THE SPECIAL ASSESSMENT

Following the issuance of Citation No. 2652922, the Secretary, pursuant to 30 C.F.R. § 100.5, specially assessed the alleged violation of section 56.12071 at eight thousand dollars ($8,000). Lyman-Richey, requested subpoenas be issued to require MSHA's director of the Office of Assessments to appear at the hearing along with other officials of the office in order to explain how the proposed special assessment was determined and to provide documentary evidence of the basis for the assessment. I issued the subpoenas, but in a letter to counsel for Lyman-Richey stated that if the company intended to challenge the special assessment, the challenge would, of necessity, be limited.

I explained the Commission had made clear that under the bifurcated nature of the Mine Act's civil penalty scheme the Commission and its judges had authority to assess civil penalties based upon the record developed in an evidentiary hearing and that when such a proceeding had taken place Commission judges were not bound by penalties proposed by the Secretary thought his Office of Assessments but rather were required to assess a

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[11] "High voltage" is defined as "[t]hat which is greater than 650 volts." U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 543.

penalty after considering the statutory civil penalty criteria in light of the evidence. I further explained that while an operator might argue that the Secretary, in proposing a civil penalty, had not complied with his own regulations and thus had to re-propose the penalty, the operator could prevail only by establishing that the Secretary had acted arbitrarily and that a remand was appropriate under all of the relevant circumstances of the case. Drummond Coal, Inc., 14 FMSHRC 661,690 (May 1992); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673,678 (April 1987).

Prior to the hearing Lyman-Richey deposed Roderick Breland, the MSHA district manager for the Rocky Mountain District. Breland was questioned regarding his recommendation that the subject citation be specially assessed. However, Lyman-Richey did not call Breland to testify at the hearing nor did it call MSHA Assessment Office officials as witnesses. Although there was limited testimony by Skinner regarding his recommendation for and knowledge of the special assessment of the violation of section 56.12071, Lyman-Richey did not offer evidence tending to show that the proposal was arbitrary nor did its counsel advocate that position in his closing argument. Tr. 317-324. Therefore, in assessing a civil penalty for the violation of Section 56.12071, I will only consider the evidence of record.

S&S AND GRAVITY

Skinner found that the violation was S&S. The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). Further, the Commission has offered guidance upon the interpretation of its National Gypsum definition by explaining four factors the Secretary must prove in order to establish that a violation is S&S. Mathies Coal Co., 6 FMSHRC 1 (January 1984).[12] I have found a violation of section 56.12071

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[12] In Mathies the Commission stated:

> [T]o establish that a violation of a mandatory 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 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.

Mathies, 6 FMSHRC at 3-4.

and given the fact that the violation was the proximate result of a fatality and serious injury, I conclude the other three factors are established as well.

In assessing the gravity of the violation both the potential hazard to the safety of miners and the likelihood of the hazard occurring must be analyzed. Here, the potential hazard was extremely serious. What happened to Johnson and McGhee is exactly the sort of accident section 56.12071 was designed to prevent. Given the violation, the death and injuries that resulted were likely to occur. Miners do work in, on or adjacent to equipment while it is being moved or operated. When equipment is moved or operated within less than 10 feet of energized high-voltage power lines and precautions have not been taken to prevent contact with the lines, the margin for error is reduced to an unacceptable minimum -- especially when a large piece of equipment is involved, for then even a proportionally small movement of the equipment can lead to contact with the lines and resulting disaster to those in its immediate vicinity. Therefore, I find that this was a violation of the utmost gravity.

NEGLIGENCE

Skinner found that Lyman-Richey exhibited a "moderate" degree of negligence in allowing the violation to exist. G. Exh. 7. In reaching this finding Skinner credited Lyman-Richey for the written safety procedures it had prepared and given to its employees concerning work under high-voltage power lines. Tr. 58-60, 114, 132. Nonetheless, he believed Lyman-Richey's management personnel exhibited fault in that they should have evaluated the situation once the crane had become disabled. Tr. 64-65. Skinner was of the opinion that someone from management should have assessed the situation prior to Dryden's arrival and before any action was taken with respect to the attempted repair of the crane. Tr. 114-116. He stated, "[E]ven though . . . Dryden was not there to make the determination, I feel somebody should have been in charge of that procedure there, from the company." Tr. 117. What Skinner had in mind was the presence of a supervisor to monitor safety procedures while repair work was undertaken on the tramming engine.

> [T]he central point was the tramming engine and getting the tramming engine back into operation; and that 's where everything was pinpointed . . . and that's the reason for someone to safety check it per se.

Tr. 119.

Counsel for the Secretary essentially argued that Skinner's assessment was right, that Lyman-Richey's management personnel

failed to exercise the care required by the situation, even though there were some factors in mitigation of its lack of care. Tr. 314-316. On the other hand, counsel for Lyman-Richey argued that the employees involved in the accident were adequately trained regarding safety procedures and power lines and that the accident represented a type of judgmental lapse on Jirovsky's part to which all of us are heir and which no amount of training, vigilance or care can completely eliminate. Tr. 319. Counsel emphasized that Dryden was in the area for only a brief period before the accident occurred, that he did not know the boom was going to be raised and that things happened so quickly there was simply no time for him to intervene in the situation. Tr. 320-321. Moreover, Dryden had made a perfectly reasonable judgement that there was no need for him to intervene:

> He did that based on [Johnson's] description to him of what was to be done next; and that is, change the fuel filter . . . and in . . . Dryden's understanding, and his correct understanding, . . . the boom needn't be raised in order to access the fuel filter; and I think it's fair to say that there [was] an evaluation made by him that he need not intervene.

Tr. 234.

The Commission has afforded its judges extensive guidance in evaluating negligence. Among other things, it has long held that the negligence of a rank-and-file miner is not attributable to the operator for civil penalty purposes. Southern Ohio Coal Company, 4 FMSHRC 1463-1464 (August 1982). Therefore, while I accept the statement of Jirovsky that he raised the boom into the wires because of a "misjudgment of distance" and conclude that he was obviously negligent so doing I do not attribute his lack to care to Lyman-Richey. Tr. 302. Rather, I look beyond Jirovsky, to acts of commission or omission by Lyman-Richey itself.

Again, the Commission has provided guidance.

> 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.

A.H. Smith Stone, 5 FMSHRC 13, 15 (January 1983).

Starting with Lyman-Richey's supervision, training and disciplining of its employees, I conclude that Skinner properly credited the company for its training. As the testimony of Skinner and of Lyman-Richey's witnesses makes clear, the company had a written training program in place that fully apprised its employees of the hazards of moving and operating equipment in the vicinity of high-voltage power lines. Moreover, it had a disciplinary program to enforce its training, a program relying on that most powerful of incentives -- money. I conclude from Jirovsky's testimony that he read and understood the company safety manual with respect to its prohibition of operating or moving the crane within less than 10 feet of power lines. Tr. 291-292. I also conclude from the testimony that not only was Jirovsky adequately trained regarding the hazards of power lines, but that the company had taken the additional precaution of placing signs inside the equipment's cab to remind him of such hazards. Tr. 220, 290.

I further find that Lyman-Richey had a policy of discussing particular jobs and the safety hazards they entailed prior to undertaking the jobs (a policy that was referred to generally as "task training" during the testimony) and that this policy was usually implemented at the mine, at least with respect to the "bigger jobs." Tr. 295. I conclude from Dryden's testimony that in response to this policy a general discussion among the crew was held prior to the crane being moved and that the discussion involved safety, at least to the extent that Johnson volunteered to serve as spotter. Tr. 244-245.

Thus, this is not a situation where the operator can be faulted for the training and discipline of its employees to prevent violations of the standard in issue. It does not follow, however, that I find that Lyman-Richey was fault free. Rather, I agree with what seems to have been the essence of Skinner's reasoning for finding Lyman-Richey negligent -- that when the risks involved are considered together with the circumstances under which the crane had broken down, the supervision provided by Lyman-Richey fell far short of the standard of care required.

The risks involved of moving the crane under the energized high-voltage power lines were clearly very serious. Holmes accurately describe the situation as "dynamite." Tr. 174, 196. Lyman-Richey responded to the danger by having the crane back away from the dredge. Jirovsky and Frye explained that given the length of the boom and the rise in the ground that the crane had to negotiate, the decision to back away from dredge was made in order to assure clearance under the lines. Tr. 268, 297-288. It also responded by having Johnson acted as spotter.

These steps, while commendable, were not enough, for Dryden left the area and in so doing left his miners without supervision. Obviously, a foreman cannot be with his crew at all

times and I do not fault Dryden for wanting to survey the next work area in order to determine where the crane should be located. However, so potentially hazardous were the power lines to the safety of the crane operator and to those miners in the vicinity of the crane that in my view managerial supervision was required until the crane was clear of wires.

The crane's stall triggered a confluence of events that on-site supervision might well have prevented. As Benke noted, once attention shifted to repairing the tramming engine, Johnson ceased to act as spotter, and no one was on-hand to ensure he was replaced. Tr. 229.[13] To argue, as Lyman-Richey does, that once Dryden arrived on the scene there was no time within which to intervene to prevent the accident misses the point. He or his delegate should have been there all along.

It is appropriate to evaluate the foreman's actions or lack thereof in gauging the negligence of the operator. Here, where the potential danger to miners dictated a very high standard of care, the foreman did not meet that standard. Therefore I find that Lyman-Richey was commensurately negligent.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated the certified copy of the MSHA assessed violations history accurately reflects the violations at the mine for the two years prior to March 7, 1991. The copy, which was not introduced into evidence, reveals three violations cited and assessed during this period. None of the violations were of section 56.12071. This is a small history of previous violations. The parties also stipulated that Lyman-Richey is a medium size operator, that the proposed penalty of eight thousand dollars ($8,000) would not affect Lyman-Richey's ability to continue in business and that Lyman-Richey demonstrated good faith in abating the violation.

CIVIL PENALTY ASSESSMENT

In assessing a civil penalty for the violation of section 56.12071, I have found instructive the case of Warren Steen Construction, Inc., 14 FMSHRC 1125 (July 1992). In that case Commission Administrative Law Judge James Broderick assessed a civil penalty of eight thousand dollars ($8,000) for a violation of section 56.12071, a violation that like the one at issue had resulted in the electrocution of a miner. 13 FMSHRC 256 (February 1991)(ALJ Broderick). The company appealed and the

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[13] Dryden recognized the dangers inherent in the situation. He acknowledged that if equipment has to be worked on, the work is never preformed any where near a power line. Tr. 239

Commission affirmed the judge's assessment. 14 FMSHRC 1125 (August 1992).

A comparison of Warren Steen with the present case establishes substantial differences in culpability and other penalty criteria. In Warren Steen the Commission concurred with the judge that Steen, an individual who personally directed the operation and the company, acted with a high degree of negligence. 14 FMSHRC at 1133. Unlike Dryden and Lyman-Richey, Steen and the company purposefully and knowingly placed equipment within 10 feet of energized high-voltage power lines. Also unlike the present case, the company offered no evidence that it disciplined its employees to prevent violations and the company did not train the victim to be aware of the hazards involved. Moreover, unlike Lyman-Richey the company did not demonstrate good faith in attempting to achieve rapid compliance after having been notified of the violation.

The absence here of the factors which the Commission found supported an eight thousand dollars ($8,000) assessment, strongly suggest that in this matter a lower assessment is warranted. Therefore, I conclude that an appropriate penalty for the violation is three thousand dollars ($3,000).

ORDER

Based on the foregoing it is ORDERED:

1. Citation No. 2659299 is AFFIRMED.

2. Lyman-Richey shall, within thirty (30) days of the date of this decision, pay to the Secretary three thousand dollars ($3,000) for the violation found herein and upon receipt of payment, this matter is DISMISSED.

David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 92-1073 A.C. No. 15-13920-03788
v.	:	
COSTAIN COAL INCORPORATED, Respondent	:	Docket No. KENT 92-1110 A.C. No. 15-13920-03789 Docket No. KENT 93-25 A.C. No. 15-13920-03793 Docket No. KENT 93-206 A.C. No. 15-13920-03798 Docket No. KENT 93-261 A.C. No. 15-13920-03799 Pyro #9 Wheatcroft Docket No. KENT 93-260 A.C. No. 15-14492-03626 Docket No. KENT 92-1049 A.C. No. 15-14492-3616 R Baker Mine

DECISIONS

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for the Petitioner; Carl B. Boyd, Esq., Henderson, Kentucky, and R. Eberley Davis, Esq., Costain Coal Inc., Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for twenty-two (22) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed timely answers and contests,

and in response to a prehearing order, the petitioner's counsel informed me that the parties proposed to settle most of the disputed citations, but were unable to resolve others. Under the circumstances, the cases were consolidated with other cases involving these same parties, and hearings were held in Evansville, Indiana, on June 8, 1993.

Discussion

In the course of the hearings, the parties informed me that the respondent agreed to pay the full amount of the initial proposed civil penalty assessments for sixteen (16) of the disputed citations in settlement of the violations. With respect to the remaining six (6) disputed citations, the parties informed me that after further discussions and negotiations, they proposed to settle the violations, and arguments in support of the proposed settlements were made and heard on the record (Tr. 5-11; 137-140).

Citation No. 3858304. The citation was issued after the inspector observed equipment tracks which led him to believe that a shuttle car trailing cable had been run over. The petitioner's counsel asserted that the evidence reflects that the cable was not damaged, and that the facts would not support the inspector's "S&S" finding. Under the circumstances, counsel concluded that the citation should be modified to a section 104(a) non-"S&S" citation, and the respondent agreed to pay the reduced penalty assessment.

Citation Nos. 3857517 and 3857734. With respect to Citation No. 3857517, petitioner's counsel stated that the available evidence supports a modification of the inspector's gravity finding because the number of miners exposed to any potential hazard was less than originally believed by the inspector. With regard to Citation No. 3857734, petitioner's counsel stated that the available evidence reflects a low degree of negligence, rather than the moderate negligence finding originally by the inspector. Under the circumstances, the parties believed that the reduced settlement penalty assessments were reasonable and warranted, and the respondent agreed to pay the modified penalties in settlement of the violations in question.

Citation Nos. 3552688, 3552693, and 3553249. The parties were in agreement that the available evidence reflects that the inspector failed to take any dust samples to support his gravity findings with respect to Citation No. 3553688, and the petitioner's counsel stated that the citation will be modified to

reflect a non-"S&S" violation. Petitioner's counsel further stated that the available evidence reflects that the hazard exposure associated with Citation No. 3552693, was less than originally believed by the inspector, and that the inspector's gravity finding will be modified to accurately reflect the number of miners exposed to the potential hazard. With respect to Citation No. 3553249, petitioner's counsel asserted that the available evidence reflects a low degree of negligence rather than the moderate negligence finding originally made by the inspector, and that the citation will be modified accordingly. The parties believed that the reduced penalty amounts for these citations were reasonable and warranted, and the respondent agreed to pay the modified penalties in settlement of the violations in question.

Findings and Conclusions

In addition to the arguments presented on the record in support of the proposed settlements, the parties also presented information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. After careful review and consideration of the pleadings, arguments, and submissions in support of the proposed settlements, and pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, I rendered bench decisions approving the proposed settlements. Upon further review of the entire record, I conclude and find that the settlement dispositions which have been approved are reasonable and in the public interest, and my bench decisions are herein reaffirmed. The citations, initial assessments, and the settlement amounts are as follows:

Docket No. KENT 92-1073

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3857393	7/27/92	75.304	$362	$362
3857397	7/28/92	75.517	$235	$235

Docket No. KENT 92-1110

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3857390	7/23/92	75.202	$987	$987

Docket No. KENT 93-25

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3553192	7/6/92	75.400	$2,301	$2,301
3552416	7/29/92	75.402	$506	$506

Docket No. 93-206

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3859297	10/8/92	75.516-2(b)	$50	$50

Docket No. KENT 93-261

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3552688	10/6/92	75.316	$235	$50
3552693	10/8/92	75.400	$506	$362
3552694	10/8/92	75.402	$506	$506
3859298	10/8/92	75.316	$288	$288
3857489	10/26/92	75.316	$235	$235
3553249	11/23/92	75.400	$690	$309

Docket No. KENT 93-260

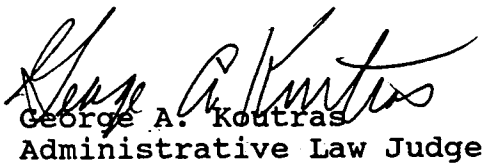
Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3857517	10/14/92	75.400	$506	$362
3859147	10/23/92	75.517	$204	$204
3857734	11/4/92	75.316	$204	$154

Docket No. KENT 92-1049

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
3858304	8/29/91	75.606	$147	$50
3858307	8/30/91	75.400	$157	$157
3858308	9/16/91	75.400	$206	$206
3546628	10/21/91	75.400	$227	$227
3858168	10/22/91	75.400	$227	$227
3546381	10/30/91	75.400	$147	$147
3546389	11/26/91	75.400	$206	$206

ORDER

The respondent IS ORDERED to pay civil penalties 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 the date of these decisions and order, and upon receipt of payment, these proceedings are dismissed.



George A. Koutras
Administrative Law Judge

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JUL 27 1993

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 93-231-R
	:	Order No. 3658846; 2/18/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Dilworth Mine
	:	Mine ID 36-04281

DECISION

Appearances: Rebecca J. Zuleski, Esq., Furbee, Amos, Webb & Critchfield, Morgantown, West Virginia for Contestant;
Anita Eve Wright, Esq., U.S. Department of Labor Office of the Solicitor, Philadelphia, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

On March 18, 1993, the Operator, Consolidation Coal Company, (Contestant) filed a Notice of Contest challenging the issuance of Order No. 3658846 which alleges a violation of 30 C.F.R. § 75.364. Also, Contestant filed a Motion to Expedite. The issues raised by the pleadings were generally discussed with counsel for both parties in a telephone conference call on March 19, 1993, and again on March 22, 1993, at which time, based on representations of counsel, this case was scheduled for a one-day hearing on April 15, 1993. At the hearing held on that date in Washington, Pennsylvania, Robert W. Newhouse, Robert G. Santee, James S. Conrad Jr., and Eugene Zvolenski testified for the Secretary (Respondent). The hearing was continued on May 13, 1993, in Morgantown, West Virginia, at which time Louis Barletta Jr., Patrick N. Wise, James E. Hunyady and Gary J. Klinefelter testified for Contestant. At the conclusion of the hearing, the parties requested an opportunity to summit written briefs, and were so granted this right. Contestant filed its Post Hearing Brief on June 15, 1993. Respondent filed Findings of Fact, Conclusions of Law and Brief in Support on June 17, 1993.

Stipulations

1. Consolidation Coal Company is the owner and operator of the Dilworth Mine, which is the subject of this proceeding.

2. Consolidation Coal Company and the Dilworth Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801, et seq.

3. The Administrative Law Judge has jurisdiction over this matter pursuant to Section 105 of the Act.

4. The subject order, number 3658846, was issued pursuant to section 104(d)(2) of the Act, and was properly served by Robert Santee, a duly authorized representative of the Secretary of Labor, upon an agent of the Respondent, Pat Wise, on February 18, 1993, at the Dilworth Mine.

5. The assessment of a civil penalty in this proceeding will not affect the Operator's ability to continue in business.

6. Abatement of the condition cited and listed in the Order was timely.

7. A copy of the subject Order is authentic and may be admitted into evidence for the purpose of establishing issuance, but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein.

8. Order No. 3658846 states in pertinent part:

> There was water present ranging up to 11 inches deep for the width of the entry beginning [sic] just inby survey spad 73+50 (between the No. 46 and the No. 47 crosscut) and continuing inby for a distance of approximately 50 feet, exact distance could not be measured at this time, in the 9-D (023) longwall section No. 4 intake entry (future 10-D tailgate entry). The presence of such water presents a very possible slipping and/or tripping hazard due to the possibility of debris consisting of crib blocks, cement blocks, rock, loose coal, mud etc., under such water accumulations. This entry is required to be examined weekly by a certified mine examiner, who is an acting agent of the operator, and the last date observed, outby this area, was 02-17-93 JLF 8:22 p.m. There was 1 violation issued during the last inspection period from 10-01-92 to 12-31-92 of 30 C.F.R. § 75.364(d).

9. Order No. 3658846 alleges a violation of 30 C.F.R. § 75.364.

I. Findings of Fact

1. Contestant's Dilworth Mine experiences, on a regular basis, accumulations of water on the mine floor. To control this problem, Contestant installed a series of pneumatic pumps to pump the water out of the mine.

2. On February 18, 1993, the bleeder entry (the future tailgate entry) for the 10-D longwall panel in the 9-D East Section extended 8,000 feet, and was approximately 16 feet wide.

3. On February 10, 1993 the longwall face in the 9-D East Section was located at spad 31+50.

4. On February 18, 1993, the bleeder entry outby the face was designated an escapeway. The working section did not extend inby the face, and the bleeder entry was not designated an escapeway inby the face.

5. The bleeder entry inby the face is traveled weekly by miners to fire-boss. Also miners travel there regularly to service and repair the pumps.

II. Further Findings of Fact and Discussion

Robert G. Santee, an MSHA inspector, testified that on February 10, 1993, he inspected the 9-D East Section at Contestant's Dilworth Mine. Between the 19th and 20th crosscuts in the No. 4 intake entry (bleeder entry) he observed water up to 14 inches deep. He indicated that he was unable to see the bottom of the water as it was muddy. He also observed a 4 inch drainage line, and a 3 inch air line going under the water. He said that he also suspected the presence of other material in the water as, while travelling up the entry (inby) to the point in question, he had observed crib blocks, old pipeline, loose rock, and coal. He issued a citation, alleging a violation of 30 C.F.R. § 75.364, and informed Contestant's representatives that he would allow until 8:00 a.m., February 12, for the violation to be abated.

Santee did not return until February 17. He indicated that when he returned there was more water present. He told Contestant's representatives that he was going to issue a Section 104(b) order. Kenny Boyle, the longwall coordinator, and J.J. Pohira, the pumper foreman, informed him that on February 12, water had been pumped out. Santee then terminated the original citation, and issued a Section 104(b) order because Contestant had allowed the water to return. Upon discussion with his supervisor, Santee voided the Section 104(b) order, and extended the abatement of the original citation until February 18. According to Santee, when he returned on February 18, he observed 2 or 3 miners pumping water in the area between the 19th and 20th

crosscuts. He also observed that crib blocks were being removed from the water inby.

According to Santee, at spad 73+50 he observed an accumulation of water that he indicated was "almost identical" (Tr. 69) to that to which he had previously observed between crosscuts 19 and 20. He indicated that the water went from rib to rib, and extended 50 feet. He indicated that the water was muddy,[1] and he could not see through the water. When he entered the water he went as far as he felt safe. He put a ruler in the water until it hit the mud on the bottom, and noted that the depth was 11 inches. He took only one measurement.

Santee also observed footprints on the floor at the outby side of the water accumulation. He also indicated that there was a swag at Spad 72+10, 140 feet outby, and at a lower elevation than the water accumulation. According to Santee, the presence of a pump in the swag indicated that water had been pumped out of the swag.

At spad 73+50, two pipes led into the water accumulation. One pipe was four inches in diameter, and the other was three inches in diameter. These pipes ran the entire length of the entry, and were placed on the right side of the entry inby. Aside from these items, nothing was protruding from the water, nor were there any cement blocks, crib blocks, loose coal, or rocks observed. Santee stated that he believed that there were objects under the water, as he had observed crib blocks and cement blocks at various locations when he had walked the entry inby earlier that day. According to Santee, there were "numerous" crib blocks, 6 inches by 6 inches by 30 inches in length throughout the entry. (Tr. 86). Also, according to Santee, he saw aluminum and steel pipeline joints, 3 to 4 inches in diameter, and 10 to 15 inches in length, around the pump in the swag outby spad 73+50. Santee said that the area of water between crosscuts 19 and 20,[2] contained steel bands that were 3/4 inch wide 16th of an inch thick, and between 4 and 6 feet in length. He said that it is very easy to trip on such items.

Santee opined that if a person had entered water at Spad 73+50 he could have been injured by slipping or tripping on submerged objects such as pipes, crib blocks, cement blocks, loose rock or mud.

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[1]Eugene P. Zvolenski a miner who accompanied Santee on his inspection described the water at 73+50 as cloudy, and said that he could not see where he was walking.

[2]The area at crosscuts 19 and 20 is approximately 4,300 feet from Spad 73+50.

Santee issued a Section 104(d) order alleging a violation of 30 C.F.R. § 75.364[3]. Section 75.364, supra as pertinent, provides that at least every 7 days an examination shall be made, and that hazardous conditions "shall be corrected immediately."

III. Analysis

A. Violation of 30 C.F.R. § 75.364

The key issue for resolution is whether, on the date of Santee's inspection, the accumulation of water in the cited area constituted a hazardous condition which had not been corrected immediately.

Contestant did not impeach the testimony of Santee regarding his observations of the water accumulation. Patrick M. Wise, who accompanied Santee in his capacity as Contestant's Safety Inspector, did not contradict Santee's testimony with regard to the depth, and extent of the accumulation. Nor did he contradict the testimony of Respondent's witnesses that the water was cloudy or muddy, which prevented the bottom from being seen.

According to Santee he concluded that the accumulation was present for some time because the area between the swags was dry, and crusted, and because he had observed a water-discoloration line 36 inches high, approximately 20 feet inby spad 73+50. On the other hand, Louis Barletta, who was the superintendent of the mine during the period in issue, indicated that it is not possible to tell the age of an accumulation of water soley by looking at a water-discoloration line. He opined that water can accumulate quite quickly.

The record does not contain any testimony from any person having personal knowledge of the length of time the accumulation of water had existed prior to Santee's inspection. Resort thus is made to an analysis of the documentary evidence. The documentary evidence indicates, prior to Santee's inspection, the presence of water close to the cited area. In an Examinations of Emergency Escapeways, Facilities, Air Courses, and Bleeders Including Tests for Methane, ("Weekly Examination Book"), on February 17, 1993 at the 10-D tailgate, "15 xc to backend" it is noted as follows under the heading "hazards noted": "H_2O 73+80". The following is set forth under the heading "action taken": "reported". (Contestant's Exhibit C). The Pumper's Report (Contestant's Exhibit D), wherein pumpers note the condition of pumps, and the water level in the area of various pumps,

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[3]The pertinent language, set forth in Section 75.364, supra was previously found at 30 C.F.R. § 75.305, and had been revised effective August 16, 1992, 57 F.R. 20914 (March 15, 1992)).

indicates that, on February 15, 1993, at the pumps located at spad 72+20 the water was "at strainer" (sic). Barletta explained that this indicates a water depth of approximately 2 to 3 inches. The same comments are found in the reports for the midnight to 8:00 a.m. shift on February 17, 1993. In the next shift, at the pump location 72+20 the water level is noted as 12" at 57+20 it is noted as 10", and at 36+90, 20 xc, the water level "noted as "strainer" (sic). Also, the Pumper's Report for this shift contains the following remarks "told E.B. that pumpe needs to start pump inby in 10-D tail for 12/18/93" (sic).

Considering the depth of the water, the fact that it was cloudy or muddy, the extent of the accumulation, the presence of two pipes in the water, and the fact that mud and rocks, occur naturally on the floor of mines, I conclude that the accumulation of water cited by Santee constituted a hazardous condition that should have been reported.

Within the framework of the above evidence I conclude that the hazardous water accumulation had not been corrected by Contestant prior to the time it was noted by Santee. I thus conclude that Contestant herein did violate Section 75.364, supra.

B. Significant and Substantial

Santee characterized the violation he cited as significant and substantial. He defined "significant and substantial" as a condition which would cause a serious injury before it could be corrected. He opined that in the situation presented herein, an injury was reasonably likely to have occurred, taking into account the presence of water, and the likelihood that it contained debris. This conclusion was based upon his observation of debris in the area of crosscuts 19 and 20, which was 4,300 feet outby the area cited.

On the other hand, Barletta indicated that he was not aware of any slipping or tripping injuries in water up to 12 inches that occurred from January 1988 to February 1993. Patrick M. Wise, who was Contestant's Safety inspector during the period in issue, testified to the same effect. He also opined that the accumulation at issue did not constitute a hazard, as it was possible to travel in the cited area without slipping. He said that he had travelled there in the past without slipping. Barletta indicated, in essence, that miners are aware of the need to walk carefully in water that is muddy or cloudy, and miners are aware of the placement of pipes in the water and their location. He also indicated that by using a stick as a guide, it is possible to safely traverse water that can not been seen through.

