

AUGUST 1991

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AUGUST 1991

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

Cyprus Empire Corporation v. Secretary of Labor, MSHA and United Mine Workers of America, Docket No. WEST 91-454-R, etc. (Judge Morris, June 27, 1991)

Francis Marin v. ASARCO, Inc., Docket No. WEST 91-161-DM. (Judge Morris, July 15, 1991)

Southern Ohio Coal Company v. Secretary of Labor, MSHA, Docket No. LAKE 91-650-R, 91-664-R. (Judge Weisberger, July 19, 1991)

Energy West Mining Company v. Secretary of Labor, MSHA, Docket No. WEST 91-83-R. (Judge Lasher, July 22, 1991)

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

Secretary of Labor, MSHA v. Hickory Coal Company, Docket No. PENN 90-49. (PDR denied as premature)

Lancashire Coal Company v. Secretary of Labor, MSHA, Docket No. PENN 89-147-R. (Reconsideration of June 11, 1991 Commission Decision)



COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 6, 1991

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

v.

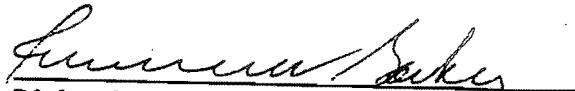
LANCASHIRE COAL COMPANY

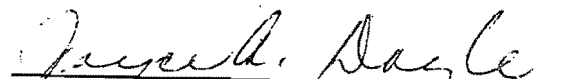
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Docket Nos. PENN 89-147-R  
PENN 89-148-R  
PENN 89-149-R  
PENN 89-192-R  
PENN 89-193-R  
PENN 90-10..

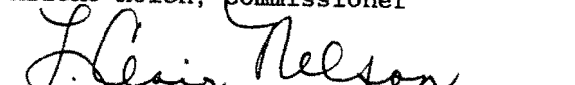
ORDER

Lancashire Coal Company has filed a Petition for Reconsideration requesting that the Commission reconsider its decision of June 11, 1991, in this matter, and the Secretary of Labor has filed a Response opposing the Petition. Upon consideration of the Petition and Response, the Petition is denied.

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 29, 1991

WYOMING FUEL COMPANY

v.

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

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Docket No. WEST 90-238-R

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

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), Wyoming Fuel Company ("WFC") seeks review of a decision by Commission Administrative Law Judge John J. Morris, affirming an imminent danger order of withdrawal issued pursuant to section 107(a) of the Mine Act.<sup>1</sup> The judge held that the section 107(a) order was validly issued when methane concentrations in excess of 1.5% were detected in a return entry of WFC's

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<sup>1</sup> Section 107(a) of the Mine Act provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section [104] or the proposing of a penalty under section [110].

30 U.S.C. § 817(a).



Golden Eagle Mine. 12 FMSHRC 1664 (August 1990)(ALJ). The Commission granted WFC's petition for discretionary review. For the reasons that follow, we reverse the judge's decision.

I.

The essential facts are undisputed. On June 12, 1990, several inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"), including Inspector Don Jordan, were conducting an inspection of WFC's Golden Eagle Mine, located in Weston, Colorado. This underground mine uses a combination of continuous miner and retreating longwall mining methods.

At about 7:50 a.m., Inspector Jordan, General Mine Foreman Steve Salazar, and miner representative Ralph Sandoval approached the northwest No. 1 tailgate section of a longwall unit. As they entered the section, they were informed by the section mechanic, Ben Chavez, who was on his way to deenergize the longwall unit, that methane gas in excess of 1.5% had been detected by foreman Rich Kretaski while Kretaski was examining the return entry. Kretaski had then ordered the immediate withdrawal of all personnel from the area and had posted the entry point of the unit to prevent the return of any of the withdrawn employees.

Jordan and Salazar went to the No. 1 return entry and, using hand held methane detectors, measured the methane gas level at 1.7%. In the No. 4 return, gas concentrations measured from 0.9 to 1%, and at the face, from 0.3 to 0.8%. After leaving the face area, the two men travelled approximately 1,400 feet down the return entry, where further methane measurements ranged from 1.4 to 1.7%. Tr. 89.

At 8:10 a.m., Inspector Jordan issued the contested section 107(a) order, which stated:

Methane (CH<sub>4</sub>) in excess of 1.5% was detected with a permissible hand held methane detector. Was present in the 1 return entry of the NW #1 tail gate section.... Management had taken steps to correct the condition prior to the issuance of this order. The order was issued to safeguard the health and safety of personnel and to insure proper corrective action.

At 2:30 p.m. the same day, Jordan modified the order to permit mining when the methane concentrations dropped below 1%. The order was terminated on June 21, 1990.

At the hearing, Inspector Jordan indicated three factors supporting his decision to issue the imminent danger order. He stated that the mine was a very gassy mine and that methane concentrations can escalate rapidly. He also stated his belief that 30 C.F.R. § 75.309(b) requires an inspector

to issue such order when methane reaches 1.5% in a return entry.<sup>2</sup> Tr. 25-27. He further testified that a 1.5% concentration of methane in a return entry is not in itself an imminent danger. Tr. 37. He stated that he issued the withdrawal order because 30 C.F.R. § 75.309(b) requires him to withdraw miners whenever the methane level exceeds 1.5%. Id.

In his decision, the judge first considered whether existing conditions constituted an imminent danger when the order was issued. He concluded: "On the facts presented here, it would appear that no condition of imminent danger existed within the ordinary meaning of section 107(a)." 12 FMSHRC at 1670. His determination was based on the considerations that the methane concentrations had not reached an explosive range and that the inspector and mine superintendent would not have walked some 1,400 feet up the entry if they had believed an imminent danger existed. Id.

Nevertheless, the judge pointed to the requirement of section 303(i)(2) of the Mine Act that all persons "shall be withdrawn" from a return entry of a mine endangered by a concentration of methane of 1.5% or more. He opined that whether "the described methane concentrations are held to be a 'per se imminent danger' ... or a Congressionally mandated imminent danger is not critical to a resolution of the issues." 12 FMSHRC at 1670. He rejected WFC's argument that "the presence of 1.7% methane does not trigger a section 107(a) order because there can be no per se imminent danger under the Act," stating:

WFC's argument should be addressed to the Congress, not to the Commission. The statute, as stated above, clearly defines a 1.5 percent concentration methane to be an area of the mine that is endangered. It requires withdrawal of all miners from such an area.

12 FMSHRC at 1671.

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<sup>2</sup> 30 C.F.R. § 75.309(b), a mandatory safety standard, repeats verbatim section 303(i)(2) of the Mine Act, which provides:

If, when tested, a split of air returning from any working section contains 1.5 volume per centum or more of methane, all persons, except those persons referred to in section [104(d)] of this [Act], shall be withdrawn from the area of the mine endangered thereby to a safe area and all electric power shall be cut off from the endangered area of the mine, until the air in such split shall contain less than 1.0 volume per centum of methane.

30 U.S.C. § 863(i)(2).

The judge also stated that the proper forum in which to seek an alternative method of enforcing section 75.309(b) without resort to a section 107(a) order is in a rulemaking proceeding. 12 FMSHRC at 1672. Finally, the judge rejected WFC's argument that proposed changes in the Secretary's ventilation regulations, which would not require the withdrawal of miners until the methane concentration reaches 2.0%, invalidated the Secretary's position. The judge stated that the case had to be decided on existing regulations and not on proposed changes, which might never be adopted. Id.

## II.

On review, WFC contends that the 1.5% concentration of methane in the return entry did not constitute an imminent danger and that, lacking a finding of imminent danger by the judge, the imminent danger order was invalidly issued. The Secretary argues that the presence of methane in concentrations exceeding 1.5% in a return entry constitutes an imminent danger, justifying the use of a section 107(a) order to require the withdrawal of all miners.

We conclude that substantial evidence amply supports the judge's finding that "no condition of imminent danger existed within the ordinary meaning of section 107(a)." 12 FMSHRC at 1670. The Secretary did not contest this finding on review. The record clearly demonstrates that at the time the section 107(a) order was issued, the concentration of methane had not reached an explosive level,<sup>3</sup> mining activity had been suspended, the miners had been withdrawn, and electric power to the unit was being deenergized. Accordingly, we affirm the finding of the judge that no imminent danger existed at the time the order of withdrawal was issued.

The Mine Act does not empower the Secretary to issue a section 107(a) order except upon the finding of an imminent danger. We reject the Secretary's implicit argument that section 303(i)(2) of the Mine Act authorizes the use of a section 107(a) order regardless of whether an imminent danger is found. The testimony of Inspector Jordan suggests that he was trained to issue a section 107(a) order to implement the withdrawal of miners required under 30 C.F.R. § 75.309. He testified that "when I encounter 1.5% methane regardless of the situation, if I am in fact present, ... I am obligated to issue an imminent danger" order. Tr. 36-37. Thus, he issued the order, not because he found that the specific conditions in the mine created an imminent danger, but because he felt obligated to issue such an order whenever the level of methane exceeds 1.5% in return air.

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<sup>3</sup> The highest concentrations of methane measured by Inspector Jordan were 1.8% in the No. 1 return entry, 1.2% in the No. 4 return entry and 0.8% at the face. Tr. 22-25; 88-89. The inspector further testified that methane is explosive only when the concentration is between 5 and 15% and is most explosive at 9%. Tr. 45-46. The inspector did not detect an explosive mixture of methane at any location in the mine.

The language of section 303(i)(2) of the Mine Act directs mine operators to withdraw miners and to cut off electric power when a concentration of methane in excess of 1.5% is detected in a return entry of an underground coal mine. The relevant legislative history explains the reason for the required withdrawal of miners from the endangered areas:

This section requires that men be withdrawn by the operator or inspector, if he is present, and power shut off from a portion of a mine endangered by a split of air returning from active underground workings containing 1.5 percent of methane.

The presence of 1.5 percent of methane in the air current returning from active underground working places indicates that considerably larger amounts of methane may be accumulating in the air at places in the mine through which the current of air in such split has passed. Safety requires that employees be withdrawn from the portion of the mine which is endangered by the possibility of an explosion of any such accumulation of methane, and that all electric power be cut off from such portion of the mine, until the cause of the high percentage of methane in such returning air is ascertained and the quantity of methane in such returning air is reduced to no more than 1.0 percent.

S. Rep. No. 411, 91st Cong., 1st Sess. 59 (1969), reprinted in Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 185 (1975) (Legis. Hist.).

As the legislative history explains, Congress was concerned that a 1.5% concentration of methane in a return entry indicates that "considerably larger amounts of methane in a return entry may be accumulating" in other areas, creating "the possibility of an explosion." Id. (emphasis added). Nowhere in the language of the statute or in its legislative history do we find support for a conclusion that a concentration of 1.5% of methane constitutes, by its very nature, an imminent danger as that term is used in the statute.<sup>4</sup>

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<sup>4</sup> The Interior Board of Mine Operations Appeals, in Pittsburgh Coal Company, 2 IBMA 277 (1973) concluded that, under section 303(h)(2) of the Coal Act of 1969, the presence of 1.5% of methane in a working place "per se warrants a finding of 'imminent danger'." Id. at 278. The Board's finding was based on the reasoning of the administrative law judge that since Congress required the "drastic action of withdrawal, then it must be because the situation was viewed as one of imminent danger." Id. at 282. We do not agree. Neither in Pittsburgh, nor in the case now before us, was evidence presented by the Secretary to support a finding that a concentration of 1.5% of methane in and of itself constitutes an imminent danger.

We reject the Secretary's argument that the withdrawal of miners under section 303(i)(2) of the Mine Act (section 75.309(b)) warrants a finding of imminent danger and the issuance of a section 107(a) order of withdrawal. This argument superimposes, improperly we believe, the Secretary's authority to issue a section 107(a) order of withdrawal onto the provisions of section 303(i)(2). Section 303(i)(2) is a mandatory safety standard; it is violated only when an operator fails to withdraw miners and shut off power when methane concentrations reach 1.5% in return air. The presence of such concentration is not by itself a violation of the standard.

Further, nowhere in the language of section 303(i)(2) or its legislative history are the terms "imminent danger", or "imminent danger order of withdrawal" to be found. The statute simply states that "all persons ... shall be withdrawn," and the legislative history makes clear that the miners must be withdrawn "by the operator or inspector, if he is present." The Secretary's mandatory standard at 30 C.F.R. § 75.309(b) reiterates the statutory provision, requiring that all persons "shall be withdrawn." The responsibility for complying with the mandatory standard rests with the operator. Unlike section 107(a), section 303(i)(2) and 75.309(b) are directed to the operator rather than to the Secretary. A violation of the mandatory standard occurs if and when an operator fails to withdraw the miners and cut off electric power as required by the standard. The operator should be cited under section 104, 30 U.S.C. § 814, for such a failure. Then, failure to abate the violation in a timely manner would result in the issuance of an order of withdrawal under section 104 and the withdrawal of miners would thus be effected.<sup>5</sup>

Congress has provided the Secretary with considerable authority to order the withdrawal of miners to ensure their safety for other than imminent danger conditions. Such withdrawal may be required by an inspector pursuant to section 104(b) of the Act, 30 U.S.C. 814(b), when the operator has failed to abate a violation of a mandatory standard in a timely manner or pursuant to section 104(d), 30 U.S.C. § 814(d), based on a finding of "unwarrantable failure" on the part of an operator. Section 103(k), 30 U.S.C. § 813(k), authorizes an inspector to issue orders requiring the withdrawal of miners as he deems appropriate in the event of "any accident" and section 107(b)(2), 30 U.S.C. 817(b)(2), permits an inspector to order the withdrawal of miners under certain conditions short of imminent danger, after specified procedures are followed.


Substantial evidence supports the judge's finding that the conditions present at the mine did not constitute an imminent danger. The language of the Mine Act and the legislative history establish that section 303(i)(2) is addressed to mine operators and requires that they remove miners and cut off electric power when the level of methane in the return split of air reaches


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<sup>5</sup> Of course, if an inspector does find that conditions at the mine create an imminent danger, as defined in section 3(j), 30 U.S.C. § 802(j), he is required to issue a section 107(a) order.

1.5%, because an explosive level of methane "may be accumulating at places in the mine through which the current of air in such split has passed." Legis. Hist. at 185. In this case, Inspector Jordan inspected the area through which the current of air passed and found that, in fact, explosive levels of methane were not accumulating at the mine. Neither section 303(i)(2) nor section 107(a) provides that such a condition constitutes an imminent danger. The Secretary is not authorized to issue an imminent danger withdrawal order unless her authorized representative, in this case the inspector, finds that an imminent danger is present.

For the foregoing reasons, we reverse the judge's decision and vacate the contested section 107(a) order.

  
Richard V. Backley, Acting Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
L. Clair Nelson, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 30, 1991

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

v.

WESTMORELAND COAL COMPANY

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Docket No. VA 90-28

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"), involves a citation issued to Westmoreland Coal Co. ("Westmoreland") by the Secretary of Labor ("Secretary") for a violation of 30 C.F.R. 75.1003, a mandatory safety standard applicable to trolley wires in underground coal mines. Commission Administrative Law Judge Avram Weisberger determined that Westmoreland violated the standard and that the violation was significant and substantial in nature. 12 FMSHRC 1782 (September 1990)(ALJ). The Commission granted Westmoreland's petition for discretionary review. For the reasons that follow, we reverse the judge's decision and vacate the citation.

### I.

#### Factual and Procedural Background

Westmoreland owns and operates the Bullitt Mine, an underground coal mine in Wise County, Virginia. The mine uses longwall mining systems for the extraction of coal, belt conveyors for coal handling, and a trolley rail system for the transportation of personnel and supplies. The trolley system, which is the subject of this contest, is comprised of three components: a narrow gauge track line, the rails of which are 44 inches apart; a 300-volt trolley wire, which is suspended from the roof, runs parallel and to the right of the track line, and provides power to the rail cars through a conductor called a pole or harp; and the rail cars themselves, which include mantrips for the transportation of miners. Jt. Exh. 1; Tr. 21-23, 44, 66; 12 FMSHRC at 1783.

The area of the mine giving rise to this dispute is the intersection of the West Mains Entry and the Four Left Entry. The West Mains Entry contains the main trolley line and a belt conveyor, which run parallel to each other. The Four Left Entry is one of four entries that service the Four Left Section, a longwall section located approximately 300 feet inby the intersection in question. 12 FMSHRC at 1783-84.

At the intersection of the two entries, a spur line of the trolley system branches off to the left from the West Mains trolley line and heads into the Four Left Entry for a distance of about 50 feet. This spur line is used to convey mantrips into the mouth of the Four Left Entry and also serves as a parking area for rail cars that have to be diverted from the West Mains track. Just as the spur line branches off from the West Mains Line, it passes underneath the West Mains No. 3 belt conveyor line.  
Tr. 27, 38.

The West Mains Entry is 22 feet wide and the Four Left Entry is 20 feet wide. The height of both entries ranges from 5 to 5.5 feet. The West Mains belt conveyor is 4 feet wide and clearance under the belt is also 4 feet. The distance from the trolley wire to the roof from which it is suspended ranges from 1.5 to 2 feet. At the point where the Four Left Entry spur line intersects the West Mains belt conveyor, both the trolley wire and the track pass beneath the belt. Tr. 19-20, 23; Jt. Exh. No. 2.