In evaluating whether the violation herein was significant and substantial, I disregard the erroneous definition proffered by Santee, and instead refer to established case law.

In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the recent Decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); See: also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

(Southern Ohio, supra at 916-917).

I have already found that Contestant did violate Section 75.364, supra, and that, in essence, the violation herein

did contribute to the hazard of slipping or tripping. In evaluating the third element of the Mathies formula, I take cognizance of the following facts: the depth of the water; the fact that the bottom could not be seen through the water; the presence of 2 pipes in the water; the uncontradicted testimony of James Samuel Conrad Jr., an MSHA Inspector who inspected the site on February 7, 1993, and observed, in the area cited, planks and crib blocks lying on the floor in the center of the entry on the right side;[4] and Conrad's uncontradicted testimony that within 20 feet inby of Spad 73+50 he had observed a canvas lying on the floor covered with mud which made it extremely slippery when wet. Within the above framework, I conclude that it has been established that an injury producing event i.e., slipping or tripping, was reasonably likely to have occurred. I also conclude, due to the nature of the items in water, that should a person have tripped or slipped, there was a reasonable likelihood of an injury of a reasonably serious nature. Thus, I conclude that it has been established that a violation herein was significant and substantial.[5]

C. Unwarrantable Failure

According to Santee, the violation herein resulted from Contestant's unwarrantable failure. Santee defined "unwarrantable failure" as a situation where an operator knew or should have known of a violative condition, and did not take corrective action. In this connection, he referred to the similar accumulation which he had cited on February 10, in an area outby, and concluded that accordingly, Contestant should have been made aware of hazardous water conditions. Also, he indicated that an outby swag at a higher elevation had been pumped out. In this connection, reference is made to the entry in the Pumper's Report of the second shift on February 17, 1993 as follows: "Told E.B. that pumpe needs to start pumps inby 10-D tail for 2/18/93." (sic)

In making a de novo determination whether the record establishes unwarrantable failure on the part of Contestant, I

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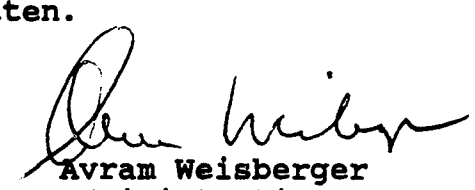
[4]Conrad said that he observed 5 crib blocks, and 7 planks approximately 20 feet inby Spad 73+50.

[5]The issue for resolution is not whether Santee's determination that the violation was significant and substantial finds support in the factors he took into account, but rather a decision on the issue of significant and substantial must be based upon all the evidence presented at a de novo hearing on this issue. Accordingly, the observations of Conrad, although not known to Santee when he made his determination, constitute important evidence to be taken into account in analyzing the issue of significant and substantial.

consider the following facts: the depth and extent of the accumulation observed by Santee; the fact that a similar accumulation had been cited on February 10; the lack of factual evidence indicating that the accumulation at issue had occurred at a point of time close to Santee's inspection which would not have allowed Contestant sufficient time to have pumped it out before Santee's inspection;[6] and the lack of any evidence on Contestant part explaining why the area in question has not been pumped out. Within the context of these facts, I conclude that it has been established that the violation herein was as a result of aggravated conduct on the part of Contestant and, hence constituted an unwarrantable failure (See Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)).[7]

ORDER

It is ORDERED that the Notice of Contest be DISMISSED, and the ORDER be affirmed as written.



Avram Weisberger
Administrative Law Judge

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[6]I find that Barletta's opinion that such an accumulation can occur quickly is of little probative valve in establishing how long the accumulation observed by Santee had actually existed.

[7]It appears to be part of Contestant's argument that, prior to October 1992, MSHA had an unwritten policy that an accumulation of water would not be cited in bleeders unless the water exceeded hip boot height; in the return entries unless the water exceeded knee height; and in intake entries unless the water was higher than 15 1/2 inch boots. Hunyady indicated that he was told of such a policy by various inspectors when they came across water accumulations when he accompanied them on inspections subsequent to 1986 or 1987. I do not find much merit to this argument. First of all, there is no evidence that Contestant's personnel in charge of pumping water accumulations were aware of such MSHA "policy". Nor there is any evidence that such persons measured or walked into the water accumulation at issue and decided, in reliance upon past MSHA "policy", not to pump the accumulations, as being below the level of hip boots.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-111-M A.C. No. 48-00007-05562
v.	:	Mountain Cement Company
MOUNTAIN CEMENT COMPANY, a Wyoming Partnership, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

Philip Nicholas, Esq., NICHOLAS LAW OFFICE, Laramie, Wyoming, for Respondent.

BEFORE: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent Mountain Cement Company ("MCC") with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

A hearing on the merits was held in Laramie, Wyoming, on September 1, 1993. The parties submitted their respective cases on oral argument.

Citation No. 3635856, issued under Section 104(d) of the Act, alleges MCC violated 30 C.F.R. § 56.12017.[1] The Citation reads as follows:

> The high voltage dc circuit to the "B" field of the electrostatic precipitator was not de-energized while two employees were attempting to repair the "A" field. Energized components from both fields were located in the same compartment. The circuit powering the "A" field was de-energized and locked out. One individual climbed into the compartment to retrieve a conductor connection that had been dropped earlier. He contacted the energized "B" field component and was electrocuted. The accident occurred at 2:55 p.m. on March 1, 1991. The victim was the working electrical foreman and was reportedly very familiar with the system. This practice was an unwarrantable failure.

STIPULATION

The parties stipulated as follows:

1. MCC is engaged in mining and selling of limestone in the United States, and its mining operations affect interstate commerce.

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[1] The cited regulation provides:

> **§ 56.12017 Work on power circuits.**
>
> Power circuits shall be de-energized before work is done on such circuits unless hot-line tools are used. Suitable warning signs shall be posted by the individuals who are to do the work. Switches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individuals working on them. Such locks, signs, or preventive devices shall be removed only by the person who installed them or by authorized personnel.

2. MCC is the owner and operator of Mountain Cement Company Mill, MSHA I.D. No. 48-00007.

3. MCC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. (the "Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect Respondent's ability to continue business.

8. The operator demonstrated good faith in abating the violation.

9. MCC is a large mine operator with 568,861 hours worked in 1990.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the History of this mine for the two years prior to the date of the Citation.

THE EVIDENCE

MSHA's accident investigation report encapsulates the basic facts as well as the technical aspects of the case. The parties have stipulated to the facts in the report. (Tr. 10). It states in part that the MCC mill was located at 5 Sand Creek Road in the southwest part of Laramie, Albany County, Wyoming. The mill was operated three shifts per day, seven days a week. The mill employed 107 people. Limestone, shale, and gypsum, which was mined at other locations and hauled to the mill, were processed into several types of Portland cement. Production at the mill averaged 400,000 tons a year.

A cement mill had been located at the site since 1927. MCC had purchased the facility in 1986 and had remodeled and upgraded

the operation in 1987. The mill was equipped with one dry-feed kiln. A two-stage preheater was used to heat the material to more than 1500 degrees F before entering the kiln. Dust generated within the kiln and preheater system was removed with a high voltage electrostatic precipitator located between the kiln and the emissions stack.

On March 1, 1991, LeRoy A. Robarge, victim, reported for work at MCC at 7 a.m., his normal starting time. Robarge, the working electrical foreman, initially received work assignments from James Lupton, chief electrician, and his immediate supervisor. Robarge also carried a company pager, through which he was notified of electrical problems and their priority as they occurred during the shift.

From 7 a.m. until approximately 11 a.m., Robarge had been working on miscellaneous jobs around the plant. At 11 a.m., Robarge was assigned by Lupton to troubleshoot an ongoing problem with one of the electrostatic precipitators. The kiln was temporarily down at this time while a trunnion was being repaired and the precipitator power could be shut off without causing the plant to be in violation of EPA stack emissions.

Greg Morrissey, a newly hired electrician, was contacted by Robarge to assist with the task of determining why A-field in the precipitator was not producing the dc voltage as it was designed to produce. Morrissey had been working with Robarge on several electrical jobs the past two weeks and was being trained by Robarge. The men went to the motor control center #4 where Robarge explained to Morrissey the control switches and disconnects for the four precipitator units. The A-field circuit breaker was switched off and locked out and they proceeded to the top floor of the nearby precipitator building where the transformer/rectifier units were located. Robarge began troubleshooting by draining the oil from the A-field transformer. The transformer was then dismantled and the transformer coils tested for possible damage. When it was concluded that the problem was not in this area, the transformer was reassembled and the oil replaced.

The high voltage power conductors for the A-field were located inside a 14-inch diameter isolating (air insulating) container tube. The tube was provided with an inspection cover located on the east horizontal section leading from the transformer. The cover was removed so the internal conductors could be visually inspected. Because the vertical conductor appeared to be misaligned and entered the bushings at an angle, they decided to correct this by extending the horizontal conductor approximately 1/2 to 3/4 inch by the addition of a nipple.

Morrissey, working through the inspection cover, disconnected the connection between the vertical and horizontal con-

ductors. At this time, the vertical section slipped and dropped inside the precipitator compartment.

Because of the time which was 2:15 p.m. (break time), and the need to get an extension nipple, the two men left the area by the south exit door and went to the electrical shop. After a short coffee break, the men returned with the nipple to the precipitator floor.

Robarge went to the west side of the unit and opened the access hatch. It could not be determined whether Robarge entered the compartment head first or feet first but while trying to reach the fallen conductor, he contacted the energized B-field conductor.[2]

Morrissey, working on the east side, heard the arcing caused by Robarge's contact with approximately 50,000 volts of dc current. He went around the compartment where he could see arcing and knew that he could not help Robarge until the power had been turned off. Going to the east side door he shouted for help. Joe Bigelow, electrician, working one floor below the accident scene responded. Bigelow ran down the stairs to the motor control center where he shut off the power to all four precipitator units. He then went back outside and shouted to Morrissey that all power was off and secured.

Ken Keirn, Stan Vialpondo, and Gary Cook, all mechanics, also responded to the calls for help. They assisted with removing Robarge from the interior of the precipitator unit. Robarge's jacket was on fire and they removed it. His shirt was also burning and the fire was put out. Vital signs could not be detected at this time and CPR was immediately initiated and continued until the arrival of emergency personnel from the Laramie Fire Brigade, County Sheriff's office, and three Emergency Medical Technicians with the Ivinson Memorial Hospital ambulance.

Robarge was placed on a back board and carried down the outside east stairway. CPR was continued at the different stairway landings on the way down.

The victim, under the care of EMTs, was transported to Ivinson Memorial Hospital where he was pronounced dead by the emergency room physician at 4:24 p.m. Cause of death was cardiac arrest caused by electrocution.

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[2] The west side of the compartment is shown in Exhibit M-1. The 22-inch access door is shown in Exhibit G-9 (if Robarge entered the compcompartment head first he would move in the direction shown by the worker in Exhibit G-8). (Tr. 52).

PHYSICAL FACTORS INVOLVED

The accident occurred on the upper level of the electrostatic precipitator inside a compartment that contained electrical components that were fed from two different power resources. The precipitator was a dust-collecting device located between the kilns and the emissions stack. The precipitator utilized groups of suspended wire electrodes charged with a positive polarity 50,000-volt direct current charge to attract dust and particulates generated in the kiln. These groups of suspended wire electrodes were called "fields." Periodically the electrodes were subjected to mechanically applied vibrations to shake down the attracted dust into hoppers located beneath the electrodes. The collected dust was then hauled away for disposal.

Exhibit G-12 shows the energized tube on the B field and insulated portions in the compartment. They are marked "energized" and "insulator." Burns on Robarge indicated his head touched the energized portion. (Tr. 37-40).

The electrostatic precipitator was approximately 80 feet high, 30 feet wide and 40 feet long. The upper level of the precipitator was covered with a gable-roofed metal building. Access to the upper level of the precipitator was provided by two outside stairways located on the east and south sides of the precipitator.

The electrode fields in the precipitator were divided into four groups. These groups were identified as A, B, C, and D fields. Each field was powered from a separate high voltage transformer/rectifier unit.

Three rows of compartments with four compartments in each row were located in the metal building on top of the precipitator. These compartments were used to enclose the electrical connections and parts of the suspension system for the fields. The A and B fields were located at the kiln end of the precipitator where the dust was the heaviest. Consequently, these fields required more power and less space. Both A and B fields were installed in the first (south) row of compartments.

C and D fields were suspended and connected individually in the next two rows of compartments. This nonstandard arrangement may have confused the victim and contributed to the accident.

The twelve compartments atop the precipitator were all constructed similarly. They were approximately 8′ 6" long, 4′ high and 2′ 8" wide. Access to the interior of the compartment was through 22" diameter round hatches that extended 8" from the long side of the compartments near floor level. The access hatch to the compartment where the accident occurred was on the west side

of the compartment located at the southeast corner of the precipitator.

Two support insulators were located in the compartments one at each end. The insulators were constructed of fiberglass tubing approximately 14" in diameter and approximately 18" high. A .25" thick steel plate was bolted to the top of each insulator. A 2" diameter threaded steel rod extended upward from the top of the insulator. The steel plates and threaded rods were energized when the fields were energized. At the time of the accident the B-field was mistakenly left energized and the victim contacted the energized rod or plate while inside the compartment.

The primary power for the four precipitator fields was fed from motor control center #4 located in a ground level building on the west side of the precipitator. The primary power was 480 volts ac, single phase. The controllers for the fields were fed from circuit breakers mounted in the panel located in the center of the building. The controllers were located along the west wall of the building. Each controller was equipped with a disconnect and instruments to monitor voltages and currents of the fields.

The transformer/rectifier units for the fields were located between the compartments on the top of the precipitators. The transformer/rectifier units were equipped with tap changing rotary switches. The tap changers had five positions which could be set to isolate and ground the fields or could be set to change the intensity of the dc charges on the field. Other than the tap changers there was no way to disconnect the transformer/rectifier units on the upper level. Electricians stated that the primary power had to be deenergized before the tap changers could be operated to prevent damage to the transformer/rectifier unit.

The rotary tap changers were equipped with key operated interlocks that were designed to prevent persons from gaining access to the interior of the compartments or to the interior of the precipitator while the system was energized. Witnesses and others interviewed during the investigation stated that the lock to the compartment where the accident occurred had been disassembled and the interlocking system, was bypassed. No one knew or would say when the lock was disassembled. Further investigation found that the interlocking system required some maintenance and alignment but would operate. The system would have prevented access to energized components had the lock not been disassembled.[3]

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[3] The lock is shown on the access door at approximately 2 o'clock in Exhibit G-9.

The victim, who was the working electrical foreman, and his assistant were engaged in troubleshooting the A-field components. They were attempting to locate the cause of an ongoing low output voltage problem. The assistant who had only worked two weeks at the operation stated that he knew very little about the precipitator and was following instructions of the victim. The circuit to the A-field transformer/rectifier unit was opened and locked out in the control house at ground level. The originally planned work did not require either of the two electricians to enter the compartments or the precipitator so probably no thought was given to the need to deenergize the B-field. As the trouble-shooting continued, the A-field conductor was uncoupled and part of the conductor and a piece of the coupling fell into the compartment. In attempting to retrieve the conductor and coupling part, the victim entered the compartment and was electrocuted.

A shorting stick with a clamp and 6' long conductor was available at the compartment to test for current and to discharge static from the components within the compartments. Evidently the stick was not used prior to the accident. The victim may have failed to use the shorting stick[4] because he was in a rush to get the precipitator on line.

DISCUSSION AND FURTHER FINDINGS

The cited regulation 30 C.F.R. § 56.12017 requires that power circuits "shall be deenergized before work is done on such circuits unless hot-line tools are used."

The Commission in Ideal Cement Company, 11 FMSHRC 2409, 2416 (November 1990) stated that in interpreting and applying broad-worded standards, the appropriate test as whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard, citing Canon Coal Co., 7 FMSHRC 6676, 6678 (April 1987), Quinland Coal, Inc., 1614, 1617-1618 (September 1987).

In this situation, the electrical foreman who was very knowledgeable about the electrical circuits, entered the compartment containing energized and deenergized circuits. There were multiple ways to shut off the power but these were ignored as was the by-passed lockout system.

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[4] The shorting stick is shown in Exhibit G-14.

It is common knowledge that if a person is in close proximity to energized circuits of 50,000 volts, he runs the risk of electrocution.

In support of his position, the Secretary cites Amax Coal Company 8 FMSHRC 1975 (August 1981) wherein Judge Joseph B. Kennedy considered a similar regulation, § 77.500, to the one in contest here. I agree with Judge Kennedy when he stated that:

> Even if Mr. Morris [electrician] did not intend to work on the upper energized circuits, he was in violation of Section 77.500. The MSHA Inspector's Manual states:
>
> "[w]hen work is performed in close physical proximity to exposed electrical circuits or parts, they shall be deenergized ... . All circuits within an electrical enclosure shall be deenergized before work is performed within the enclosure unless such energized circuits are guarded by suitable physical guards or adequate physical separation. 3 FMSHRC at 1982, 1983.

In the instant cases, both the energized and deenergized circuits were located in the same compartment. The very hazard presented by entering such compartments is the danger of contacting such circuits.

In addition, the Secretary's interpretation of his regulation is entitled to due deference; Secretary of Labor, o.b.o. Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989).

MCC contends its foreman was working on the "A" field. As a result, there was no violation because he was not working in the energized "B" field. I disagree. Once a situation of close proximity exists, a violation has occurred.

MCC further argues the standard should be interpreted as written. (Tr. 29). In short, the only evidence of work being done at the time was the foreman's efforts at retrieving the tools. Therefore, no "work" was being done "on such circuits." The record here illustrates that no work was being done on any circuit. However, if I accept MCC's argument to its ultimate conclusion, then no circuit would be deenergized merely to retrieve tools in the energized compartment. Such an interpretation of § 56.12017 would hardly promote the safety and health of miners.

The citation should be **AFFIRMED**.

SIGNIFICANT AND SUBSTANTIAL

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-104 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007, 2011-2012 (December 1987).

The evidence establishes that a violation of § 56.12017 occurred. A measure of danger to safety was contributed to by the violation. Since the hazard contributed to the fatality, the third and fourth formulations of Mathies were established.

The special allegations of S&S should be **AFFIRMED.**

UNWARRANTED FAILURE

The Secretary contends this violation was due to the unwarrantable failure of MCC to comply with the regulation.

The special finding of unwarrantable failure, as set forth in Section 104(d) of the Mine Act, 30 U.S.C. § 814(d), may be made by authorized Secretarial representatives in issuing citations and withdrawal orders pursuant to Section 104. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), and Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987), The Commission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms

as "indifference," "willful intent," "serious lack of reasonable care," and "knowing violation." 9 FMSHRC 15 2003.

In this case, there were no written instructions posted for employees to review explaining the deenergizing and locking out of the circuits. In addition, no warning signs were posted on the compartment to show the circuits were fed by two different power sources. Further, a shorting stick was not used to check the current. Additionally, the interlock system was rendered ineffective and by-passed. An effective system would have prevented the accident. Finally, the working electrical foreman failed to insure that the B-field was deenergized before he worked in close proximity to it.

These factors establish high negligence and unwarrantability on the part of MCC.

CIVIL PENALTIES

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

MCC is a large operator with 568,861 hours worked in 1990. (Stipulation).

The proposed penalty will not affect the operator's ability to continue in business. (Stipulation).

The operator's prior history consisted of 67 assessed violations for the two-year period ending March 26, 1990. (Ex. G-1).

The operator's negligence was such that the violative condition could have been easily prevented.

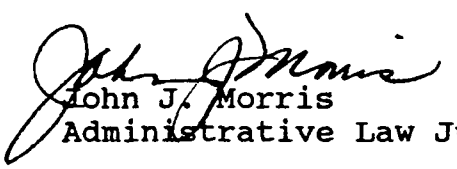
The gravity was apparent. MCC abated the violation and is entitled to statutory good faith.

In this case, the Secretary proposes a civil penalty of $30,000. Based on the record, I concur in this assessment.

For the foregoing reasons, I enter the following:

ORDER

Citation No. 3635856 is **AFFIRMED** and civil penalty of $30,000 is **ASSESSED**.



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 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of RICHARD E. GLOVER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 92-172-D
	:	HOPE CD 92-11
v.	:	Shawnee Mine
U.S. STEEL MINING COMPANY, INC. Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 93-13
	:	A. C. No. 46-05907-03657
v.	:	Shawnee Mine
U. S. STEEL MINING COMPANY, INC. Respondent	:	

DECISION

Appearances: Tina C. Mullins, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) on behalf of Richard Glover, filed a Complaint pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("the Act,"). The Complaint alleges that Glover was discriminated against by U.S. Steel (Respondent), who did not compensate him for newly employed experienced miner training it provided him. The Secretary also seeks a civil penalty, alleging a violation of 30 C.F.R. § 48.10 which requires that miners attending such training shall be compensated. At issue in both cases is whether Glover was a miner.

Pursuant to notice, the cases were heard on April 27, 1993, in Charleston, West Virginia. At the hearing, Richard E. Glover, Fred A. Tucker, and James F. Bowman testified for Petitioner. Respondent did not call any witnesses to testify. The parties filed post-hearing briefs on June 18, 1993.

I. Findings of Fact

1. Richard E. Glover has been employed by the United Mine Workers of America ("UMWA") as an international representative assigned to health and safety since 1984.

2. An UMWA representative, Glover conducts safety inspections and investigates accidents at coal mines. He spends approximately 1/3 of his time in underground mines.

3. Glover worked for U.S. Steel Mining Company, Inc. ("USM") from 1972 until he was laid off in 1983 because USM's No. 36 Mine closed.

4. In October 1989, Glover placed his name on the recall panel at U.S. Steel's Shawnee Mine.

5. Glover intended to work only one day at USM's Shawnee Mine to obtain employee status there pursuant to the USM-UMWA collective bargaining agreement.

6. After working one day with USM to establish a seniority date for job protection under the USM-UMWA collective bargaining agreement, Glover intended to continue his employment with the UMWA.

7. On July 1, 1992, Respondent notified Glover of his opportunity to be recalled as a mechanic at its Shawnee Mine. On July 3, 1992, Glover advised Respondent that he accepted the mechanic's position.

8. In July 1992, Glover was recalled to USM's Shawnee Mine as a mechanic.

9. Glover accepted the recall, was tested for a job as a mechanic, took a physical examination, and was administratively processed for benefits purposes.

10. USM assigned an employee number to Glover on July 15, 1992.

11. USM did not pay Glover for his activities on July 15, 1992.

12. On July 20, 1992, USM provided Glover with eight hours of newly employed experienced miner training required under 30

C.F.R. Part 48. Respondent's agents told Glover when to take a break, when to go to lunch, and when to return from lunch.

13. On July 20, 1992, Glover did not go underground at Shawnee Mine, and he was not involved in the extraction or production of coal.

14. USM did not issue Glover safety equipment on July 20, 1992, and did not assign him any duties associated with the mechanic's job.

15. Glover was an employee of UMWA on July 20, 1992, and received his UMWA wages that day.

16. USM scheduled Glover to commence work on July 21, 1992.

17. Glover did not report for work as scheduled on July 21, 1992. Glover considered UMWA to be his employer on July 21, 1992, and chose not to be employed by USM on that day.

18. Fred Tucker, UMWA representative, spoke to Glover the night before he was to start work at the Shawnee Mine, and advised Glover that he would be required to attend to an union business the next day. Tucker explained that a union representative was needed to investigate a fatality that had occurred at Sharples Coal, and that a union representative also was needed to teach a training class at the Mine Academy. Glover advised Tucker that he would cover the training course because it was closer to his home, and would only take one day, and that Charlie Johnson, an international representative, would cover the investigation, which was closer to his home, and which would take three to four days.

19. On July 21, 1992, Glover remained on the payroll of the UMWA and was paid by the UMWA.

20. On the morning of July 21, 1992, Tucker spoke to U.S. Steel's Labor Relations Representative, David Cook, because Labor Relations Manager Les Morgan was not in. He advised Cook that Glover was requesting a leave of absence in order to perform his union duties, and he faxed a leave of absence request from UMWA President Richard Trumka to Respondent at approximately 2:30 that afternoon. Cook stated that he knew nothing about the details of Glover's situation, and that Tucker would have to speak to Morgan when he returned.

21. When Morgan returned to the office on Thursday, July 23, 1992, he advised Tucker that U.S. Steel was thinking of discharging Glover. He later called back and stated that Glover had refused his recall and was no longer on the panel at the Shawnee Mine. Subsequently, Glover called Morgan to apologize for the mix-up and to explain what had happened. Morgan refused

to pay for the training, because Glover had rendered no services to U.S. Steel.

22. On August 13, 1992, Glover filed a Section 105(c) discrimination complaint with MSHA, based on Respondent's failure to pay him for the newly employed experienced miner training. On August 18, 1992, MSHA Inspector James F. Bowman issued a 104(a) citation based on the Respondent's refusal to pay Glover for the training, which he alleged was required under 30 C.F.R. § 48.10(a).

23. After MSHA issued a citation to USM for an alleged violation of § 48.30(a) (later modified to § 48.10(a)), USM abated the citation by paying Glover under protest for the day of training.

24. Payment was made by a check in the amount of $116.75, and dated August 24, 1992.

25. USM recalled Glover again, and he worked on February 11, 1993, relying on the training he had received in July, 1992.

26. Throughout 1992, Glover was never involved in the extraction or production of coal at USM's Shawnee Mine, nor was he regularly exposed to mine hazards there.

27. As an UMWA representative, Glover has never been involved in safety activities at Shawnee Mine; his involvement there has been limited to his attempts to establish a seniority date.

28. As an UMWA employee, Glover did not receive annual refresher training under Part 48, and could not work at Shawnee Mine until he received training required by Part 48.

II. Discussion

A. Docket No. WEVA 93-172-D (Violation of Section 105(c) of the Act)

In order for the Secretary to prevail in this case it must first be established that Glover is entitled to the protection of Section 105(c) of the Act. Section 105(c)(1) of the Act as pertinent, provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act . . . . (Emphasis added)

Whether Complainant was a Miner

Section (3)(g) of the Act defines "miner" as "...any individual working in a coal or other mine;". The word "working", is not defined in the Act. Webster's Third New International Dictionary, (1986 edition), defines "work", when used as an intransitive verb, as follows: "...(c): to perform work or fulfill duties regularly for wages or salary".

The record indicates, that on July 20, 1992, Glover took newly employed experience miner training, at the request of Respondent. The training was provided to Glover after he had already accepted a notice of recall, demonstrated his qualifications for a particular opening, and completed a pre-employment physical examination and all of the required paper work. On July 20, 1992, Glover did not perform any activities at the mine. Indeed, Glover could not legally perform any production or any extraction activities at the mine without first receiving newly employed experience miner training.

Hence, since Glover did not perform any work at the mine on July 20, he cannot be considered to have been "working" at the mine as that word is commonly used (See, Websters, supra).[1]

The 10th Circuit, the D.C. Circuit, and the Commission, have previously examined the term "miner" in the context of training rights under section 115 of the Act, and have held, pursuant to the definition of the term "miner" in Section 3(g) supra of the Act that job applicants, and former miners on layoff did not qualify as "miners", under the Act, and hence were not entitled to training rights under Section 115 of the Act (Emery Mining Corp v. Secretary of Labor, 783 F.2d 155 (10th Circuit) (1986) (job applicants); Brock v. Peabody Coal Company, 822 F.2d 1134 (D.C. Cir. 1987) (individuals on layoff); and Westmoreland Coal

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[1]Although Glover underwent training on July 20, at the direction of Respondent, there was no agreement beforehand that he receive any salary or wages for fullfilling this obligation. It is significant to note that on day of the training although Respondent's agents told Glover when to take a break, when to go to lunch, and when to return from lunch, he was still an employee of the UMWA on that date, and was paid for that day by UMWA. Also, it is significant to note that when Glover responded to the recall for the Shawnee Mine, he intended to work only one day to preserve his seniority rights. Further, although Glover had been directed to report for work July 21, he did not report to work on that date, and did not advise Respondent at any time on July 20, or 21 that he was not going to report to work on July 21. Thus, his activities on July 20, undergoing training, do not fall within the scope of fulfilling "duties regularly for wages or salary" (Webster's, supra).

Company, 11 FMSHRC 960 (June 1989) (individuals on layoff).