At the time that the disputed citation was issued, no work was being done in the intersection, but a crew consisting of three or four miners and a foreman was engaged in dismantling the longwall system in the Four Left Section, 300 feet inby the intersection. Tr. 30.

On January 17, 1990, MSHA inspector Gary Jessee was conducting a section 103(i) spot inspection (required for mines with excessive quantities of methane). He was accompanied by Westmoreland's assistant general mine foreman, John Yorke. Tr. 14. Upon arriving at the intersection of the West Mains Entry and the Four Left Entry, he found that the guard installed around the trolley wire where it passed under the West Mains belt conveyor had come loose so that one end was still attached and the other end was resting on the mine floor.

Inspector Jessee issued to Westmoreland a citation alleging a violation of 30 C.F.R. § 75.1003.<sup>1</sup> The citation reads as follows:

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<sup>1</sup> 30 C.F.R. § 75.1003 provides:

Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:

- (a) At all points where men are required to work or pass regularly under the wires;
- (b) On both sides of all doors and stoppings; and
- (c) At man-trip stations.

The Secretary or his authorized representatives shall specify other conditions where trolley wires and trolley feeder wires shall be adequately protected to prevent contact by any person, or shall require the use of improved methods to prevent such contact. Temporary guards shall be provided where trackmen and



The energized trolley wire was not mechanically guarded at the mouth of the 4 left section track heading where wire crosses under the West Mains No. 3 conveyor belt.

The citation was timely abated by reattaching the loose end of the guard. On January 25, 1990, Inspector Jessee issued the following modification to the citation:

Citation No. 3352277 is modified to show the additional information in the body of the citation, distances of the energized trolley wire from the two bottom rollers, West Mains No. 3 conveyor belt was 11.5, 2nd roller inby was 8.5 inches, approximate distance from conveyor belt to wire was 4.5 inches, and from support ropes (steel cables) and belt structures, distance was approximately 8.5 inches.

The citation was issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), was designated as significant and substantial in nature, and was characterized as being caused by Westmoreland's moderate negligence. The Secretary proposed a penalty of \$105, and a hearing on the merits was held on June 25, 1990.

In arriving at his decision, the judge framed the issue in these terms:

Jessee issued a Citation alleging a violation of 30 C.F.R. § 75.1003, which, as pertinent, provides that trolley wires ... shall be guarded adequately: (a) at all points where the men are required to work or pass regularly under the wires.... Thus, in order for there to be found a violation herein it must be established that there existed an unguarded point at which men are either: 1. required to work; or 2. pass regularly under the wire.

12 FMSHRC at 1784.

The judge first noted that various weekly, pre-shift and belt examinations were conducted on foot in the area and that assistant general foreman Yorke had testified that two or three times a year miners would be assigned to clean up spillage on the West Mains side of the belt but were not required to go beneath the belt or under the unguarded wire. The judge went on to conclude that such evidence was "insufficient to establish that persons are required to work at a point under the unguarded wires."  
12 FMSHRC at 1784 n.2.

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other persons work in proximity to trolley wires and trolley feeder wires.

The judge then turned to the issue of whether miners were required to "pass regularly under the wire." The judge found that despite there being four access routes to the Four Left Section where the longwall was being dismantled, the Four Left Entry was the primary route from the area out of the mine and that travel from the Four Left Entry was generally by trolley-powered mantrip rather than by foot. 12 FMSHRC at 1784.

The judge further found that the mantrip extended more than 1 foot on either side of the trolley tracks and that the trolley wire was 1.5 feet in a lateral direction beyond the track. The judge deduced that "there is support for the testimony of Jessee that a person sitting on the driver's side of the mantrip would be an inch from the unguarded energized wire." 12 FMSHRC at 1785.

Finally, the judge noted that Jessee had indicated that he had observed full mantrips in the area of the unguarded wire in question. Accordingly, the judge concluded that, when riding a mantrip to and from the Four Left Entry, "miners do regularly pass at a point where the trolley wire was unguarded, and as such, Respondent herein did violate Section 75.1003(a)." 12 FMSHRC at 1785. The judge went on to reject as unduly restrictive what he deemed to be Westmoreland's argument that the standard is not violated when miners in a mantrip (as opposed to miners on foot) pass under an unguarded trolley wire. 12 FMSHRC at 1785 n. 3.

Turning to the issue of whether the citation was significant and substantial, the judge held that, in light of his finding that persons sitting on the driver's side of the mantrip would be one inch from an unguarded wire energized at 300 volts, those persons would be exposed to the hazards of being burned or electrocuted. He further credited Jessee's testimony that persons riding in the inby end of the mantrip could come in contact with the wire by being jostled or thrown against it due to a sudden stop caused by a wreck or irregularities in the track. 12 FMSHRC 1785-86. Accordingly, he determined that the violation was significant and substantial in nature.

With respect to assessing a civil penalty, the judge, citing the Commission's decision in U.S. Steel Mining Company, Inc., 7 FMSHRC 865, 867 (June 1985), noted strong Congressional concerns with hazards posed by bare trolley wires and, accordingly, found a high level of gravity associated with the violation. 12 FMSHRC at 1786. Concerning the degree of negligence surrounding the violation, the judge found that the violation was readily noticeable but also noted that Yorke had testified that the guard had been in place the night before. He thus concluded that the violation resulted from Westmoreland's moderate negligence. In consideration of the above findings, and the other statutory assessment criteria, the judge assessed a civil penalty of \$400. 12 FMSHRC at 1787.

II.  
Disposition of Issues

On review, Westmoreland seeks reversal of the judge's decision on both procedural and substantive grounds. We address the procedural challenge first.

The operator contends that the citation should be vacated as invalid because it fails to charge with particularity a violation of section 75.1003, as required by section 104(a) of the Mine Act, 30 U.S.C. § 814(a). Citing the Commission's decision in Mid-Continent Resources, Inc., 11 FMSHRC 505, 510 (April 1989) ("Section 104(a) thus mandates that the operator be given fair notice in the citation of the violation it is required to correct"), Westmoreland contends that the citation and its modification address only the fact that the trolley wire was not guarded where it passed beneath the conveyor belt, but not whether miners regularly worked or passed under the unguarded wire at that location in violation of section 75.1003(a), as found by the judge.

The operator also argues that since the inspector cited section 75.1003 generally rather than the specific provision contained in section 75.1003(a), the citation must be vacated. Westmoreland contends that the Secretary is obliged to defend the citation as written, and that it was improper for the judge to rectify deficiencies in the original citation by allowing the hearing to proceed on the basis of a violation of section 75.1003(a) and in light of conditions not set forth in the citation or the modification thereto.

The Secretary responds by arguing that the citation on its face clearly sets forth the conditions constituting the violation. She further avers that at no time prior to, during or after the hearing did Westmoreland indicate that it did not understand the nature of the violation charged. The Secretary notes that in its post-hearing brief Westmoreland acknowledged that a violation of section 75.1003(a) was at issue when it stated, "the Secretary's arguments have lost sight of the issue in this case -- whether miners were required to work or pass regularly under the trolley wire in the area in question." Sec. Br. at 7. Citing section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), the Secretary further contends that Westmoreland's arguments regarding a prejudicial lack of notice as to the violation charged were not presented to the judge and therefore cannot now be presented to the Commission without the judge's having had the opportunity to consider and rule on the issue.

It is clear from the record that counsel for Westmoreland made no objection at trial with respect to the Secretary's or the judge's clarification of the charges against it. In the absence of such objection, it would appear that Westmoreland gave at least implied consent to what it now objects to as defects in the citations. Cf. Fed. R. Civ. P. 15(b). See A.H. Smith Stone Co., 5 FMSHRC 13, 16 n. 5 (January 1983). Furthermore, the Secretary is correct in arguing that given the constraints on review in section 113(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass"), we

cannot entertain Westmoreland's challenge to the underlying validity of the citation at this juncture.

Westmoreland also challenges the judge's decision on the grounds that certain material findings of fact relied upon by the judge in concluding that a violation occurred are clearly erroneous. Accordingly, the operator argues, the judge's findings are not supported by substantial evidence and his decision must be reversed.

Westmoreland points to the judge's finding on the basis of his reading of the evidence that "there is support for the testimony of Jessee that a person sitting on the driver's side of the mantrip would be an inch from the unguarded trolley wire." 12 FMSHRC at 1785. Westmoreland contends that there is no such testimony by Jessee or any other witness. Rather, Jessee testified that a person "sitting in the passenger side of the mantrip [would] [p]robably [be] a foot or less" from the trolley wire in the cited area or that the trolley wire was within "arm's reach" or "about a foot from somebody's head." Tr. 42-45; W. Br. at 9.

Westmoreland also argues that the judge's conclusion regarding the proximity of the trolley wire to persons sitting in the mantrip is contradicted by Jt. Exhs. 2, 3 and 4, which show that beneath the belt, the lateral distances between the trolley wire and the track on the trolley wire side ranged from 2 feet to 2 feet, 3.75 inches. Even allowing for Jessee's testimony and the judge's conclusion that the mantrip extended "more than a foot" on either side beyond the tracks, Westmoreland argues that the evidence does not support a finding that persons in a mantrip would be sitting "an inch from the trolley wire." <sup>2</sup>

Westmoreland further notes that the judge's finding of a violation was predicated on the presence of a fully loaded mantrip passing beneath the belt causing those persons seated on the trolley wire side of the mantrip (what the judge called the "driver's side") to be situated closer to the trolley wire. The operator contends however that the hazards of a fully loaded mantrip alleged by Jessee and accepted by the judge would obtain throughout the entire length of the trolley system, not just under the conveyor belt, since whatever differences exist between the trolley wire under the belt and the trolley wire elsewhere in the system involve vertical as opposed to horizontal clearances.

Westmoreland further argues that the judge misconstrued the standard in finding a violation under the factual circumstances presented. Noting that there is no material difference between the area cited and all areas where mantrips traverse the trolley system, Westmoreland asserts that the judge's decision would require the guarding of trolley wires throughout the mine, particularly since he concluded that "when riding a mantrip, on the way to and from the Four Left entry from the West Mains entry, miners do regularly pass

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<sup>2</sup> Westmoreland points out that the inspector's only testimony on the extent of the overhang of the mantrip beyond the track is as follows: "Probably, at least, a foot. It would be a foot on either side. It could be closer." Tr. 121; W. Br. at 7 n. 7, 8-9.

at a point where the trolley wire was unguarded, and as such, [Westmoreland] did violate section 75.1003(a)." W. Br. at 11-12.

With respect to Westmoreland's argument that substantial evidence does not support the judge's finding of violation, we conclude that the operator has established sufficient grounds to require reversal of the judge's decision.

Westmoreland is correct in asserting that there is no evidence in the record to support the judge's conclusion (which he attributed to the testimony of Inspector Jessee) that miners travelling in the mantrip would be one inch away from the unguarded trolley wire. In fact, Jessee testified that the distance was "about a foot" or "within an arm's reach" of the miners. Tr. 42-45. Moreover, the judge refers to miners on the "driver's side" of the mantrip as being closer to the trolley wire. Again, there is no testimony with respect to the "driver's side" of the vehicle, and Westmoreland points out in its brief that the driver sits in the middle of the mantrip. W. Br. at 8.

Most importantly, the judge's conclusion is directly at odds with Jt. Exhs. 2, 3, and 4. Jt. Exhs. 2 and 3 are engineer's drawings that portray the trolley wire in relation to both the conveyor belt and the rail on the trolley wire side of the Four Left spur line. They were prepared jointly and co-signed by representatives of both Westmoreland and the Secretary. Jt. Exh. 4 is an accompanying legend setting forth the various measurements taken at key locations in the cited area. The exhibits establish that the lateral distances between the trolley wire and the rail on the trolley wire side were widest where the trolley wire crossed beneath the belt and where the guard would have been installed (between 2 feet and 2 feet, 3.75 inches as opposed to between 1 foot, 6 inches and 1 foot, 11 inches at those locations where the guard would not have been installed).

On the other hand, the exhibits show that the vertical clearances between the trolley wire and the rail are lower at some locations under the belt than elsewhere (between 3 feet, 9.75 inches and 3 feet, 11.5 inches as opposed to 4 feet, 8.5 inches). However, Jt. Exh. 3 indicates that the vertical clearances at two points under the belt are virtually identical to another point away from the belt where the guard was not installed.<sup>3</sup>

The other factor that needs to be considered is the reduction in lateral clearance owing to the extension of the mantrip on either side of tracks. The judge found this overhang to be "more than a foot" but, as Westmoreland points out, his conclusion is based on very equivocal testimony by the inspector. ("Probably, at least a foot. It would be a foot on either side. It could be closer." Tr. 121). Unfortunately, Jt. Exhs. 2, 3 and 4 do not clear up this discrepancy. However, both parties agree on review that the overhang was approximately a foot. W. Br. at 7; Sec. Br. at 10. In any event, the trolley

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<sup>3</sup> The various vertical measurements in Jt. Exh. No. 3 are not uniform in that, some are taken between the trolley wire and the mine floor while others are taken between the trolley wire and the top of the rail.

wire at the cited location was further away horizontally from the mantrip than it was at points where a guard was neither provided nor required by the inspector. Thus, the overhang of the mantrip, whatever its distance, would bring miners closer to the wire at those points along the trolley wire, identified in Jt. Exh. 2, where the guard would not have been provided or required.

The standard requires a guard where miners regularly pass under the trolley wire, i.e., where miners would break the plane created by the trolley wire and a parallel line running along the mine floor. While the evidence may show that miners passed close to the trolley wire when the mantrip travelled beneath the belt, it does not establish that they travelled under the wire. The stipulated drawings and measurements in Jt. Exhs. 2, 3, and 4 clearly indicate that the trolley wire ran slightly higher and to the side of the miners travelling in mantrips beneath the belt conveyor, a position not markedly different from other locations along the trolley system. <sup>4</sup>

We are mindful of the close clearances presented by the trolley system passing beneath the conveyor belt in the cited area and the potential hazards presented by a bare, energized trolley wire carrying 300 volts of current. As the record clearly indicates, however, those conditions arise throughout the trolley system in the Bullitt Mine. 30 C.F.R. § 75.1003(a) explicitly applies to miners being required to travel under unguarded trolley wires, not in proximity to the unguarded trolley wires, as the Secretary argues. Here, the record shows that, although miners in the mantrips passed in proximity to the trolley wire, they did not travel under it within the meaning of the standard.


If the Secretary or her inspectors determine that certain clearances are insufficient to protect miners from contact with energized trolley wires, the standard provides a remedy:

"The Secretary or [her] authorized representatives shall specify other conditions where trolley wires ... shall be adequately protected to prevent contact by any person, or shall require the use of improved methods to prevent such contact. Temporary guards shall be provided where trackmen and other persons work in proximity to trolley wires....


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<sup>4</sup> It would appear that the inspector was strongly influenced by his perception that "the clearance is vastly reduced from the main heading into that area by reason of the conveyor belt crossing over at that point." Tr. 42. However, as noted above, the vertical clearance under the belt was the same as the vertical clearance under at least one other point outside the area covered by the dislodged guard.

Since the evidence submitted jointly by the parties convincingly establishes that the miners in this case did not regularly pass under the trolley wire, Westmoreland did not violate subsection 75.1003(a) as the judge concluded. In view of this conclusion, we need not address the judge's significant and substantial findings. Accordingly, the judge's decision is reversed and the citation is vacated.

  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 9, 1991

ROY FARMER AND OTHERS

v.

ISLAND CREEK COAL COMPANY

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:  
:  
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Docket No. VA 91-31-C

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

## DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). On December 20, 1990, Commission Administrative Law Judge James A. Broderick issued an Order of Dismissal dismissing the pro se compensation complaint filed in this matter by Roy Farmer on his own behalf and on behalf of some 275 other miners at the Virginia Pocahontas No. 3 Mine of Island Creek Coal Company ("Island Creek"). 12 FMSHRC 2641 (December 1990)(ALJ). Granting a motion to dismiss filed by respondent Island Creek, the judge found that the compensation complaint had been filed late and that complainants had not advanced any explanation for the late filing. Complainants filed a pro se Petition for Review of the judge's order. We also received a Supplement to Petition for Review from the United Mine Workers of America ("UMWA") and an Opposition to Petition for Review from Island Creek. On January 29, 1991, we issued a Direction for Review and stayed briefing in this matter. For the reasons explained below, we vacate the judge's dismissal order and remand this matter to the judge in order to afford complainants the opportunity to present to the judge the reasons for their late filing asserted in their petition for review. The judge shall determine whether those reasons excuse the late filing of the compensation complaint.<sup>1</sup>

We briefly summarize the relevant procedural history. It appears from the record that on April 17, 1990, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Island Creek an imminent danger withdrawal order alleging the presence of a dangerous concentration of methane in the Pocahontas Mine. The order states that the affected area was the "entire mine." On the same date, MSHA also issued Island Creek a citation alleging that various conditions contributing to the buildup of methane constituted a violation of the operator's ventilation plan and,

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<sup>1</sup> The papers already filed with the Commission on review adequately discuss the legal issues raised by complainants' petition and, accordingly, we continue the briefing stay provided in our Direction for Review and decide this matter without additional briefing.



hence, of 30 C.F.R. § 75.316.

By letter dated October 29, 1990, and received by the Commission on November 2, 1990, Roy Farmer filed a "Request for compensation per section 111 of Coal Mine Safety and Health Act of 1977." Among other things, the letter states that Island Creek, in violation of section 111 of the Mine Act, 30 U.S.C. § 821, had refused to compensate its employees who were idled by the imminent danger order during the period April 17 through 20, 1990. The letter notes the issuance of the citation accompanying the imminent danger order. Attached to the letter is a list of some 275 Island Creek miners allegedly idled by the withdrawal order. The letter asserts that all such employees lost three 8-hour shifts due to the idlement and asks that Island Creek "be ordered to immediately compensate all employees idled." Complaint at 1. Mr. Farmer identifies himself as a miner's representative.

Commission Procedural Rule 35, 29 C.F.R. § 2700.35 ("Rule 35"), provides:

A complaint for compensation under section 111 of the Act, 30 U.S.C. 821, shall be filed within 90 days after the commencement of the period the complainants are idled or would have been idled as a result of the order which gives rise to the claim.

Farmer's Complaint, submitted to the Commission more than six months after the issuance of the imminent danger order, is silent as to reasons for the late filing.

On November 28, 1990, Island Creek filed its Answer to the compensation complaint. (See 29 C.F.R. § 2700.37.) As an affirmative defense, the Answer states that "the Complaint must be dismissed because it was not filed within the period required by Commission Rule 35." Answer at 2 (¶ 6). Island Creek also asserts that it did not violate any mandatory standard in connection with any idlement alleged in the Complaint and notes that it contested the citation, which, at the time, was the subject of a civil penalty proceeding pending before the Commission.

On November 30, 1990, Island Creek filed a Motion to Dismiss Compensation Complaint. The Motion argues that the Complaint was late-filed and that no excuse was offered for the untimeliness and that, accordingly, the proceeding ought to be dismissed. On December 5, 1990, the matter was assigned to Judge Broderick. The official file contains no response from the complainants to the dismissal motion.<sup>2</sup>

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<sup>2</sup> Under Commission procedures, a party has 10 days after date of service, plus five additional days for documents served by mail, to file a statement in opposition to a motion. 29 C.F.R. §§ 2700.8(b) & .10(b). In this instance, complainants' 15-day period for filing a response ended on December 17, 1990.

On December 20, 1990, Judge Broderick issued his Order of Dismissal. The judge noted that the motion to dismiss argues for dismissal because the complaint was filed 198 days after the date of the alleged entitlement and Rule 35 requires filing within 90 days after entitlement. 12 FMSHRC at 2641. Referencing the late filing and complainants' failure to respond to the motion or to offer any justification for the late filing, the judge granted the motion and dismissed the proceeding. 12 FMSHRC at 2641-42.

On January 4, 1991, Farmer filed with the Commission a pro se Petition for Review. The Petition, which is signed by Farmer and is unsworn, alleges essentially that the miners were misinformed by both Island Creek and government officials as to their compensation rights and the time limit for filing a compensation complaint. Pet. at 1-2. Among other things, the Petition asserts that government officials whom the miners contacted informed them that any applicable time limit would run from the date of the resolution of the related civil penalty proceeding. *Id.*<sup>3</sup> The Petition does not provide details concerning the dates, circumstances, or individuals involved in the alleged contacts with company and government officials. In conclusion, Farmer states:

So due to the above set of facts, our local union's financial inability to retain legal counsel, and our local union's representatives' inabilities and lack of knowledge in these procedural matters, we respectfully request a review and reversal of [the judge's] decision to dismiss our claim for compensation.

Pet. at 2.

On January 9, 1991, the UMWA filed a Supplement to Petition for Review. The UMWA asserts that the complainants have alleged several explanations that would justify late filing, including a representation that "Island Creek officials misled complainants and contributed to the delay in

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<sup>3</sup> In connection with this alleged assurance regarding filing time limits, Farmer states that unnamed government officials referred the miners to section 111 of the Act, a copy of which is highlighted and attached to the Petition. Pet. at 1 (¶ 2). The highlighted portion is the third sentence, which deals with "one-week compensation." Apparently Farmer's reference is to the language in that sentence stating that any required compensation is to be paid "after" the compensation-triggering withdrawal order is "final." 30 U.S.C. § 821 (third sentence). The language addresses the procedural requirement that compensation itself may not be awarded until the underlying withdrawal order is deemed to be final, whether through the operator's failure to contest it or through a separate judicial determination of its validity. See generally *Loc. U. 1810, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). This language does not, however, prescribe any time limit for the filing of a miner's complaint for compensation. As noted below, section 111 does not address the subject of such a time limit.

filing." UMWA Supp. at 2. The UMWA states that the complainants were "not sleeping on their rights" but, rather, contacted government officials for advice on how to proceed and relied upon "erroneous information" provided by the latter. Id. The UMWA asks the Commission to review the case for the purpose of remanding it to the judge in order to allow complainants to present to him their reasons for the late filing. The UMWA notes that the Commission has afforded pro se mine operators relief from default orders where their failures to respond to judges' orders were due to inadvertence or mistake. UMWA Supp. at 3.

Also on January 9, 1991, Island Creek filed an Opposition to Petition for Review. Island Creek relies mainly on the review limitation in section 113(d)(2)(A)(iii) of the Act: "Except for good cause shown, no assignment of error ... shall rely on any question of fact or law upon which the ... judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). Island Creek contends that review should be denied because the basis of complainants' petition was not first presented to the judge and good cause has not been shown for the failure to do so. I.C. Opp. at 1-2. Island Creek also argues that the filing delay involved here was "particularly egregious," that complainants failed to advance any justification to the judge for the late filing, and that their present explanations for the delay are "plainly not believable." I.C. Opp. at 1-2.

This case presents two issues on review: whether the late filing of the compensation complaint precludes the compensation claim, and whether complainants' failure to present to the judge their explanations for the late filing bars Commission consideration of those issues on review. We address first the issue of the effects of the late filing.

Section 111 does not provide any time limit for the filing of a compensation complaint. In relevant part, section 111 merely states:

The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5.

30 U.S.C. § 821 (fifth sentence). Neither the legislative history of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977), nor that of the Mine Act addresses time periods for the filing of compensation complaints.

As referenced above, however, the Commission's Rule 35 does deal with the subject and establishes a 90-day period for the filing of compensation claims. As Island Creek appropriately points out (I.C. Opp. at 2), this is a generous period, larger than other filing periods in the Commission's Procedural Rules. However, particularly in view of the statutory silence on the subject, this time limit is not jurisdictional in nature.

In Loc. U. 5429, UMWA v. Consolidation Coal Co., 1 FMSHRC 1300 (September 1979) ("Consol"), the Commission held that the 30-day filing

period in former Commission Interim Procedural Rule 29, 43 Fed. Reg. 10320, 10324 (March 10, 1978) ("Interim Rule 29"), for filing compensation complaints could be extended in "appropriate circumstances." In that case, a UMWA Local had filed a compensation complaint late but had attempted to seek timely relief in other ways and was apparently confused as to applicable procedural requirements. The Commission noted that section 111 itself does not contain a time limit and that its Interim Procedural Rules "shed little light" on the issue. 1 FMSHRC at 1302. Accordingly, the Commission interpreted the rule in a manner consistent with the remedial nature of the statute in general and of section 111 in particular. 1 FMSHRC at 1302-03. The Commission relied in part on the Mine Act's legislative history, which indicates that the time limits for filing discrimination complaints under section 105(c) of the Act, 30 U.S.C. § 815(c), may be extended in justifiable circumstances. 1 FMSHRC at 1303, citing S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of Federal Mine Safety and Health Act of 1977, at 624-25 (1978). Determining that sections 105(c) and 111 are similar remedial provisions, the Commission concluded that the filing limit in Interim Rule 29 could be extended in "appropriate circumstances," just as could the time limits in section 105(c). 1 FMSHRC at 1303.

Turning to the question of whether the UMWA's late-filed complaint should be entertained, the Commission stated that the "primary purpose" of a limitations period is "to ensure fairness to the parties against whom claims are brought." 1 FMSHRC at 1304, citing Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965). The Commission indicated, however, that to be "balanced against this policy of repose ... are considerations of whether 'the interests of justice require vindication of the plaintiff's rights' in a particular case." 1 FMSHRC at 1305, quoting Burnett, 380 U.S. at 428. The Commission determined that the UMWA "did not sleep on its rights," and had taken other timely steps to secure relief. Id. The Commission emphasized that the operator did "not argue, and the record [did] not indicate, that it in any manner relied on the policy of repose embodied in Interim Rule 2[9] ... or was otherwise prejudiced." Id. The Commission accordingly excused the late filing.

Consol is largely dispositive of the issue presented here. Although Consol construed former Interim Rule 29, the principles announced in that decision are so fundamental that they apply with equal appropriateness to similar timeliness problems under present Rule 35. Accordingly, the Commission may excuse the late filing of compensation complaints in "appropriate circumstances." Such excusable circumstances could include situations where a miner is misinformed or misled as to his compensation rights and procedural responsibilities, or has taken some timely, although incorrect, action to vindicate those rights, or presents some other potentially justifiable excuse for late filing. However, the Commission expects a showing of good cause to explain any such delay. If a miner has knowingly slumbered on his rights, those rights may be lost. Cf. David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 25 (January 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984)(tab'e). If serious delay has prejudiced the respondent's right to due process in an adversarial

proceeding, the policies of judicial repose may override the opportunity for vindication of the complainant's rights.

As noted, Consol relied on the Mine Act's analogous discrimination scheme. Since the time of that decision, the Commission has further clarified the principles applicable to the late filing of discrimination complaints. In Hollis, 6 FMSHRC at 24, the Commission indicated, as a preliminary guiding proposition, that "[t]imeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation." The Commission has held that a miner's genuine ignorance of applicable time limits may excuse a late-filed discrimination complaint. Walter A. Schulte v. Lizza Indus., Inc., 6 FMSHRC 8, 13 (January 1984). The Commission's decisions make clear, however, that even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal: "The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay ... in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim." Secretary on behalf of Donald R. Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986)(emphasis added). The Commission has noted that legally recognizable prejudice must be "material" -- i.e., affect issues necessary to a meaningful opportunity to defend. Hale, supra. The Commission also has explained that material legal prejudice means more than merely being required to defend a case that could have been avoided if failure to file on time were treated as a jurisdictional defect:

While the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated. [The operator] has not demonstrated ... the kind of legal prejudice [that we are prepared to recognize], namely, tangible evidence that has since disappeared, faded memories, or missing witnesses.

Schulte, 6 FMSHRC at 13. Given Consol's orientation, the foregoing discrimination principles are correspondingly valid in the compensation complaint context.

In evaluating the adequacy of explanations for failure to comply on time with filing requirements, the Commission also may appropriately consult the principles of mistake, inadvertence, and excusable neglect that it has employed pursuant to Fed. R. Civ. P. 60(b)(1) to determine whether to grant relief (usually to pro se parties) from defaults and other final judgments. See, e.g., M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1271 (September 1986), and authorities cited.

Here, complainants have alleged that they discussed their possible compensation entitlement with representatives of the operator and government and, essentially, were misinformed as to their compensation rights and filing responsibilities. In particular, they claim that they were informed -- mistakenly -- that any time limit would run from the final resolution of the related civil penalty proceeding. They assert a general lack of

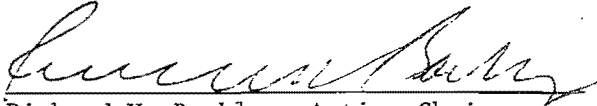
knowledge as to applicable procedure and note financial inability to retain counsel. If true, those allegations could possibly establish adequate explanation or justification for the late filing. However, the Petition is unsworn and provides no details as to the relevant dates and persons involved. We cannot make a determination concerning this issue on the present record. Given the possibly exculpatory nature of these explanations, a remand to the judge to allow him to assess the merits of these allegations is appropriate.

Island Creek also argues that the Commission is barred from considering these issues because of complainants' failure to raise them before the judge. Like timeliness questions, determinations regarding the "opportunity to pass" review restriction "must be decided on a case-by-case basis." Richard E. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (June 1984). There is no dispute that complainants did not present to the judge the excuses for late filing now raised on review. The question presented is whether "good cause" has been shown for this failure.

Island Creek correctly observes that there is no express attempt in the Petition to make a showing of "good cause." However, in our opinion, this depiction of complainants' position takes too narrow a view of the procedural history and the Petition. Given complainants' silence below in the face of the operator's motion to dismiss, this case arrives at the Commission in virtually the same posture as a default. As in any default case, the defaulted party has failed to speak at some crucial juncture. The nature of the justification offered for late filing also impliedly suggests a reason for the failure to respond to the motion to dismiss: a pro se party's general lack of understanding of appropriate Mine Act and Commission procedure. The UMWA, in its Supplement, argues as much by asking the Commission to afford relief from the judgment below pursuant to the settled principles it has applied in default cases. See UMWA Supp. at 3.

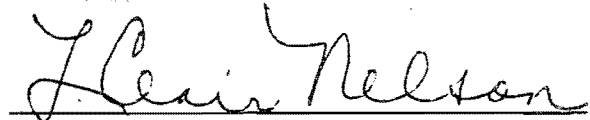
We conclude that good cause has been shown to the extent that, in the interests of justice, the matter should be remanded to the judge so that complainants' explanations can be placed before him for his resolution. At that time, the operator will have the opportunity to present evidence of the material legal prejudice, if any, resulting from such delay.

Accordingly, we vacate the judge's dismissal order and remand this matter so that the judge may determine whether appropriate circumstances exist to excuse the late filing of the compensation complainant and to allow this matter to go forward.

  
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ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 90-213
Petitioner	:	A.C. No. 42-01474-03549
	:	
v.	:	Docket No. WEST 90-214
	:	A.C. No. 42-01474-03550
ANDALEX RESOURCES, INC.,	:	
Respondent	:	Docket No. WEST 90-256
	:	A.C. No. 42-01474-03551
	:	
	:	Pinnacle Mine
	:	
	:	Docket No. WEST 91-126
	:	A.C. No. 42-01750-03513
	:	
	:	Apex Mine

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Thomas R. May, Safety Director, Andalex Resources,  
Inc., Price, Utah,  
pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA"), alleges Respondent Andalex Resources, Inc. ("Andalex"), violated safety regulations promulgated under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the "Act").

A hearing on the merits was held on April 16, 1991, in Salt Lake City, Utah. The parties filed post-trial briefs.

STIPULATION

At the hearing, the parties stipulated as follows:

1. Andalex is engaged in mining and selling bituminous coal in the United States, and its mining operations affect interstate commerce.

2. Andalex is the owner and operator of Pinnacle Mine, MSHA I.D. No. 42-01474.

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

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

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Andalex on the dates stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Andalex 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 penalties will not affect Andalex's ability to continue in business.

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

9. Andalex is a large mine operator with 4,037,818 tons of production in 1989.

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.

Docket No. WEST 90-213

In Citation No. 3414458, the Secretary originally cited Andalex for a violation of 30 C.F.R. § 75.1100-3. However, prior to the hearing, the Secretary alleged a violation of 30 C.F.R. § 77.1110.<sup>1</sup>

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<sup>1</sup> The regulation allegedly violated reads as follows:

§ 77.1110 Examination and maintenance of fire-fighting equipment.

Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

MSHA Inspector William Taylor, a person experienced in mining, found that the actuator for the chemical fire suppression system was inoperative because of a lack of batteries. The defective suppression system was located above ground at the No. 1 belt line, which was also a secondary designated escapeway.

Andalex admits the fire suppression system was inoperative but denies the "significant and substantial" (S&S) designation.

Inspector Taylor believed the inoperative system was S&S as it affected any miner who might be required to put out a fire above ground in the area of the discharge roller. In his opinion, the S&S designation did not extend underground into the nearby belt line. This was because any smoke from a fire entering the portal would be removed by the ventilation system at the first crosscut.

The Commission has set the parameters of an S&S violation. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (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, 103-104 (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, 500-01 (April 1988); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011-2012 (December 1987).

In the instant case, a violation of 30 C.F.R. § 77.1110 exists. A measure of danger exists as the discharge belt could overheat. If so, a fire could result and the fire suppression device would not function. A miner is not ordinarily stationed at this location. Injuries can and do occur when miners are

fighting fires. Finally, it is reasonable to expect that the injury would be reasonably serious. While this fire suppression device is not underground, photographs R-1 through R-6 show that some of the areas in the immediately vicinity are not reasonably accessible.

The testimony of Inspector Taylor is clear as to the likelihood a miner would be in danger of suffering a serious injury. He stated:

But I do believe, that the person who had to try and go up and fight this fire after it had been allowed to exist without being suppressed by the automatic fire suppression system, that his life would be in danger. (Tr. 23).

Further,

The hazard here would be to the man who had to extinguish this fire. It's not reasonable to believe that any mine operator would allow a fire to exist that was in close proximity to a very large coal stock pile without attempting to extinguish that. And it's reasonable to believe that the first person who was made aware that there was a fire would attempt to extinguish that fire rather than to continue to allow other men who are on the property to be endangered. (Tr. 23, 24).

It is true that MSHA does not require an automatic fire suppression device at this location. However, once installed, § 77.1110 requires that it "shall be continuously maintained in a usable and operative condition."

Andalex, in its post-trial brief, raises various issues. Initially, the operator asserts its mine has no history of fires or explosions.