In Cyprus Empire Corporation, 15 FMSHRC 10 (1993), the Commission noted the holdings of Emery, supra, Peabody, supra, and Westmoreland supra, and held that striking employees were not miners for purposes of being entitled to have their previously designated walk-around representative accompany an MSHA inspector during an inspection. The Commission, after reviewing the definition of the term "miner" as set forth in Section 3(g) supra, concluded as follows: "Thus, a person's status as a miner is determined not by the fact that he is employed by an operator, but rather by whether, as the statute provides, he works in a mine." (Cyprus supra at 13). I conclude, that in general, this reasoning is applicable to the case at bar. Hence, considering all the above, I conclude that inasmuch as Glover on July 20, had not yet reported for work, and was not yet working in the mine, he was not a miner.[2]

Accordingly, for all the above reasons, I conclude that Glover is not entitled to the protection of Section 105(c) of the Act. Hence, Complaint filed under Section 105 of the Act, is to

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[2]Petitioner also argues, in essence, that inasmuch as Glover was an International Representative of the UMWA, he qualifies as a "representative of miners", and he is entitled to the protection of Section 105(c)(1) supra. Also, Petitioner argues that since Glover was on Respondent's recall panel, applied for employment, accepted the notice of recall, and underwent the requisite procedures to qualify for a position as a mechanic, he should be considered an "applicant for employment" and thus entitled to the protection of Section 105(c)(1) supra, of the Act. However, under the terms of Section 105(c)(1), supra, an "applicant for employment" or "representative of miners" comes within the purview of that section only if there has been interference "...with the exercise of the statutory rights of any ... representative of miners or applicant for employment... ." According to Petitioner the statutory right that was allegedly interfered with herein was Glover's right to receive and to be compensated for newly employed experience miner training. Specifically, it is alleged that Respondent interfered with Glover's right to receive compensation for training pursuant to 30 C.F.R. § 48.10 supra. Section 48.10 supra, provides, as pertinent, that "...miners attending such training shall receive the rate of pay as provided in Section 48.2(d)...". (emphasis added) Accordingly, pursuant to the terms of Section 48.10 supra, the right to receive compensation for training is limited to those persons who fall within the category of being a "miner". Although Glover may be construed to have been a representative of miners or an applicant for employment, in these capacities, Glover did not have a right to receive compensation for training.

be dismissed.[3]

B. Docket No. WEVA 93-13 (Violation of 30 C.F.R. § 48.10(a))

At issue herein is the validity of Citation No. 2736770 issued by MSHA inspector James F. Bowman, on August 18, 1992, alleging a violation by Respondent of 30 C.F.R. § 48.10(a), which, as pertinent, provides that "miners", shall receive compensation for training. On July 20, 1992, Respondent required Glover to receive newly employed experienced miners training and he received such training on that date. The critical question is whether Glover qualifies as a "miner" as defined in 30 C.F.R. § 48.2(a)(1). Section 48.2(a)(1), supra, defines a miner as "...any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods". Clearly, on July 20, 1992, Glover was not working in any underground mine, as explained above, II(A) infra, as he was not engaged in the extraction and production process. Glover had been employed as an underground miner on the effective date of the regulations, October 13, 1978, and, accordingly, was an "experienced miner", as opposed to a "new miner" (See, 30 C.F.R. §§ 48.2(b) and (c)). However, on July 20, 1992 he was not engaged in the extraction or production process. Hence he was not a "miner" at that term is defined in Section 48.2(a)(1) supra.[4] At best, he can be considered a "former miner", (See Cyprus Empire Corp, supra, at 13). As such, his status on July 20, 1992 was comparable to the experienced miner who was in a layoff status and who was found by the Commission in Westmoreland, supra, to have no right to be compensated for training that he took during the period of his

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[3]Additionally, I note that in order for Petitioner to prevail under Section 105(c) supra, it must first be established that Glover was involved in protected activity (Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Company v. Marshall 633 F.2d 1211 (3rd Cir. 1981)); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-818 (1981)). In this connection, in essence, it is Petitioner's argument that the protected activity herein was Glover's right to receive, and be compensated for newly employed experience miner training. There is no merit to this contention for the reasons set forth above, II(A). Hence, I conclude that the record fails to establish that Glover was engaged in any protected activity.

[4]No argument was made by the Petitioner, that Glover was either a maintenance or service worker, or that he was "regularly" exposed to mine hazards.

layoff, as he was not considered a miner at that time.

I find therefore that since Glover was not a "miner", Respondent did not have any obligation, pursuant to Section 48.10 supra, to compensate him for the training it provided. As such, Respondent did not violate Section 48.10, supra, and the Citation at issue shall be DISMISSED.

ORDER

It is hereby ORDERED that, for all the above reasons, these cases be DISMISSED.

Avram Weisberger
Administrative Law Judge
(703) 756-6215

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 28 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DANNY SHEPHERD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 93-219-D
	:	BARB CD 92-35
	:	Diamond No. 1 Mine
v.	:	
ADENA FUELS, INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

STATEMENT OF THE PROCEEDING

This proceeding concerns a complaint of discrimination filed by the Secretary of Labor ("Secretary") on behalf of Danny Shepherd and against Adena Fuels, Incorporated ("Adena Fuels") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(2). In addition, through counsel, Shepherd has intervened on his own behalf.

Following the filing of the complaint and Shepherd's intervention, the parties engaged in extensive pre-trial discovery and the proceeding was scheduled to be heard on July 7, 1993. However, on July 1, 1993, the parties orally advised me they had settled all aspects of the proceeding and that they intended to file a joint motion requesting approval of their settlement and dismissal of the proceeding.

The joint motion was received on July 14, 1993. The motion states that the parties have reached a full and final settlement of this litigation, including the payment by Adena of a civil penalty of one hundred dollars ($100) to the Mine Safety and Health Administration. The motion further discloses other confidential monetary aspects of the agreement. Danny Shepherd has signed the motion, as has Adena's president, Charles Yates.

Mindful of the Commission's statement that "Oversight of proposed settlements is an important aspect of the Commission's adjudicative responsibilities . . . and is, in general, committed to the Commission's sound discretion[,]" I have fully reviewed the settlement agreement and have concluded it is reasonable

and in the public interest. Citing Birchfield Mining Co., 11 FMSHRC 1428, 1430 (August 1989); UMWA v. Utah Power and Light Co., 12 FMSHRC 1548, 1554 (August 1990). Therefore I will approve the settlement and will dismiss this matter.

In addition, to honor the parties desire for confidentiality, I will order the settlement motion to be placed under seal in the record, where it will be subject to review by the Commission or an appellate judicial body only.

ORDER

The parties are ORDERED to comply with all aspects of the settlement, including the payment of a civil penalty to MSHA in the settlement amount stated above, within thirty (30) days of the date of this decision. The Joint Motion to Approve Settlement IS ORDERED SEALED and upon reciept of payment this proceeding is DISMISSED.

David F. Barbour

David F. Barbour
Administrative Law Judge
(703) 756-5232

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JUL 29 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 92-1292
	:	A.C. No. 46-01455-03941
v.	:	
	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Daniel E. Rogers, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Feldman

The above captioned proceeding is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act). This case was called for hearing on June 22, 1993, in Washington, Pennsylvania. The parties' stipulations concerning my jurisdiction to hear this matter and the pertinent facts associated with the civil penalty criteria contained in section 110(i) of the Act are of record.

This single citation proceeding concerns Section 104(d)(2) Order No. 3121636, which was issued to the respondent by Inspector Michael G. Kalich, at 10:30 a.m., on June 25, 1992. The subject order was issued for an alleged impermissible accumulation of combustible coal dust in violation of the mandatory health and safety standard contained in section 75.400, 30 C.F.R. § 75.400.[1] At the hearing, the respondent stipulated to the fact of the occurrence of the violation. (Tr. 7). Therefore, the remaining issues for resolution are whether the

[1] Section 75.400 provides as follows:
"Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein (emphasis added)."

violation was properly designated as significant and substantial and whether the violation occurred as a result of the respondent's unwarrantable failure. As noted below, after hearing a significant portion of Inspector Kalich's testimony, I expressed my reservations about the sustainability of the unwarrantable failure allegation. The parties subsequently conferred and reached a settlement in this matter.

The dispositive facts are not in dispute. On June 24, 1992, at approximately 1:15 p.m., Inspector Kalich issued 104(a) Citation No. 3121633 for violation of section 75.400. This citation, which is not a subject of this proceeding, noted excessive accumulations of combustible materials, fine coal, coal dust, lumps of coal and oil in the vicinity of the continuous miner in the one left section at the respondent's Osage No. 3 Mine. Inspector Kalich established at termination deadline for removing the accumulations as 6:00 p.m., on June 24, 1992.

Kalich returned to the respondent's Osage No. 3 Mine the following morning on June 25, 1992. He returned to the one left section where he observed what he believed to be the same accumulations around the continuous miner that he had observed the previous day. (Tr. 39). However, for reasons best explained by Kalich, he issued Order No. 3121636, the subject of this proceeding, as a 104(d)(2) order for new accumulations rather than a 104(b) order for failure to timely abate the accumulations he had observed the previous day that were noted in Citation No. 3121633. In explaining his action in this regard Kalich stated:

> I informed Mr. Renner at 10:30 a.m., on the 25th, that I was going to issue a (b) order, a 104(b) order, which is for failure to terminate and which would have been the appropriate piece of paper to issue in this case, since I believed that it was the same accumulations that were on the miner. But during the course of the day and in subsequent discussions with management personnel at the mine---and they basically begged me not to issue a (b) order because it's a lot more serious, you know, Consol takes a (b) order a lot more serious than a (d) order because it's [a] failure of someone, you know, to abate a citation. And they brought forth the afternoon section foreman that was basically going to say that, you know, that they had cleaned it up. So based on, you know, the story that I heard about, that it was cleaned up and that it reoccurred again, I terminated the citation and changed my mind and issued a (d) order on the 25th, instead of the (b) order that I originally told them that I was going to issue. (Tr. 40-41).

> . . . I physically did not observe the miner cleaned, so I was basing the termination on the afternoon boss' statement that they had cleaned it up and that the accumulation had reoccurred. And based on that, that's why I changed my mind and issued a (d) order instead of a (b) order that I had originally told them I was going to issue on the 25th at 10:30 in the morning. . . (Tr. 41).
>
> I believe [the accumulations observed on June 24 and June 25] to be the same accumulations. I still believe it was the same accumulations. But based on what the company told me, and you know, they're asking me not to write a (b) order, I issued a (d) order instead. (Tr. 44).

Kalich testified that he terminated both Citation No. 3121633 and Order No. 3121636 at 1:00 p.m., on June 25, 1992. However, he stated that Citation No. 3121633 was actually terminated at 6:00 p.m., on June 24, based on his decision to accept "the foreman's word" that the accumulations had been cleaned. (Tr. 43).

In order to prevail on the issue of unwarrantable failure, the Secretary must establish that the respondent's conduct constituted "aggravated conduct" characterized by conduct that was "not justifiable" or behavior that is "inexcusable". See Rushton Mining Company, 10 FMSHRC 249 (March 1988); Emery Mining Corporation, 9 FMSHRC 1977 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In the case at bar, by issuing a 104(d)(2) order rather than a 104(b) order, Kalich, in effect, elected to credit the respondent with cleaning the accumulations observed on June 24, 1992. Having given the respondent credit for cleaning these accumulations, it cannot be said that the accumulations observed the following morning at the same location are attributable to aggravated conduct on the part of the respondent.

During a bench conference I expressed the above noted concerns and urged the parties to consider a settlement of this case.[2] They conferred and informed me that settlement had been reached. A motion for approval of settlement was proffered on the record. The substance of the settlement agreement is that the Secretary has agreed to modify the 104(d)(2) order to a 104(a) citation thus reducing the underlying degree of negligence

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[2] During this bench conference, counsel for the Secretary requested that I modify the 104(d)(2) order in issue to a 104(b) order. Counsel's request was denied as such a modification would be prejudicial to the respondent.

from high to moderately high. As such, the unwarrantable failure designation is removed. The characterization of the violation of Section 75.400 remains as significant and substantial. The respondent has agreed to pay a civil penalty of $1,300 for the citation in issue. Given the serious gravity associated with the underlying combustible dust accumulation violation and the civil penalty criteria contained in Section 110(i) of the Act, I concluded that the parties' proposed settlement of this matter was appropriate. Consequently, the motion for the approval of settlement was granted on the record. (Tr 63-65).

ORDER

Accordingly, Order No. 3121636 is modified to a 104(a) citation that is properly designated as significant and substantial. The respondent is **ORDERED** to pay a civil penalty of $1,300 in satisfaction of the violation in issue. Payment is to be made within 30 days of the date of this Decision, and, upon receipt of payment, this matter is **DISMISSED.**

Jerold Feldman
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 29 1993

UNITED MINE WORKERS of AMERICA on Behalf of CHARLES MARK ROSEN, et al., Complainants	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 93-89-D
	:	MORG CD 92-15
v.	:	
	:	Saginaw Mine
SAGINAW MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

This case is before me based upon a discrimination complaint filed pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act). The parties now seek my approval of their joint motion for settlement of this matter. The substance of their proposed resolution is that the respondent, without admitting that any discriminatory act has occurred, has agreed to pay the total sum of $200 to District 6 and Local Union 9695, which will be distributed appropriately to the complainants on behalf of whom this action was brought.

I have considered the information provided in support of the parties' motion and I conclude that the proffered settlement should be approved. Accordingly, the motion for the approval of settlement **IS GRANTED** and **IT IS ORDERED** that the respondent make payment of the sum noted above within 30 days of the date of this order. **IT IS FURTHER ORDERED** that, upon receipt of payment, the subject complaint in this proceeding **IS DISMISSED WITH PREJUDICE.**

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 29 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1038
Petitioner	:	A.C. No. 46-04383-03501KZV
	:	
v.	:	Docket No. WEVA 92-1058
	:	A.C. No. 46-04383-03502KZV
LEVEL LAND MINING CORPORATION,	:	
Respondent	:	Docket No. WEVA 92-1063
	:	A.C. No. 46-04383-03503KZV
	:	
	:	No. 4 Strip

DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve settlement agreements and to dismiss these cases. A reduction in penalty from $317 to $250 is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay penalty of $250 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

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Mr. Timothy A. Keeney, Level Land Mining Corporation, P.O. Box 1181, Charleston, WV 25324-1181 (Certified Mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 6 1993

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. SE 93-335-R
v.	:	Citation 3007642; 6/2/93
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	:	Docket No. SE 93-336-R
	:	Citation 3007641; 6/2/93
	:	
	:	Mine No. 3

PARTIAL DECISION GRANTING THE CONTESTANT'S CONTEST IN PART
AND
ORDER REINSTATING DUST CONTROL PLANS

Appearances: R. Stanley Morrow, Esq., Jim Walter Resources Inc., and David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, Birmingham, Alabama for Contestant;
William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Respondent.

Before: Judge Feldman

These proceedings concern Notices of Contest filed by the contestant pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, (the Act) challenging the validity of two citations issued on June 2, 1993, at the contestant's No. 3 Mine. The citations were issued for alleged violations of Sections 75.370(a)(1), 30 C.F.R. § 75.370 (a)(1), for longwall and continuous mining operations without an approved dust control plan. An expedited hearing was conducted in Birmingham, Alabama, on June 18, 1993. At the hearing, the parties agreed that my decision in Citation No. 3007641 concerning the contestant's longwall operations would also apply to Citation No. 3007642 concerning the contestant's continuous mining operations.

At the hearing, the parties identified the two central issues which must be resolved in order to determine the propriety of the Mine Safety and Health Administration's (MSHA's) attempt to rescind the subject dust control plans in effect at the contestant's No. 3 Mine. These issues are: (1) whether a citation issued for a violative dust concentration condition, which is promptly corrected, in the absence of any reoccurrence, provides a basis for rescission and modification of the dust

control plan under Section 303(o) of the Act, 30 U.S.C. § 863(o), or Section 75.370(a)(1) of the regulations;[1] and (2) in the absence of any evidence of repeated or continuing dust concentration violations, whether an operator's unilateral decision to increase the air velocity at the working face and the water pressure of the sprays in excess of the minimum requirements in the existing dust control plan, in recognition of increased production output, provides a basis for modifying the existing dust control plan to reflect higher minimum air velocity and water pressure standards.

At the hearing, the parties stipulated to the fact that there is a positive correlation between the amount of coal extracted and the amount of coal dust that is generated as a result of the extraction process. As a general proposition, the contestant agreed that an increase in the volume of air ventilation and an increase in the volume of water sprayed at the working face tends to dilute the dust and reduce the concentration.(Tr. 146-150).

The approved dust control plan in effect as of January 20, 1993, required 48,134 C.F.M. (cubic feet per minute) of air velocity at the tailgate, water pressure of 50 P.S.I. (pounds per square inch) at the stage loader and on the external sprays, and 35 P.S.I. on the drum sprays. A single shift sample obtained on March 10, 1993, as a result of MSHA's "CBE" spot inspection program for the shearer operator designated occupation 044-0 revealed a dust concentration level of 2.8 mg/m3 (milligrams per cubic meter) which exceeds the allowable limit of 2.0 mg/m3 contained in Section 70.100(a). At the time of the March 10, 1993, inspection the contestant was mining 3,600 tons of coal per day, ventilating the tailgate with 63,600 C.F.M., and using 150, 100 and 48 P.S.I. of water pressure on the stage loader, external sprays and drums sprays, respectively. As a result of this

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[1] The focal point of this proceeding with respect to the contestant's longwall dust control plan is a violative respirable dust concentration exposure by a single occupation (the longwall shearer operator on March 10, 1993) out of approximately 8 to 10 occupations at the longwall, which was promptly corrected. As a result of this violation of the respirable dust concentration standard in Section 70.100(a), 30 C.F.R. 70.100(a), MSHA rescinded the dust control plan for the contestant's longwall operations (Tr. 177). There is no evidence of subsequent violations of Section 70.100(a).

single shift sample, on March 26, 1993, MSHA notified the contestant that its existing dust control plan for the longwall was no longer adequate. [2] (Gov. Ex.2).

Subsequent respirable dust samples submitted by the contestant during the period March 25 through March 27, 1993, reflected average dust concentration levels between 1.0 and 1.3 mg/m3. These dust concentration results were achieved with air velocity of approximately 52,000 C.F.M. at the tailgate and air spray pressure of between 50 and 60 P.S.I. at the stage loader and on the external sprays, and, water pressure of approximately 45 P.S.I. on the drums sprays. These compliant dust concentration levels were achieved when production was approximately 2,100 tons of coal per day. There is no evidence of any violative dust concentration levels since the March 10, 1993 inspection.

The statutory language of Section 303(o) of the Mine Act, as well as Commission and Court of Appeals case authority interpreting this statutory provision, require that mine ventilation or dust control plan provisions must address the specific conditions of a particular mine. See Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); Zeigler Coal Co. v. Kleppe, 536 F.2d, 398, 406-07 (D.C. Cir. 1976). See also S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978).

While MSHA may consider conditions which are common to a number of mines, MSHA is prohibited from imposing general rules applicable to all mines in the plan approval process. See Peabody Coal Company, 15 FMSHRC 381, 386, (March 1993) citing UMWA v. Dole, 870 F.2d 662, 669-72 (D.C. Cir. 1989). Such universal application of mandatory standards to all mines must be accomplished through the mandatory safety and health standards

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[2] The Secretary's single shift sampling procedure was invalidated by Judge Weisberger on December 7, 1992. Keystone Coal Mining Corp., 14 FMSHRC 2017, appeal pending. Although the Secretary has appealed, the Secretary's continued use of the single sample procedure after this procedure has been determined to be invalid is inappropriate. Continued use of this procedure should be held in abeyance until resolution of the Secretary's appeal. At trial, the contestant requested that I address the important issues raised in this matter despite the impropriety of the single shift sample. Moreover, the continuous mining dust control plan in this proceeding was rescinded by MSHA as a result of a violation of the respirable dust concentration standard measured by the traditional five shift sample average.

promulgated through the rulemaking process. Carbon County, 7 FMSHRC at 1370. In this regard, the Secretary's attempt to routinely rescind dust control plans whenever a violation of the respirable dust standard in Section 70.100(a) is detected is not mine specific and contravenes the statutory language and congressional intent of Section 303(o) of the Act. [3]

In view of the above considerations, I issued the following bench decision partially granting the contestant's contest with regard to this first issue. The parties will continue to negotiate the resolution of the remaining issue concerning whether the dust control plan should be modified to reflect increased minimum air velocity and water pressure standards. The following is the transcript of the bench decision which is edited with non-substantive changes:

> The issue in these contest proceedings is whether a violative dust concentration condition, or several violative dust concentrations, which are promptly corrected, in the absence of any reoccurrence, provide a basis for rescission and modification of a dust control plan under Section 303(o) of the Mine Act or Section 75.370(a)(1) of the regulations.
>
> I believe that the Commission's decision in Carbon County Coal Company, supra, and the D.C. Circuit Court of Appeals decision in Zeigler Coal Company v. Kleppe, supra, is controlling on this issue.
>
> In Carbon County, relying on the Zeigler case, the Commission concluded that mandatory safety standards should be established through the rulemaking procedure as they are applicable to the industry at large. However, Section 303(o) and its counterpart in 30 C.F.R. § 75.370(a)(1), which are the applicable statutory and regulatory provisions in these proceedings, are intended to address unique conditions that are peculiar to a particular mine. Therefore, absent unique circumstances that have a causal relationship to continuing violative dust concentration levels, an excessive dust concentration, alone, does not provide a basis for rescission or modification of a dust control plan under Section 303(o) of the Act or Section 75.370(a)(1).

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[3] MSHA Inspector Randy Kline testified that MSHA routinely rescinds dust control plans when a violative respirable dust concentration is detected. (Tr. 174-177).

I feel that sanctions imposable under Section 70.100(a) of the regulations and Sections 104(b) and 104(d) of the Act provide an adequate incentive to achieve operator compliance with the dust concentration standards.

If the Secretary desires automatic rescission of the dust control plan for violation of the dust concentration standard, he should pursue such an approach through a rulemaking proceeding. Whether or not the Secretary is precluded from such an approach by the statutory language of Section 303(o) is beyond the scope of this proceeding.

As a further matter, there are minimum air velocity standards and water pressure standards provided in dust control plans as are provided in the instant plans. If the operator takes it upon itself to operate with air velocity and water pressure in excess of those minimum standards provided in the dust concentration plan, then it is still in compliance with the plan, since it is using air velocity and water pressure in excess of the minimum levels. Operators should not be discouraged from using more than the minimum levels. After all, the ultimate goal is preventing over exposure to dust concentrations. If, for whatever reason, the minimum standards, or, the additional standards the operator chooses to apply, do not adequately protect the miner, then there may be a basis for rescission of the dust control plan under Section 303(o) if there are peculiar circumstances in the mine which call for such a revision.

Consequently, I am issuing a bench decision granting in a limited fashion the contestant's contest in that I have concluded that a violative dust concentration level that has been corrected, in the absence of subsequent dust concentration violations, does not provide a basis for rescission of a dust control plan.

There are remaining issues with regard to the operation at Jim Walter's No. 3 Mine which may very well provide a basis for rescission. However, the Secretary has not yet completed his direct case.

The Secretary has provided a significant amount of testimony that indicates that there has been an increase in the amount of tonnage that is being produced at the contestant's mine. The contestant has apparently taken it upon itself to increase the air velocity and water pressure of the sprays. Whether or

not these circumstances, when viewed in the context of the statutory language, provide a basis under the Commission's decision in Carbon County to rescind the dust plan remains to be seen since we haven't completed testimony on this issue.

I have discussed this matter with the parties and they have expressed an inclination to continue to discuss this matter in an effort to reach a satisfactory agreement on a modification of the existing dust control plan. As the parties have indicated that they are going to attempt to reach settlement on the remaining issue, I am issuing an order reinstating the dust control plan that was in effect prior to the rescission. Thus, the dust control plan in effect for the contestant's continuous mining and longwall operations in its No. 3 Mine immediately prior to the issuance of the citations in issue shall be reinstated.

I also have a stipulation that I have confirmed on the record that the dust control plan that is currently in effect in the contestant's No. 7 Mine shall also remain in effect as the issues in these proceedings also apply to the continuing validity of that dust control plan.

The dust control plan in the No. 3 and No. 7 Mines shall remain in effect for 14 days after the date of the release of my decision formalizing this matter. The parties are requested to inform me within 14 days of the release of a written decision in this matter as to whether or not they have been able to reach settlement on the remaining issue. If settlement is reached, I will request that the contestant withdraw its contest in these matters and I will issue a decision dismissing these proceedings. If settlement cannot be reached, we will reconvene as expeditiously as possible.

ORDER

Consistent with the above decision Jim Walter Resources, Incorporated's contest of Citation Nos. 3007641 and 3007642 **IS GRANTED IN PART.** The parties **ARE ORDERED** to inform me in writing within 14 days of the date of this decision whether the remaining issues in this contest proceeding have been settled. The parties are reminded that they must negotiate in good faith if it is apparent that the minimum dust control remedies in the subject

plans are inadequate due to specific conditions at the contestant's mines. If settlement is not reached, the parties should inform me of suitable hearing dates for reconvening this matter.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 20 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 93-24
Petitioner	:	A.C. No. 41-02803-03552
v.	:	
	:	Docket No. CENT 93-48
FARCO MINING OF TEXAS INC.,	:	A.C. No. 41-02803-03553
Respondent	:	
	:	Palafox Mine

ORDER DISAPPROVING SETTLEMENTS
ORDER TO SUBMIT INFORMATION

Before: Judge Feldman

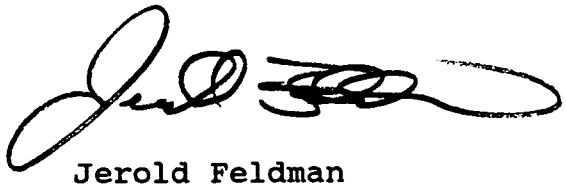
These cases are before me upon petitions for assessment of civil penalties under Section 105(d) of the Federal Mine and Safety and Health Act of 1977. The parties have filed Joint Motions to Approve Settlements of the seven alleged violations involved in these cases. The parties seek approval of reductions in the proposed civil penalty assessments as follows:

CENT	93-24	$8,630	to	$3,335
CENT	93-48	$7,000	to	$3,400

The parties request me to consider the premises presented in their Joint Motion to support their request for my approval of their agreement. However, the premises presented are superficial and do not address the specific rationale for the reduction in penalties or for the removal of the pertinent significant and substantial designations or unwarrantable failure findings. Section 110(k), 30 U.S.C. § 820(k), requires Commission approval of any settlement agreement in these matters. The Commission must consider whether the terms of the proposed settlement are consistent with the six statutory criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). See Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984).

Based upon the absence of supporting information in the parties' motion, I am unable to conclude that the recommended penalty reductions are appropriate. Accordingly, it **IS ORDERED** that the motions for approval of settlement **ARE DENIED. IT IS FURTHER ORDERED** that the parties shall provide additional information specific to each citation in issue supporting their motions for reductions in civil penalties and for the

modifications of the pertinent citations. This information should be provided within 30 days of the date of this order. Failure to timely provide the requested information will result in the scheduling of these cases for hearing.



Jerold Feldman
Administrative Law Judge

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JUL 20 1993

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

DECISION ON COMMON ISSUES TRIAL

Appearances: For the Secretary of Labor: Douglas N. White, Esq., Carl C. Charneski, Esq., James B. Crawford, Esq., L. Denise Galambos, Esq., Richard L. Gilman, Esq., Page H. Jackson, Esq., Mark R. Malecki, Esq., and Patrick M. Zohn, Esq., Arlington, Virginia;

For the Lead Defense Counsel Committee: Laura E. Beverage, Esq., Henry Chajet, Esq., and L. Anthony George, Esq., Charleston, West Virginia; Timothy M. Biddle, Esq., and R. Timothy McCrum, Esq., Washington, D.C.; Michael T. Heenan, Esq., and William I. Althen, Esq., Washington, D.C.; R. Henry Moore, Esq., Pittsburgh, Pennsylvania; John C. Palmer IV, Esq., and Edward L. Kropp, Esq., Charleston, West Virginia; and H. Thomas Wells, Esq., and J. Alan Truitt, Jr., Esq., Birmingham, Alabama;

For the United Mine Workers of America: Mary Lu Jordan, Esq., Washington, D.C.

Before: Judge Broderick

STATEMENT OF THE CASE

Each of the cases consolidated in the master docket involves an allegation that the mine operator altered the weight of the filter cassette used to sample the concentration of respirable dust to which its miners were exposed. Following extensive discovery, a common issues trial was commenced on December 1, 1992, and concluded on February 22, 1993. The Secretary of Labor (Secretary) and the Lead Defense Counsel Committee (LDCC) each filed a posthearing brief on April 30, 1993, and a reply brief on May 28, 1993. I have considered the entire record and the contentions of the parties, including the proposed findings of fact, in reaching this decision. To the extent that the proposed findings and conclusions are not incorporated in this decision, they are rejected. (The Secretary proposed 701 findings and

conclusions, and 13 ultimate findings and conclusions; LDCC proposed 79 findings of fact, and two ultimate and nine subordinate conclusions of law.)

I. FACTUAL AND PROCEDURAL BACKGROUND

A. RESPIRABLE DUST SAMPLING PROGRAM

Section 202 of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801, 842, requires coal mine operators to take accurate samples in a manner prescribed by the Secretary of the respirable dust to which miners are exposed in the mine atmosphere. Title 30 C.F.R. §§ 70.201-220 (for underground mines), 71.201-220 (for surface mines), and 90.201-220 (for Part 90 miners) set forth the sampling requirements and procedures to which the mine operators must conform. Dust samples are taken by the use of an MSA sampling train unit containing a pump, a hose, a cyclone assembly, and a filter cassette. If properly calibrated, the pump draws 2 liters of air per minute into the cyclone assembly which is designed to separate out the larger particles of dust which fall into what is called the "grit pot." The air with the smaller (respirable) dust particles is directed into the filter cassette. Inside the cassette is a capsule consisting of an aluminum cone, a filter, and a backing pad. The particles enter the capsule and are deposited on the filter face and the air goes through the filter and the backing pad into the hose and back to the pump. At the conclusion of each sampling shift, the filter cassettes are sent to the Mine Safety and Health Administration (MSHA) (usually by mail) for weighing. The cassettes with their dust data cards attached are sent in cardboard mailing boxes. At MSHA's Pittsburgh Health Technology Center (PHTC), lab technicians remove the filter cassettes and dust data cards from the boxes and place them on carrying trays. Using forceps, the lab technicians open the cassettes, remove the filter capsules, and place the capsules on processing trays for weighing. The filter capsules are desiccated to remove any moisture that may be present and then stored before weighing to ensure stability of weight. PHTC weighs about 90 percent of its samples using a robotic weighing system. The remainder are weighed manually.

Section 209(b) of 30 C.F.R. Parts 70, 71, and 90 provides in identical language: "The operator shall not open or tamper with the seal of any filter cassette or alter the weight of any filter cassette before or after it is used to fulfill the requirements of this part."

B. CHRONOLOGY OF THE AWC LITIGATION

Robert A. Thaxton, currently a supervisory industrial hygienist for MSHA, worked as an industrial hygienist in MSHA District 4 at Mt. Hope, West Virginia, in 1983. At the direction

of his supervisor, Thaxton examined the dust sampling equipment to determine the potential for removal of dust by tampering. After some preliminary consideration of the alteration of the internal workings of the pump and misalignment of the filter cassette in the assembly, Thaxton concluded that removal of dust from the filter itself could be accomplished without being readily detected, especially since of the approximately 100,000 samples submitted annually, less than 1 percent were opened to be examined for oversize particles. He subjected 25 to 50 filters to reverse air flow tests, using the pump, blowing by mouth into the cassette outlet, and directing a jet of air into the outlet. Thaxton noted the results: white, circular areas in the center of the filters in direct alignment with the cassette inlets, and varying amounts of weight loss.

In February 1989, a laboratory technician in the MSHA Mt. Hope office, when weighing an abatement sample, discovered the filter protruding into the opening of the aluminum foil capsule. When the foil was removed, a raised, white area in the center of the filter was observed. The filter was submitted to Thaxton who determined that it resembled the reverse air experimental filters he had created in 1983. When similar filters were observed from the same mine operator (Peabody Coal Company), PHTC, which receives bi-monthly respirable dust compliance samples, was instructed to examine other filters from the same mine for similar appearances. The matter was referred to the U.S. Attorney's Office for criminal investigation. PHTC was instructed to examine all Peabody filters from southern West Virginia, and later all Peabody filters nationwide. In August 1989, PHTC was directed to examine all filters submitted by all coal mine operators in the United States for abnormalities which might indicate tampering.

Thaxton performed additional tests attempting to replicate the abnormal patterns on the examined filters. He subjected dust laden filters to reverse air flow by various means, including altering the pumps and using compressed air, methane, and vacuum sources; he inserted cotton swabs, pipe cleaners, and liquids into the filter cassettes; and he dropped cassettes from varying heights and threw them against a wall. Two formal studies were conducted, one by PHTC, one by the Department of Industrial Engineering at West Virginia University, which are said to have confirmed Thaxton's conclusion that normal sample collection procedures would not cause the filter appearances.

In April or May 1989, PHTC began referring filters suspected of having an abnormal white center (AWC) to Thaxton. At PHTC, after the filter capsules are weighed, the capsules are collected, opened, and examined for abnormal appearances. Except for 1 week in late August 1989 when he was assisted by an analytical branch employee and until October 1989, the only person who performed the examination and referred suspected AWC

filters to Thaxton was Lewis D. Raymond, head of the weighing laboratory. In October 1989, Raymond trained two weighing lab technicians to prescreen suspected AWC filters for his review. No written instructions were provided, but Raymond showed them filters he considered normal and those he considered suspected AWCs. In November 1990, Raymond trained another weighing lab technician to replace a retiring technician. The training for the new technician included showing her photographs of filters. Raymond in turn referred the filters he considered abnormal to Thaxton. Prior to March 19, 1990, whenever Raymond had doubts as to whether a filter should be selected as an AWC he "sent it along and let Mr. Thaxton decide." Tr. 1477. After that date Raymond did not forward such filters to Thaxton even though he felt they were abnormal in some way. This change did not affect "95 percent or so of . . . the samples that got voided for AWC." Tr. 1475. Those deemed by Raymond to be normal, later termed "non-voids," were discarded until some time in the summer of 1991 when, at the mine operators' request, PHTC began retaining them. Over time, cassette halves, compartment trays, and petri dishes have been used to transport suspected AWC filters to Thaxton. However, none of the cited filters submitted to PHTC were transported to Thaxton inside cassette halves. Tr. 348-49. Thaxton also used cassette halves and petri dishes for storage of the AWC filters.

On many occasions between February or March of 1989 and September 1992, Thaxton reviewed the PHTC referrals of suspected AWC filters and was satisfied that they were properly referring suspected filters to him. Between February 1989 and October 1990 Thaxton examined 6600 Peabody filters, 6100 of which PHTC concluded exhibited normal appearances. In June 1991, he reviewed 1200 to 1600 filters at PHTC to compare the filters he would expect to be referred to him with those actually selected. In September 1992, he reviewed 5100 filters at PHTC for the same purpose. Thaxton concluded that only two filters of the 5100 should have been referred to him and that he would have issued a citation for one of them. Thaxton met with Raymond on numerous occasions during this period and compared suspected AWC filters. During the entire time Thaxton found only 10 or 12 filters that were not referred to him which he believed should have been.

When cross-examined at trial concerning compliance filters he had previously seen at PHTC, Raymond was able to identify the ultimate status of only nine of 16 filters. Three others which at trial he considered void were determined to be no-calls by Thaxton, and one which he stated he would send to Thaxton to decide was ultimately cited.

The Secretary argues that "Thaxton's consistency in identifying tampered filters has been nothing short of remarkable" and that "[a]s a result of their numerous communications regarding filters with AWC characteristics,

Thaxton and Raymond developed an extraordinary consistency in the criteria which they both used to identify AWC's." Secty. Br. 5, 34. The LDCC states that "Thaxton's AWC determinations are incomprehensible" and it points to "Inconsistencies Between Thaxton's and [PHTC's] AWC Criteria." LDCC Br. 12, 16 (underline omitted). As will appear in this decision, I find the facts to be somewhere between these hyperbolic claims.

On March 19, 1990, MSHA began voiding all samples exhibiting AWCs. The AWC void code takes precedence over all other void codes, such as those for oversize particles, low tonnage, etc. After the initiation of the AWC void code, field laboratories began examining filters for AWCs and forwarding suspected filters to PHTC, where they were reviewed and referred to Thaxton if PHTC considered them suspected AWCs.

On April 4, 1991, MSHA issued nearly 5000 citations to approximately 800 mines followed by proposed civil penalty assessments totalling about $6.5 million. Each citation charges the mine operator with violating the provisions of Section 209(b) of 30 C.F.R. Part 70, 71, or 90, and alleges that "the weight of the respirable dust cassette . . . has been altered while the cassette was being submitted to fulfill the sampling requirements . . . ." Although the citations were issued by MSHA Inspectors James H. Wills and William D. McKinney, the determination whether the filters should be cited for AWCs was made solely by Thaxton.

The filters referred to Thaxton which he decided should not be cited are termed "no-calls." Those he decided should be cited were classified in one of 10 "tamper codes." The bases for his determinations were the physical appearances of the filters and what he believed caused those appearances. Generally, cited AWC filters exhibit a lighter (in color), circular area in the center of the filter, approximately 6 millimeters in diameter in direct alignment with the cassette inlet. Tamper codes 1 through 4 were conceived during the Peabody investigation and prior to August 1989, when the examination of all coal mine operators' filters began. Tamper codes 5 through 9 originated within 30 to 60 days after August 1989, and tamper code 10, which applies only to filters from one geographic area, was initiated after the void code was instituted on March 19, 1990. Thaxton assigned a tamper code to each of the filters prior to the issuance of the citations. However, physical damage in the central portion of a filter could preclude it from being cited. Thaxton also considered any pertinent information on the dust data cards submitted by the mine operators, and the number of AWC filters submitted by the same mine or the same contractor within a short period of time. Thaxton did not prepare or follow a written protocol describing his criteria for determining which filters were to be cited. He described the filter appearances under each of the tamper codes at the trial, showing examples of the cited filters.

Filters classified under tamper code 1, termed "light cleaned," contain a white ring in the center of the filter approximately 6 millimeters in diameter in direct alignment with the cassette inlet where the degree of dust removal in the center portion is not significantly different than that immediately outside. Thaxton testified that tamper code 1 appearances result from reverse air flow.

Filters classified under tamper code 2, "cleaned," exhibit a circular area approximately 6 millimeters in diameter in direct alignment with the cassette inlet with a markedly lighter dust deposition within the circular area. Thaxton testified that tamper code 2 appearances result from reverse air flow.

Filters classified under tamper code 3, "cleaned and coned," are similar to those classified under tamper code 2, with the addition of a slight rise or cone in the center of the 6-millimeter, circular area. Thaxton testified that tamper code 3 appearances result from reverse air flow.

Filters classified under tamper code 4, "torn (ruptured)," show a tear in the 6-millimeter, central portion of the filter in alignment with the cassette inlet. "There does not have to be a drastic change in the dust deposition [in the center of the filter], . . . but there typically is a lighter area of some type that goes along with the tear." Tr. 216. Thaxton testified that tamper code 4 appearances result from an object being inserted through the cassette inlet to contact the filter or from reverse air flow.

Filters classified under tamper code 5, "wiped (clean wiped)," exhibit in the center portion of the filter "rough marks that look like scratch marks . . . [giving] the appearance of physically something coming in contact with the filter face and wiping across the dust to remove it." Tr. 224. The center area is greater than 6 millimeters in diameter. Thaxton testified that tamper code 5 appearances result from inserting a brush or cotton swab into the cassette inlet and twisting it to wipe dust from the filter. A few of the tamper code 5 cited filters exhibit characteristics similar to those resulting from dropped experimental filters.

None of the filters involved in this proceeding were classified under tamper code 6.

Filters classified under tamper code 7, "clean tool," exhibit a 6-millimeter area with a very light ring and rectangular area attached to the ring on one side and jutting into the interior of the ring, with a darker area filling the balance of the ring. Thaxton was unable to replicate this appearance in his laboratory. Later, "[t]hrough varying degrees

of reverse air flow it has been found that you can create this type of appearance." Tr. 256.

Filters classified under tamper code 8, "clean face," show a wide area of dust disturbance encompassing the greater part of the filter with a slightly darker, circular center in direct alignment with the cassette inlet. Thaxton testified that tamper code 8 appearances result from an object being inserted through the cassette inlet and being twisted to wipe dust from the filter.

Filters classified under tamper code 9, "clean touch," show a disturbance area in the center of the filter in direct alignment with the cassette inlet, which is much lighter than the surrounding area. There is a darker deposition immediately outside the lighter central area. The central area is smaller than 6 millimeters in diameter. Thaxton testified that tamper code 9 appearances result from an object being inserted through the cassette inlet and touching the filter.

Filters classified under tamper code 10, "clean ring," show a slightly darker, circular center less than 6 millimeters in diameter surrounded by a broad, lighter ring larger than 6 millimeters, shaped like a donut. Thaxton was not able to replicate this appearance in his laboratory.

Of the approximately 5000 filters cited, more than 4800 or 97 percent were originally classified under tamper codes 1, 2, and 3. In March 1992, Thaxton reexamined the cited filters with the filter media and backing pad being separated, and changed the tamper codes for 464 of the cited filters. The greatest change involved tamper code 3, which increased from 36 filters to 440 filters. More than 95 percent of the cited filters remain in the first three tamper codes.

Concurrent with the operator sample investigation, a large number of respirable dust samples taken in mines by MSHA inspectors were found to exhibit AWC characteristics. Thaxton characterized them under his tamper codes as he did the mine operators' samples. Most, but not all, of the inspector samples were classified under one of the reverse air flow tamper codes. The Office of Inspector General (OIG) of the Labor Department conducted an investigation to determine whether the inspectors who submitted these filter samples were guilty of misconduct. The investigation was closed, and misconduct was not found, based apparently on the finding that AWC appearances can result from snapping together the two parts of a dust laden filter cassette. This finding resulted from a chance discovery by MSHA Inspector Wills at the Mt. Hope laboratory in approximately November 1991. Thaxton testified that MSHA inspector samples are processed differently than operator compliance or abatement samples. In the former case, the MSHA field laboratory separates the cassette

to examine it for oversize particles. If the oversize particle criteria are not met, the capsule is not removed, and the cassette halves are replaced and the entire cassette is mailed to PHTC. In the latter case, operator samples are stripped of the aluminum foil in the field labs and examined for AWC characteristics. Filters suspected of having characteristics like AWCs are forwarded to PHTC. MSHA and apparently the OIG concluded that the snapping together of the cassette halves was a reasonable technical explanation for the MSHA inspector AWCs. And all of the experts agree that snapping together the cassette halves on a dust laden filter can cause a reverse air dust dislodgment. Thaxton testified that the inspector AWCs classified under tamper codes other than those thought to result from reverse air are explained by the fact that the inspector is not present at the sample site during the entire sampling period, and operator tampering could occur during his absence.

The citations were contested, and the contest and penalty cases were assigned to me. On June 28, 1991, I adopted a Plan and Schedule of Discovery which distinguished joint discovery under the generic caption and master docket number from case-specific discovery under individual docket numbers. The discovery plan was amended on five different occasions and the time was extended for completing various stages of discovery. Throughout the joint discovery period, many issues involving evidentiary privileges and other procedural matters were decided. On May 22, 1992, I denied motions of certain contestants to vacate the contested citations on the grounds that the Secretary failed to issue the citations with the "reasonable promptness" required by Section 104(a) of the Mine Act.

On August 13, 1992, I ordered consolidation of all pending cases for trial of the common issues to commence on December 1, 1992. I appointed the LDCC and directed the completion of expert witness discovery and filing of witness and exhibit lists. Case-specific discovery was stayed.

II. ISSUES

1. What is an AWC?[1]

2. Does an AWC on a cited filter establish that the mine operator intentionally altered the weight of the filter?

The Secretary has the burden of proof on these issues. The burden requires that the Secretary show by a preponderance of

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[1] Appendix A is a conceptual diagram of an AWC on a filter prepared by Dr. Andrew R. McFarland. R-1032.

evidence that (1) the term "AWC" has a coherent meaning and was consistently applied; (2) the cited AWCs can only have resulted from intentional acts; and (3) the AWCs resulted in weight losses in the cited filters.

There is no direct evidence of tampering in the record. I have excluded from this proceeding evidence concerning mine-specific handling practices or other mine-specific circumstances which may be relevant to the ultimate disposition of these proceedings. I am not considering any such evidence which may have been admitted into the record.

III. ARE THAXTON'S CLASSIFICATIONS OF CITABLE AWCs COHERENT AND CONSISTENT?

Although these cases have been consolidated for purposes of discovery and the common issues trial, it is important to keep in mind that they involve approximately 5000 individual citations to more than 800 mines, each alleging that the mine operator tampered with a dust sample by altering the weight of the filter cassette. This is not a conspiracy trial. It is not analogous to an employment discrimination case where the Government may introduce statistical evidence to establish or support allegations of racial, gender, or age discrimination. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Walther v. Lone Star Gas Co., 952 F.2d 119 (5th Cir. 1992); Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987); Capaci v. Katz and Besthoff, Inc., 711 F.2d 647 (5th Cir. 1983). Nor is it analogous to a mass tort proceeding where a large number of plaintiffs were injured in a common accident, or allege exposure to a toxic substance. See, e.g., Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981), cert. denied, 455 U.S. 994 (1982); In re Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). The cases before me involve charges of individual violations by a number of different mine operators. The purpose of this common issues trial is to decide questions on which essentially the same evidence probably would be presented. At this stage of the cases, I reject the LDCC's contention that "[t]he Secretary must satisfy [his] burden of proof on each and every citation individually." LDCC Reply Br. 3.

The basic issue to be determined in the common issues trial is whether an AWC on a cited filter establishes per se that the mine operator intentionally altered the weight of the filter. Before I resolve that issue, I have first to determine what an AWC is, and whether the criteria for an AWC were coherently and consistently applied.

The term "AWC" purports to describe an appearance on the filter face. Thaxton defined it as "a filter that exhibits an

unusual dust disturbance in the central portion of the filter . . . . Unusual in that it exhibits characteristics or patterns that are not consistent with what I've seen as far as normal filters." Tr. 127.

> [A cited AWC] indicates that there is a lighter area in the center of the filter as contrasted to the dust immediately around -- outside that circular area that's in the center of the filter. Basically, it's a lighter area that's approximately 6 milliliters [sic] in diameter that comports to the inlet diameter in the foil and in direct alignment with it.

Tr. 138-39 ("milliliters" should read "millimeters"). The first of these definitions is very general and vague. The second obviously does not fit all the cited filters: some have dust dislodgments of more and some of less than 6 millimeters; some have tears in the filter center; and in some the central area is essentially the same color as that outside the 6-millimeter ring. Therefore, because I can't use the general definition of an AWC in deciding whether the term is coherently and consistently applied, I will look to the criteria followed by Thaxton in assigning tamper codes to the cited filters. Were those criteria coherently and consistently applied? In answering these questions, I am mindful that in a few instances filters having a light, circular area in the center were not cited because of explanations submitted by operators with the dust data cards that accompany filter samples.

In determining the coherence or intelligibility of the term "AWC," some of the changes in the tamper codes following the March 1992 review are troubling. The changes from codes 1 and 2 to code 3 were adequately explained by the fact that Thaxton separated the filter and backing pad and viewed the back side of the filter. This enabled him to see coning or dimpling on the filter which had not been evident previously. Thaxton also testified to changes in certain filter appearances resulting from oil contamination and dust removal on the petri dish cover. However, many changes were not explained and some seem inexplicable.

Examples taken from trial exhibit G-270 include filters 319277, 359820, 383847, and 391652 which were changed from code 2 (cleaned) to code 4 (torn, ruptured). Were these tears present but not observed when the citations were issued? If they occurred later, what caused them? Filters 110049, 206387, 206988, 206992, and 354041 were changed from code 2 to code 5 (wiped, clean wiped). Filter 295546 was changed from code 1 to code 5. Did the filters change or did Thaxton's observation change? Filters 268052 and 274427 were changed from code 7 (clean tool) to code 3 (cleaned and coned). Filters 191096, 266732, 266778, and 295891 were changed from code 2 to code 8

(clean face). Did the wide area of dust disturbance occur after the citations were issued? If so, what caused it? Filters 287392, 311203, 320678, 385801, 416001, 416495, and 416725 were changed from code 2 to code 9 (clean touch). Filter 338072 was changed from code 1 to code 10 (clean ring). Filters 451650, 452515, 491440, and 491828 were changed from code 2 to code 10. Filters 347935 and 355890 were changed from code 2 to code 11. Filter 194755 was changed from code 5 to code 11. Thaxton testified that filter 355890 had been coated with oil following Thaxton's examination in 1990, and that filter 194755 was changed because of contact with the petri dish cover.

The Secretary states in his brief that the determinations made after Thaxton's second review

> were based solely on the filters as they appeared in March of 1992. While some filters were assigned a different tamper code during the second review, because this review was based solely upon the appearance of the filters as of that time. The March, 1992, review did not replace the tamper codes initially assigned.

Secty. Br. 38-39 (emphasis in original). I don't know whether this means that the filter appearances changed; if it does, no explanation for the changes is suggested. Appendix A-4 of Dr. Richard J. Lee's February 6, 1992, report, trial exhibit R-1001, contains photographs of 15 filters all of which were cited under tamper code 2. According to his own system, Lee classified three of them as type 1, three as type 2, three as type 3, three as type 4, and five as type 5. In March 1992, Thaxton reclassified the three Lee classified as type 5 to tamper codes 11, 8, and 8. He reclassified one of Lee's type 4 to tamper code 5. I have compared the photographs in Lee's report to the photographs of the same filters taken by MSHA in May or June 1992 and find no differences. Did Thaxton's reclassification result from Lee's report?

The reclassification of cited filters in March 1992 thus raises substantial questions as to the coherence of the criteria followed by Thaxton in determining whether to cite the filters involved here, especially those classified under codes 4 through 10.

Thaxton testified that the "no-call" filters (those referred to him by PHTC which he did not cite) "do not exhibit that degree of dust removal that I would feel comfortable in saying that there is a citation to be issued." Tr. 139. This carries subjectivity to an extreme: the "degree" of dust removal must be such that Thaxton would feel comfortable in issuing a citation.

The 4700 citations issued on April 4, 1991, and the additional citations issued in April, May, and June 1991 were

based on Thaxton's review of the filters at some time between 1989 and the date of the citations and his assigning a tamper code to each. Therefore, whether a filter exhibited evidence of tampering must be judged as of the time Thaxton made his original determination. Thaxton's reclassification following his second review in March 1992 cannot be used in deciding whether his AWC criteria were intelligible and consistent. The citations were issued based on Thaxton's observation and judgment at or prior to the time of their issuance. Further, except for the reclassification of filters from tamper codes 1 and 2 to tamper code 3, the record does not explain the rationale for the changes.

During his testimony, Thaxton displayed[2] and described cited filters represented as typical under each of the relevant tamper codes. Photographs of the cited filters have been admitted into evidence as exhibits with the designation "G" followed by the filter number.

I viewed the filters described by Thaxton at the hearing, and have reviewed the photographs of the cited filters which were introduced as exhibits. The filters cited within each of the tamper codes, while similar in many respects, exhibit a wide spectrum of appearances. This fact as well as the problems related to the reclassification referred to above creates some doubt as to the coherence of Thaxton's tamper code classification. Nevertheless, considering the filter appearances and Thaxton's explanation of the tamper codes, I find that the classification of citable AWCs under the tamper codes is, for the purposes of the common issues trial, intelligible and coherent.

The LDCC challenges the consistency of Thaxton's calls based in part on a comparison of some of the filters cited under one of the tamper codes with filters deemed to be "no-calls" (tamper code 11). It also compares Thaxton's judgments on the experimental filters of Dr. Lee with the cited filters. A consideration of Dr. Lee's experimental filters will appear later in this decision.

Exhibit R-1643 contains photographs of a number of filters -- including cited, no-call, and experimental. Filters 462514 and 323857 are displayed next to one another on page 10 of the exhibit. Both have a sharply defined, central ring approximately 6 millimeters in diameter with what Lee calls a "keyhole." The dust within the ring appears to be similar to

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[2] Many of the filters and other exhibits discussed during the trial were displayed using the Elmo Visual Presenter which projected images of the objects on television screens in the courtroom. The instrument was commonly and affectionately referred to in the transcript as "Elmo." See Commission Ex. 1.

that outside the ring. Filter 462514 was cited under tamper code 2; filter 323857 was a no-call. In reviewing the filters at the trial, Thaxton concurred with his previous determination that filter 462514 was citable under tamper code 2. With respect to filter 323857 he testified:

> if there was any other information available with the dust data card that was submitted that would also be looked at . . . at this time . . . I would say that it is a code 11 . . . . The image . . . on . . . [the] TV screen is sort of washed out compared to the actual filter. If you look at the actual filter, it's much plainer to see but the light area that's in the center with the ring . . . has basically the same deposition as that immediately outside. And in that case on this type of filters [sic], I did not believe that was definitive enough to give the benefit of any doubt to the operator.

Tr. 773-74. I viewed the actual filters as well as the photographs and find no significant differences in the appearance of the filters considering the criteria in Thaxton's tamper codes.

Photographs of filters 285344 and 510557 are displayed on page 9 of R-1643. Both have a very faint ring approximately 6 millimeters in diameter in the center of the filter. The area within the ring is slightly lighter than the area outside. Filter 285344 was cited under tamper code 2, filter 510557 was a no-call. Thaxton reviewed the filters at the hearing and testified:

> The filter on the right [285344] does exhibit what I would class as a code 2 type appearance . . . . The filter on the left, 510557, to be able to tell you . . . why it's a code 11 there is insufficient information being given to me with just the filter to tell me why that was coded as an 11.

Tr. 770. The dust data card for no-call filter 323857, R-1461A, was shown to Thaxton who found "nothing [on] here that indicates anything other than a normal dust sample that I can tell at this time." Tr. 784. I viewed the filters and the photographs and find no significant differences in the appearance of the filters considering the criteria in Thaxton's tamper codes.

Photographs of filters 462514 and 406735 are displayed on pages 10 and 11 of R-1643. Both were cited under tamper code 2. Filters 323857, 305291, and 268680, also photographed in R-1643, were no-calls. In my judgment, there are no significant differences in terms of Thaxton's tamper code criteria in these filters.

Filter 325301 was cited under tamper code 7; filter 324931 was a no-call. See photographs on page 12 of R-1643. The appearances are not significantly different in terms of Thaxton's tamper code criteria. Filter 305727 was cited under tamper code 2; filter 327749 was a no-call. See photographs on pages 12 and 13 of R-1643. Again the appearances are not significantly different in terms of Thaxton's tamper code criteria.

Thaxton reviewed thousands of filters. He determined that approximately 5000 should be cited and that thousands more should not be cited. I have reviewed photographs of the cited filters, the no-calls, and the normal compliance filters. I have considered his testimony concerning the filters cited under the different tamper codes. The above discussion shows that Thaxton was not 100 percent consistent in the application of his tamper code criteria. However, for the purposes of a decision on the common issues trial, perfect consistency is not required or expected. I find that Thaxton's determinations as to whether a filter should be cited under his tamper code criteria were sufficiently consistent so that I must consider whether an AWC establishes a violation.

IV. THAXTON TAMPER CODES vs. SCIENTIFIC EXPERT CLASSIFICATIONS

A. THAXTON TAMPER CODES vs. MARPLE DUST DISLODGMENT PATTERNS

Dr. Virgil A. Marple, working with Dr. Kenneth L. Rubow, both of the University of Minnesota, subjected dust laden filters to various experiments and classified them into various types according to their dust dislodgment patterns. Dr. Marple was not aware of Thaxton's tamper codes at the time he classified his experimental filters.

Marple's types A-1, A-2, and A-3 resulted from air flow through the filter in the reverse direction (through the outlet). Marple's type A-1 is described as having a sharply defined ring 6 millimeters in diameter with a center lighter than the outer portion of the filter and a white "dagger" extending from the perimeter of the 6-millimeter ring to the center of the filter. Types A-2 and A-3 are variations of type A-1. The descriptions and the experimental filters so classified resemble Thaxton's tamper codes 1, 2, and 7 (and 3 if a cone is shown). Marple did not address tearing in the central part of the filter and has no type analogous to Thaxton's tamper code 4.