The lack of fires or explosions at the mine is fortunate, but not necessarily indicative of whether a fire might occur.

Andalex further argues that no ignition sources were present at the #1 drive.

I disagree. Inspector Taylor was questioned on this issue. The transcript at pages 21-22 reflects the following testimony:

- Q. Were there any--were there any sources of ignition near this belt drive of extraneous materials that may contribute to a fire?
- A. Well, this particular belt drive dumps where it dumps its stock pile of coal where you have thousands of tons of coal that are stockpiled until the coal trucks can remove the coal from the area.
- Q. Now, how close would these stock piles of coal be to the belt drive itself?
- A. If the trucks have been down, for one reason or another, the stockpile could build up to just below the roller of the belt. In most cases, the level is probably lower than that because the coal trucks run on a continuing basis.
- Q. Let's assume that the pile is at its maximum, how close would it be to the belt drive itself, the one we're talking about?
- A. It would be in close proximity to the belt drive roller.

Further, Andalex argues that the fire suppression system stopped the belt as required by 30 C.F.R. § 75.1102. Thus, no coals or belt material would be carried into the mine.

This may be true, but the fire suppression system was nevertheless inoperative at the No. 1 belt line.

Andalex further contends that an employee is not regularly at the No. 1 belt drive. Therefore, miners responding could fight any fire from a safe location or such fire-fighting miners could escape by walking out in either direction.

I reject Andalex's arguments. First of all, a fire should not occur if the suppression device is operative. Without the suppression device, the fire would have a "head start." Andalex's brief rebuts its own argument by stating (Brief pg. 5, ¶6) that "[s]pontaneous combustion fires ... are commonplace in the surface coal stockpile." The lack of a fire suppression device could easily result in an injury of a serious nature.

Citation No. 3414458 should be affirmed.

Docket Nos. WEST 90-214 and WEST 90-256

These cases involve violations of 30 C.F.R. § 75.1704. 2  
Since they are related, they will be considered together.

On March 5, 1990, in Docket No. 90-214, MSHA Inspector Taylor issued Citation No. 3414454.

On that occasion, in the area of the double doors, it was readily apparent that something was wrong as Inspector Taylor could feel air flowing towards the belt. He took readings at the top, bottom, and middle of the homemade doors. The doors meet in the middle and each side of the door measured six feet by five feet.

At the hearing, the Inspector reaffirmed his citation which read as follows:

Two separate and distinct travelable passageways, designated as escapeways, were not maintained for the 1st left active working section in that 625

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**§ 75.1704 Escapeways.**

**[Statutory Provisions]**

Except as provided in §§ 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, shall be maintained in a safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.



fpm of air flowed from the designated intake escapeway into the No. 7 belt entry through holes around and in the drive-through doors at crosscut 22. The No. 7 belt entry is the designated secondary escapeway for the 1st left active working section.

Subsequently, on March 28, 1990, the inspector issued Citation No. 3415061. The citation, restated at the hearing, reads as follows:

Two separate and distinct travelable passageways, designated as escapeways, were not maintained for the 1st left, 2nd East and 1st North active working sections in that a man was observed driving an Isuzu pickup into the No. 1 belt entry through the metal drive-thru doors at crosscut No. 1. As measured with an anemometer, 15,000 cfm of air flowed from the intake entry to the belt entry with the metal doors open. When the doors were closed, 550 fpm of air flowed from the intake entry to the belt entry. Also, holes around the bottom of the metal drive-thru doors at the No. 4 belt drive permitted 850 fpm of air to flow from the intake escapeway to the secondary escapeway. Also, the metal drive-thru doors along the No. 4 belt line at crosscuts 78 and 82 permitted 760 fpm and 610 fpm of air to flow from the designated primary intake escapeway to the designated No. 5 belt secondary escapeway.

Inspector Taylor issued the later citation as an S&S violation because three working sections were affected. Further, it had been 23 days since the initial related citation had been issued. Accordingly, he felt the operator should have corrected the later condition.

In the inspector's opinion, the hazard directly affected the integrity of the escapeways. There were sources of ignition in the mine including power lines, rollers, and belt drives.

JACK MATEKOVIC, an MSHA supervisor, had discussed leaky ventilation with Andalex management before these citations were issued.

Andalex's defense focuses on the argument that the drive-through doors were reasonably airtight.

Andalex's evidence shows that Mine Manager KENT PILLING took readings six hours after the inspector on the March 1990

citation. Mr. Pilling also had an engineering drawing prepared. The drawing showed only minimal defects in the equipment doors. (See Ex. R-9).

Further, on April 15, 1991, Andalex Safety Representative JED GIACOLETTO took an air reading at the last open cross-cut right after the second citation was written. His typed notes read as follows:

On April 15, 1991, at 4 pm, an air reading was taken in the last open crosscut of the Main North Section. The reading was taken by Jed Giacoletto. The results of the reading were:

Area:  $7.5 \times 20 = 150$  square feet  
Velocity:  $113 + \text{correction factor of } 7 = 120$   
 $150 \text{ square feet} \times 120 \text{ feet per minute} =$   
 $18000 \text{ cubic feet per minute.}$

After the reading was taken, three man-doors and a material door were opened along the section intake which divides the intake entry from the belt line entry.

Another air reading was taken in the Main North section last open crosscut after the doors were opened. The results of the reading were:

Area:  $7.5 \times 20 = 150$  square feet  
Velocity:  $103 + \text{correction factor of } 7 = 110$   
feet per minute  
 $150 \text{ square feet} \times 110 \text{ feet per minute} =$   
 $16500 \text{ cubic feet per minute.}$

The issue presented is whether Andalex maintained at least two distinct travelways. If the separation at the metal drive-through doors was reasonably airtight, then no violation existed, since two distinct travelways were maintained.

In connection with these citations, I credit Inspector Taylor's expertise and testimony that he could feel the flow of air when opposite the double doors. He further described his findings as to the doors and the related leakage. In addition, at the time of Mr. Taylor's inspections, Andalex representatives

did not in any manner dispute the Inspector's findings. Andalex's evidence is not persuasive. At best, it shows some leakage existed.

Andalex also disputes the S&S designations as to Citation No. 3415061. The applicable law as to S&S has been discussed above. In this factual scenario, which deals with one of the most important underground regulations for coal mines, there was a violation of 30 C.F.R. § 75.1704, a measure of danger--somewhat substantial--contributed to by the violation. There was a reasonable likelihood that the hazard would result in an injury. Specifically, smoke in either escapeway would cause both escapeways to be contaminated. In short, there would not be two separate and distinct travelable passageways. The likelihood of injury in a smoke-filled environment is well documented.

Andalex's extensive post-trial brief raises several issues: The operator contends the doors were reasonably airtight and, accordingly, no violation existed. This is a credibility issue previously discussed. As indicated, I have credited the inspector's views. He further explained the separate and distinct requirement of the regulation:

Q. (Mr. May): Okay. What is separate and distinct?

A. Separate and distinct means that if I have an entry that starts on the surface, that you have to maintain that through ventilation devices from the surface portal all the way to the working section separate from another entry.

Q. How is that separation accomplished?

A. In other words, those two entries cannot be common, they cannot be common at any port.

Q. Common, you mean air mixing?

A. That's right. (Tr. 71).

The amount of air, recorded and manually observed, was excessive. This was due to a lack of proper maintenance of the doors. 625 feet of leakage per minute was not "reasonably airtight."

Andalex asserts the citations were not issued because of hazardous conditions but because the operator resisted MSHA's verbal policy to install double airlock material doors.

The testimony of witness MATKOVIC is conflicting as to whether MSHA, as a policy, required double airlock doors at the time of this inspection. (Tr. 96, 98). But even such a policy would not excuse the operator if the facts otherwise establish a violation of the escapeway regulations.

Andalex asserts the theory of separate and distinct escapeways exists only in the regulations since all doors leak air. The extent of the leak is the critical matter and the facts establish the leak was excessive. Andalex says MSHA's non S&S Citation No. 3414454 is inconsistent with the subsequent citation (designated as S&S) relating to the same subject. On this issue, I credit Inspector Taylor's explanation.

Q. (Mr. Murphy): ... can you justify the issuance of an S&S citation just on the facts of the last citation?

A. Yes ... even though no citation had been previously issued, the conditions in the second Citation, 3415062, are definitely significant and substantial because of the number of people affected and because of the repeated violations of separate different belt lines because there are three belt lines involved on this violation. And, in my opinion, it is reasonably likely that if these conditions were not corrected, they would result in a reasonably serious injury at this mine. (Tr. 91).

The operator argues that if the belt entry had not been designated as the secondary escapeway, then the citations would be invalid since the doors are shown on the approved map and are therefore part of the approved ventilation plan.

It is the operator who designates the escapeways. MSHA's function is to approve them. The operator's position is rejected.

Andalex further argues that previous MSHA inspectors had not issued similar citations. The Commission and the appellate courts have rejected the doctrine. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981); the Supreme Court of the United States has ruled that the doctrine does not apply against the federal government. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power and Light co. v. United States, 243 U.S. 389, 408-411 (1927).

I have reviewed the briefs filed by the parties. To the extent they are inconsistent with this decision, they are rejected.

Citation Nos. 3414454 and 3415061 should be affirmed.

Docket No. WEST 91-126

In this case, Petitioner filed a written settlement motion. In the motion, Petitioner moved to vacate Citation No. 3409636. For good cause shown, the motion should be granted.

Andalex further agreed to withdraw its contest as to Citation Nos. 3415076 and 3415077 and to pay the related penalties of \$20 for each such violation.

The settlement motion contains information relating to the assessment of civil penalties as required by Section 110(i) of the Act.

The settlement agreement is approved and disposition is incorporated in the order herein.

CIVIL PENALTIES

The statutory criteria for assessing civil penalties is contained in 30 U.S.C. § 820(i).

Joint Exhibit 2 shows Andalex has an average adverse history. Andalex paid 91 violations in the two years prior to March 27, 1990. Before March 28, 1988, the operator paid 78 violations.

Andalex is a large operator and the proposed penalties will not affect the company's ability to continue in business (Stipulation).

The operator was negligent in that a company representative could have detected the flow of air through and around the doors.

The gravity has been discussed; further, the operator demonstrated good faith in abating the violations.

Considering the statutory criteria, I believe the penalties assessed in the order of this decision are appropriate.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

Docket No. WEST 90-213

1. Citation No. 3414458 is AFFIRMED and a penalty of \$100 is ASSESSED.

Docket No. WEST 90-214

2. Citation No. 3414454 is AFFIRMED and a penalty of \$20 is ASSESSED.

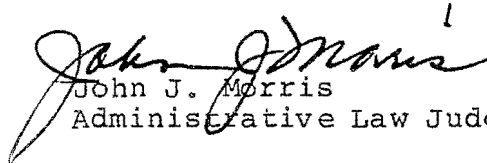
3. Citation No. 3415061 is AFFIRMED and a penalty of \$200 is ASSESSED.

Docket No. WEST 91-126

4. Citation No. 3409636 and all penalties are VACATED.

5. Citation No. 3415076 and the proposed penalty of \$20 are AFFIRMED.

6. Citation No. 3415077 and the proposed penalty of \$20 are AFFIRMED.

  
John J. Morris  
Administrative Law Judge

Distribution:

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Mr. Thomas R. May, Safety Director, Mr. Kent Pilling, ANDALEX RESOURCES, INC., P.O. Box 902, Price, UT 84501 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

AUG 6 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-97
Petitioner	:	A. C. No. 15-13469-03730
	:	
v.	:	Docket No. KENT 90-120
	:	A. C. No. 15-13469-03737
GREEN RIVER COAL COMPANY,	:	
INC.,	:	Docket No. KENT 90-444
Respondent	:	A. C. No. 15-13469-03756
	:	
	:	No. 9 Mine

## DECISION

Appearances: W. F. Taylor, Esq., Office of the  
Solicitor, U. S. Department of  
Labor, Nashville, TN, for the  
Petitioner;  
B. R. Paxton, Esq., Central City,  
KY, for the Respondent.

Before: Judge Fauver:

The Secretary of Labor seeks civil penalties for alleged safety violations in these consolidated cases, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Respondent moved to strike the Secretary's posthearing brief on the ground that government counsel failed to include references to the transcript. The Secretary was allowed time to add such references. Counsel for the Secretary did so, and the motion to strike is DENIED.

In filing a new brief with references to the transcript, the Secretary's counsel stated in the cover letter that "we find that [the procedural regulations and the Act] do not require transcript references in briefs filed with the Commissions Judges. \*\*\* [M]any, many, times, because of budget constraints, this office is prohibited from purchasing trial transcripts and the post-trial briefs are, therefore, written based upon the attorney's trial notes."

I find counsel's position to be in error. The professionalism required of an attorney to submit page references to the transcript

does not need a procedural rule. This judge expects attorneys to submit professionally prepared briefs, not to be based on guesswork or surmise and not to cause the other parties and the trial judge to search the hearing record for support for the counsel's recollection or "notes" as to what was said at the trial. The Mine Act is a very important piece of legislation. It authorizes the Commission to adjudicate very serious and complicated matters involving safety and health in the mines and the due process rights of parties, including allowing a mine to remain closed for violations or to be reopened, determination of violations, assessment of civil penalties with a limit of \$50,000 for each violation, reinstatement of miners with substantial awards of back pay, attorney fees and other litigation costs, etc. Litigation under this statute is not to be reduced to the government's guesswork as to what was proved or disproved in a formal, accusatory hearing.<sup>1</sup>

If, in the future, the government does not choose to obtain a transcript, it may use the Commission's public reading room to read the transcript and make references to it.

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

#### **FINDINGS OF FACT**

##### **Citation No. 3420966**

1. At all relevant times Respondent operated an underground coal mine, known as Green River Coal #9, which produced coal for sale or use in or affecting interstate commerce.

2. Federal Coal Mine Inspector Bobby Clark inspected the mine on May 9, 1990, accompanied by Respondent's Safety Director, Mike McGregor, and the miners' representative, Ron Nelson. As the men walked inby (toward the working section) at the 8A seals, the alarm on Inspector Clark's methane detector sounded, showing a presence of 1.4 percent methane. He was in front of the No. 4 seal. Inspector Clark checked each seal as he passed it and the methane gas reading remained 1.4 percent. He checked the return entry, about 100 feet inby the first seal, and the methane gas accumulation was still 1.4 percent. Inspector Clark inspected each seal and determined that no leaks were present. He concluded that the methane was in the return airsplit from the No. 2 working section, and told McGregor that he was issuing a citation under 30

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<sup>1</sup> A different situation exists when the parties present oral arguments before a transcript is prepared. Such is not the case here.



C.F.R. § 75.309(a), which provides in pertinent part:

If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. \* \* \*

3. Later in the day, after Inspector Clark returned to the surface, he observed that the fire boss who examined the area on May 8, 1990, had recorded in the examiner's book on that date the presence of 1.5 percent methane gas all across the area in front of the 8A seals and his report was countersigned by Foremen Cates and Whitfield. He then determined that the citation should be issued under § 104(d)(1) of the Act, charging an unwarrantable violation.

Citation No. 3420800

4. Inspector George W. Siria inspected the mine on December 13, 1989, accompanied by Respondent's Safety Director McGregor and miners' representative Nelson. Before they arrived at the working section, they were told there was no power on the section and a roof fall may have struck the power transmission cable.

5. When he reached the section, Inspector Siria examined the roof, took an air reading and started making methane checks. He found methane in excess of 1.0 percent in nine locations, which he pointed out to McGregor. He issued § 104(a) Citation No. 3420800 charging a violation of 30 C.F.R. § 75.302, which provides:

(a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately.

(b) The space between the line brattice or other approved device and the rib shall be large enough to permit the flow of a sufficient volume and velocity of air to keep the working face clear of flammable,

explosive, and noxious gases, dust and explosive fumes.

(c) Brattice cloth used underground shall be of flame-resistant material.

Citation No. 3421762

6. Inspector Siria observed accumulations of coal dust and loose coal in the same section where he found excessive methane. Based on these observations, he issued § 104(d)(1) Citation No. 3421762, charging a violation of 30 C.F.R. § 75.400, which provides:

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

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3420966

The key issue is whether the one percent methane level of 30 C.F.R. § 75.309(a) or the two percent level of § 75.312-2(d) applies to the place where Inspector found 1.4 per cent methane inby the 8A seals.

The government contends that the inspector found 1.4 percent methane in a split of air returning from No. 2 working section inby the first seal, and therefore 30 C.F.R. § 75.309(a) applies. That section provides:

If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. Tests under this § 75.309 shall be made at 4-hour intervals during each shift by a qualified person designated by the operator of the mine. In making such tests, such person shall use means approved by the Secretary for detecting methane.

Respondent contends that the methane was being liberated from an abandoned area inby the 8A seals, and therefore 30 C.F.R. § 75.312-2(d) and § 75.309-2 apply. These sections provide:

30 C.F.R. § 75.312-2(d)

The methane content in any return aircourse other than an aircourse returning the split of air from a working section (as provided in § 75.309 and 75.310) should not exceed 2.0 volume per centum.

30 C.F.R. § 75.309-2

The methane content in a split of air returning from any working section shall be measured at such point or points where methane may be present in the air current in such split between the last working place of the working section ventilated by the split and the junction of such split with another airtail or the location at which such split is used to ventilate seals or abandoned areas.