Marple's types B-1 and B-2 were created by directing air into the inlet of the cassette. Type B-1 is described as a white, circular spot in the center of the filter of irregular diameter and often an area within the white spot containing a darker deposit. Type B-2 shows a circular, white spot of a more uniform diameter with no darker deposit within the spot. Type

B-1 resembles Thaxton's tamper code 8; type B-2 looks most like Thaxton's tamper code 5.

Marple's type C was created by a vacuum applied to the cassette inlet. The resultant pattern resembles type A-2 but has a more uniform gray value in the light center. Type C resembles tamper codes 1 and 2 (and 3 if a cone is present).

Marple's type D was created by inserting a cotton swab into the cassette inlet and touching the filter face. The pattern is described as showing particles removed from the center of the filter in an area generally smaller than the inlet. In some cases swirl marks are seen on the filter. Type D resembles Thaxton's tamper code 9.

Marple's types E-1, E-2, and F were created by randomly dropping the cassettes. Type E-1 is described as larger in diameter and less sharply defined than type A patterns. Type E-2 is described as smaller in diameter with a less diffuse boundary than type E-1, and has a diffuse dagger in the center. Type F exhibits a thin, white ring 6 millimeters in diameter. Type E-1 may resemble tamper code 10. Type E-2 may resemble tamper code 7 and type F may resemble tamper code 1, but these resemblances are tenuous.

B. THAXTON TAMPER CODES vs. LEE TYPES AND FEATURE CODES

Dr. Richard J. Lee, President of the R. J. Lee Group, examined more than 1450 cited filters and videotapes of more than 1240 additional cited filters. Lee stated that he grouped the cited AWCs into five major types based on three variables: (1) a 6-millimeter ring resulting from contact between the filter and the 6-millimeter inlet ring on the aluminum foil; (2) a "keyhole" -- a wedge-shaped or circular-shaped, lighter area within the 6 millimeter, circular zone in the center of the filter; and (3) a diffuse zone -- a generally circular zone with dust dislodgment which can be within or extend beyond the 6-millimeter ring. Each feature appears with various degrees of intensity. Thus, AWCs could be considered, according to Lee, to represent a continuum.

Lee's type 1 exhibits a white ring with a nominal 6-millimeter diameter in the center of the filter. The remnant deposit of dust within the ring has a color and density similar to the dust outside the ring. The center deposit has a white, wedge-shaped or circular-shaped, lighter area termed a keyhole. Type 1 resembles Thaxton's tamper code 1.

Lee's type 2 shows a white ring with a 6-millimeter diameter in the center of the filter. The dust deposit enclosed by the ring has the same color but is significantly lighter in density than the dust outside the ring. The keyhole is often less

distinct and sometimes appears irregular. Type 2 resembles Thaxton's tamper code 2.

Lee's type 3 has a circular, white center with a diameter of about 6 millimeters. Any remaining dust in the center is so light that characteristics, such as a keyhole, are difficult to discern. Type 3 is most like Thaxton's tamper code 2.

Lee's type 4 has a circular, light center about 6 millimeters in diameter, but the transition between the dust outside the center and that within is generally more irregular than types 1, 2, and 3. The particulate in the center is evenly distributed but usually shows a stippled or mottled texture. Type 3 most resembles Thaxton's tamper code 2.

Lee's type 5 shows some features of types 1 through 4, but is unique in some way -- water spots, white centers greater than 6 millimeters or some other irregularity. Type 5 is a catch-all category with a variety of appearances which cannot be characterized. The filter shown in R-1001 as a Lee type 5 was cited by Thaxton under tamper code 8.

Lee also characterized filters according to "feature codes" which he described as follows:

1. 6 = a distinct 6-millimeter ring

2. 9 = a distinct 9-millimeter segmented ring

3. K = keyhole (a wedge-shaped, lighter area) inside the 6-millimeter ring

4. R = a ring or series of resonance rings beyond the 9-millimeter area in the center of the filter

5. F = a partial, faint, or fuzzy feature combined with any of the above

6. B = spots, smears, or undefined dislodgment of large amounts of dust (a blotch)

7. O = other features

8. X = no discernible dust dislodgment

C. THAXTON TAMPER CODES vs. CORN CENTRAL DISCOLORATION

Dr. Morton Corn, Professor of Environmental Health Engineering at Johns Hopkins University, viewed about 100 cited filters of some 300 such filters selected by Thaxton at the Mt. Hope MSHA laboratory. Thaxton told Corn that the 300 filters represented the spectrum of AWCs. A consultant hygienist

accompanied Corn and looked at a number of the filters. Photographs were taken of these filters.

Corn testified that he saw a wide range of features on the cited filters -- dark centers, partial dark centers, light centers, patterns in centers, patterns elsewhere, billowing patterns outside the center, artifacts of the handling process, etc. Corn concluded that the array defied confident classification by visual means. He considered categories and combinations of pattern, linear dimension, and depth of coloration, but concluded that it was not possible to visually classify AWCs.

D. THAXTON TAMPER CODES vs. McFARLAND CDC PATTERNS

Dr. Andrew R. McFarland, Professor of Mechanical Engineering at Texas A&M University, viewed the U.S. Steel Mining Co. cited filters -- 43 in all, in Arlington. Forty-two were cited under tamper codes 1 and 2, and one was cited under tamper code 9. They had four basic characteristics, though not all had all four, and on some the characteristics are not as fully defined as on others:

1. A 6-millimeter ring lighter than the average color on the rest of the filter.

2. The region in the 6-millimeter center is lighter than the average on the rest of the filter.

3. A dagger pattern within the 6-millimeter ring, lighter in color than any other portion of the filter.

4. Many filters had indentations or cuts or embossed areas in the ring where the filter had contacted the aluminum shroud. The cuts often can only be seen under a microscope.

After Thaxton's March 1992 reclassification McFarland studied the coning phenomenon. His report refers to patterns which have cones, dimples, or cuts as "CDC" patterns. McFarland examined the U.S. Steel filters which had been reclassified -- five were reclassified to tamper code 3, "cleaned and coned." McFarland concluded that three exhibited cones, one did not have a cone but had a cut, and one had a faint cone. One filter which was not reclassified had a cone and many others had cuts.

E. THAXTON TAMPER CODES vs. GRAYSON "Y" AND "N" CATEGORIES

Dr. R. Larry Grayson, Dean of the College of Mineral and Energy Resources at West Virginia University, examined more than 400 cited AWC filters of mine operator clients of Crowell & Moring. He also attended Thaxton's deposition. Grayson

performed experiments on more than 740 compliance samples from 34 different mines operated by Crowell & Moring clients and classified the results as "Y" - probably a citable AWC, "Y?" - possibly a citable AWC, and "N" - not a citable AWC. He testified that his "Y" and "Y?" categories reflect the full range of AWCs that he observed in the cited filters.

Grayson subjected the experimental filters to sampling assembly impact tests and hose impact tests. He described the resulting "Y" and "Y?" filters as having a nominal, 6-millimeter diameter ring with a dust dislodgment pattern inside the ring, and dust loading outside the ring. He compared his experimental filters with cited filters and testified he did not see a substantial difference between the general features of his "Y" and "Y?" filters and the cited filters. The cited filters to which he compared his experimental filters were cited under tamper codes 1, 2, 3, and 9. Certain of the experimental and cited filters were compared at the hearing, and the filters in fact were not substantially different.

V. DOES AN AWC ESTABLISH TAMPERING?

A. THE SECRETARY'S EVIDENCE

1. THAXTON

Robert Thaxton, an MSHA Industrial Hygienist, has a bachelor's degree in analytical chemistry and a master of science degree in occupational health and safety engineering. He has been employed as an industrial hygienist for about 16 years. Thaxton was accepted as an expert witness in respirable dust sampling and in determining normal and abnormal dust patterns on respirable dust filters. However, since the accuracy of his determination of citable tampering is the precise issue in this proceeding, his expert opinion is not disinterested, and must be evaluated with that fact in mind.

Thaxton's judgments that certain dust dislodgment patterns establish tampering are based in part on the reverse air experiments he performed in 1983 when 25 to 50 filters were subjected to different kinds of reverse air flow tests, and on various tests he performed beginning in February 1989 and continuing until the fall of 1990. During this period, he subjected dust laden filters to various experiments described previously herein. The tests were non-systematic and not conducted with any scientific rigor. Consequently, Thaxton's expert opinions are of diminished weight. The two formal studies, one conducted by the PHTC and the other at West Virginia University at MSHA's request, though reported, were not offered in evidence. A further problem with Thaxton's determinations is his failure to note in his classification of cited AWC filters the phenomenon described by other witnesses as a "dagger" or

"keyhole" -- a white area within the central 6-millimeter area enclosed by a white ring. Thaxton noted such a condition only in the filters classified under tamper code 7 (63 filters were so classified). A review of the cited filters classified under tamper codes 1, 2, and 3 (4849 in all) shows that the vast majority display such a condition.

2. MARPLE/RUBOW

Dr. Virgil A. Marple is a Professor of Mechanical Engineering at the University of Minnesota and a participant in the Generic Mineral Technology Center for Respirable Dust, a consortium composed of Pennsylvania State University, West Virginia University, University of Minnesota, Massachusetts Institute of Technology, and Michigan Technological University, and funded in part by the United States Bureau of Mines. He has a Ph.D. in mechanical engineering from the University of Minnesota, specializing in aerosol particle technology. He was accepted as an expert witness in the fields of mechanical engineering, aerosol physics, particle technology, and coal dust research. Dr. Kenneth L. Rubow is a Research Associate and Manager of the Particle Technology Laboratory and Associate Director of the Center for Filtration Research at the University of Minnesota Department of Mechanical Engineering. He has a Ph.D. in mechanical engineering from the University of Minnesota, specializing in aerosol science and particle technology. Dr. Rubow was accepted as an expert witness in the fields of mechanical engineering, aerosol physics, particle technology, coal dust research, and filtration research. The work and reports of Drs. Marple and Rubow were reviewed and critiqued (orally) by Dr. James Vincent of the University of Minnesota and Dr. Dale Lundgren of the University of Florida. Because neither Dr. Vincent nor Dr. Lundgren participated in the experiments of Drs. Marple and Rubow, because they did not submit any written reports, and because they did not testify at the trial, the hearsay evidence as to their opinions is of very limited value.

a. Preliminary Studies

Initially, Drs. Marple and Rubow examined the relative "pressure drops" (the difference in pressure between two points in an air flow) through the various elements of the personal dust sampler with an air flow rate of 2 liters per minute. They concluded after testing randomly selected samplers that the highest pressure drop element in the sampling system is the filter. This was confirmed by monodisperse particle deposition studies and polydisperse particle deposition studies. From these studies they concluded that dust is normally deposited uniformly on the filter with a slight tendency for larger particles to concentrate near the center. Therefore, normal dust sampling in a coal mine using the MSA sampler will not result in a white center on the filter.

In their particle dislodgment studies Marple and Rubow determined that a jet of air directed through the filter cassette from the outlet ("reverse air") causes the filter to move toward the inlet because the pressure drop through the filter causes the air to flow uniformly. Just before the filter contacts the lip of the foil near the inlet, the air flows radially inward over the filter and out through the inlet. This causes removal of dust particles and a white ring in the center. The ring is the same dimension as the inlet diameter, approximately 6 millimeters. Where the filter is pressed tightly against the foil lip, an opening must be formed for the air to escape. This in turn produces a high velocity jet of air which dislodges particles in a white dagger shape inside the white ring. The amount of air movement required to remove particles from the center of the filter is quite small if the movement is in the form of a pulse. The same effect can result from introducing a vacuum source into the cassette inlet. Air directed into the inlet also causes dislodgment but the white center is much larger and may include the entire center area of the filter.

Marple and Rubow impacted filter cassettes by hand on a table top, with the plugs removed; this resulted in the removal of a thin, round ring of dust particles where the filter had touched the foil. Ordinarily the ring was more diffuse and wider than that caused by reverse air flow.

Marple and Rubow were of the opinion that the "threshold velocity" (the velocity required to remove particles from the filter) is the overriding parameter in determining dust dislodgment. The threshold velocity is a property of the dust particles on the filter and varies from filter to filter. When the tangential air flow through the cassette becomes larger than the threshold velocity, dust dislodgment occurs. Threshold velocity can vary from mine to mine and from location to location within the same mine.

Marple and Rubow attempted to characterize the patterns of dust dislodgment in an objective way. They took video images of the filters with a camera attached to a TV screen and a computer. Each filter was digitized into 153,000 pixels[3] and a grayness value of between 1 and 256 was assigned to each pixel. The computer printed out a graph and a digital image which they called a fingerprint. Dr. Marple testified that the fingerprint combined with a visual inspection of the filter provided a powerful and accurate tool in identifying the pattern of particle dislodgment. Subsequent witnesses who used digital analysis

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[3] A pixel is defined as a picture element. The video camera creates a digitized image consisting of a number of small elements of equal area. Each of these areas is a pixel.

criticized Marple's fingerprint because it had only two values and because he used inferior equipment. I find that for Dr. Marple's purposes it was adequate, and it provided intelligible data to the court.

b. Systematic Dust Dislodgment Studies

Drs. Marple and Rubow conducted a series of systematic studies of particle dislodgment (Pitt-1 and Pitt-2) at the PHTC in approximately September and December 1991. Seven hundred and forty filters taken from MSHA's compliance program from 10 MSHA districts throughout the United States were subjected to various tests. The tests were performed in two sets, approximately 3 months apart, with 435 filters in the first set and 305 in the second. The filters used in the tests were visually examined for particle dislodgment and those exhibiting such dislodgment were not tested. The capsules had been weighed by MSHA and were again weighed by Marple before testing. After testing they were again weighed, photographed, and transported to Marple's laboratory for digitizing and classification by Marple. Twenty filters from the first set and 60 from the second set were selected as control filters and not subjected to testing.

Sixty-four filter cassettes were subjected to reverse air flow tests -- air was blown by mouth through a tube inserted into the cassette outlet; air was introduced by pressure through a valve and into the outlet; and a vacuum was introduced into the inlet. In all cases the pressure drop and flow rate were measured, the cassette was opened, the capsule weighed, the filter examined, placed in a petri dish, and photographed. Marple types A-1, A-2, and A-3 were found on 45, five, and six respectively. There were five type F patterns and three showed no effect.

Ten filter cassettes were subjected to air flow through the cassette inlet, either through a tube inserted into the inlet or from 1 inch away. Type B was found in four of five when the tube was inserted into the inlet; type B-2 was found in five of five when the tube was 1 inch away. Twenty filters were subjected to a rapid decrease in air pressure, 10 in containers and 10 without containers. The pressure was equivalent to the pressure decrease at 49,000 feet. No dust dislodgment patterns resulted.

Seventy filters were subjected to tests involving disconnecting the air line at the pump or from the cassette outlet with the pump on, and a finger on the cyclone inlet. The finger was withdrawn to let the air rush back in. No reverse air flow patterns resulted. Only two type E-1 patterns were found.

Two hundred and ten filter cassettes were subjected to random drop tests from 3 feet and 6 feet to an asphalt tile covered concrete floor. They were dropped in various

configurations: with all plugs in; with all plugs out; with inlet plugged and outlet open; with outlet plugged and inlet open; with inlet down; with outlet down; and with side down. A type E pattern resulted in 35 cassettes; type E-2 in two cassettes, type F in three cassettes. The dislodgment pattern was quite different than the reverse air flow patterns in that it was larger in diameter and less sharply defined. In a second set of drop tests, 70 cassettes were dropped with the inlet down from a height of 5 feet. Dust dislodgment patterns resulted in 55 cassettes: 43 were type E1, one was type E-2, 11 were classified as other.

Twenty tests were performed dropping the entire sampling assembly from heights ranging from 3 to 6 feet. A type E-1 pattern was found in 11 of them.

Ten filter cassettes were tested by touching the filter with a cotton swab inserted into the cassette inlet and moving the swab over the filter surface. A type D pattern resulted in each of the filters.

Twenty filters were tested with a combination reverse air flow and impact test. The cassette was impacted on a table top or with a screwdriver handle while air was flowing in the reverse direction through the cassette. Fifteen had particle dislodgment patterns; seven were type A-1, one type A-2, three type E-1, two type F, and two other.

Twenty filters were tested by removing the pump inlet and outlet valves and the dampener and attaching the cassette to the tampered-with pump and allowing it to run for 30 seconds. No dislodgment patterns resulted.

Twenty cassette filters were subjected to a snap cassette closed test which had been suggested by MSHA. Reverse air dislodgment patterns were found on seven filters.

c. Coal Mine Dust vs. Laboratory Dust

As I stated earlier, Marple and Rubow believe that the threshold velocity of the dust was of overriding importance in their testing. They have worked with wind tunnels and dust chambers and believed that they could not duplicate in a tunnel or chamber the kind of dust found in coal mines. For this reason they used filters from the compliance program -- from a number of different mines from all 10 MSHA districts. Marple and Rubow measured and compared the threshold velocity of particles on filter surfaces containing coal mine generated dust and laboratory generated dust. The coal mine generated dust was collected on filters by MSHA field offices -- 388 such filters were returned to PHTC and were called special test filters. Thirty were used in the threshold velocity tests. They were

compared with 18 laboratory loaded filters from Drs. Lee, McFarland, and Yao (Shell). The velocities required to create particle dislodgment from the mine-generated samples varied from 30 to 140 centimeters per second. The velocity required to create particle dislodgment with the lab-generated samples was consistently about 30 centimeters per second. Dr. Marple concluded on the basis of these tests that in general dislodgments were easier to create on laboratory prepared dust samples than on mine prepared dust samples. Lab-generated dust samples do not provide the mix of threshold velocities required to simulate mine samples.

d. Marple Classification of Dust Dislodgment Patterns

Following his threshold velocity studies, his digitized fingerprints of filters, and his Pitt-1 and Pitt-2 experiments, Dr. Marple classified dust dislodgment patterns into six major types, some of which had subordinate categories.

Type A patterns resulted predominately from reverse air flow tests. In type A, type A-1 was the most common. Marple classified as type A-1 patterns those with a 6-millimeter, white ring in the center of the filter, some type of dagger formation within the ring, with the dust inside the ring of a lighter color than that outside the ring. He classified as type A-2 patterns those exhibiting a 6-millimeter, central dislodgment with a fairly uniform coloring across the center. Neither the white ring nor the dagger formation were "predominate," but the ring was very sharp and there appeared to be a "V" through the central portion of the dislodgment. He classified as type A-3 patterns those exhibiting a very light but sharp, 6-millimeter, narrow ring around the outside, and a dagger formation inside the ring. The color inside and outside the ring was the same.

Type B patterns resulted from blowing air into the inlet of the cassette. The type B-1 pattern exhibited a rather large, diffuse area in the center, "not extremely circular," where the particles have been removed. The type B-2 pattern also had a very diffuse, white center somewhat smaller than B-1, and was fairly uniform in color.

The type C pattern resulted from introducing a vacuum source by way of a tube inserted into the inlet. The pattern was quite circular with sharp, crisp edges and a uniform gray value across the bottom not unlike the type A-2 pattern.

The type D pattern resulted from inserting a cotton swab into the cassette inlet and twisting it. Spiral lines were caused if the swab was twirled. The dislodgment was generally less than 6 millimeters in diameter.

The type E pattern resulted from the dropping experiments, both random and controlled. The type E-1 pattern was rather diffuse, and donut-shaped with diffuse outer and inner surfaces. There was a wide variety of E-1 patterns. The type E-2 pattern showed a dagger in the center going across the internal section of the dislodgment. It was more diffuse than the type A patterns.

The type F pattern, also resulting from the drop tests, exhibited a very thin, white ring with a little dip in the fingerprint.

e. Dust Dislodgment and Weight Loss

The filters exhibiting dust dislodgment patterns as a result of the Marple/Rubow experiments (sets 1 and 2) generally showed a weight loss. See G-280, tables 5.1 and 5.2. The average percentage loss varied from 0.7 percent, for the test involving disconnecting the air line from the cassette outlet with the pump on and a finger over the cyclone inlet, to 23.6 percent, for the test involving air blown into the inlet through a tube. The control filters used in set 1 showed a 1.3 percent weight loss and those used in set 2 showed a 0.9 percent weight gain. Filters used in the test involving removal of the pump inlet valve and flow dampener using the Model G pump showed a 1.5 percent weight gain. Filters used in the test involving a rapid decrease in air pressure surrounding the cassette in a container, in the test involving a 3-foot control drop with all plugs out, and in the test involving the air line disconnect with the pump on and a finger on the cyclone inlet, all showed no loss or gain in weight. Of the 700 test filters used by Marple and Rubow in their experiments, about 250 showed a dust dislodgment pattern. Of this number approximately 220 showed a weight loss, 20 a weight gain, and 10 no change. Of the approximately 75 type A dislodgment patterns, about 70 had a weight loss, two a weight gain, and three no change. Of the approximately 110 to 115 type E patterns, 100 had a weight loss, about 10 to 12 a weight gain, and one no change. Dr. Marple explained the weight gain on the filters with dislodgment patterns as due to "uncertainty in the measurements of the weight." Tr. 3070. The A-1 patterns showed an average weight loss of 13.4 percent; A-2, 16.3 percent; A-3, 0.6 percent; E-1, 10 percent; E-2, 6.3 percent; F, 0.2 percent gain; others, 13.2 percent loss.

f. Filter-to-Foil Distance and Filter Floppiness

Drs. Marple and Rubow directly measured the filter-to-foil distance of about 1040 unused filters from MSHA field offices. The filters were manufactured in 1988, 1990, 1991, and 1992. None were available from 1989. They were measured with a laser measuring device and measurements were taken (1) "out of the box;" (2) when 2 liters of air was pulled through the filter;

(3) with a small amount of pressure on the back side; and (4) when the pressure was released. The filter-to-foil distance for 31 1988 filters averaged 1.57 millimeters; for 280 1990 filters, 1.13 millimeters; for 439 1991 filters, 1.29 millimeters; and for 274 1992 filters, 0.87 millimeters. The 31 1988 filters were largely manufactured on the same day, June 9, 1988. Marple and Rubow conclude that the filter-to-foil distance has not increased with time for the examined filters having manufacturing dates in 1988, 1990, 1991, and 1992. But see exhibits G-253A, 255A, 257A, 259A, 260A, 261A, 262A, 263A, 265A, 266A, and R-1068, 1069, 1070, and 1071 which indicate a tendency for larger filter-to-foil distances over time between April 1988 and May 1992.

The floppiness of the filters was determined by measuring the difference in filter distances between when the filter was pressurized in reverse direction by 1 inch water and when 2 liters per minute was pulled in the correct direction through the cassette. The floppiness has not decreased over time and there is some indication that it has increased.

Of the 1040 filters which were measured, 400 were sent to have dust collected from mines; 388 were returned. These are referred to as special test filters. In one group the filter-to-foil distance before and after loading are in good correlation. In the other group, filters have a larger filter-to-foil distance after sampling than before. This indicates to Marple that large filter-to-foil distances after loading do not indicate the extent of the filter-to-foil distance before loading.

The special test filters were subjected to certain systematic studies (Pitt-3 experiments). In the hose step tests, a 230-pound individual wearing size 10-1/2D mining boots walked in a normal walking pattern on a hose. No dislodgment resulted. When the same individual stepped on the hose with maximum stomping force with the toes pointed toward the filter, dislodgments resulted as they did when he stepped on a hose in a heavy manner with his toes directed toward the filter. When a 30-pound tool box was dropped on a hose from a height of 6 inches, only one dislodgment occurred on 20 cassettes tested. When an individual sat on a hose as hard as he could, seven of 25 cassettes tested showed A-3 patterns; 17 showed no dislodgment. No effect resulted from the same individual leaning back against a wall with the hose wrapped around him. Marple also performed two desiccator tests, using 40 capsules in each. Only two filters showed any dislodgment patterns and they were unlike any in Marple's classification. Wrapping the hose around the pump and throwing the pump on a table from 6 feet caused dislodgment patterns in only two of 60 cassettes tested.

Marple and Rubow performed additional threshold velocity tests, using the special test filters, lab filters from Lee, McFarland, and Yao, and filters from the compliance program. The

100 lab dust filters had a threshold velocity of from 0 to 40. Thirty of the mine dust filters had threshold velocities of from 0 to 40; 24 of from 40 to 80; 33 of from 80 to 120; and 12 of over 120.

g. MSA Documents

Dr. Rubow reviewed certain documents from MSA, particularly R-1100 to 1191, in which manufacturing defects and problems were disclosed and discussed. In Dr. Rubow's opinion, changes in the filter and backing pad pressure drops would not render the filter susceptible to the formation of dust dislodgment patterns in the center of the filter under reverse air flow or reverse air pulse situations. Dr. Rubow conceded that a sustained reverse air flow on a filter with higher resistance would tend to cause the filter to flex, but this is not the case, in his opinion, with a reverse pulse.

h. Marple/Rubow Conclusions

1. Dust dislodgment patterns on filters cannot occur naturally in the operation of a personal dust sampler in a coal mine environment.

2. The primary mechanism for removing dust from a filter is the tangential air flow being larger than the threshold velocity of the dust on the filter.

3. The most probable cause of type A patterns of dust dislodgment on filters is reverse air flow.

4. The easiest method for producing reverse air flow to create an type A pattern is blowing through the filter outlet.

5. Type A patterns most probably result from deliberate mishandling.

6. The most probable cause of type E patterns of dust dislodgment on filters is impact.

7. Type E patterns most probably result from accidental mishandling of sampling equipment.

8. The operation of the desiccator at PHTC is not a source of dust dislodgment patterns.

9. The shipment of compliance samples by airplane is not a probable cause of dust dislodgment patterns on filters.

10. Cone formations on filters are probably caused by reverse air flow.

11. Impacts to the hose on MSA sampling units most probably do not create dust dislodgment patterns. However, Marple's Pitt-3 tests showed that 28 out of 119 filters subjected to hose impact tests resulted in dust dislodgment patterns. See G-282, table 1.

12. Snapping a cassette shut is not a probable cause of dust dislodgment patterns on filters. However, Marple's Pitt-2 study reported that snapping the cassette closed can create a dislodgment pattern on the filter. Twenty cassettes were tested in this manner and reverse air flow dislodgment patterns were found in seven filters.

13. A dust dislodgment pattern on a filter indicates that there has been a weight loss on the filter. But see page 24, supra, on which it is indicated that in some instances no weight loss occurs; in fact some filters show a weight gain after a dust dislodgment.

14. Mine dust is preferable to lab dust in studying the problem of dust dislodgment patterns on filters.

15. Manufacturing variables such as filter-to-foil distance and floppiness are not probably contributing factors to dust dislodgment patterns. But see Marple's testimony at Tr. 2803-04.

> Q. . . . [Y]ou found a wide range in response among the filters in how they flexed in response to the reverse airflow; is that right?
>
> A. I would say not probably on how they flexed, but when they touched the inlet, how high they got up, yes.
>
> Q. And you believe that it's the variation between different filters which produces these differences, isn't that right . . . ?
>
> A. I would say this is related back to the floppiness of the filter . . . .
>
> Q. . . . You believe that its variations between different filters . . . in how they respond to the reverse airflow?
>
> A. I think it would be variations in the floppiness.

Dr. Marple also testified that floppiness, and the distance between the filter and foil could be influential in the formation of cones on a filter. Tr. 2821-42.

> A. So I still believe that that would be a factor, that floppiness should be a factor.
>
> Q. And then I asked should be a factor in influencing dust dislodgement?
>
> A. Correct.
>
> Q. And then I asked "and that a more floppy filter would be more prone to forming a dust dislodgement pattern" and you answered --
>
> A. That's right.

3. McCAWLEY

Dr. Michael A. McCawley, employed as Team Leader, Research Team, Environmental Investigations Branch, National Institute of Occupational Safety and Health (NIOSH), testified as a rebuttal witness for the Secretary. Dr. McCawley has a master's degree in air pollution engineering from West Virginia University, and a Ph.D. in environmental health from New York University. He teaches courses in air pollution and aerosol science at West Virginia University as an adjunct professor. His work includes taking and processing samples of particulate matter including coal dust. He was accepted as an expert witness in the fields of aerosol sampling and respirable coal dust sampling and processing for NIOSH.

Dr. McCawley was involved in the preparation of a report, including tables and a chart, responding to a request from Senator Arlen Specter. Senator Specter requested, inter alia, that NIOSH determine the amount of dust that could be removed from a filter sample by tampering, and whether others had performed tests on tampered samples to determine the amount of dust that could be removed.