The focus thus sharpens to the question whether the area contended by Respondent to be an abandoned area (see Exhibit R-1, area marked from "X" to "Y") was an abandoned area within the meaning of § 75.309-2.

"Abandoned area" is defined in 30 C.F.R. § 30.75.2(h) as follows:

"Abandoned areas" means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D of this Part 75.

If an operator contends that an area is abandoned, or is to become abandoned, § 75.330 provides that the operator must follow a "plan ... approved by the Secretary and adopted by such operator so that, as each working section of the mine is abandoned, it can be isolated from the active workings of the mine with explosion-proof seals or bulkheads."

Respondent's Safety Director testified that an abandoned area existed about 2500 feet outby the No. 2 working section, and inby the place where Inspector Clark reported methane. He described it as an area where "we had either roof falls or the condition of the roof was such that we couldn't go in and make these safe and we couldn't mine them safely." Tr. 77. He further stated "the examiner was making his weekly exam staying in the timber walkway." Id. The examination books reported that this area was being examined weekly.

When the citation was issued by Inspector Clark, Respondent did not say that this was an abandoned area, so that he could investigate the claim. Nor did it offer proof at the hearing that it was following an approved plan for designating this area as abandoned and sealing it from active workings. In addition, the return airway was clearly an "active working" within the meaning of 30 C.F.R. § 75.2(g)(4), which provides: " '[a]ctive workings' means any place in a coal mine where miners are normally required to work or travel." I find that the area Respondent claims to be abandoned was not "abandoned" within the meaning of the Act or regulations. The area cited by the inspector was an airsplit returning air from a working section and inby the first sealed or abandoned area within the meaning of § 75.309-2. The Secretary proved a violation of § 75.309(a), because 1.5 per cent methane had been detected by the operator on May 8, 1990, and the operator had not complied with § 75.309(a) by making changes so that the "returning air shall contain less than 1.0 volume per centum of methane."

#### Unwarrantable Violation

The Commission has held that an "unwarrantable" failure to comply means "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987). As defined in the legislative history, an "unwarrantable" failure is "failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1512 (1975); see also id., at 1602; and see: Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978).

After Inspector Clark returned to the surface, he discovered that the fire boss who examined the area on May 8, 1990, recorded in the examiner's book on that date the presence of 1.5 percent methane gas all across the area in front of the 8A seals, and this report was countersigned by two Green River supervisors, Foremen Cates and Whitfield. He determined that the citation should be issued under § 104(d)(i) of the Act, charging an unwarrantable violation.

Respondent's Safety Director, McGregor, testified that his inquiries indicated the foremen signed the examiner's book on May 8, 1990, before it was completed for that date and they did not see the entry reporting 1.5 percent methane. Tr. 87-88. The foremen, Whitfield and Cates, did not testify at the hearing.

I do not credit the Safety Director's hearsay testimony as

reliable evidence of an explanation for Respondent's failure to heed the examiner's report of 1.5 percent methane. Respondent is accountable for the information provided in the examiner's book, and its supervisors are required to read the examiner's report and countersign it. Absent the testimony of the supervisors as to their reasons for not taking action as required by § 75.309(a), with the opportunity of government counsel to cross-examine, I find that the examiner's report is imputable to Respondent. The methane was being liberated from an unsealed area where roof falls could build up methane to an explosive level. Prompt action was required. Respondent's failure to heed the report of excessive methane was aggravated conduct, sustaining the inspector's finding of an unwarrantable violation.

#### A Significant and Substantial Violation

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (§ 104(d)(1) of the Act; emphasis added). Also, under the statute, (1) an "imminent danger" is defined as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated," <sup>2</sup> and (2) an S&S violation is less than an imminent danger. <sup>3</sup> It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a

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<sup>2</sup> Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.

<sup>3</sup> Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger . . . ."

substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease is more probable than not.

As stated above, the methane was coming from an unsealed area where roof falls could build up methane to an explosive level. Under continued mining conditions, sources of ignition would be present. The violation presented a substantial possibility of resulting in a mine explosion or fire caused by methane ignition. It was therefore a significant and substantial violation.

#### Section 104(b) Order

When Inspector Clark issued Citation No. 3420966, he believed a reasonable time to reduce the methane level to below one percent was 24 hours. However, his supervisor directed him to allow only two hours for abatement. Respondent began immediate abatement work when Inspector Clark first told McGregor that he found 1.4 percent methane and would be issuing a citation. Respondent reduced the methane level by building eight seals and four concrete blocks across the area later claimed to be abandoned. This was done by 6:00 p.m. on the following day, well within the 24 hours expected by the inspector. When the inspector returned three hours after he issued the citation, abatement work was in progress, but the inspector did not extend the abatement period. Instead, he issued § 104(b) Order No. 3420967, for failure to abate within the time provided in the citation.

I find that Respondent demonstrated good faith and reasonable speed in abating the methane condition after the inspector brought it to Respondent's attention.

In the absence of a finding of imminent danger, which was not the case here, it was arbitrary for Inspector Clark's supervisor to direct him to allow Respondent only two hours to abate the condition cited in the citation. The order shall be vacated.

Considering all the criteria for a civil penalty in § 110(i) of the act, I find that a penalty of \$1,200 is appropriate for the violation proved under Citation No. 3420966.

#### Citation No. 3420800

On December 13, 1989, Inspector George W. Siria issued § 104(a) Citation No. 3420800, which charged:

Properly installed and adequately maintained line brattice or other approved devices were not continuously used from the last open crosscut to provide adequate ventilation to the working section. There was CH<sub>4</sub> present in the following places when checked one foot

from roof, face & rib, No. 1. = 1.0%, 2. = 1.2%, 2xL = 1.0%, 6 = 1.1%, and 6xR 1.0% this was on the No. 2 unit, ID. 007.

The citation charges a violation of 30 C.F.R. § 75.302, which provides in pertinent part:

Properly installed and adequately maintained line brattices or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes .... [Emphasis added.]

At the hearing, the inspector acknowledged that the brattices were properly installed and maintained (Tr. 120, 123). The ventilation problem was that someone had left a man door open some distance outby the last open crosscut. After the door was closed, in two hours or so the methane level was reduced below one percent.

Since the problem was an improperly opened man door outby the last open crosscut, and not line brattice or other ventilation devices inby the last open crosscut, I find that the Secretary did not prove a violation of § 75.302, which applies only "from the last open crosscut" toward the working face.

#### Citation No. 3421762

On December 13, 1989, Inspector Siria issued § 104(d)(1) Citation No. 3421762, for a violation of 30 C.F.R. § 75.400. There were accumulations of loose coal and coal dust 6 to 12 inches deep along the ribs in the Nos. 1 through 8 entries to a point about 75 feet outby the working faces, a large coal spillage in the crosscut in No. 7 entry, loose coal and coal dust around the belt, and cribs constructed on loose coal. These accumulations were obvious, substantial, and should have been prevented from developing.

Respondent contends that the accumulations were not dangerous because the power was off. However, the gravity of conditions observed by an inspector is evaluated by assuming continued normal mining operations. Assuming continued mining operations, the accumulations of coal dust and loose coal presented a substantial possibility of resulting in or propagating a mine fire. This is sufficient to establish a "significant and substantial" violation, as discussed above. The testimony of the Respondent's Safety Director that the coal dust was wet, and most of it was "mud" (Tr. 139), does not disprove an S&S violation. Loose coal is not "mud" and can propagate a mine fire. Once a fire spreads, the heat can rapidly dry loose coal or coal dust and further propagate a fire. A mine fire is one of the principal dangers in underground coal

mining. Permitting substantial accumulations of fuel for a fire underground is a "significant and substantial" violation. Given the obvious conditions involved here, the extensive amount of accumulations, and the danger to the miners, the evidence shows aggravated conduct, sustaining the inspector's finding of an unwarrantable violation.

Considering all the criteria for a civil penalty is § 110(i) of the Act, I find that a penalty of \$1,000 is appropriate for the violation proved under Citation No. 3421762.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. § 75.309 as alleged in Citation No. 3420966.
3. Respondent violated 30 C.F.R. § 75.400 as alleged in Citation No. 3421762.
4. The Secretary failed to prove a violation of 30 C.F.R. § 75.302 as alleged in Citation No. 3420800.
5. Order No. 3420967 is invalid as being arbitrary and unreasonable.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 3420967 is VACATED.
2. Citation No. 3420800 is VACATED.
3. Citation Nos. 3420966 and 3421762 are AFFIRMED.
4. Respondent shall pay civil penalties of \$2,200 within 30 days from the date of this decision.

  
William Fauver  
Administrative Law Judge

#### Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 6 1991

PYRO MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 91-169-R
	:	Citation No. 3550463;
SECRETARY OF LABOR,	:	2/11/91
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Pyro No. 9 Wheatcroft
Respondent	:	
	:	Mine ID 15-13920

## DECISION

Appearances: Robert I. Cusick, Esq., Wyatt, Tarrant & Combs,  
Louisville, Kentucky, for Contestant;  
W. F. Taylor, Esq., U. S. Department of Labor,  
Office of the Solicitor, Nashville, Tennessee, for  
the Secretary.

Before: Judge Maurer

This contest proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of a single Section 104(a) citation issued by an MSHA mine inspector. The issue is whether the contestant violated the cited mandatory safety standard; or more specifically, whether Pyro Mining Company failed to comply with its approved ventilation plan.

Pursuant to notice, a hearing was held in this case on May 9, 1991, in Owensboro, Kentucky. The parties have both filed post-trial briefs, which I have duly considered in making the following decision.

Section 104(a) Citation No. 3550463, issued on February 11, 1991, by MSHA Inspector James E. Franks, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, and the cited condition or practice is described as follows:

The approved Ventilation Plan (approved 11/29/90 see page 3) was not being followed in that crosscuts had not been positioned at or near the face of the Nos. 1 thru 16 rooms in the 2nd North panel. The mining conditions in these areas were good.

Pyro Mining Company is charged with a failure to follow one of the provisions of its approved ventilation plan. Any violation of an approved plan provision would constitute a violation of mandatory safety standard 30 C.F.R. § 75.316, which provides as follows:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The applicable ventilation plan provision in question is found on page 3 of Pyro's approved plan dated November 29, 1990, and it states as follows:

All dead end places shall be ventilated. When practical, crosscuts will be positioned at or near the face of each entry or room before it is abandoned. Otherwise, line curtains will be installed as needed.

The facts of the case are straightforward. During the course of a regular quarterly inspection of Pyro's No. 9 Wheatcroft Mine, Inspector Franks observed that Pyro had failed to cut and position crosscuts at or near the face of the abandoned rooms in the second North panel, identified as rooms numbered 1 through 16. Inspector Franks also noted that ventilation curtains were in place and there was no evidence of methane in the area. He further observed that the roof in the area was good, no water was present and in fact, he opined there were no adverse mining conditions present which would have prevented the operator, from a purely safety standpoint, from making the crosscuts at or near the face of the aforementioned rooms.

Basically, it is the Secretary's position that the plan requires crosscuts be provided if it can be safely done. To the Secretary, the phraseology, "when practical" means in this context that the operator must position crosscuts at or near the face of abandoned rooms, unless because of safety considerations, it would be more dangerous to do so than to place line curtains. The inspector testified that the working definition of "practical" at least in District 10 is that the only excuses the operator would have for not putting the crosscuts through is if

they had bad top or water in the area, i.e., unsafe conditions.

Pyro, however, does not agree that these are the only two allowable considerations of practicability. I have to concur that this limitation is not clearly apparent from the approved ventilation plan.

If "impractical" can be used as the antonym of "practical," then the Secretary would define "impractical" for the purposes of this case as an act which is impossible to safely perform given the conditions at hand, i.e., water or bad roof. But the ventilation plan does not state "when possible"; it states "when practical" which implies that a fuller range of circumstances could be considered. The inspector himself acknowledged that if we disregard for a moment the very restrictive definition of "practical" that District 10 has devised, then there are many other considerations that could go into determining what is "practical."

There are certainly imaginable situations where it would be possible to make these crosscuts safely, but it would not be practical. Pyro believes that their mining procedure is one such instance. Typically, the first and second shifts work coal production. They try to move out of a set of rooms at the end of the second shift. Then the third shift crew is responsible for the moving of the equipment to position it for the next day's work. Therefore, Pyro's position is that when they abandon a room, they take all operational factors into account (safety factors as well as economic factors) in determining whether it is practical to place crosscuts. If not, line curtain is hung to ensure proper ventilation. In years past, this has been an acceptable interpretation of this provision of the ventilation plan. Pyro has not previously received a citation for a violation of this portion of the plan even though their mining methods have remained unchanged until the instant citation was issued.

The Secretary points out that 30 C.F.R. § 75.316-2 which provides criteria for approval of ventilation plans states that:

A crosscut should be provided at or near the face of each entry or room before the place is abandoned.

However, that section also provides in pertinent part that:

A ventilation system and dust control plan not conforming to these criteria may be approved, providing the operator can satisfy the District Manager that the results of such ventilation system and dust control plan will provide no less than the same measure of protection to the miners.

Pyro's plan did not strictly conform to that particular criteria. The District Manager approved the plan with a somewhat less than mandatory requirement for crosscuts. It is clear that crosscuts are preferred (when practical) but line curtain, as needed, is an alternative albeit less desirable means of compliance. The inspector testified that what this provision really means is that crosscuts are required except in two instances (bad roof or water in the area). Even so, this still does not absolutely incorporate the suggested criteria. The District Manager has allowed for alternative compliance; the only dispute is when is the alternative permissible.

Essentially, the answer to that query is whenever the District Manager says it is. But the important feature to make his intention enforceable is to put it clearly into the approved plan. As it now stands, the inspector's interpretation, which he claims is the District's interpretation, is not to be found in the document. That is the key. The language contained in the plan does not support the allegation that Pyro is not in compliance.


Apparently for years, "practical" in this context was interpreted broadly enough to include all relevant considerations and Pyro's mining practices under the approved plan passed muster. Now a new "unwritten rule" is in effect, without prior notice to the operator and most importantly, without amendment to the plan. Pyro complains that this does not comport with standards of basic fairness, let alone give the operator notice or an opportunity to be heard concerning the changed enforcement procedure. I agree. If the District Manager wishes to make a change to the operator's ventilation plan, he may certainly do so as part of the approval process, but it is not too much to ask that he clearly state what the provisions are to be in writing.

I also take note and it should be clear herein that the inspector found that adequate line curtain was installed and all dead end places were sufficiently ventilated in the affected areas.

Under the circumstances, I find that the Secretary has failed to establish a violation of the cited ventilation plan provision and therefore the citation at bar will be vacated.

ORDER

On the basis of the foregoing findings and conclusions, **IT IS ORDERED THAT** Section 104(a) Citation No. 3550463, citing an alleged violation of 30 C.F.R. § 75.316, **IS VACATED**, and Pyro Mining Company's contest **IS GRANTED**.

  
Roy J. Maurer  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 7 1991

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 89-72-D
ON BEHALF OF	:	MSHA Case No. NORT CD-89-18
AMOS HICKS,	:	
Complainant	:	
v.	:	
COBRA MINING, INC.,	:	
JERRY K. LESTER and	:	
CARTER MESSER,	:	
Respondents	:	

## DECISION

Before: Judge Weisberger

On June 4, 1991, a Decision on Remand was issued which, intra alia directed Complainant to file a statement indicating the specific relief requested, and allowed Respondent to file a reply 20 days from the date of service upon it of Complainant's statement. On June 24, 1991, Complainant filed his statement of requested relief, and Respondent filed their response on July 15, 1991.

In his statement Complainant seeks back wages of \$5,111.59, along with interest in the amount of \$1,024.85. He also seeks telephone charges of \$57.18, mileage of \$319.18, medical bills of \$490.91, lost wages for trial attendance of \$100 and hotel costs for trial attendance of \$47, all of which are essentially alleged to be costs incurred as a consequence of Respondents discriminatory discharge of him. Complainant also seeks \$95.39, for work boots which he alleges are required in the State where he obtained new employment. Complainant also asserts further that subsequent to his discharge by Respondent he did not have any income, and could make payments on his truck which was repossessed and resold causing him to loose his equity in the truck totally \$4,818.80. He thus seeks that amount plus \$5,042.20, the amount still owned by him after the repossession. Also the Secretary seeks a civil penalty of \$1,500.

Respondents' reply contains an objection only to Complainant's request for consequential damages arising out of the loss of his truck. As such, I conclude that, inasmuch as Respondents have not specifically objected to any other item of

Complainant's request for damages, that they be allowed.

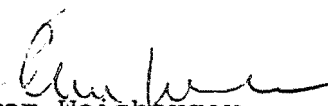
In resolving the issue of Respondents' liability for consequential damages arising out of the repossession of Complainant's truck, I note that the legislative history of the Federal Mine Safety and Health Act of 1977 ("the Act") reveals an intent to require that the scope of relief provided shall encompass "...all relief that is necessary to make the complaining Party whole... ." (Senate Report on the Act, S. Rep. No. 181, 95 Cong., 1st sess., at 37 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, "Legislative History") at 625 (1978)). Thus it is Respondents' obligation to put Complainant in the position he would be in if there had not been a discriminatory discharge in violation of the Act. (Secretary on behalf E. Bruce Nolan v. Luck Quarries, 2 FMSHRC 954 (1980) (ALJ Merlin)). I thus find that the loss of equity in the truck occurred as a direct consequence of Complainant's discharge and hence, to make Complainant whole Respondents have the obligation of replacing the lost equity in the truck (Nolan supra at 961). However, the amount still owing on the loan constitutes Complainant's obligation under the loan, and does not appear to be related to his having lost his employment. Accordingly, Respondents are not obligated to pay him that sum.