Dr. McCawley and others at NIOSH performed two tests involving 20 filters which had been loaded with coal dust in a dust chamber. The dust had been collected as an airborne sample from a coal mine in the Pittsburgh coal seam some years previously. The PHTC study and the West Virginia University study of Dr. Myers were referenced in NIOSH's report to Senator Specter, but were not relied upon. Eight filter cassettes were used in the first test. Each loaded cassette was tapped two or

three times on the side of a table. Then with both caps off McCawley (and his co-worker Frank J. Hearl) "blew about as hard as you would blow to blow up a balloon" into the cassette outlet. Tr. 8933. This produced a puff of dust out of the inlet. The cassettes were weighed before and after sampling and again after the "tampering" (testing). Some of the test filters were lightly loaded (sampled for 6 hours); some were heavily loaded (sampled for 12 hours). Eight additional cassettes were used in the second test. They were tapped two or three times on a desk and then an MSA sampling pump was attached to the inlet to suction off dust. The person conducting the test placed his thumb over the outlet "and pulsed the air through two to three times . . . ." Tr. 8933. On cross-examination, Dr. McCawley changed his estimate to four times. The loading and weighing processes were the same as in the first test. There were also four filter cassettes used as controls.

The dust removed as a result of the two tests varied from 0.08 milligrams (over 5 percent) to 1.12 milligrams (34.25 percent). The control filters showed essentially no change in weight. In Dr. McCawley's opinion, the weight loss due to the tests is statistically significant. The average weight loss for the filters subjected to the first test was 10.27 percent, and for the filters in the second test, 16 percent. According to the series numbers the filters used appear to have been manufactured in 1988.

4. MILLER

Dr. John J. Miller is an Associate Professor in the Department of Applied and Engineering Statistics at George Mason University. He has a Ph.D. in statistics from Stanford University. He was accepted as an expert witness in the field of statistics.[4]

Miller used as his database, MSHA's Denver database including a record of all dust samples processed between August 8, 1989, and March 31, 1992, Thaxton's database including

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[4] The LDCC argues that statistical evidence has no probative value in this case. I answered this contention in part in my order denying Contestants' motion to exclude the testimony of Dr. Miller. Statistical evidence alone obviously cannot prove causal relationships. "Even when the correlation is very strong and predictions are firm, we cannot use that fact to prove that one variable causes the other . . . ." Derek Rowntree, Statistics Without Tears 188 (1981). Nevertheless, statistical evidence can be helpful in explaining probable relationships between variables, and it has long been accepted as probative in the federal courts. Hazelwood School District v. United States, 433 U.S. 299 (1977).

all filter samples submitted to Thaxton with the tamper code assigned to each by Thaxton, all mines in the Denver database from the MSHA Norton subdistrict, all Peabody mine IDs, all mine IDs of companies (or officers of companies) which pled guilty to criminal charges of submitting fraudulent samples, all abatement samples, and records from MSA Corporation showing the date of manufacture of the filter cassettes. With this database, Miller performed certain statistical tests. He created three variables for his subsequent analyses, each of which had three possible values: "before," "after," or "missing." Before-A version was "before" if the sample date or the processing date was on or before March 19, 1990. If the dates were known and were not on or before March 19, 1990, before-A was "after." If both dates were missing, before-A was "missing." Before-B version was defined in the same way except the cutoff date was March 31, 1990. Before-C version was used to delete the observation of sample dates between March 19, 1990, and March 31, 1990.

a. Whether the Rate of Cited AWCs was Random

First, Dr. Miller performed a chi-square (χ^2) analysis of cited rates to determine whether the rate of cited AWCs was random as between mines. For purposes of the analysis, the null hypothesis[5] is that the rate of AWCs is the same at each mine. The test shows a P-value of 1×10^{-72} which is overwhelming evidence against the null hypothesis.[6] The conclusion is that the phenomena generating cited cassettes are not random or the likelihood of cited cassette generation is very heterogenous, with some mines much more prone to generate cited cassettes than others. Similar tests involving only cassettes whose sample date is before March 20, 1990, and before April 1, 1990, and tests excluding mines in the Norton subdistrict and excluding abatement samples all result in overwhelming rejection of the null hypothesis.

In Dr. Miller's opinion, the results of these tests exclude mailing as a cause of the cited AWCs, assuming that the Post Office handles the cassettes mailed to MSHA in essentially the

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[5] "The hypothesis being tested is called the null hypothesis . . . . If the condition specified under the null hypothesis is rejected by the test, the condition is assumed to be false." Wayne C. Curtis, Statistical Concepts For Attorneys 119 (1983).

[6] The "P" stands for probability. The P-value is the statistical measure of the consistency between the null hypothesis and the observed data: P-values are always numbers between 0 and 1. P-values close to zero are not consistent with the null hypothesis.

same manner. The results also rule out handling in the PHTC as the cause of AWCs assuming it does not handle cassettes from different mines in a different manner.

b. Tests for Sample Date vs. Cited Rate

Miller then performed a number of analyses of sample date vs. cited rate. The purpose of these analyses was to determine whether there was any inhomogeneity through time in the rate of cited cassettes, and, more particularly, whether there was any change in the cited rate occurring on or about March 19, 1990, when the AWC void code was instituted. The results show a Z-score[7] of over 80. This is overwhelming evidence that the null hypothesis (no difference in the before and after cited rates) is not correct.

Dr. Miller concluded that (1) there seems to be a trend to decreasing cited rates over time; and (2) there seems to be a marked decrease in the cited rate on or about March 19, 1990. This could be due to a behavior modification at the mines leading to a decrease in the cited rate or to a systematic change in the cassettes over time. The data are not consistent with a hypothesis of randomness with homogeneous rate over time.

c. Cassette Manufacture Date

Dr. Miller then did an analysis of sample date vs. cited rate adjusting for cassette manufacture date. The adjustment assumed that cassettes manufactured on the same date or on temporally close days would exhibit similar properties. He used a statistical test called the sign test, and used both the analysis data set and the reduced analysis data set in versions A, B, and C. In all cases the results were extremely small P-values and, thus, an overwhelming rejection of the null hypothesis. Dr. Miller thus concluded that there is overwhelming evidence of a definitive change in the cited rate between "before" and "after" even after adjustment for manufacture date. Because of potential bias resulting from the fact that there is a difference in the number of samples in the before and after period for any individual date of manufacture, Dr. Miller did a bootstrap analysis.[8] The analysis did disclose such a bias, but it is a small one. The null hypothesis (that date of manufacture

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[7] A Z-score of more than 2 or 5 translates into an extremely small P-value. The P-value corresponding to a Z-score of 80 is less than 1.0×10^{-72}.

[8] A test using hypothetical data enforcing the null hypothesis to be true. The test is designed to determine the effect of potential bias resulting from unequal variables.

makes a difference) is still not consistent with the data. Therefore, adjustment for manufacture date does not explain the large differences in cited rates before and after March 19, 1990, or March 31, 1990.

Dr. Miller did a test to determine whether the difference in cited rates is explained by whether the cassettes were manufactured before or after January 1, 1990. The null hypothesis is that the hypothetical rate of citations for cassettes manufactured before January 1, 1990, is the same as the hypothetical rate for cassettes manufactured January 1, 1990, and after. Following a bootstrap analysis to enforce the null hypothesis, he concluded that there is little or no evidence that holding the sample date constant, there is no difference in before and after January 1, 1990, in terms of manufacture date and cited rate. Therefore, the date of manufacture does not explain the observed difference when analyzing sample date before and after March 19, 1990, or March 31, 1990. The observed difference in cited rate for cassettes manufactured before and those manufactured after January 1, 1990, is explained by an adjustment for sample date.

d. Filter-to-Foil Distance and Floppiness

For Dr. Marple's Pitt-3 experiments, Dr. Miller allocated 400 filters by (1) year of manufacture (there were none from 1989); (2) filter-to-foil distance, as measured by Marple; and (3) floppiness as measured by Marple; to be sent to the MSHA district offices for dust loading. After the Pitt-3 experiments, Miller did a logistic regression to determine whether the possibility of citable dislodgment (using Thaxton's calls) could be predicted using the type of experiment and either the filter-to-foil distance or floppiness, or both. The results failed to show any statistically or marginally statistically significant relationship between filter-to-foil distance or floppiness and citable AWC formation. However, the piston test data did show a significant effect of both filter-to-foil distance and floppiness on dust dislodgment: larger filter-to-foil distance was associated with larger probability of dislodgment, and larger floppiness was associated with larger probability of dislodgment. The strength of the floppiness relation was much greater than that of the filter-to-foil distance. (This conclusion of Miller refers to Marple's calls on dislodgment, not Thaxton's calls on citable AWCs).

e. AWCs and Weight Loss

Miller did a formal statistical analysis to determine whether a weight loss was associated with reverse air AWC formation. He studied compliance filters (including operator filters and inspector filters), and special filters separately. The statistical null hypothesis is that the average weight change

in the control group is the same as in the experimental group. The statistical analysis is an analysis of variance. Because the four groups had unequal numbers of filters, Dr. Miller did a least squares means analysis: an estimate of the mean that the group would have had if the sample sizes in all the groups were the same. Least squares means are the statistically appropriate things to compare if averages are being compared as here. The analysis took into consideration the fact that the filter weights differed: some were lightly loaded; some heavily loaded. The conclusion is a rejection of the null hypothesis: there is a greater weight loss for the experimental group. Some filters do not show a weight loss with an AWC, but the likelihood that an AWC filter will have a weight loss is greater than the likelihood that it won't.

f. Miller Conclusions

1. The cited AWC phenomenon is not a random occurrence.

2. A mechanism or event which is equally likely to occur at all mines is not responsible for the observed pattern of cited AWCs.

3. There was a decrease in the rate of cited AWCs at about the time of the initiation of the void code in March 1990.

4. The observed drop-off in the rate of the cited AWCs is not due to a change in the quality of the cassettes over time.

5. Any potential mine-specific explanation for the occurrence of AWCs is not constant over time.

6. When filter cassettes have air blown through them in the reverse direction there is the likelihood of a weight loss.

B. THE MINE OPERATORS' EVIDENCE

1. LEE

Dr. Richard J. Lee is President of the R. J. Lee Group, an independent testing and research laboratory which, inter alia, engages in materials characterization. Dr. Lee has a Ph.D. in solid state physics from Colorado State University. He was accepted as an expert witness in physics, materials characterization and analyses, and environmental monitoring. I previously stated that Dr. Lee examined and evaluated more than 1450 cited filters and examined videotapes of more than 1240 additional cited filters. He classified them into five types previously identified in this decision. Approximately 34 percent

were type 1, 46 percent were type 2, 6 percent were type 3, 7 percent were type 4, and 6 percent were type 5.

When Lee was cross-examined at trial with respect to filters he had previously classified, his trial classification agreed with his prior classification in only 10 of 35 filters, not an impressive batting average.

a. Systematic Dust Dislodgment Studies

For use in his experiments, Lee generated over 3100 dust samples in the R. J. Lee Group dust tunnel. The coal used was from various coal seams and included high-vol, medium-vol, and low-vol coal. Samples included particle sizes within the same range as those from coal mines, and were of similar shape and aerodynamic diameter. Samples were collected under controlled temperature and humidity. In addition to the laboratory samples, Lee obtained over 650 dust samples from coal mines across the country. For each sample tested, Lee measured the filter-to-foil distance with a stereo optical microscope. For laboratory samples, these measurements were taken prior to testing both before and after dust loading. The tests were designed to simulate sample collection, handling, and processing.

Lee first conducted a series of cassette and cyclone impact tests. Cassettes were dropped from heights ranging from 3 inches to 4 feet; with caps in and with caps out; with secondary impact and without secondary impact. When cassettes were dropped from 4 feet with caps in and with secondary impact, AWC appearances indistinguishable from cited AWCs occurred in 33 percent of the samples with a filter-to-foil separation of less than 1 millimeter. When the filter-to-foil separation was greater than 3 millimeters, AWC appearances resulted in only 4 percent of the samples. Sampling heads (including cyclone and filter cassette) were dropped from heights ranging from 3 inches to 3 feet, some with secondary impact. When dropped from 2 feet with secondary impact, AWC appearances indistinguishable from cited AWCs occurred in 40 percent of the samples with a filter-to-foil distance of less than 1 millimeter. They occurred in only 8 percent of the samples when the filter-to-foil separation was greater than 3 millimeters.

Hose impact tests were performed using hoses that were soft, medium, and hard. AWC appearances occurred more frequently with soft hoses during the initial tests. Weights ranging from 1/2 pound to 10 pounds were dropped from heights ranging from 1 inch to 8 inches onto a sampler hose. When hoses were impacted by a 1-pound weight dropped from 3 inches to 1 foot onto a 1-inch length of hose, AWC appearances occurred in 67 percent of samples with a filter-to-foil separation of less than 1 millimeter. AWC appearances resulted in only 10 percent of the samples when the separation was greater than 3 millimeters. Filter-to-foil

distance was the dominant factor affecting AWC formation. Capsules with a filter-to-foil distance of 1 millimeter or less were extremely susceptible to AWC formation. Potentially citable AWCs occurred both with the pump on and off. However, with the pump on and running at 2 liters per minute, impacts were less likely to produce AWCs. An important factor in the hose impact tests was the abruptness of the impact. Heavy tread on a hose with the foot perpendicular to the hose caused AWCs. Lighter treads were not capable of doing so. When the hose was wrapped around the pump and the pump placed down firmly on a countertop, it resulted in potentially citable AWCs when the pump was off and the filter-to-foil distance was small.

b. PHTC Handling and AWC Formation

Lee viewed an MSHA videotape, G-170, on PHTC procedures, and he inspected and videotaped procedures in the PHTC laboratory. He then designed tests to simulate the MSHA laboratory handling practices. Lee measured the rates of evacuation and recompression in MSHA's desiccator. He then performed a series of tests in his own desiccator using the same evacuation and recompression rates. In Lee's opinion, AWCs occurred when the capsule was close to the recompression port and at recompression rates possible in the MSHA desiccator. Subsequently, eight dust laden filter capsules were placed on a carrying tray from which they were picked up, stacked, and chucked into a cardboard box. This resulted in some cases in the formation of AWCs. Lee also conducted tests to simulate the rapid disassembly of the filter capsules at the PHTC lab. AWCs were formed as a result of these tests and considerable damage was done to the aluminum foils. Dr. Lee evaluated about 700 cited filters to determine the percentage that resulted from MSHA handling. It was his opinion that 5 to 15 percent were caused and 20 to 50 percent were contributed to by MSHA handling.

c. AWCs and Weight Loss

Forty-seven filters used in the hose impact tests which resulted in AWC formation were weighed before and after testing. Lee followed the MSHA weighing and calculation protocol. Twenty-eight of the filters showed no weight loss; 10 showed a weight loss, and nine showed weight gains. On the average no weight loss was recorded. Lee concluded that the formation of an AWC does not necessarily result in a reduction in filter weight.

d. Filter-to-Foil Distance

Lee measured the filter-to-foil distance on over 3000 filters newly purchased from MSA. The distances varied from about 0.1 millimeter to almost 5 millimeters. The measurements were made using a microscope with a computerized 3 axis state. The measurement is accurate to within 0.1 millimeter. After dust

was deposited on the filters, the filter-to-foil distance was again measured. Two populations were found: one had a generally large filter-to-foil distance (about 3.7 millimeters), while the other measured about 1 millimeter. In some groups of filters, the measurement before loading was similar to that after loading; in another group, the measurement before was much smaller than the measurement after -- the latter were floppy filters.

Exhibits R-1068, 1069, 1070, and 1071 show the filter-to-foil distances in the experimental filters of Lee, Grayson, and Marple manufactured from April 3, 1988, to February 13, 1990, from February 20, 1988, to April 3, 1989, from February 13, 1990, to October 25, 1990, and from February 15, 1992, to May 28, 1992. See the reference to these exhibits in the Marple discussion, supra. There is a significant difference in the filter-to-foil distance after the 300,000 series (those manufactured from April 3, 1989, to February 13, 1990). Lee testified that the cited filters (from the 200,000 and 300,000 series) had shorter filter-to-foil distances than those he used in his experiments.

e. Filter-to-Foil Distance and Dust Dislodgment

In the 4-foot cassette drop test with secondary impact and caps in, 33 percent of 30 filters with a filter-to-foil distance of 0 to 1 millimeter were found to have potentially citable AWCs (Lee's type and feature 1 6K); 27 percent of 129 filters with a filter-to-foil distance of 1 to 2 millimeters were found to have potentially citable AWCs; none of 43 filters with a distance of 2 to 3 millimeters, 4 percent of 52 filters with a distance of 3 to 4 millimeters, and none of 5 with a distance of 4 to 5 millimeters were found to have potentially citable AWCs.

In the hose impact test using a 1-pound weight, with 1 inch of hose impacted and the pump off, 66 percent of 30 filters with a filter-to-foil distance of 0 to 1 millimeter, 12 percent of 8 filters with a distance of 1 to 2 millimeters; none of three filters with a distance of 2 to 3 millimeters, 12 percent of 30 filters with a distance of 3 to 4 millimeters; and none of nine filters with a distance of 4 to 5 millimeters were found to have potentially citable AWCs.

Lee concluded that cassettes with a short filter-to-foil distance have a higher degree of susceptibility to formation of AWCs either by reverse air pulses or mechanical impacts. In Lee's opinion, the filter-to-foil distance is the strongest factor in increasing susceptibility to AWC formation. Filters with short filter-to-foil distances before or after loading are more susceptible to AWC formation with small impacts or air pulses than filters with large filter-to-foil distances before and after loading. Filters with variable filter-to-foil distances, in that pre-loading and post-loading distances differ, are less susceptible to reverse air pulse AWCs than those with

small distances. Lee is uncertain of the situation involving mechanical impacts. Filters with a larger filter-to-foil distance have a greater incidence of 9-millimeter standoff rings. Twenty to 24 percent of the filters tested by Lee (field and dust tunnel samples) had 9-millimeter standoff rings. One percent or less of the cited filters, and about 1 percent of the Peabody filters had such rings.

Lee examined the no-call filter population, some of the non-void filters, and some of the 5109 normal filters and concluded that some of the filters in each category were physically indistinguishable from the cited filters.

f. Lee Second Set of Experiments

One hundred and thirteen samples from various underground coal mines and 82 samples previously collected in the R. J. Lee dust tunnel were subjected to three different types of experiments. A weight of 1 or 2 pounds was dropped from heights ranging from 3 inches to 2 feet onto a known length of hose attached to a pump and cyclone. Of 31 filters tested, 18 exhibited AWCs. Pumps were dropped from heights of 4 inches to 1.5 feet onto a hose. The pumps weighed about 1.71 pounds. All the hoses were soft. Of the 20 filters tested, 14 exhibited AWCs. A hose was left hanging out of a cabinet door or drawer and the door or drawer was closed on the hose. Of the six filters tested, five exhibited AWCs. A person sat on a hose which was attached to the pump and cyclone. Of the 13 filters tested, 4 exhibited AWCs. The hose was wrapped around the pump and then impacted on a table. Of the five filters tested, five exhibited AWCs.

Hoses of soft, medium, and hard pliability were tested using filters with similar filter-to-foil distances. Of 17 filters tested, four used a soft hose, six a medium hose, and seven a hard hose. AWCs occurred on all of the filters using the soft hose, two using the medium hose, and none using the hard hose. All the samples were taken from the dust tunnel and used mid-vol coal from the Pocahontas No. 4 coal seam.

Lee concluded that hose softness or toughness is a significant factor in susceptibility to AWC formation on hose impacts.

Lee performed cassette snap tests: the cassette was snapped closed while the outlet was plugged or covered with a thumb. Thirty-four of the filters were still in the capsule. Twenty-five of them exhibited AWCs. Forty-five filters were removed from the capsule and put in the cassette before it was snapped closed. Thirty-two exhibited AWCs.

In another test, the hose was impacted to create a reverse air pulse with a thin, plastic sheet inserted between the capsule and the cassette outlet to prevent the flow of air through the filter. Of 24 filters tested, 17 exhibited AWCs.

g. Lee Coning Report

After Thaxton reclassified many of the cited filters in his tamper codes including 425 said to have evidence of cones, Lee examined 266 of the filters for coning. In some there was no discernible evidence of coning, including some with a dust disturbance in the 6-millimeter, central region. When dust has been partially removed from the front surface of the filter and the filter is wrinkled through the center, there may be an optical illusion of a cone. Manufacturing variabilities or mishandling during disassembly may contribute to coning. Cones were found on some of the inspector samples examined by Dr. Lee.

h. Lee Analysis of Marple Filter-to-Foil Study

Dr. Lee examined and analyzed photographs of the filters used in Dr. Marple's piston studies, groups 1 and 2, using the filter-to-foil measurements supplied by MSHA. Sixty-one filters were included, but Lee's analysis was limited to 57 because the others had no information regarding filter-to-foil distance after dust loading. With respect to group 1, including Marple's piston tests 1, 2, and 3, filters with a short (less than 1.6 millimeters) filter-to-foil distance pre-dust loading and post-dust loading (14 in all) exhibited AWCs in 50 percent of the cases. Filters with a shorter initial filter-to-foil distance and longer filter-to-foil distance after loading (10 filters) exhibited AWC characteristics in 10 percent of the cases. Filters with a long filter-to-foil distance before and after loading (three filters) did not exhibit any AWCs. Lee used his type codes to determine which filters exhibited AWC characteristics. With respect to group 2, Marple's test 4, filters with a short filter-to-foil distance before and after loading (13 filters) exhibited AWCs 50 percent of the time. Those with a short pre-loading distance and a long post-loading distance (14) exhibited AWCs 46.7 percent of the time. Those with a long distance before and after loading (three) exhibited AWCs 33.3 percent of the time. Combining the two groups: where the filter-to-foil distance was small before and after dust loading, AWCs resulted 50 percent of the time. Where it was small pre-loading and large after loading, AWCs resulted 32 percent of the time. Where it was large before and after loading, they resulted 16.7 percent of the time.

i. The 5109 Filters

Lee examined several thousand of the 5109 normal filters identified by MSHA. There were complete, identifiable,

6-millimeter rings on about 20 percent of those examined, and about 50 percent had indications of a partial ring. This would indicate that the filters come in contact with the foil on a regular basis and thus are "halfways on the way to being AWCs." Tr. 6276.

j. AWC and Weight Loss

Lee took apart a series of filters after dust had been deposited on them, weighed them, reassembled them, subjected them to tests, and reweighed them. He followed the formula prescribed by MSHA, which means the second decimal is truncated, e.g., a weight of 19.23 milligrams is recorded as 19.2 milligrams. Lee found that some filters showed a weight gain, some a weight loss, and some no change. Of the 47 filters measured, Lee found no weight loss on average.

Lee did an analysis of the dust weights reported for the 4900 cited filters recorded in MSHA document 405. The existence of gaps in the number of samples for each frequency interval results from MSHA's truncation process. Thus, in the 1 to 2 milligram range there will be about a "5 percent or greater intrinsic uncertainty in the dust concentration determination." Tr. 6306. Therefore, unless there is a weight change of more than 5 percent, one can't be certain that in fact there was a weight change.

k. Lee Conclusions

1. The primary mechanism for causing AWCs is not air flow through a filter, but a tympanic or mechanical wave. The impact of the filter at the foil causes a pulse through the filter resulting in "different effects and different amounts of dust dislodgement and different patterns." Tr. 6285-86. Tangential air flow may be a competing factor depending on the nature of the dust, the humidity, etc.

2. There are cited filters which can be directly attributed to MSHA's handling in the PHTC or other facilities where filters are disassembled.

3. Manufacturing variables, especially filter-to-foil distance, increase the susceptibility of filters to the AWC formation seen on the cited filters. A shorter filter-to-foil distance was seen on the cited filters than on those manufactured more recently.

4. Manufacturing variability continues to change. In the cassettes recently purchased and used for tests, there appear to be more filters with a filter-to-foil distance that varies substantially before and after

loading. There is also a higher incidence of 9-millimeter rings after loading.

5. Hose pliability is an important factor affecting the occurrence of AWCs.

6. MSHA's definition of what constitutes a citable AWC is subjective and inconsistent. (Tr. 6536 "consistent" should read "inconsistent.")

7. The appearance of a lighter area in the central region of the filter does not necessarily imply that there has been a reduction in the weight or the concentration pursuant to MSHA's method of calculation.

8. The presence of a 9-millimeter, segmented ring generally indicates a larger filter-to-foil distance and vice-versa.

9. AWCs can occur by dropping the pump on the hose from a height of 6 inches, closing a door or a drawer on the hose, sitting on the hose, or wrapping the hose around the pump and impacting the assembly on a table.

10. AWCs can be caused by snapping the cassette halves shut with or without the aluminum foil cone.

1. Miscellaneous

Graphs created from R. J. Lee data (G-217, 219; See also G-221, 223) indicating the percentage of potentially citable AWCs (Lee's 1 6K) vs. filter-to-foil distances show:

1. The 4-foot cassette drop test with secondary impact, caps out, where the filter-to-foil distance was 0 to 1 millimeter, 12-1/2 percent of 32 filters exhibited AWCs; where the distance was 1 to 2 millimeters (118 filters), 30 percent; where the distance was 2 to 3 millimeters (61 filters), 16 percent; where the distance was 4 to 5 millimeters (12 filters), 25 percent.

2. The 4-foot cassette drop test with no secondary impact, caps in, where the filter-to-foil distance was 0 to 1 millimeter (36 filters), 14 percent showed AWCs; where the distance was 1 to 2 millimeters (77 filters), 26 percent; where the distance was 2 to 3 millimeters (56 filters), 2 percent; where it was 3 to 4 millimeters (49 filters), 2 percent; where it was 4 to 5 millimeters (7 filters), 0 percent.

3. The 4-foot cassette drop test, no secondary impact, caps out, where the filter-to-foil distance was 0 to 1 millimeter (36 filters), 27 percent showed AWCs; where the distance was 1 to 2 millimeters (78 filters), 22 percent; where it was 2 to 3 millimeters (35 filters), 15 percent; where it was 3 to 4 millimeters (48 filters), 12.5 percent; where it was 4 to 5 millimeters, 16 percent.

4. The 2-foot cyclone drop with no secondary impact, where the filter-to-foil distance was 0 to 1 millimeter, 36 percent of 10 filters showed AWCs; where the distance was 1 to 2 millimeters (96 filters), 47 percent; where the distance was 2 to 3 millimeters (52 filters), 35 percent; where the distance was 3 to 4 millimeters (49 filters), 10 percent; where the distance was 4 to 5 millimeters (11 filters), 0 percent.

The data in the Lee report shows that 60 percent of the field samples (5 filters) vs. 37.5 percent of the dust tunnel samples (48 filters) with 0 to 1 millimeter filter-to-foil distance had 6K features; where the distance was 1 to 2 millimeters, 27.9 percent of the field samples (43 filters) and 39 percent of the dust tunnel samples had 6K features; where the distance was 2 to 3 millimeters, 0 percent of the 21 field samples and 39.4 percent of the dust tunnel samples had 6K features; in the 3 to 4 millimeter range, 0 percent of the 21 field samples and 10.2 percent of the 33 dust tunnel samples had 6K features; in the 4 to 5 millimeter range, 0 percent of the two field samples and 10.5 percent of the 19 dust tunnel samples showed 6K features.

The Lee experimental filters reviewed by Thaxton included about 40 filters classified by Thaxton as citable which resulted from cassette drops, cyclone drops, hose impacts, hose wrap and impact, and vacuum desiccator. About twice as many of these filters had short filter-to-foil distances.

2. CORN

Dr. Morton Corn is Professor and Division Director, Department of Environmental Health Sciences, School of Hygiene and Public Health, the Johns Hopkins University. He has a Ph.D. in industrial hygiene and sanitary engineering from Harvard University. He was a Professor in the Department of Industrial Environmental Health Sciences at the University of Pittsburgh, and was Assistant Secretary of Labor for Occupational Safety and Health from December 1975 to January 1977. Corn was accepted as an expert witness in the fields of industrial hygiene and exposure assessment; aerosol and particle physics; coal mine dust sampling technology; design and management of research and

investigation of projects that involve exposure assessment, aerosol and particle physics, and sampling technology; and federal occupational safety and health regulation and enforcement systems.

Corn cooperated with the R. J. Lee Group in the experiments on dust samples simulating events expected from MSHA compliance sampling, handling, and analysis. He reviewed and photographed 300 filters from MSHA's Mt. Hope office, visited the PHTC, and visually inspected and videotaped 1248 cited filters in Arlington. He also examined AWCs identified as MSHA inspector samples and more than 200 no-call filters. He then performed an image analysis of the central discolorations of the cited filters. The image analysis will be discussed later in this decision.

Corn visually examined the Lee experimental filters produced in Lee's supplemental study. Based on his subjective visual observation, Corn concluded that the Lee tests caused central discolorations indistinguishable to the human eye from cited AWCs. It is Corn's opinion that image analysis of the experimental filters would produce a significant number of filters with characterizing parameters matching those of cited AWCs. Corn's conclusion is that commonplace events associated with collection, handling, and analysis, in compliance with MSHA regulations and procedures, are a more plausible explanation for central discolorations than the tampering alleged by MSHA.

3. GRAYSON

Dr. R. Larry Grayson is Dean of the College of Mineral and Energy Resources, West Virginia University. He has a Ph.D. in mining engineering from West Virginia University and was accepted as an expert witness in the fields of respirable coal dust research and mining engineering.

a. Sampler Assembly Drop Tests

At Dr. Grayson's request, nine operator clients of Crowell & Moring submitted approximately 20 samples each, taken in a normal compliance manner, for a total of more than 740 samples from 34 different mines across the country. The cassettes were opened and weighed to the nearest 0.01 milligram and divided into five groups according to their weight. They varied from 0.35 milligram to more than 2 milligrams. Before testing they were examined and none was found to have AWC appearances.

It was originally planned to drop the sampler assembly including the dust laden cassette from heights of 1.5, 2.5, and 3.5 feet onto a corrugated cardboard on the floor. Because many cassettes cracked during the 3.5 foot drop, the test was modified and the assemblies were dropped from 1.5, 2, and 2.5 feet. After

the assembly was dropped from the designated height, the filter was inspected. If the dust was disturbed or the cassette cracked, testing was stopped. If not, the procedure was repeated. A maximum of three drops were performed. The capsules were removed and reweighed, and the filters were examined for AWCs. Grayson's determination that a dust disturbance was equivalent to an AWC was based on Thaxton's deposition testimony and on Grayson's examination of more than 400 cited AWC filters. Of the 744 filters tested, 11 were found to have distinct, 6-millimeter AWCs (1.5 percent); 159 were found to have probably citable or possibly citable AWCs (21.4 percent). Later, Dr. Grayson went to a Utah mine and performed assembly drop tests on 36 filters. Eight were found to have AWCs (six had distinct, 6- millimeter AWCs; two had probable or possible AWCs). The assemblies were each dropped once on a concrete floor. Grayson believes that the greater number of AWCs from the Utah mine is related to differences in coal seam properties, humidity, mineralology, etc.

b. Filter-to-Foil Distance

Of the samples received from the mines, 178 were measured for filter-to-foil distance. Two had distances of 0 millimeter; seven of 0.5 millimeter; 23 of 1 millimeter; 20 of 1.5 millimeters; 26 of 2 millimeters; 30 of 2.5 millimeters; 30 of 3 millimeters; 31 of 3.5 millimeters; and nine of 4 millimeters. Thus, 29.2 percent had a 1.5 millimeter or smaller filter-to-foil distance. The measurements were taken by inserting a millimeter scale into the cassette inlet and barely touching the filter. No microscope was used. Ninety-four were drop tested and 84 were not tested but examined for AWCs. No AWCs were found. The two cassettes with a filter-to-foil distance of 0 millimeter when tested were found to have probable or possible AWCs; 50 percent of those with a distance of 0.5 millimeter, 66.7 percent of those with a distance of 1, 40 percent of those with 1.5, 21.4 percent of those with 2, 18.8 percent of those with 2.5, 20 percent of those with 3, and none of those with 3.5 or 4 were found to have probable or possible AWCs.

c. Grayson Conclusions

1. Mailing the filter cassettes is not a factor in causing AWCs.

2. The fact that the samples mailed to Grayson did not show AWCs indicated that no accidental dropping had occurred. This was "probably for good reason. The sensitivities in the industry were such that they would take special handling at this point in time . . . ." Tr. 5744.

3. AWCs result from the striking of the shroud on the surface which imparts a vibration to the filter causing varying degrees of dislodgment.

4. AWCs can result from sampler assembly drops and impacts, and from hose impacts.

5. Filter cassettes with a lower range of filter-to-foil distances (below 2 millimeters) have a greater likelihood of developing AWCs.

d. Further Tests

In November 1992, Grayson examined 13 filters which were reclassified by Thaxton to tamper code 3. In Grayson's opinion seven of the filters did not show evidence of a three-dimensional effect but were the result of optical illusions. Four filters had a very slight three-dimensional effect and only two had a clear three-dimensional character. The filters were examined with an unlighted magnifying glass.

Grayson also participated with the R. J. Lee Group involving the dropping of weights from a specified height onto a hose connected to a pump and cyclone. A 10-pound weight was dropped impacting a 6-inch length of hose. Three-dimensional effects were found "in many of the post-test filters." R-1014A at 2. A 2-pound weight was dropped from 2 feet impacting a 6-inch length of hose. Many of the resulting filters exhibited three-dimensional effects substantially identical to, and often more pronounced than, those observed in the reclassified filters.

4. McFARLAND

Dr. Andrew R. McFarland is a Professor of Mechanical Engineering at Texas A&M University. He has a Ph.D. in mechanical engineering from the University of Minnesota. His thesis was on the grinding of fine particles. He was accepted as an expert witness in the fields of aerosol mechanics, fluid mechanics, thermodynamics, aerosol filtration, and engineering statistics.

a. McFarland Experiments

For all his experiments, Dr. McFarland used coal dust obtained from U.S. Steel Mining Company (USSMC) mines. He crushed and ground the coal and size-classified it by a process described as fluidized bed/flow duct, and loaded it onto the filters. Most of the experiments were conducted with dust weights of about 1.5 milligrams which is the equivalent of 1.8 milligrams per meter squared -- the average concentration on the cited AWCs. However, some of the experiments were conducted with weights of 0.05 to 0.8 milligram of dust on the filter. A

steady back flow of air was directed through the dust laden filter cassettes. When the flow was greater than about 4 liters per minute, light areas in the center of the filters were noted. This resulted from the filter touching the inlet part of the aluminum shroud. Thereupon, the air predominately flowed through the small region of the port opening rather than through the entire filter. As a consequence the velocity is higher at the port region and there is a greater tendency for dust to be removed from the filter in that area.

When a back pulse is introduced from the hose to the filter, the filter is pushed up toward the aperture and a jet of air is directed across to the center of the filter causing a dagger formation. The air flows radially to the center of the filter. Dr. Marple called it tangential air flow. The velocity of the air flow is on the order of tens of meters per second, considerably higher than the normal velocity of air passing through the filter, which would be a fraction of a meter per second. The keyhole and the white ring are formed by the air as it is escaping through the filter before the filter contacts the foil. It is possible to produce AWCs with radial flow alone but not with normal flow alone. However, it is easier to create AWCs when both normal flow and radial flow are present.

A vacuum pump was connected to the inlet side of dust laden cassettes. In some cases, the vacuum was applied gradually and in some cases as a pulse. Typically, a light, gray center was produced with a gradually applied vacuum. For the pulsed vacuum, a sharp, white ring was also noted.

A student assistant stepped on the hose connecting the cassette to the pump and created a pressure pulse sufficient to generate an AWC pattern. A pulse, as distinguished from an air flow, is of short duration, less than 0.1 second, but the patterns produced on the filters by reverse air flow and reverse air pulse are virtually indistinguishable.

McFarland set up an apparatus (a piezoelectric crystal transducer) to measure the pressure associated with an air pulse and to record the pressure on a computer. It was used extensively by Dr. McFarland for producing AWC-type patterns in his laboratory. A smaller version of the apparatus was set up in the courtroom on January 13, 1993. A bottle of nitrogen gas under pressure was used to inject 3 cubic centimeters of air into the piston cylinder and the air in front of the cylinder was displaced and travelled through the MSA hose to the back side of the filter. The filter showed a very distinct, 6-millimeter ring with a dagger formation in the center. An AWC pattern was apparent. About 30 inches water pressure was generated. A second courtroom demonstration was presented in which a pulse was applied with a pressure reading of 23 inches water at its peak. An AWC pattern resulted. The 6-millimeter ring was somewhat

thicker on one side with a dagger-type pattern and a difference in coloration between the outer region of the filter and the 6-millimeter center. McFarland performed more than 100 experiments, using reverse air flow, pressure pulses, stepping on the hose, dropping the pump, wrapping the hose, snapping the cassettes, tool box drop, hose in cabinet, using different coal types, varying filter-to-foil gaps, and flexible and non flexible filters. On all tests, he recorded what he considered to be AWC formations. He recorded the results in computer generated graphs. See R-1035.

Stepping on a hose with the pump running and the foot oriented in the lengthwise direction caused AWC patterns with pressure on the order of 20 to 30 inches water. Higher pressures are required to create AWCs when the pump is running than with the pump off. Stepping on the hose with the pump off created AWC formations at pressures of 11, 22.5, and 34 inches water. Pump drops of 8 inches on a hose and drops of a pump with a hose wrapped around it produced AWCs on both mine-run and laboratory samples at pressures of from 9.2 to 17.5 inches water. Shutting a door or drawer on a hose can cause pressure pulses as high as 22 inches water. The average pressure pulse needed to create an AWC is about 10 inches water. AWCs were created on seven filters by shutting a cabinet door or drawer on a hose. AWCs were formed by snapping the cassette halves together using both mine-run and lab samples. Snapping the cassette can cause pressure pulses of 3.75 to 11 inches water.

McFarland presented a videotape attempt to capture on film the actual formation of an AWC. See R-1029. The time required for the formation of an AWC is very small, on the order of 0.01 second. No AWC resulted from a pressure of 3 inches water, but an AWC patten was seen after 9.6 inches water was applied. He demonstrated, by squeezing a hose which was attached to a cassette from which the inlet nipple was machined off, that the filter rises and falls, moving in the direction of the foil when squeezed and dropping back when relaxed.

b. <u>McFarland Review of Cited Filters</u>

McFarland examined the 43 USSMC cited filters in the MSHA Arlington offices. They were cited under tamper codes 1 and 2, with one filter cited under tamper code 9. The filters had four basic characteristics, though not all filters had all four and on some the characteristics were not as fully defined as on others. The characteristics were:

1. A dagger pattern within the confines of the 6-millimeter ring, lighter in color than any other portion of the filter;

2. A 6-millimeter ring also lighter than the average color of the rest of the filter;

3. The region within the 6-millimeter ring is lighter than the average on the rest of the filter;

4. Many filters had indentations or cuts or embossed areas in the ring where the filter had contacted the aluminum shroud. The cuts can often only be seen under a microscope.

c. Filter-to-Foil Distance

McFarland set up an apparatus to measure the distance between the filter surface and the aluminum shroud of the filter cassette. A microscope was focussed on the filter and then on the cassette inlet and a deal micrometer was used to measure the distance between the two points. The MSA patent application drawing indicates the distance at 0.125 inch. McFarland measured several hundred cassettes. The filter-to-foil distance varied from 0.002 to 0.142 inch. Filters with gaps larger than 0.07 inch were loaded with dust and a pulse volume of 1.5 cubic centimeters was applied. Of six filters tested, only three showed AWC patterns. Increasing the pressure volume to 3 cubic centimeters caused AWC patterns on the three filters. Eleven filters were dust loaded in a USSMC mine. Seven were rigid filters and four had large gaps. One and one-half cubic centimeters air volume was applied using the piston cylinder apparatus. No AWCs resulted on two of the seven rigid filters. One AWC was produced on the four large gap filters. AWCs were produced on all the six close gap mine-run filters. The initial gaps of 110 filters were measured and recorded. The mean gap was 0.061 inch. The range was from 0.014 to 0.147 inch. One-fourth of the filters had a gap of less than 0.05 inch. The average pressure which caused contact of the filter with the aperture was 5 inches water with a standard deviation of 1.3 inches water. Twelve percent of the filters strike the aperture with an applied pressure of less than 4 inches water. In Dr. McFarland's opinion the initial gap is an important factor in susceptibility to AWCs. The floppiness of the filter is also of consequence. However, some filters were found to be too floppy to form AWCs. Only one of 30 had a gap of 0.125 inch or larger. Some had a zero gap. The vast majority lie in the range of about 0.06 inch.

d. Other Tests

An individual sat on a hose placed on a bench. The hose was laid straight and then in a coiled arrangement. The pump was not running. The uncoiled hose was sat on 25 times and created a mean pressure of 11.4 inches water with a maximum pressure of 19.5 inches water. No AWCs resulted. An individual sat on a coiled hose 11 times and created a mean pressure of 25.8 inches

water and a maximum pressure of 56 inches water. An AWC with cuts but no dimple or cone resulted.

A tool box weighing 40 pounds loaded was dropped on a straight hose and on a coiled hose. In some tests the pump was operating and some not. Pressure pulses of 25 to 128 inches water were generated. Only one filter was used. After the second test (involving a pressure pulse of 119 inches water), a cone could be clearly viewed through the opening of the aluminum shroud.

On January 14, 1993, McFarland conducted a tool box drop demonstration in the courtroom. The tool box was 6 inches by 19.5 inches and weighed 31 pounds. It was dropped from a height of 6 inches onto a towel-covered table. The pressure pulse was 72 inches. An AWC pattern resulted with a 6-millimeter ring and a dagger in the center, with a difference in coloration between the region inside the ring and that outside. The filter had been loaded with laboratory dust. A second demonstration was conducted with a filter loaded with 2.32 milligrams of mine-run dust. The filter-to-foil distance was 0.055 inch. The tool box was dropped from 6 inches and a pressure peak of 42 inches water was recorded. An AWC pattern resulted with a 6-millimeter ring, diffuse rather than clear cut, a resemblance of a dagger pattern, and a difference in coloration between the area inside and that outside the 6-millimeter zone.

e. Mine Dust vs. Laboratory Dust

McFarland did tests with laboratory samples and mine-run samples from three mines in three different States. Back pulses were delivered to filter cassettes. Fifteen cubic centimeters of air created AWCs. The mean pressure at which AWCs were formed using mine-run coal was 9.72 inches water. The mean pressure for laboratory loaded samples was 9.82 inches water. Statistically there was no difference in the ease of AWC formation using mine-run or laboratory loaded samples. By using laboratory dust, Dr. McFarland was better able to control variables such as dust weight, dust type, particle size, humidity, etc. McFarland had CCI Technologies make a determination of the size distribution of dust collected on filters. There is little difference in the median particle sizes of the lab dust and the mine dust, though the lab dust is slightly smaller. The similarity of the median sizes results from the cyclones stripping the largest particles from the dust prior to its being deposited on the filter. The dust concentration on the USSMC cited filters averaged about 1.9 mg/m^3. The average concentration on non-cited filters of USSMC was about 0.5 mg/m^3. Cited filters have higher dust loadings because (1) it is easier to recognize an AWC on a filter with a higher dust loading in that the optical contrast is

better; and (2) it is more difficult to form AWCs on lightly loaded filters.

f. McFarland Cone Studies

McFarland refers to patterns which have cones, dimples, or cuts as CDC patterns. Dr. McFarland's studies show that CDC patterns can be produced at pressures considerably lower than those reported by MSHA expert Dr. Marple. Thaxton reviewed 67 filters used by Dr. McFarland in his experiments and concluded that 44 of them exhibited AWC characteristics that would be citable and eight were coned or dimpled. The maximum pressures recorded for three of the eight were 7.5 inches water, 8.4 inches water, and 16 inches water. McFarland did not find cones or dimples on two of the eight. He believes that Thaxton, who did not use a microscope, confounded the cuts with dimples or cones. McFarland examined the USSMC cited filters which were reclassified by Thaxton. Three had cones, one a faint cone, and one a cut. He found one not reclassified which had a cone and many with cuts. All the filters reclassified to tamper code 3 were floppy. Floppiness not only enhances AWC formation but also could enhance CDC formation. McFarland measured floppiness by a pressure to touch method. A wide range of pressure to touch values was found, ranging from 3 inches water to about 10 inches water. In his lab tests, Dr. McFarland produced CDC patterns with pressures of 34 inches water or more. Tests established that filters do not fatigue and cause a CDC at abnormally low pressure levels when subjected to repeated pulses provided the pulses do not cause the filter to exceed its elastic limit.

g. McFarland Conclusions re CDCs

1. A CDC pattern can be produced by removal of the sampling hose from the pump.

2. CDCs can be created at pressures as low as 7.5 inches water.

3. A pressure of 47 inches water can result when air is squeezed from as little as 2.5 inches of hose.

4. Pressures as high as 40 inches water were created when an individual duck-walked on a hose.

5. A CDC can be produced by stepping heavily on a coiled hose and generating pressures no larger than 44 inches water.

6. A pressure of 56 inches water can be created by sitting on a coiled hose placed on an 8-inch high bench with an inoperative pump.

7. CDC patterns can be produced on dust loaded filters subjected to pressure pulses of about 20 inches water.

8. There are great variations in the susceptibility of filters to forming AWCs and CDCs. A pressure of about 20 inches water caused an AWC and CDC on a floppy filter.

h. McFarland Conclusions

1. At least a portion of the filters cited under tamper codes 1, 2, and 3 have the same characteristics as the AWCs McFarland obtained by reverse air flows or pulses.

2. The AWC patterns obtained by reverse air flow and those obtained by reverse air pulse have the same characteristics.

3. When reverse air comes into a cassette it pushes the filter toward the aperture of the aluminum shroud. This causes air that is trapped between the upper surface of the filter and the inner surface of the shroud to be squeezed through the annular region at the 6-millimeter ring and sweep away the dust from the surface and produce an AWC pattern.

4. The filter-to-foil distance is a factor in the production of an AWC pattern. If the distance is less than 0.125 inch, an AWC is more likely to result.

5. Filter-to-foil distance varies from filter to filter in all those examined by McFarland. The majority have a gap of less than 0.125 inch.

6. Floppiness of the filter is an important factor in susceptibility to AWC formation.

7. The minimum volume of air needed to form an AWC pattern is 0.5 to 1 cubic centimeter. The minimum pressure is about 4 inches water in the form of a back pulse. But a pressure of 10 inches water will not always produce an AWC. "There are no absolutes." E.g., Tr. 5026, 5057.

8. It is possible to apply pressure pulses sufficient to create AWC patterns by squeezing the hose attached to the sampling unit.

9. Any of the following can cause sufficient pressures and sufficient volumes of air to cause an AWC pattern on a filter:

a. Dropping an object such as a pump on the hose from a distance of 8 inches.

b. Shutting a drawer or door on a hose while the sampling head assembly is attached.

c. Dropping an object 6-inches wide and 30 pounds in weight on a sampling hose.

d. Sitting on a hose to which the sampling assembly is attached.

e. Stepping on a hose to which the sampling assembly is attached.

f. Removing the hose from the pump at the completion of the sampling period in accordance with the instructions contained in the MSA instruction manual.

10. There is no difference between mine-run samples and laboratory samples with respect to AWC formation, or with respect to threshold velocity, or dislodgment patterns associated with threshold velocity experiments.

11. Variables such as water during or after the sampling process, the presence of diesel equipment, and other factors can influence the manner in which dust is deposited on a filter.

12. The most influential factors in the AWC formation process with respect to tamper codes 1, 2, and 3 are the filter-to-foil distance and filter floppiness.

13. The next most influential factor is the condition of the hose.

14. The presence of an AWC-type pattern on a filter does not indicate that the weight of the filter was intentionally altered.

5. ROTH

Dr. H. Daniel Roth is President and founder of Roth Associates, Inc., a statistical consulting firm. He has a Ph.D. in mathematics (probability theory) from the State University of New York at Stony Brook. He was accepted as an expert witness in the field of statistics.

a. Analysis of AWC Citation Rate Over Time

Using the same data as Dr. Miller, Dr. Roth plotted the weekly rates of AWC citations from August 1989 to March 1992. The plot shows a strong trend of declining AWC rates over virtually the entire period. After a brief initial period of apparently increasing AWC rates in August and September 1989, the rate of cited AWCs continuously decreased through the rest of the period.

The rate of decline was significantly steeper before the March 1990 void code notification than after that event. Roth did a regression analysis which showed that the slope of weekly AWC rates before March 19, 1990, was -0.11 (P-value 0.0001). The difference is highly significant and is inconsistent with the claim that the March 19, 1990, void code notification caused a decline in the AWC rate. In fact, the decline in the cited rate is monotonical throughout the entire period.

b. Analysis of Sample Date vs. Cited Rate

Dr. Miller's conclusion that there is a marked decrease in the cited rate on or about March 19, 1990, has a fundamental flaw: he fails to recognize that the rate of AWCs is statistically significantly higher before virtually any cutoff date in the study period than it is after that date. Roth prepared a chart comparing the cited rates before and after the 15th of each month from August 1989 to April 1991. In every case the cited rate after was statistically significantly lower than the cited rate before. Roth was provided with data on the MSHA inspector sample AWCs from July 1989 to October 1991. From January 1990 the number of inspector AWC samples (not the rate) is declining.

c. Analysis of AWC Rates Between Mines

Dr. Roth did a chi-square analysis comparing AWC rates between all mines, replicating Dr. Miller's chi-square analysis. Roth states that Miller didn't go far enough in that he did not do an analysis to see if there was a variation in rates between mines after March 19, 1990. Roth did such an analysis testing the homogeneity of AWC rates after March 19, 1990, and March 31, 1990, using the same data set as Miller with 2377 different mine IDs. The result showed a non-randomness in AWC rates after these periods. In fact there was a wide disparity in the AWC rates between the mines.

Further, Miller's data set did not include data in the before period for 762 mines because there was no information, but they were considered in the after period. Three hundred additional mine IDs were only considered in the before period, not in the after. Therefore, more than 1000 mines out of a total

of 2677 weren't used in both analyses. So the entire difference in cited rates could be explained by differences between mines having nothing to do with cutoff dates.

d. Analysis of Date of Manufacture

Of the cassettes manufactured before 1990, 4337 filters were cited, 95,246 were not cited. Thus, the cited rate was 4.36 percent. Of the cassettes manufactured in 1990 and after, 482 were cited, 122,590 were not cited. The cited rate was 0.392 percent. Roth performed a sign test of cited rates after January 19, 1990, March 19, 1990, and May 19, 1990, using Miller's adjustment for manufacture date. They show that the rates were declining throughout the period, and using different cutoff dates the result was the same: the rates were higher before. "[T]here is nothing magic about the March 19th, 1990 date." Tr. 3994. Roth prepared a plot of a trend analysis of the monthly AWC rates by date of manufacture. He concluded that the decline in cited rates seems to be nicely correlated with manufacturing date. In Roth's opinion, Miller's analysis of the differences in cited rates for cassettes manufactured before January 1, 1990, and after December 31, 1989, was "totally contaminated." The sign test was inappropriate because Miller eliminated 44,000 cassettes manufactured in 1989 or before. Miller also strung out the analysis to 1992 by which time all the cassettes manufactured before 1990 would have been used up. The sign test does not have any power and the bootstrap doesn't correct it.

e. Weight Loss Analysis

Dr. Roth did a weight loss analysis using four variables: type, condition, MSHA load (the weight of the compliance filter over the initial manufacturer's weight), and the Marple load (the load on the filter before the experiment), and the interaction between these variables. Miller used only the type and condition variables. Using the four variables, Roth did not find the experimental condition (reverse air flow AWC) to be a statistically significant explainer of weight loss. Roth agrees that for the compliance filters in the Miller/Marple analyses of weight loss/gain, the reverse air AWCs had a mean weight loss, and the control filters had a mean weight gain. In Roth's opinion this is not explained by whether the filter was a reverse air AWC or not, but by the MSHA load and the compliance weight, mainly by the compliance weight. The Marple load is not a statistically significant explainer of weight loss.

f. Roth Conclusions

1. If beginning in October 1989, the PHTC lab technicians began for the first time to make initial screening of filters prior to Raymond's seeing them to determine

which ones would be sent to Thaxton, this could have an effect on the rate of AWCs thereafter.

2. If beginning in March 1990, Raymond first began looking at filters under magnification, this could affect the rate of AWCs thereafter.

3. If between March and June 1990, photographs of examples of AWCs were posted for PHTC technicians to use in prescreening, and if Raymond developed a written protocol for the technicians to follow, and filters not meeting the criteria in the protocol were not further reviewed, this could affect the AWC rate thereafter.

4. If the dust collected on filters differs from mine to mine, some being more difficult to dislodge, this could affect the differences in AWC rates in different mines and could explain the chi-square distribution among mines.

5. If the dust collected on filters differs from mine to mine, some being more difficult to dislodge, the Post Office or PHTC handling of the filters could result in different AWC distributions.

6. If the dust collected on filters differs from mine to mine, some being more difficult to dislodge, and handling practices at all mines are identical, the difference in susceptibility to dust dislodgment could explain the chi-square results.

C. IMAGE ANALYSIS EVIDENCE

The testimony of three expert witnesses was largely devoted to image analysis evidence: Dr. Morton Corn, Dr. John C. Russ, and John C. Holm.

Dr. Corn, whose expertise is set out earlier in this decision (he is not an expert in image analysis), viewed about 100 cited AWC filters through a stereo microscope at the Mt. Hope MSHA facility. The array of filters which he examined defied confident classification by visual means. Because he believed it impossible to visually classify the cited AWCs which showed such a spectrum of features, Corn concluded that a more objective method of classification was required.

Corn chose the Ponca City laboratory of Conoco to do image analysis of the cited filter central discolorations and a comparison with other filters discussed hereafter. (Corn uses the term "central discoloration" or "CD" rather than the MSHA term "AWC.") The image analyst, Page Johnson, a graduate chemist who had worked at Conoco for 2 years, with a specialization in

optical imaging, performed the analysis under Corn's general direction. Corn had 1248 cited filters videotaped and a Zeiss image analysis system was used to measure 884 for diameter, area, perimeter, circularity, and similar morphological parameters of the central discoloration. He found that the CDs varied in roundness, diameter, image clarity, and internal shape. Corn's "gold standard" was determined by the cited AWC filters. No-calls, R. J. Lee experimental filters, and MSHA inspector AWC filters were measured and compared with the gold standard in six linear parameters of shape: average diameter, maximum diameter, minimum diameter, aspect ratio (ratio of minimum diameter to maximum diameter), internal shapes (P1/P2: ratio of perimeters of exterior edge and any keyholes to exterior edge only), and circularity (comparison with the area of a circle). Corn considered CDs indistinguishable if the CD parameters fell within the following ranges of Corn's six parameters:

5 mm < average diameter < 10 mm
5.5 mm < maximum diameter < 11.8 mm
4 mm < minimum diameter < 10 mm
perimeter ratio P1/P2 (internal shapes) < 2.25
circularity > 0.2
aspect ratio > 0.65

These parameters obviously do not take into account all the features of cited AWCs, including changes in grayness levels inside or outside the 6-millimeter ring, three-dimensional changes (e.g., cones), tears in the filter, scratch marks, and the position of the CD on the filter face (i.e., in alignment with the cassette inlet).

Using the optical imaging system, Corn had 65 of 265 no-call filters measured. Forty-seven were found to be indistinguishable from cited AWC filters. Two hundred and fifty-five of 438 R. J. Lee experimental filters with CDs were measured and 213 were found to be indistinguishable from cited AWCs. One hundred and eleven of 193 MSHA inspector AWC filters were measured and 99 were found to be indistinguishable from cited AWCs. Corn concluded that MSHA's allegations of tampering based on visual examination of the AWC filters are subjective and inconsistent. In Corn's opinion, characterizing parameters of cited AWCs are variable when measured objectively by image analysis techniques. Corn concluded that MSHA's tamper codes indicating causes of AWCs are not supported by image analysis techniques.

Corn did a supplemental analysis involving a reproducibility study of Dr. Lee's February 6 report. Sixty-five Lee experimental filters were randomly selected and measured using the Zeiss imaging system. Thereafter, 60 filters were remeasured once and five were remeasured seven times. Corn concluded that the reproducibility study indicated that the Lee experimental filters, the no-call filters, and the MSHA inspector filters

match the "AWC acceptability criteria," i.e., are consistent with Lee's February 6 report findings, although "a small number of filters might be affected in their match to cited AWCs" -- filters "at the fringes of the acceptability criteria." R-1037 at 4. In Corn's opinion his image analysis used high quality data, he obtained good reproducibility, and his conclusions are accurate. He conceded that his database had transmission, typographical, and reanalysis errors. He did not check Page Johnson's decisions that some filters could not be analyzed (because she saw no CD or the image required enhancement). Johnson was not offered as a witness at trial. Prior to this case, Corn had never worked with computer-assisted image analysis.