It is hereby ORDERED that, within 30 days of this decision, Respondents shall pay Complainant the following amount:

Lost Equity in the Truck	\$4,818.80
Back wages	5,111.59
Interest on Back wages	1,024.85
Telephone charges	57.18
Work Boots	95.39
Automobile mileage	319.18
Medical Bills	490.91
Lost wages for trial attendance	100.00
Hotel Cost for trial attendance	47.00

It is further ORDERED within 30 days of this Decision Respondent shall pay a civil penalty of \$1,500.

It is further ORDERED that the Decision issued June 4, 1991 is now final.

  
Avram Weisberger  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**AUG 8 1991**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-27
Petitioner	:	A. C. No. 46-01867-03864
v.	:	
	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY	:	
Respondent	:	

**DECISION**

Appearances: Page H. Jackson, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for the Secretary of Labor (Secretary);  
Walter J. Scheller III, Esq., Pittsburgh,  
Pennsylvania, for Consolidation Coal Company  
(Consol).

Before: Judge Broderick

**STATEMENT OF THE CASE**

The Secretary seeks civil penalties for three alleged violations of mandatory safety standards alleged in three citations issued on August 31, 1990. Pursuant to notice, the case was called for hearing in Morgantown, West Virginia, on April 17-18, 1991. At the hearing, the Secretary proposed a settlement with respect to one of the alleged violations. After the close of the hearing she submitted a settlement motion with respect to a second alleged violation. With respect to the other one, Federal Coal Mine Inspector Joseph Migaiolo testified on behalf of the Secretary. John Morrison and Craig G. Yanak testified on behalf of Consol. Both parties have filed Posthearing Briefs. I have considered the entire record and the contentions of the parties in making the following decision.

**SETTLEMENT MOTION CITATION NO. 3314114**

This citation alleged a violation of 30 C.F.R. § 75.400 because an accumulation of loose coal and float coal dust had been deposited on the P-8 longwall roof support shield and other parts of the longwall. The violation was alleged to be significant and substantial, and caused by Consol's moderate negligence.



It was assessed at \$500. The motion proposes a reduction to \$350 on the ground that the negligence should be reduced to low negligence. I have considered the motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

#### SETTLEMENT MOTION CITATION NO. 3314113

On August 5, 1991, the Secretary filed a motion for approval of a settlement whereby Consol agreed to pay the amount originally assessed, \$276. The citation alleged a violation of 30 C.F.R. § 75.305 because Consol failed to conduct an adequate weekly examination in that it failed to report a hazardous roof condition in the intake escapeway. I have considered the motion in the light of the criteria in Section 110(i) of the Act, and conclude that it should be approved.

#### FINDINGS OF FACT

Consol was at all pertinent times the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Blacksville No. 1 Mine. Consol is a large operator. The imposition of penalties in this case will not affect its ability to continue in business. The subject mine has an average history of prior violations for a mine of its size, and any penalties imposed herein will not be increased or decreased because of that history. The violations involved in this case were abated timely and in good faith.

#### CITATION NO. 3314111

On August 31, 1990, there was an accumulation of hydraulic pump fluid covered with fine coal and coal dust on a hydraulic pump sled inby the mantrip station along an active travelway in the subject mine. The material measured from 1/8 to 1/4 inch in depth. The extent of the accumulation was such that it would have taken several working shifts to develop. The pump has a 440 volt AC motor. A 104(d)(2) Order was issued for a violation of 30 C.F.R. § 75.400. That Order is not before me in this proceeding, which only involves an alleged violation of 30 C.F.R. § 75.303(a). The hydraulic fluid consists of a white emulsion combination of oil and water. In the material on the sled, the water had partially evaporated leaving a yellow sticky residue which the inspector believed to be combustible. No sample of the material was taken to test its combustibility. Craig Yanak, Consol's Supervisor of dust, noise control, and hazardous chemicals, testified that the hydraulic fluid was 95 percent water and 5 percent concentrate. The concentrate is itself only 5 percent petroleum. Based on Yanak's discussion with the manufacturer, he believed the product would not be combustible under normal mining conditions. Consol submitted a letter from the manufacturer

stating that once the product is mixed with water, the water cannot evaporate sufficiently to make the residue combustible. (Operator's Ex 1). The August 31, 1990, preshift examiner's report did not refer to the accumulation on the pump sled. Inspector Migaiolo issued the contested citation charging a violation of 30 C.F.R. § 75.303(a) because he believed that the failure to note the condition showed that an adequate preshift examination was not performed.

I find that the accumulation on the pump sled was combustible regardless of the combustibility of the hydraulic fluid itself, since it contained coal, coal dust, and float coal dust. The accumulation was clearly visible. Therefore, it should have been seen by the mine examiner and reported in the examiner's book.

The pump sled motor constituted an ignition source. If a fire broke out it would travel directly to the longwall face where miners were working. The citation was terminated September 6, 1990. The inspector determined that adequate preshift examinations were being conducted as of that date.

#### REGULATIONS

30 C.F.R. § 75.303(a) provides as follows:

(a) within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which

coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil on a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

#### ISSUES

1. Whether the evidence establishes that the cited violation occurred?
2. If so, was the violation significant and substantial?
3. If so, what is the appropriate penalty?

#### CONCLUSIONS OF LAW

Consol is subject to the provisions of the Mine Act in the operation of the Blacksville No. 1 Mine. I have jurisdiction over the parties and subject matter of this proceeding.

#### CITATION NO. 3314111

I have found as a fact that the accumulation on the hydraulic pump sled was combustible. It was evident and created a hazard. Therefore, the mine examiner should have reported and recorded it in the preshift examination book. His failure to do so constituted a violation of 30 C.F.R. § 75.303(a). Because

there was an ignition source at the area of combustible accumulation, the condition created a hazard and failure to note it would permit it to go uncorrected. A fire could result and cause injury to miners. The violation was reasonably likely to result in such injuries and was therefore significant and substantial. See Mathies Coal Co., 6 FMSHRC 1 (1984). It was a serious violation, and resulted from Consol's negligence since the condition was obvious to visual observation. Based on the criteria in Section 110(i) of the Act, I conclude that \$400 is an appropriate penalty for the violation.

#### ORDER

Based on the above findings of fact and conclusions of law, **IT IS ORDERED:**

1. Citation No. 3314111, including its designation of the violation as significant and substantial, is **AFFIRMED**.

2. Citation No. 3314113, including its designation of the violation as significant and substantial, is **AFFIRMED**.

3. Consol shall, within 30 days of the date of this Decision, pay the following civil penalties:

<u>CITATION</u>	<u>AMOUNT</u>
3314111	\$400
3314113	\$276
3314114	<u>\$350</u>
TOTAL	\$1026

*James A. Broderick*

James A. Broderick  
Administrative Law Judge

#### Distribution:

Page H. Jackson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Walter J. Scheller III, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

dcp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 8 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-10-M
Petitioner	:	A. C. No. 20-00667-05511
v.	:	
	:	Leix Road Dredge and Mill
ANDERSEN SAND & GRAVEL	:	
COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor,  
U. S. Department of Labor, Chicago, Illinois, for  
the Secretary of Labor (Secretary);  
Frank M. Andersen, President and Owner, Andersen  
Sand & Gravel Company (Andersen), for Respondent.

Before: Judge Broderick

## STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of the mandatory safety standard in 30 C.F.R. 56.9300(a) at Andersen's Leix Road Dredge and Mill. The violation was charged in a 104(d)(1) citation because of the unwarrantable failure of Andersen to comply with the regulation. Pursuant to notice, the case was called for hearing in Bay City, Michigan on July 23, 1991. Federal Mine Inspector Victor W. Chicky testified on behalf of the Secretary, and the Secretary called Charles Corl, Supervisor of the subject plant as a witness. Andersen cross-examined both witnesses, but did not call any additional witnesses. Both parties waived their right to file post-hearing briefs and argued their respective positions on the record. I have considered the entire record and the contentions of the parties in making the following decision.

## FINDINGS OF FACT

1. Andersen is the owner and operator of a sand and gravel pit in Tuscola County, Michigan, known as the Leix Road Dredge and Mill. Its operations affect interstate commerce.

2. The plant is a small operation, which produces sand and gravel seasonally. It has one full time and one part time employee. In 1989, it produced and sold 45,889 tons of material. During the year, prior to the violation alleged herein, 3789 production hours were worked.

3. Andersen's history of prior violations is not such that a penalty otherwise appropriate should be either increased or decreased because of it.

4. The imposition of a penalty in this proceeding will not affect Andersen's ability to continue in business.

5. The subject operation involves the dredging of gravel from a lake or pond and transporting it by conveyor to a mill where it is screened, crushed, sized, washed, and distributed to customers.

6. In approximately November 1989, Andersen's Supervisor Charles Corl removed a berm which had been constructed at the dredging area of the plant in order to work on machinery involved in the floating dredge.

7. Between November 1989, and late March 1990, the dredging operation was shut down, although gravel continued to be sold to customers.

8. From the time the operation began in late March 1990, until May 2, 1990, Corl was involved in producing 2s sand which was needed by a customer. He knew the berm was missing, but had not gotten around to replacing it.

9. On May 3, 1990, a berm between 10 and 50 feet wide was missing from the dredging area at the lake. The vertical drop to the lake was about 12 feet.

10. The water in the lake was between 4 and 10 feet deep, shallower at the edge.

11. Corl was operating a front-end loader in the area. The loader was about 22 feet long and weighed 18 tons. Tracks were seen approaching 8 to 10 feet from the vertical drop off.

12. On May 3, 1990, Inspector Chicky issued a citation under Section 104(a) charging a violation of 30 C.F.R. § 56.9300(a). It was modified on May 7, 1990, to a 104(d)(1) citation because of the unwarrantable failure of Andersen to comply with the standard.

13. The condition was abated immediately and the citation was terminated 20 minutes after it was issued.

## REGULATION

30 C.F.R. § 56.9300(a) provides as follows:

Berms on guard rails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

## ISSUES

1. Whether the evidence establishes a violation of the safety standard requiring berms?
2. If so, what is the appropriate penalty?

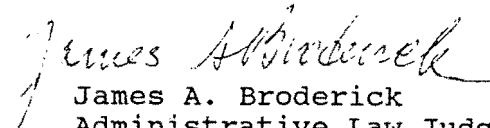
## CONCLUSIONS OF LAW

1. Andersen is subject to the provisions of the Mine Act in the operation of the subject facility, and I have jurisdiction over the parties and subject matter of this proceeding.
2. Andersen failed to have a berm or guardrail on 10 to 50 feet of the bank of a roadway where a drop off of 12 feet existed. This is a violation of 30 C.F.R. § 56.9300(a).
3. The violation was serious. It could have resulted in the front-end loader overturning, and the operator being severely injured or even drowned.
4. Andersen was aware of the violation, and the failure to comply with the standard was an unwarrantable failure.
5. Based on the criteria in Section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$500.

## ORDER

Based on the above findings of fact and conclusions of law, **IT IS ORDERED:**

1. Citation No. 3444340 is **AFFIRMED**.
2. Respondent shall, within 30 days of the date of this decision, pay to the Secretary a civil penalty in the amount of \$500 for the violation found herein.

  
James A. Broderick  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

AUG 8 1991

METTIKI COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. YORK 89-19-R
v.	:	A. C. No. 3110337; 11/30/88
	:	
SECRETARY OF LABOR,	:	Docket No. YORK 89-20-R
MINE SAFETY AND HEALTH	:	A. C. No. 3110339; 11/30/88
ADMINISTRATION (MSHA),	:	
Respondent	:	Mettiki General Prep Plant
	:	Mine ID 18-00671

**FINAL ORDER ON REMAND**

A penalty settlement of the two citations involved in these proceedings was approved on July 12, 1991, in Docket No. YORK 89-42. Accordingly, all proceedings in the above cases are CONCLUDED.

  
William Fauver  
Administrative Law Judge

**Distribution:**

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 9 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 91-104
Petitioner	:	A. C. No. 15-05423-03653
	:	
v.	:	Mine No. 1
	:	
MANALAPAN MINING COMPANY, INC.,	:	
Respondent	:	

## DECISION

Appearances: G. Elaine Smith, Esq., Office of the  
Solicitor, U. S. Department of  
Labor, Nashville, TN, for the  
Petitioner;  
Susan C. Lawson, Esq., Harlan, KY,  
for the Respondent.

Before: Judge Fauver

The Secretary brought this case for civil penalties for two alleged violations of safety standards, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

One of the citations (No. 99877861) was settled at the hearing, and Respondent was ordered to pay a penalty of \$157. The other citation went to hearing on the merits.

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

## FINDINGS OF FACT

1. At all relevant times, Respondent operated an underground coal mine, known as Mine No. 1, which produced coal for sale or use in or affecting interstate commerce.

2. On July 23, 1990, Federal Mine Inspector Larry Bush issued § 104(d)(1) Citation No. 3383894 to Respondent, for a

violation of 30 C.F.R. § 75.312,<sup>1</sup> alleging that the ventilating air current for 004 working section was passing through a gob area (where pillars had been removed). Inspector Bush found that air from the gob area was passing into the intake air course through nine ventilation curtains hung along the intake air entry. He checked the movement of air in front of the curtains by using a smoke tube and by feeling the movement of the air. He did not check behind the curtains before issuing the citation.

3. Foreman Charles Polly was unsure how to abate the cited condition, because the nine curtains appeared to him to be snug and free of leaks. He took men to the bleeder system, and put up additional curtains there. He did not adjust, repair, or change the nine curtains observed by Inspector Bush.

4. The citation allowed 47 minutes to abate the cited condition. After that time passed, Inspector Bush issued § 104(b) Order No. 3383897.

5. After Foreman Polly installed curtains in the bleeder system, he returned and Inspector Bush told him he issued the § 104(b) order because air was still coming through the nine curtains. Foreman Polly asked the inspector to check the air with him before any miners were withdrawn under the § 104(b) order. The inspector agreed to do so.

6. Inspector Bush and Foreman Polly then went to the front of one of the nine curtains near the gob area. They could feel air coming around the curtain and Inspector Bush confirmed the flow of air with a smoke test. They then went behind the curtain and the inspector conducted another smoke test, which showed that the air behind the curtain was moving slightly but it was moving back into the gob area, not through the curtain. They checked behind three other curtains in the same way, and the results were the same. As a result of these tests, Inspector Bush terminated the § 104(b) order.

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<sup>1</sup> Section 75.312 provides:

Air that has passed through an abandoned area or an area which is inaccessible or unsafe for inspection shall not be used to ventilate any working place in any mine. No air which has been used to ventilate an area from which the pillars have been removed shall be used to ventilate any working place in a mine, except that such air, if it does not contain 0.25 volume per centum or more of methane, may be used to ventilate enough advancing working places immediately adjacent to the line of retreat to maintain an orderly sequence of pillar recovery on a set of entries.

7. The nine curtains along the intake course were a few feet outside the gob area.

8. On July 23, 1990, about 56,000 cfm of air was ventilating 004 section. This high rate of air movement created a swirling effect in the air in front of the nine curtains, giving the impression that air was passing from the gob area through the curtains. In fact, as the tests by Inspector Bush and Foreman Polly later showed, the air was not coming from the gob area.

9. Respondent's ventilation plan required concrete blocks or permanent type brattice at the place where the nine curtains were installed. On July 5, 1990, Respondent had applied to MSHA for approval of a supplemental plan that would permit the use of curtains. The application was denied by MSHA on July 23, 1990.

10. After termination of the citation and order, Respondent replaced the nine curtains with permanent type brattice.

11. On at at least one prior occasion, curtains like the nine curtains inspected by Inspector Bush had been approved by MSHA at Mine No. 1 to prevent air movement from a pillared-out area into an intake air course.

#### DISCUSSION WITH FURTHER FINDINGS

On July 23, 1990, when Citation No. 3383894 was issued by Inspector Bush, the air in front of the nine curtains was swirling because of a high volume of air rapidly moving in the intake course. It gave the impression to Inspector Bush that it was coming from the gob (pillared-out area), but it was not.

At the location where the citation was issued, the ventilation plan required concrete blocks or permanent type brattice, instead of curtains, to keep air in the gob area from moving into the intake course. A pending application by Respondent to MSHA, to approve curtains, was denied on the date of this inspection, but that decision was not known by Inspector Bush or Foreman Polly at the time.

The evidence does not show that the air condition in front of the nine curtains was any different when Inspector Bush issued the citation compared to when he terminated it. The only factual difference is that, to check abatement of the citation, he went behind the curtains (for the first time) and made air tests. These showed that the air movement behind the curtains was going into the gob and not through the curtains into the intake air course. Respondent had not adjusted, repaired, or changed the nine curtains to abate the cited condition. The evidence thus raises a reasonable inference that the air condition behind the nine curtains was the same when the citation was issued and when it was terminated. The Inspector's finding of air moving from the gob

through the curtains into the intake air course may be explained by the swirling effect in front of the curtains, caused by 56,000 cfm of air moving through the intake air course, and not air moving from the gob into the intake air course. On balance, the government has not shown by a preponderance of the evidence that the ventilation air in 004 working section was passing through the gob area.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. The Secretary failed to prove a violation of 30 C.F.R. § 75.312 as alleged in Citation No. 3383894.