Dr. John C. Russ, a Research Associate and Visiting Associate Professor in the Materials Science and Engineering Department, North Carolina State University received his Ph.D. in engineering from California Coast University. He was accepted as an expert witness in image analysis and statistical analysis of image analysis results.

Dr. Russ reviewed Dr. Corn's report and concluded that it was consistent with standard practice for applying computer-based image analysis methods. In Russ' opinion, Corn's conclusions that the cited AWC filters are not distinguishable from inspector filters, no-call filters, and R. J. Lee experimental filters are logical and supported by the data. Russ concluded that Corn's supplemental analysis on reproducibility shows that there was no operator bias and that the measurement parameters are reproducible with sufficient accuracy. Russ did a statistical analysis of Corn's study which showed that it was not possible to distinguish cited AWC filters from non-cited filters. Russ concluded that there is no characteristic or combination of characteristics which would permit distinguishing such filters with confidence. Dr. Russ criticized John Holm's critique of Corn's report as flawed, irrelevant, inconsequential, or misinformed. Russ' opinion is based on viewing Corn's images of cited AWC filters only, not experimental, inspector, or no-call filters.

John C. Holm is employed as Network Manager, Department of Radiology at the University of Minnesota. He previously was employed by Kontron Elektronik in the areas of development, sales, and support. He has a B.S. in medical technology from Michigan Technological University and is pursuing a master's degree in biophysical sciences at the University of Minnesota. His research topic involves image analysis using a Kontron system. He was accepted as an expert witness in the field of image analysis.

Holm reviewed Corn's initial analysis and concluded that it had significant defects which call into question the results

claimed. He is of the opinion that Corn's use of a color CCD video camera was inappropriate because the object of interest is in shades of gray. In Holm's opinion, Corn's choice of video lens and magnification factor was inappropriate as was his use of videotape rather than direct video camera input. Holm asserts that Corn's database is compiled from an unknown source and is unreliable and undermines Corn's digital analyses and conclusions. In Holm's opinion, Corn's definition of what constitutes an AWC is too broad to compare filter populations because the ranges include almost all of the measurements -- the boundary points are not based on any statistical or percentile test. Holm testified that almost all of the experimental filters fall within Corn's ranges. Holm criticized Corn for selecting only experimental filters that resembled cited AWCs (i.e., the least distinguishable) for comparison to cited AWCs.

Holm performed measurements and analysis using a Kontron system and concluded that many of the R. J. Lee experimental filters (drop filters) which Corn found indistinguishable from the cited AWC filters are distinguishable on the basis of area alone. Holm found that the filters subjected to desiccator experiments are distinguishable from the cited filters on the basis of area or on observable differences in the off-center position of the CD. In Holm's opinion, choosing appropriate image acquisition techniques, feature measures, and classification scheme would have enabled classification of a greater number of filters and distinguished between cited AWC filters and the non-cited and R. J. Lee experimental filters. Holm performed a courtroom demonstration in which, inter alia, he measured and analyzed cited and experimental filters that were considered not analyzable or unmeasurable by Johnson, and excluded from Corn's study. Holm found that there were differences between the experimental and cited filter populations in area size, perimeter, maximum diameter, and minimum diameter. Circularity, shape factor, P1/P2 ratio, and roughness were similar in the two populations.

Although the measurements are processed objectively by the computer, the decision of which digitized shape to measure is made subjectively by the operator. Johnson apparently measured CDs approximately 6 millimeters in diameter, but there is no record of the measurements (threshold values) with which she defined the CDs, making verification of the precision of her measurements difficult. Holm's measurements included much larger shapes where the dust dislodgment continued outside the 6 millimeter, central area. Clearly, the image analysts defined the shapes they measured differently.

The reports and testimony on image analysis of the filters are complex, confusing, and contradictory. The image analysis experts are attempting to objectify and quantify what is basically a subjective and qualitative judgment of an experienced

government technical expert. If such a task is possible, it has not in my judgment been accomplished in this case. I have carefully considered the reports and testimony of Dr. Corn, Dr. Russ, and Mr. Holm concerning image analysis, but I am not relying on their conclusions in this decision.

FINDINGS OF FACT

I. AWCs IN GENERAL

A. The term "AWC" has a coherent, intelligible meaning. It refers to an abnormal filter appearance in a dust sample consisting of dust dislodgment from the central portion of the filter.

B. The classification of AWCs by Thaxton under his tamper codes was consistently applied to the cited filters.

II. REVERSE AIR AWCs

A. More than 95 percent of the cited filters were classified by Thaxton under tamper codes 1 (light cleaned), 2 (cleaned), and 3 (cleaned and coned). Thaxton concluded that the dust dislodgment patterns on these filters resulted from reverse air flow through the filter cassette. He later came to believe that filters cited under tamper code 7 (clean tool) also resulted from reverse air flow.

B. The dust dislodgment patterns on the cited filters classified under tamper codes 1, 2, 3, and 7 can have resulted from intentional acts: blowing by mouth through the cassette outlet, otherwise directing a jet or pulse of air into the cassette outlet, or introducing a vacuum source into the cassette inlet. This finding is supported by all the expert testimony.

C. The dust dislodgment patterns on the cited filters classified under tamper codes 1, 2, 3, and 7 can have resulted from:

1. impacts to the cassette from dropping or striking it;

2. impacts to the hose from stepping on it, dropping an object on it, striking it against a wall while the hose was wrapped around the sampling assembly, closing a door or drawer on it, or sitting on it;

3. snapping together the two halves of the filter cassette.

Although the expert witnesses for the Secretary and the mine operators differ as to the likelihood that a dust dislodgment pattern similar to the cited AWCs would result from incidents

described in numbers 1 and 2 above, the experiments all show that at least sometimes they do occur. Many of the filters subjected to tests such as those described exhibit dust dislodgment patterns indistinguishable from cited AWCs. All the expert witnesses agree that snapping together the two halves of the filter cassette can cause an AWC pattern on a dust loaded filter.

D. The dust dislodgment patterns on the cited filters classified under tamper codes 1, 2, 3, and 7 cannot have resulted from:

1. a rapid decrease in air pressure such as might occur when the cassettes were transferred by airplane, or the handling of the cassettes by the Post Office. The results of Dr. Marple's rapid decrease in air pressure experiment and the experience of Dr. Grayson who received a number of dust laden filters by air and postal delivery establish that air transport and Post Office handling do not cause AWC patterns on filters.

2. desiccation of the filter capsules in the PHTC weighing laboratory. Dr. Lee's desiccator tests which produced what he termed AWCs are of limited evidentiary value because of the differences in the desiccator used by MSHA and that used by Lee. Moreover, most of the photographs of the filters which underwent the test do not show dust dislodgment patterns similar to cited AWCs. Dr. Marple's experiment using the MSHA desiccator establishes that proper operation of the desiccator (and there is no evidence that it was not used properly by MSHA) does not cause dust particle dislodgment.

3. handling of the cassettes and capsules in the PHTC. Dr. Lee was of the opinion based on his observation of the handling practices in the PHTC and on the results of his stack and chuck tests and rapid disassembly tests that 5 to 15 percent of the cited AWCs resulted from PHTC handling and 30 to 50 percent were contributed to by PHTC handling. He did not provide the rationale for these percentage estimates. The photographs of the filters after the stack and chuck and rapid disassembly tests for the most part do not resemble the cited filters. Based upon my consideration of G-170 showing the operation of the PHTC and of the various tests and experiments which produced AWC-like dust dislodgment patterns, I conclude that the PHTC handling, including the stack and chuck procedures and the rapid disassembly procedures, did not cause the cited AWCs.

E. I am not considering in this decision the effect, if any, on the cited cassettes of the handling of the sampling assemblies, including the cassettes, at the mines, nor any factors peculiar to any specific mine or mines. I have excluded evidence of such mine-specific matters from this proceeding.

F. Sampling assembly variables

1. Filter-to-foil distance in the MSA cassettes used for dust sampling in the time period pertinent to this proceeding, and in the experiments performed by the expert witnesses varied from filter to filter.

2. Floppiness or tautness of the filters used for dust sampling in the time period pertinent to this proceeding, and in the experiments performed by the expert witnesses varied from filter to filter.

3. A filter cassette with a smaller filter-to-foil distance is more prone to an AWC dust dislodgment pattern than one with a larger filter-to-foil distance. With respect to this issue I am accepting the opinions and conclusions of Drs. Lee, Corn, Grayson, and McFarland over the contrary opinions and conclusions of Drs. Marple and Rubow (and the statistical conclusion of Dr. Miller). If a reverse air flow or reverse air pulse creates an AWC by causing the filter to move toward the inlet, resulting in the removal of particles close to the foil lip (Dr. Marple), it is reasonable to conclude that the closer the filter is to the foil, the easier it is to cause the movement and resulting dislodgment.

4. A floppy filter is more prone to an AWC dust dislodgment pattern than a more taut filter. Although there is some ambiguity in the opinions of Drs. Marple and Rubow, I conclude that all of the expert witnesses ultimately agree to this finding.

5. The cited filters had a shorter filter-to-foil distance than those manufactured subsequently and specifically than those used in the experiments performed by the expert witnesses. Dr. Lee testified that 1400 to 1500 of the cited filters were from the MSA 200,000 series, which were manufactured between April 20, 1988, and April 3, 1989. He further testified that about 2800 of the cited filters were from the 300,000 series which were manufactured between April 3, 1989, and February 13, 1990. The Secretary did not controvert this evidence. Thus between 4200 and 4300, or more than 80 percent, of the approximately 5000 cited filters were manufactured between April 20, 1988, and

February 13, 1990. The filter-to-foil distance on the cited filters was not measured before the citations were issued, and is, of course, not recoverable now since the cassettes were disassembled and the foils discarded. Exhibits G-253A, 255A, 257A, 259A, 260A, 261A, 262A, 263A, 265A, 266A, and R-1068, 1069, 1070, and 1071 referred to supra at page 25, consist of graphs prepared by the Government which show the filter-to-foil distances on experimental filters manufactured from April 20, 1988, until after May 28, 1992. The pre-loading measurements show a slight tendency toward an increase over time in the percentage of filters with filter-to-foil distances of more than 2 millimeters. Ninety-five percent of those in the 200,000 series and 100 percent of those in the 300,000 series had filter-to-foil measurements of 2 millimeters or less; 97 percent of those in the 400,000 series (manufactured from February 13, 1990, to October 25, 1990), and 72 percent of those in the 500,000 series (manufactured from October 25, 1990, to August 5, 1991) had such measurements. The post-loading measurements show a somewhat greater increase over time in the percentage of filters with larger filter-to-foil distances. Eighty percent of those in the 200,000 series and 95 percent of those in the 300,000 series had filter-to-foil measurements of 2 millimeters or less; 45 percent of the 400,000 series and 50 percent of the 500,000 series had such measurements. Dr. Rubow injected two cautionary notes with respect to these graphs: the number of filters measured from each series varied considerably. In the pre-loading measurements, 32 filters were from the 200,000 series, 24 from the 300,000 series, 259 from the 400,000 series, and 1684 from the 500,000 series. In the post-loading measurements, 69 filters were from the 200,000 series, 24 from the 300,000 series, 156 from the 400,000 series, and 1591 from the 500,000 series. With respect to some of the series, only Marple's measurements are included; with respect to others the measurements of Marple and McFarland; Lee, Marple, Yao, and McFarland; Lee, Grayson, and Marple; and Lee, Grayson, Marple, and McFarland are included. Furthermore, Lee, Grayson, Marple, and McFarland all followed different methods in measuring the filter-to-foil distance. Nevertheless, keeping these cautions in mind, the graphs provide the best evidence on an important issue, and they indicate and I find, that the cited filters had a shorter filter-to-foil distance than those manufactured subsequently.

6. The firmness or softness of the sampling assembly hose may be related to the formation of an AWC. A softer

hose is more prone to an AWC dust dislodgment. Dr. Lee was of the opinion that AWCs occurred more frequently in his experiments when he used soft hoses than when he used medium or hard ones. He concluded that hose softness or toughness is a significant factor in susceptibility to AWC formation on hose impact. Dr. McFarland concurred and demonstrated that it is possible to apply pressure pulses sufficient to create AWC patterns by squeezing the hose. Both Dr. Marple and Dr. Rubow stated that a softer hose is more susceptible to a reverse air pulse.

G. Dust variables

1. Susceptibility to AWC dust dislodgment patterns varies with:

   a. type of coal; Dr. Marple and Dr. Grayson both indicated that the type of coal may be influential in the formation of dust dislodgment patterns.

   b. humidity in the mine environment; humidity, of course, affects the weight and adhesion of the dust on the filter. It was believed to be a factor in dust dislodgment by Dr. Marple, Dr. Grayson, and Dr. McFarland.

   c. weight of dust on the filter; the weight of dust on the filter was stated to be an important factor by Dr. Lee and Dr. Grayson. Dr. Grayson testified that a lightly loaded filter is less susceptible to dust dislodgment than a heavier one.

   d. size and shape of the dust particles; Dr. Corn stated that the size and shape of the dust particles could be a factor in dust dislodgment patterns.

   e. amount of rock dust or diesel dust, if any, on the filter; these factors were believed to be important by Dr. Marple and Dr. McFarland.

H. Weight Loss

1. Not all cited AWC dust dislodgment patterns result in a weight loss. Some show a weight gain.

2. However, reverse air AWC filters with dust dislodgment patterns show on the average a weight loss.

III. AWCs CITED UNDER OTHER TAMPER CODES

A. Thaxton speculated that with respect to tamper code 4 (torn, ruptured) the tear resulted from something contacting the filter face, tearing it, and pulling it toward the inlet when it was removed. Dust dislodgment patterns on the cited filters classified under tamper code 4 can have resulted from someone intentionally inserting an object into the cassette inlet and contacting and tearing the filter media. They also can have resulted from reverse air flow or reverse air pulses.

B. Thaxton testified that filters classified under tamper code 5 (wiped, clean wiped) give the appearance of something contacting the filter face and being rubbed or twisted to try to remove dust from the filter.

1. Dust dislodgment patterns on the cited filters classified under tamper code 5 can have resulted from someone inserting a cotton swab into the cassette inlet and rubbing or twisting it on the filter.

2. Dust dislodgment patterns on the cited filters classified under tamper code 5 can have resulted from dropping the filter cassettes.

C. Thaxton concluded that tamper code 8 (clean face) resulted from inserting an object through the cassette inlet, possibly wetted with some liquid such as water, alcohol, etc. A review of the four filters originally cited under this tamper code, 206368, 262147, 264160, and 326966, discloses rather marked differences in appearances. The first two listed do not appear to have a lighter deposition encompassing the greater part of the filter. In fact they closely resemble many filters cited under tamper codes 1 and 2.

D. Thaxton testified that tamper code 9 (clean touch) filters were caused by inserting an object into the inlet. The dust dislodgment patterns on the cited filters classified under tamper code 9 can have resulted from someone intentionally inserting something in the cassette inlet.

E. There is no evidence in the record from which I could find or infer that the dust dislodgment patterns on the cited filters classified under tamper code 10 (clean ring) can have resulted from intentional acts; Thaxton was unable to reproduce this pattern in his laboratory.

IV. STATISTICAL EVIDENCE

A. RANDOMNESS OF CITED AWCs

Dr. Miller stated that his chi-square analysis resulted in overwhelming evidence that the rate of AWCs was not random as between mines either when he used the entire data set or when he used only cassettes whose sample date was before March 20, 1990, and before April 1, 1990, or when he eliminated the mines in the MSHA Norton subdistrict and the compliance samples. The results of these tests provide cogent evidence that Post Office handling and PHTC handling were not causes of the cited AWC patterns. However, because there are many other variables between mines, I do not find that it is persuasive evidence of intentional tampering of the dust samples. Dr. Roth's chi-square analysis using the same data set as Dr. Miller shows a wide disparity in AWC rates between mines after March 19, 1990, and after March 31, 1990, which tends to show that there was no change in randomness of cited AWCs after the void code was instituted.

B. SAMPLE DATE vs. CITED RATE

Whether the data show a significant change in the rate of cited AWCs on or about March 19, 1990, when the AWC void code was instituted, is sharply disputed by Dr. Miller and Dr. Roth. They agree that there was a general decline in cited rates during the period from August 1, 1989, to March 31, 1992. Dr. Miller did a chi-square analysis of the data and concluded that the evidence pointed to a significant change in the cited rate on or about March 19, 1990. Dr. Roth, using the same data as Dr. Miller, concluded that after a brief initial period of apparently increasing AWC rates in August and September 1989, the rate of AWCs continuously decreased through the rest of the period. He states that the rate of decline was significantly steeper before the March 1990 void code notification than after that event. Dr. Roth also noted that the number of MSHA inspector filters with AWCs declined at about the same rate during the relevant periods. I am including as Appendix B to this decision a copy of a graph prepared by Dr. Miller (attachment 4, G-454) showing the cited AWC rate by week from August 1, 1989, to March 31, 1992. The graph clearly shows a steep decline in cited rates beginning about March 19, 1990, followed by ups and downs, mostly downs, through the remainder of the period. However, it also shows other sharp declines, although not so steep, beginning about October 1989, about November 1989, about January 1990, and about February 1990. The Secretary argues that the steep decline beginning about March 19, 1990, can only be construed as showing intentional misconduct which ceased when the operators became aware of the void code. I am unable to make the suggested leap from the fact of a declining rate to a conclusion that it shows intentional tampering followed by a cessation of intentional tampering. The fact that AWC citations continued, albeit in

reduced numbers, long after the initiation of the void code, after the publicity concerning the criminal investigation including guilty pleas and jail sentences, and after the issuance of the citations which are the subject of these proceedings would argue to the contrary. I find that the statistical evidence does not establish that AWCs resulted from intentional tampering which ceased when the void code was instituted.

C. CASSETTE MANUFACTURE DATE

Dr. Miller did a sign analysis of sample date vs. cited rate adjusted for cassette manufacture date, using G-342 listing the cassette numbers of cassettes manufactured on certain dates between June 22, 1987, and February 26, 1990 (cassettes made after the latter date obviously were not used in sampling by March 19, 1990). He found that there is a definite change in cited rate occurring on or about March 19, 1990, even after adjusting for date of manufacture. The marked decrease in cited rate cannot be explained by a time trend in the quality of the cassettes. Dr. Roth disagreed with Miller's analysis and concluded that the date of manufacture of the cassettes is a plausible explanation of the decline in rates of cited AWCs. The evidence shows that cassettes manufactured before January 1, 1990, had a much higher rate of AWC citation than those manufactured later. This does not establish that the decline resulted from changes in the cassettes over time, but may point to variables in the cassettes uncovered by the scientists.

D. STATISTICAL RELATIONSHIP BETWEEN FILTER-TO-FOIL DISTANCE OR FLOPPINESS AND AWC CITED RATES

Dr. Miller did a logistic regression test[9] using 400 special filters to determine the relationship between citable dust dislodgment and filter-to-foil distance or floppiness. He found no statistically significant relationship for the special filters measured by Dr. Marple and deemed citable by Thaxton. This statistical conclusion does not overcome the weight of the scientific evidence that shows that filters with a shorter filter-to-foil distance or which are floppy are more susceptible to reverse air AWC formation.

E. WEIGHT LOSS

Miller and Roth agree that of the 200 reverse air AWC compliance filters drawn at random from Thaxton's database for the Miller/Marple analyses, the AWC filters had a mean weight loss and the control filters a mean weight gain. They disagree on whether the weight loss is explained by whether the filter was

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[9] Regression is a technique for estimating the mathematical relationship between factors on the basis of numerical data.

a reverse air AWC or not. I previously found that reverse air AWC filters with dust dislodgment patterns show on the average a weight loss. The statistical evidence does not affect that finding.

CONCLUSIONS OF LAW

Based on the above findings of fact and the entire record in the common issues trial, I conclude:

1. The Secretary has failed to carry his burden of proving by a preponderance of the evidence that an AWC on a cited filter establishes that the mine operator intentionally altered the weight of the filter.

2. The Secretary has failed to carry his burden of proving by a preponderance of the evidence that deliberate conduct on the part of the cited mine operators is the only reasonable explanation for the cited AWCs.

I noted earlier that there is no direct evidence in the record that the mine operators intentionally altered the weight of the cited filters. To prove his case, the Secretary relies on circumstantial evidence: the appearances of the cited filters, expert opinion as to the causes of these appearances, and statistical conclusions related to the time period during which the filter appearances occurred, and the time when the appearances "declined dramatically." Tr. 33. Findings of Fact II.C.1, 2, and 3 indicate that the appearances of the filters cited under tamper codes 1, 2, 3, and 7 can have resulted from many different incidents or accidents unrelated to intentional tampering. Drs. Marple and Rubow are of the opinion that type A patterns of dust dislodgment (similar to cited AWC patterns) most probably result from deliberate mishandling. The opinions of Drs. Lee, Grayson, McFarland, and Corn are to the contrary. Weighing the conflicting opinions and considering all the evidence of record especially the systematic studies of the experts, I conclude that the evidence does not establish that the AWCs resulted from deliberate mishandling.

The susceptibility of a filter to a dust dislodgment pattern similar to those on the cited filters depends in large part on filter variables (filter-to-foil distance and floppiness), on the firmness or softness of the sampling assembly hose, and on the dust variables listed in Findings of Fact II.G.1.a, b, c, d, and e. These conditions vary from filter to filter, from sampling assembly to sampling assembly, from mine to mine, from section to section within each mine, and even from day to day. Dr. Miller's statistical analyses did not adequately take all these variables into account. His conclusions do not establish that the cited AWCs are not the result of accidental occurrences or manufacturing variables. The record contains relatively little

expert evidence concerning the filters cited under the other tamper codes, and I conclude that it does not establish that they resulted from intentional weight alteration. In summary, the record shows too many other potential causes for the dust dislodgment patterns on the cited AWCs for me to accept the Secretary's circumstantial evidence as sufficient to carry his burden of proof that the mine operators intentionally altered the weight on the cited filters.

FURTHER PROCEEDINGS

I excluded from the common issues trial evidence proffered by the Secretary and LDCC concerning the dust sampling practices in individual coal mines. Therefore, the record in the consolidated cases is not complete, and it is not appropriate for me to consider the proposal in the LDCC's reply brief that the citations be vacated. Nor does it seem to me to be conducive to "as prompt and economical a resolution as possible" of these cases to refer them back to the Chief Judge for general assignment to Commission Administrative Law Judges as the LDCC's original posthearing brief proposes. The Secretary suggests a case-specific trial covering all the citations issued to either Consolidation Coal Company (20 mines, 396 violations) or Rochester & Pittsburgh Coal Company (15 mines, 646 violations). In my judgment such a case-specific trial would be unwieldy. As an alternative, I am selecting a single mine, Urling No. 1 Mine of the Keystone Coal Mining Corp. for a mine-specific trial. The mine is located in Indiana County, Pennsylvania, and has a total of 75 violations cited under four different tamper codes.

The trial will be limited to evidence of dust sampling and handling practices at the Urling No. 1 Mine, and evidence concerning the specific filters covered by the citations issued to the mine. I will not receive or consider any further evidence on the matters covered in the common issues trial, including scientific or experimental evidence concerning the causes of AWCs, nor will I consider further evidence concerning the effect of mailing of cassettes from the mines to MSHA facilities or the handling of the cassettes in the MSHA offices. The findings and conclusions in this decision will be incorporated in any decision following the mine-specific trial. Following the mine-specific trial I will render a final decision with respect to the citations issued to the Urling No. 1 Mine.

The issue in the mine-specific trial is whether the weight of the filters cited as AWCs from the Urling No. 1 Mine was intentionally altered by the mine operator, considering the findings made as a result of the common issues trial, and the evidence which may be introduced concerning the dust sampling and handling practices at the mine. The burden of proof remains with the Secretary.

Therefore, IT IS ORDERED

1. Proceedings in all the pending cases except with respect to the citations issued to Keystone Coal Mining Corp. for the Urling No. 1 Mine are STAYED.

2. Counsel for the Secretary and for Keystone Coal Mining Corp. shall appear at a prehearing conference in the Commission Hearing Room, 5203 Leesburg Pike, Suite 1000, Falls Church, Virginia, on Tuesday, August 10, 1993, at 10:00 a.m., for the purposes of discussing discovery proceedings and a trial date for the case-specific trial referred to above.

James A. Broderick
Administrative Law Judge

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Appendices A and B

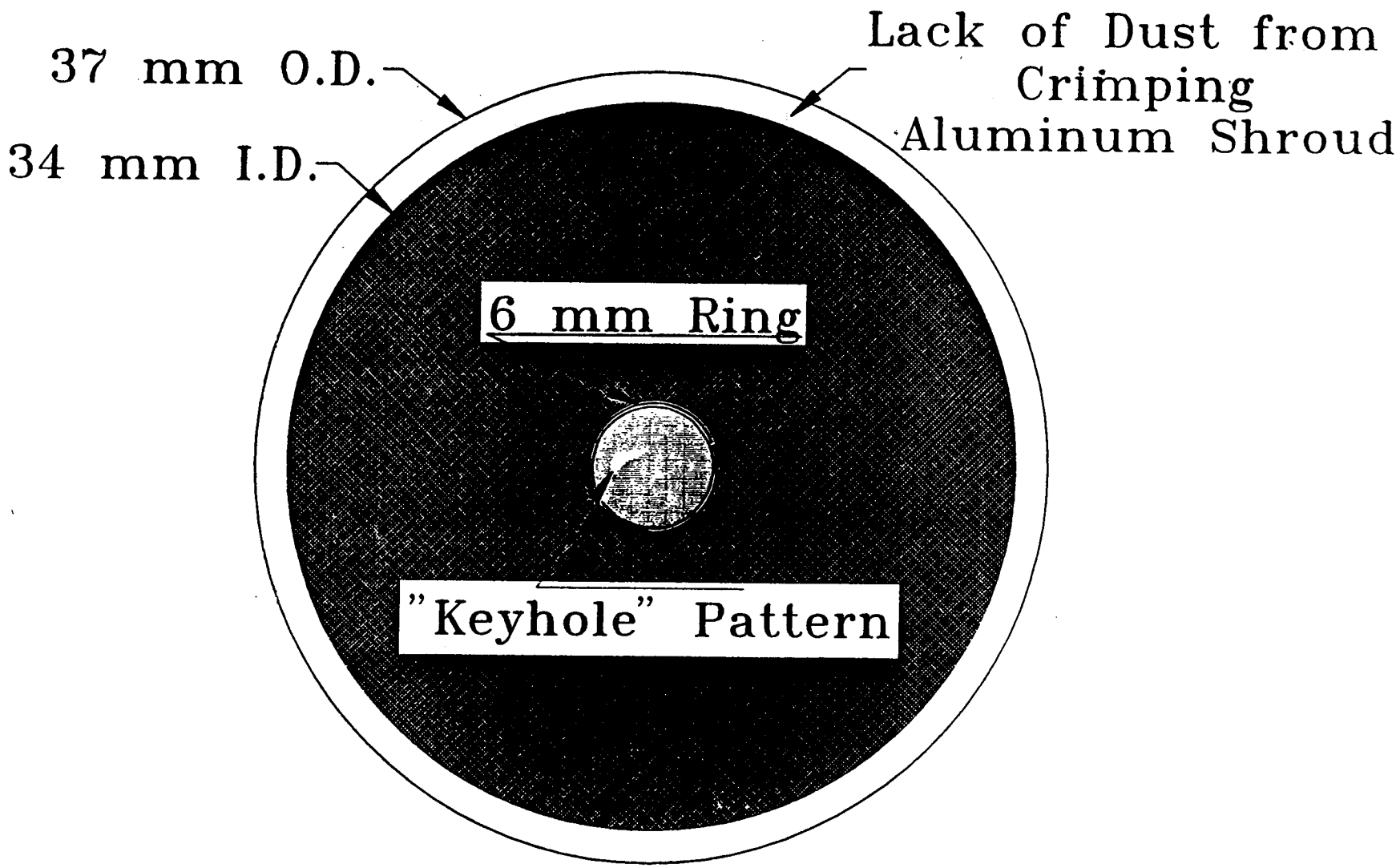

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EXHIBIT
R-1032

Cited Rate by Week from 8/1/89 to 3/31/92 (Linear Fit in Solid)

(Analysis Data Set)

(Vertical Line at 3/19/90--Pre and Post Smoothed Separately)