#### ORDER

WHEREFORE IT IS ORDERED that Citation No. 3383894 and Order No. 3383897 are VACATED and this proceeding is DISMISSED.

  
William Fauver  
Administrative Law Judge

#### Distribution:

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

Mr. Richard D. Cohelia, Safety Director, Manalapan Mining Company, Inc., P. O. Box 311, Brookside, KY 40801-0311 (Certified Mail)

Susan C. Lawson, Forester, Buttermore, Turner & Lawson, P. O. Box 935, Harlan, KY 40831 (Certified Mail)

/fas

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 14 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 90-356
Petitioner	:	A. C. No. 15-16477-03526
v.	:	
	:	Docket No. KENT 90-399
	:	A. C. No. 15-16477-03528
LJ'S COAL CORPORATION,	:	
Respondent	:	Docket No. KENT 90-400
	:	A.C. No. 15-16637-03529
	:	
	:	No. 3 Mine
	:	
	:	Docket No. KENT 90-401
	:	A.C. No. 16-16637-03505
	:	
	:	No. 4 Mine

## DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee for the Petitioner;  
Carl E. McAfee, Esq., LJ's Coal Corporation, St. Charles, Virginia, for the Respondent.

Before: Judge Weisberger

### Statement of the Case

These cases are before me based upon petitions for assessment of civil penalty filed by the Secretary (Petitioner), alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to a notice of hearing, issued on November 16, 1990, these cases were scheduled for hearing on December 18, 1990. On December 11, 1990, a message was received from counsel for Petitioner, indicating that the parties settled these cases. On January 14, 1991, Petitioner filed a joint motion to approve settlement. On January 18, 1991, in a conference call I initiated between counsel for both parties, it was explained that, inasmuch as the motion did not contain sufficient facts to support the proposed settlements, it could not be granted. On February 4, 1991, the parties filed a supplement to the motion to approve settlement. On February 25, 1991, an order was issued denying the motion to

approve settlement on the ground that neither the motion nor the supplement provided any facts in support of the appropriateness of the proposed penalties. Subsequent to notice, these cases were scheduled for hearing, and were subsequently heard in Tazewell, Tennessee, on June 18, and 19, 1991. Robert W. Rhea, Robert E. Jones, and Elijah Myers, testified for Petitioner. The operator (Respondent) did not call any witnesses, nor did it offer any documentary evidence.

## Findings of Fact and Discussion

### I. Docket No. KENT 91-356

#### Order No. 3377046

On January 18, 1990, a section 104(d)(1) order was issued to Respondent, alleging a violation of a mandatory standard at its No. 3 Mine. There were no intervening clean inspections between January 18, 1990 and March 8, 1990.

On March 8, 1990, Robert W. Rhea, an MSHA Inspector, inspected the belt at the 001 section at Respondent's No. 3 Mine. He testified that there was no guard on the tail piece of the roller. According to Rhea, the roller in question is 24 inches in diameter and holds the belt down to the tail piece. He indicated that production was in process, and a scoop was dumping coal on the belt when he arrived. He observed a metal structure against a rib. The section foreman, Dwayne Nicely, informed him that this structure was the guard.

Rhea observed one employee breaking rock with a sledge hammer approximately 10 feet from the tail roller. He indicated that the height of the coal seam, being between 42 and 48 inches, and the fact that the floor in the area in question contained loose coal and rock, made it difficult to move around. In essence, it was his opinion that a person working in the area might come in contact with the moving roller, causing a serious injury. Rhea issued a section 104(d)(1) order, alleging a violation of 30 C.F.R. § 75.1722.

As pertinent, section 75.1722, supra, provides that, in essence, exposed moving machine parts which may be contacted by persons and which may cause injury shall be guarded, and that guards shall be securely in place while the machinery is being operated.

Respondent did not proffer any witnesses or documentary evidence. Based upon the testimony of Rhea, I conclude that the tail roller in question, was not guarded, and this condition exposed moving parts that might be contacted by persons working in the area, especially considering the low height of the seam,

and the uneven surface of the floor. Accordingly, it has been established that Respondent violated section 75.1722, supra.

According to Rhea, any loose clothing, gloves, tools, or battery light cord, worn by a miner, coming in contact with the unguarded belt, would cause the miner to be pulled into the roller, causing dismemberment or death. Considering the proximity of the miners working in the area to the unguarded tail roller, and the low height of the roof, and the surface of the floor containing loose coal and rocks, I conclude that it has been established that there was a reasonable likelihood of a hazard of contact with the moving tail roller, and a reasonable likelihood that such a hazard would have resulted in an injury of a reasonably serious nature. Hence, I conclude that it has been established that the violation herein was significant and substantial. (See, Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984)).

According to Rhea, on "numerous occasions," he had cited the same violation and discussed it with the section foreman, Dwayne Nicely (Tr. 37,38). He said that during two or three inspections between January 18, 1990, and March 8, 1990, he talked with Nicely about the guarding of the tail piece. He indicated that when he issued the citation on March 8, 1990, he asked a miner at the tail roller whether he was aware of the roller and whether he thought that it needed a guarding, and the miner indicated in the affirmative and stated that the guarding was at the rib. Hence, I find that Respondent was aware of the need for the guarding at the location in issue, and was also aware that the guarding was not in place. There are no facts to explain why Respondent did not replace the guard. I conclude thus that the violation resulted from Respondent's aggravated conduct. Accordingly, I find that the violation herein to be the result of Respondent's unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

Considering the gravity of the violation, and its degree of negligence, as testified to my Rhea, and considering the remaining statutory factors, I conclude that a penalty herein of \$800 is appropriate.

B. Citation No. 3377047

Rhea testified, in essence, that on March 8, 1990, he observed a cavity in the roof of the last open crosscut in the No. 3 entry. He described the cavity as 20 to 30 feet wide, 20 to 30 feet long, and approximately 20 feet in depth. He said that such a cavity was evidence that a rock fall had occurred. According to Rhea, Nicely indicated to him that a roof fall had occurred that week i.e., the week of March 8th, which had entrapped a roof bolting machine. Rhea said that Nicely told him that the roof fall had not been reported. Rhea issued a citation alleging a violation of 30 C.F.R. § 50.10 which in essence

requires an operator to "immediately" contact MSHA "if an accident occurs." 30 C.F.R. § 50.2(h)(a) defines accident, as pertinent, as ". . . an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;" "active workings" is a term defined in 30 C.F.R. § 75.2(g)(4) as "any place in a coal mine where miners are normally required to work or travel".

Based on the testimony of Rhea that has not been rebutted or impeached, I find that a roof fall had occurred which was not reported. There is no evidence that this roof fall was planned, and since it entrapped a roof-bolting machine, I conclude that it occurred in a area where miners were required to work and did impede passage. Accordingly, since this roof fall had not been reported, I conclude that Respondent did violate section 50.10, supra.

Taking into account the significant amount of the rock fall as evidenced by the cavity in the roof observed by Rhea, and the fact that Respondent had knowledge of the roof fall as evidenced by Nicely's statement to Rhea that efforts had been made to remove a bolter entrapped by the roof fall, and the fact that no evidence was adduced by Respondent in order to mitigate its negligence, I conclude that the level of its negligence in regard to the violation herein was high. Rhea testified to the hazards miners were exposed to occasioned by their having to work to retrieve the entrapped bolter under an area without roof supports. However, Petitioner did not adduce evidence through Rhea or any other witness or document, with regard to the gravity of the violation herein, i.e., failure to report a roof fall as opposed to hazards attendant upon the roof fall itself. I find that a penalty of \$400 is appropriate for the violation.

3. Orders Nos. 3377049, 3277050, 3377051, and 3377052

According to Rhea, when he examined the No. 1 entry on March 8, 1990, he observed hillseams approximately 50 to 75 feet from the coal face, and covering an area of the roof of approximately 30 by 25 feet. Rhea stated that the width of the hill seam varied from a "crack," to, up to 3 to 4 inches (Tr. 128). In this connection, he said that three of the hillseams were 3 to 4 inches wide. Rhea defined hillseams as vertical fractures in the roof.

According to Rhea, the area in question was supported only by bolts. There were no cross bars, steel straps, or cribs. Rhea issued an order alleging a violation of the roof control plan ("the plan").

In the No. 2 entry Rhea observed more than two hillseams in the last open crosscut. He said they were approximately the same type and width as those he testified to in the No. 1 entry,



(Order No. 3377049, infra). He indicated that the only roof supports were roof bolts.

Rhea also observed an area of a hillseam 8 feet wide by 20 feet in the No. 2 entry that was totally unsupported. This area was located one crosscut inby the section dumping point, and was 100 feet outby the hillseams he had observed at the last open crosscut.

Rhea said he also observed hill seams in the No. 4 entry inby the last open crosscut, and their condition was the same as in entries one and two. Rhea issued separate orders for failure to follow the roof plan in entries 1, 2,<sup>1</sup> and 4 respectively.

Paragraph 3 of page 5 of the plan (Government Exhibit 5), specifically provides that when "hillseams" are encountered, cross beams or steel straps are to be used. Inasmuch as Rhea's testimony that there were no beams or straps in areas of hillseams, has not been impeached or rebutted, I conclude that Respondent herein did violate its roof-control plan in entries 1, 2, and 4.

According to the uncontradicted testimony of Rhea, all haulage has to go through the area in question in order to get to the face, and, hence, miners are required to travel in the area in question. He said that there was a danger of a roof failure where the hillseams intersect, and an injury was reasonably likely to occur, considering the fact that there was a roof fall in the No. 3 entry, and the fact that the hillseams were "numerous," (Tr. 123) and the fact that the roof conditions stretched across the last open crosscut. Rhea also said that the combination of hillseams across all the entries increased the danger of a roof fall especially considering that only 50 feet separated the entries. Should a roof fall occur, there would be a reasonable likelihood of a injury of a reasonable serious nature due to the fact that, at a any one time, according to Rhea, four miners are present in the area. Inasmuch as Rhea's testimony has not been contradicted or rebutted I conclude, that it establishes that the violations herein are significant and substantial (See, Mathies, supra).

Rhea indicated that the hillseams were obvious and that water was dripping out of them. Rhea related that he discussed the condition with Nicely who indicated that he was aware of what was required in the ventilation plan, and acknowledged that he had hillseam problems in all areas of the section. Rhea testified that Nicely was sure the section was going to be moved within the next few days, due to the massive roof fall that had occurred in entry No. 3 over the weekend. There is no evidence,

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<sup>1</sup>Two locations separated by approximately 100 feet.

however, that Respondent abandoned these entries and that they were no longer working sections. Taking into account the extent of the hillseams, their width, and the fact that water was dripping out of them, I conclude that Respondent was negligent to a high degree in not having complied the terms its roof plan, requiring the provision of additional support to the area in question. This is especially true inasmuch as Respondent did not adduce any facts which would tend to mitigate its negligence. Due to the fact that the hillseams were not supported in the fashion required by the roof control plan, which could result in a roof fall causing serious injuries to miners, I conclude that the violations herein were of a high level of gravity. I find that a penalty of \$800 is proper for each violation found herein.<sup>2</sup>

d. Citation No. 3391846

MSHA Inspector Robert E. Jones, testified that on March 20, 1990, he inspected the elevated roadway, on the surface of Respondent's No. 3 Mine. He testified that this roadway, which is the only access to the mine, is 6 miles in length, and that 3 miles of this road, go up a steep grade which he estimated as being more than 15 percent "in places" (Tr. 209). He said that he observed truck traffic on the road.

Jones testified that he observed no berms at "intermittent" (Tr. 213) locations. He said that in narrow places where the road had been washed out, there were no berms or guard rails. He said that the road bed is flat, and that as it travels up to the mine there is a ditch on the right side of the road, and a "outer bank or the hill side" on the left side that slopes down (Tr. 217). Jones issued a citation alleging a violation of 30 C.F.R. § 77.1605(k), which provides as pertinent, that berms or guards shall be provided on the outer bank of elevated roadways. Based on Jones' testimony that had been neither rebutted nor contradicted, I find that Respondent herein did violate section 77.1605(k), supra.

Essentially, according to Jones, as a consequence of the lack of berms, an accident is reasonably likely to occur due to the grade of the road and its steep banks. He said that if a truck left the roadway due to the absence of berms, and went over the side of the hill, "there wouldn't be any hope" (Tr. 215). In this connection he indicated that he also took into account the width of the road bed which he indicated averaged about 15 feet, but that in some it was not more than 10 to 12 feet wide.

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<sup>2</sup>The cited violative conditions were in four distinct separate areas, and hence four citations were properly issued.

Jones, in his testimony, did not specifically indicate the location of the areas that did not have a berm. Nor did he describe their location with reference to any drop off from the roadway. Nor did his testimony specify the extent and length of any area in the roadway that did not have a berm. Accordingly, I conclude that it has not been established that the violation herein was significant and substantial.

Taking into account that the violation herein might lead to a truck running off road and seriously injuring personnel inside, I find that the violation was of a moderate level of gravity. I find Respondent slightly negligent in that Rhea conceded that Respondent did a good job with the berm and that due to the weather the berms are hard to maintain, although "it could be done"(Tr. 219). I conclude that a penalty of \$100 is appropriate for this violation.

## II. Docket No. KENT 90-399

### a. Order No. 3377161

On April 12, 1990, Jones issued Order No. 3377161 alleging, in essence, that the deluge water spray system on the No. 2 belt would not operate properly when tested, and hence was in violation of section 75.1100-3 which provides that all firefighting equipment shall be maintained in a usable and operative condition.<sup>3</sup>

The system at issue contains sprays located approximately 8 feet apart, which are activated only by exposure to heat, and can only be tested in that fashion. Water pressure is supplied by way of a pump which is located outside the mine.

Jones indicated that a plug, 1-inch in diameter, had been removed from the bar connecting the spray system "together", (Tr. 236) and water was coming out of the hole where the plug had been removed. Jones concluded that accordingly, pressure was weakened all along the line. However, on cross-examination, Jones indicated that there was pressure in the system. He conceded that the only way to know whether the system works, is to open the valve at the end of the 50 foot line. He indicated that he did not open this valve, nor were the sprays tested by applying heat.

Hence, although it is possible that as a consequence of the plug having being removed there was weakened pressure, I find that it has not been established that the system was in an

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<sup>3</sup>The order, which on its face alleges a violation of section 75.1101, was modified on April 3, 1990, to show instead a violation of section 75.1100-3, supra.

inoperative condition and was not usable. Hence, I conclude that it has not been established that the Respondent herein violated section 75.1100-3.

b. Citation No. 3377351

Jones testified, in essence, that an update of Respondent's dust-control plan was due to be submitted April 6, 1990. He said but that the MSHA mine file for the subject mine was checked by him on May 30, 1990, and the record did not indicate that such a plan was submitted. Respondent did not assert or adduce any evidence that such a plan was submitted.

30 C.F.R. § 75.316, provides that a dust-control plan ". . . shall be reviewed by the operator and the Secretary at least every 6 months." On the record before me, I conclude that the operator did not submit an updated plan at the 6-month due date. Accordingly, it was not possible for the Secretary to review such a plan with the operator, and hence, the operator herein violated section 75.316.

Jones indicated, however, that Respondent herein did have a valid plan with projections extending 6-months beyond May, 1990 and that the plan indicated good ventilation. Also on cross-examination, it was elicited that at the date the citation was issued, Respondent was in the process of mining out, and that on June 22, 1990, the mine was sealed. Taking these factors into account, I conclude that a penalty of \$20 is appropriate for this violation.

III. Docket No. KENT 90-400 (Order No. 3376874)

In the 001 section of Respondent's No. 3 Mine, coal is removed by way of pillar extraction. The sequence in which coal is mined by taking a 10 by 20 foot cut out of a 40 by 40 foot pillar, is illustrated in Government Exhibit 16. According to Rhea, an operator using such a system is permitted to either cut in sequences from right to left as illustrated on Government Exhibit 16, or from left to right. The roof-control plan, (the plan") states that, "all pillars will be mined from the same direction" (Government Exhibit 5, page 13). The plan illustrates two parallel rows, each containing four breaker pillars, along with four posts in a diagonal line, all to be placed in the last open crosscut, outby the left split of a pillar that is being mined. In this connection, the plan provides as follows "breaker timbers to be installed before mining of corresponding mining sequence number." (Exhibit P.13, supra).

On April 17, 1990, when the section was inspected by Rhea, production was in process, the first in the series of cuts had already been taken from the four pillars in the section, and breaker timbers had been installed outby the left sided split of

blocks one and four as depicted in the plan (Exhibit 5, page 13, supra). There were no breaker timbers installed in the last open crosscut outby the left side split of pillars one and three in the position depicted in the plan, i.e., outby the left side split with the row of timbers furthest to the left in a line with the left side of the left split. However, the same number of post called for in the plan, had been installed in the last open crosscut, outby the right split of pillars one and three, respectively. Rhea also observed haulage traffic going in an outby direction, down entries two and four.

Rhea issued an order alleging a violation of the plan, ". . . in that the No. 1 & 2 pillar block (sic) and the No. 4 & 5 pillar blocks were being mined from one roadway." In this connection, the order further alleges, with regard to the plan, that it ". . . stipulates in sketch No. 8, page 13, that one pillar split shall be mined from one roadway only."

Page 13 of the plan (Exhibit 5, supra) does not contain any language specifically stipulating that a split shall be mined from one roadway only. Indeed there is no language specifically relating mining from a pillar to any specific roadway. The only language in the plan with regard to the direction in which the pillars are to be mined consists of the stipulation on Page 13, supra, that the pillars can be mined from either side and that "all pillars will be mined from the same direction." (Emphasis added) Rhea indicated the path to be taken by a miner, in cutting pillars one, two, three, and four, going from right to left, and utilizing breaker timbers as illustrated in the plan (see the arrows on Government Exhibit 16). However, he did not testify to having observed the direction in which all of the pillars were cut. Indeed, he did not testify to having observed the direction in which any of the pillars were being cut. Also, his testimony did not set forth any explanation which would tend to indicate that, by virtue of the placement of post in the areas observed outby blocks one and three, as opposed to their placement in the area depicted in the plan, all pillars would then be mined not from the same direction.

According to sketch 8, of the plan (Exhibit 5 supra) the breaker timbers that are to be installed, are to be placed in the last open crosscut, outby the left side split. As observed by Rhea, only the timbers set at pillars two and four were in the area illustrated on the plan, and the timbers installed at pillars one and three were outby the right side split rather than the left. Accordingly, I conclude that Respondent did violate the plan as alleged.

According to Rhea, the breaker timbers placed by Respondent at the pillars one and three, did not provide "maximum" (Tr. 349) support especially in the intersections between pillars one and two, and three and four, respectively. According to Rhea, the

lack of support in an intersection results in a weakened roof, and a greater danger of roof fall in the intersection. There is no allegation by Petitioner that the breaker timbers installed by Respondent were improperly installed, or were of a lesser quantity or covered a lesser area than that stipulated to by the ventilation plan. It also would appear that the pillars installed by Respondent, outby the right split of pillar No. 1 provided support to the intersection between the last open crosscut and Entry No. 5. Similarly, it would appear that the timbers installed outby the right split of pillar No. 3 provided additional support to the intersection between the last open crosscut and Entry No. 3. I thus find the evidence insufficient to establish that the violation was significant and substantial.

Rhea indicated in essence that in a discussion with Nicely, he asked him if he understood the plan and he said "absolutely." (Tr. 338). Rhea said that he asked Nicely why he pulled the breaker timbers from the No. 2 and No. 4 entries, and Nicely told him that he (Nicely) had stored or dumped loose materials consisting of rocks, mud and coal in the No. 1 and No. 5 entries. Accordingly, Rhea's testimony indicates that Respondent's action in not following the plan was taken intentionally, and in spite of its understanding of the requirements of the plan. Respondent did not adduce any testimony or documentary evidence to mitigate its negligence, or to contradict or impeach Rhea's testimony. Accordingly, I find that the violation herein was as a result of Respondent's unwarrantable failure (See, Emery supra).

Inasmuch as Rhea's testimony has indicated that failure to provide maximum roof support can lead to a roof fall, and since the intersection between the last open crosscut, and entries two and four had not received the maximum support stipulated by the plan, I conclude that the gravity of the violation is moderately high. Further, I find that Respondent's negligence was high, and that a penalty of \$950 is appropriate for this violation.

#### IV. Docket No. KENT 90-401

On April 30, 1990, Elijah Myers, an MSHA electrical specialist inspected the electrical systems of Respondent's No. 4 Mine. He inspected a 480-volt three-phase generator and observed that there was neither a ground field nor a grounding resistor installed. He observed that although there was a neutral wire, it ended when the lead came out of the generator. He said that it was "very evident" (Tr. 385) that a cable from the bolter was attached to a wire from the generator. He also said that a ground wire did not go to the roof bolter, and a pilot wire was not hooked up going to the bolter. Myers issued Citation No. 3384008, alleging a violation of 30 C.F.R. § 75.901.

Section 75.901, supra, provides in essence, that "Low and medium voltage three phase alternating current circuits used

underground shall contain either a direct or derived neutral which shall be grounded through a suitable resistor at the power center, and a grounding circuit, . . . ." Myers testified that the three phase circuit herein, was being used to power a roof-bolting machine, and there was no grounding i.e., neither a ground field nor a ground resistor was provided. This testimony was not impeached or contradicted. Accordingly, I conclude that Respondent herein did violate section 75.901, supra.

According to Myers, the absence of a ground field leads to a hazard of electrocution, inasmuch as the amount of current is not dissipated, and accordingly, a person coming in contact with the bolter, could contact 277 volts and be electrocuted. I hence find the violation to be significant and substantial (See, Mathies, supra).

Myers indicated that Gary Williams, Respondent's certified electrical person, told him that he had operated the roof-bolting machine and had installed the generator. According to Myers Williams said he knew that the generator was not installed right, and, "knew all this stuff had to be on it." (Tr. 389). This testimony has been neither rebutted nor impeached. I thus find Respondent to have been highly negligent in connection with the violation herein. Further, considering the gravity of this violation, as contributing to the hazard of an electrocution, I find that a penalty of \$500 is appropriate.

Inasmuch as there was no breaker observed by Myers, he also issued a section 104(a) citation, alleging a violation of 30 C.F.R. § 75.900, which in essence, provides for the protection by circuit breakers of power circuits serving three phase alternating current equipment. Myers' testimony that a circuit breaker was not present, was not contradicted or impeached. Hence, it must be concluded that Respondent did violate section 75.900 supra.

Myers explained that in the absence of a circuit breaker, in the event of a overload, power would continue to flow, creating a danger of electrocution. He indicated that if the roof bolter would run over the cable, it would short out and put 277 volts on of the frame of the bolter. He said that if the bolter would be touched, the one touching it would be electrocuted. I conclude that the violation was significant and substantial. The appropriate penalty for this violation, considering its gravity, and the negligence of the Respondent as set forth above, infra, is \$500.

The testimony of Myers, which was not impeached or contradicted, establishes that a ground monitor, to monitor the ground wire to make sure it was not separated or broken, was not in existence. Hence, I find that the citation in this regard issued by Myers, alleging a violation of 30 C.F.R. § 75.902, was

properly issued, as it has been established that there was no fail safe ground check in violation of section 75.902, supra. Essentially, for the reasons I set forth above, infra, I conclude that the violation herein was significant and substantial. Considering the gravity of this violation and the Respondent's negligence as set forth above, infra, I conclude that a penalty of \$500 is appropriate.

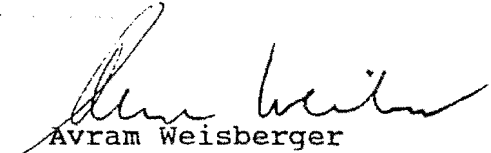
ORDER

It is ORDERED that:

(1) Citation No. 3391846 and Order No. 3376874 be amended to reflect the fact that the violations set forth therein are not significant and substantial.

(2) Order No. 3377161 be DISMISSED.

(3) Respondent pay within 30 days of the date of this decision \$6,970 as a civil penalty for the violations found herein.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

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(Certified Mail)

Carl E. McAfee, Esq., LJ's Coal Corporation, P. O. Box M,  
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cc



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 14 1991

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEVA 90-223-R
	:	Citation No. 3312467; 5/30/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Robinson Run No. 95 Mine
ADMINISTRATION (MSHA),	:	Mine ID 46-01318
Respondent	:	

## DECISION

Appearances: Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant;  
Wanda M. Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Weisberger

## Statement of the Case

This case is before me based upon an application for review filed by Consolidation Coal Company (Operator) on June 22, 1990, challenging the issuance of a section 104(b) withdrawal order. On July 6, 1990, the Secretary (Respondent), filed an answer and the motion for continuance. The motion for continuance was not objected to by Contestant and a stay order was issued on July 27, 1990, staying proceedings in this case pending the filing of the corresponding civil penalty petition. Subsequently, Respondent filed a statement on March 5, 1991, indicating that no civil penalty would be proposed for the violation set forth in the section 104(b) order. The statement further indicates that the issues involved in the underlying section 104(a) citation had been settled by the parties, and the settlement was approved in a decision issued by Commission Chief Judge Paul Merlin on February 13, 1991, (Docket No. WEVA 91-25). Subsequently, in a telephone conference call with both parties, Contestant indicated its intention to litigate the issues raised by the 104(b) order in issue.

Pursuant to notice the case was heard in Morgantown, West Virginia, on May 14, 1991. At the hearing, James A. Young, Robert Toth, Robert L. Kniesely, and Philip Edward Morgan, testified for Respondent. Timothy T. Underwood, Denver A.

Johnson, and Philip Edward Morgan, testified for Contestant. The parties were granted time to file post hearing briefs. On August 5, 1990, the parties filed posthearing briefs containing proposed findings of fact.

Upon review of the transcript of the hearing, counsel for both parties agreed that two corrections should be made to the transcript. I agree. It is ORDERED that the transcript of the hearing be amended as follows:

1. Page 126 at line 15 should be amended to read as follows:

"The trolley wire was six inches outby, approximately six inches outby the rail."

2. Page 16 at line 22 should be amended to read as follows:

". . . would you please tell us the name of the mine in which you were?"

### Findings of Fact and Discussion

#### I. Introduction

On May 22, 1990, MSHA Inspector James A. Young inspected the coal haulage track located in the main north area of Operator's Robinson Run No. 95 Mine. Young indicated that from a point outby block No. 124 and continuing approximately 600 feet to block No. 129, the haulage track was sunk in mud. He indicated that the track had shifted to the wire side and, as a consequence, the trolley wire at the 127 block, which should have been between the rail and the rib on the right side, was located over the center of a motor and two cars which were in that area. He further indicated that while walking the ditch side of the track, water reached the top of his 12 inch boots, and that the water was at a depth of 4 to 5 inches in the middle and on the walk side of the track. Young also noted that the rail joints and fish plates of the track were loose, and there were belts missing. Young issued a section 104(a) citation which states as follows:

The loaded track side on the coal haulage track, located on main north from 129 blk. outby to 123 blk. and including the 124 blk. switch and around the curve to the tail truck switch was not being safely maintained. The truck has low/loose joints mud, water, and debris on the sides and middle of the truck to the point that haulage equipment is being raised off the rail. Coal haulage cars in one place are actually rubbing the rib on a turn. The truck sinks below the mud and water level that is present.

Young discussed with one of the Operator's safety officers, Richard Moats, the time to be allowed for the Operator to abate the violative conditions. Moats indicated that he would need 5 days, and Young set the abatement for 0900 on May 29, 1990. On May 30, 1990, Young returned to the area in question and indicated that the conditions were the same, but that some areas were worse. He issued a section 104(b) order which states in part as follows:

On this day a [sic] area 30 feet in length on 127 block side loaded track has been raised, but has since deteriorated to almost its original condition. One other area approximately 6 ties in length was raised. The close clearance has become worse since the area was cited. Motors were observed only inches from striking the rib and rolling track equipment including loaded coal cars have packed the debris even higher. Loads are still badly rubbing the rib, and no mud and water has been removed. (sic).

The Commission, in Mid-Continent Resources, Inc., 11 FMSHRC 505, at 509, held that when an operator challenges the validity of a section 104(b) order, ". . . it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case, by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred."

## II. The Secretary's prima facie case

As set forth by the Commission in Mid-Continent Resources, supra, at 509, the Secretary has the burden of proving that the "violation described in the underlying citation has not been abated within the time period originally fixed, or as subsequently extended." The "violation described" in the underlying citation is that the track in the area in question "was not being safely maintained." (Secy. Ex. 1). According to Young, on May 22, he observed mud and water in the track and ditch, and these were still present in the area on May 29, except for a 60 foot long area of the track that was dry. He also indicated that the debris that he had observed on May 30, looked identical to that seen by him on May 22. He further indicated that on both May 22 and May 29, he straddled the rail in order to observe the location of the trolley wire, and on both times, the

wire was located between the rails, rather than between the rail and the rib on the right side, indicating that the track had not been removed to its original position from where it had shifted. He also indicated that on May 22, he made notches with his hammer on one of the broken ties, and he observed these notches on the same tie on May 30.

Robert Toth, a bolter who accompanied Young on May 22, and May 30 essentially corroborated the testimony of Young with regard to his observations on May 22. Toth indicated that he observed the same situation on May 30, as he had seen on May 22, with the exception of a 30 to 40 foot area in length around block 127 that had been jacked and blocked.

The Operator did not offer the testimony of any witnesses to compare the conditions that existed on May 30, with those that had existed on May 22. Denver Johnson, the Operator's superintendent, and Philip Edward Morgan, one of the Operator's mine escorts, observed the area in question on May 30. The gravamen of their testimony is that on May 30, the conditions on the track with regard to mud, were worse, and also that had been braces were torn out, and pump lines were damaged. However, their testimony did not contradict the specifics of Young's testimony with regard to what he had observed on May 30. Specifically, the citation alleges that the track has "low/loose joints, mud, water and debris." Young testified that on May 30, mud was still present, the debris packed against the rib was higher, water was still 4 to 5 inches deep, and at the 124 switch at the curve, the track had sunk down farther. He also indicated that the first of the fish plates was loose.

The citation alleges that coal cars "in one place are actually rubbing the rib on a turn." In this connection, Young testified that on May 22, "I could take my hand and put it between the 50 ton and the edge of the rib," (Tr. 26) (sic) whereas on May 30, he could not get his hand between them. He said that the track had moved closer to the wire side on May 30.

Accordingly, I find that the Secretary has established a prima facie case, in that the evidence establishes that the violations described in the original citation existed on May 30, when the citation 104(b) order was issued.

### III. The Operator's Rebuttal

Essentially, it is the Operator's position that, in the time period set for abatement, the violative conditions cited on May 22, had been abated, but, due to intervening circumstances, had recurred by May 30. Underwood testified as follows, with regard to abating the violative conditions cited on the day shift: "And on the afternoon shift we started working on this particular violation. We talked to the shift foreman, told him

exactly what we wanted done in the area, how to attack the problem, then he put his people on the violation." (Tr. 71)

It is a practice for the Operator's foremen to make daily entries in a "construction book," setting forth the work performed by miners on their sections during each shift. The entries for the various shifts in the time period between May 22 and May 25, indicate that at various locations in the area in question, the track was blocked, cleaned, raised, and shovelled. No testimony was proffered by the Operator from any witness who had personal knowledge as to specifically what work had been performed, and more importantly, whether such work cured the violative conditions described in the underlying citation. Underwood stated that he went through the area prior to May 26, and in his opinion, the area "was ready for abatement" (Tr. 116).<sup>1</sup> Not much weight was accorded his conclusion with regard to the conditions on May 25, as his testimony did not describe in any detail the conditions that he had observed. Further, the only work that he observed in connection with the abatement was at either block 128 or 129 where he saw three persons jacking and blocking the track. Johnson testified that when he was in the area on May 25, there was not any water above the rails. He said that although the area was a little wet, "it wasn't real bad" (Tr. 126). On cross-examination, he testified that there was not any water on the tracks, but there was water in the ditches and the sumps. He further said that the area was only a "little" muddy, but that the pumps were pumping (Tr. 126). He said that the track was blocked and braced and that there was a brace at the 124 block between the rib and the rail. He also said that there were new wood ties. In his opinion, on May 25, the area was "ready for abatement" (Tr. 138).

According to Underwood, a train derailment occurred some time during the midnight shift, on Friday, May 26. However, he did not observe the accident, and when he was at work in the area the following day, the wreckage had already been removed. No evidence was presented from any witnesses who observed the derailment. Nor was there any specific evidence adduced as to the specific damage that the derailment had caused. Underwood testified that a derailment could tear out blocking that had already been installed. He also said that cars that have been derailed would cover the ditch alongside the track, causing water to go on the tracks.

Morgan was in the area for the first time before noon on May 29. He indicated that there was "no problem" from the tail track to the empty track switch (Tr. 144). According to Morgan,

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<sup>1</sup> In earlier testimony on direct examination, Underwood was unable to indicate when he was in the area subsequent to May 22, but that he was not there on May 29 and May 30.

a 50 foot area at the 124 switch had to be cleaned, and a pump needed to be changed. He also said that there was mud and debris in the same areas, but he did not observe any broken tracks, loose joints, or loose fish plates (Tr.65). When Morgan visited the site again on May 30, he said that the 124 block switch "looked worse, much worse" (Tr. 149). He said that there was more mud, the pavement had torn at the 124 switch, and that a brace bar at block 126, which had been in place on the day before, was torn out. In the same fashion, Johnson testified that the conditions on May 30, were generally worse. He stated that the ditches were full of mud, a pump line was broken, and braces were torn out. He opined that these conditions occurred as a consequence of a wreck that had taken place on May 27.

For the reasons that follow, I conclude that the Operator has failed to rebut the prima facie case. Johnson's testimony indicates that on May 25, the track was blocked and braced, there was a new wood tie at 124, there was no water above the rails, and the track was replaced in its original position with the trolley wire being 6 inches outby the rail. (Tr. 126). However, there is no evidence that the violative conditions of debris and loose joints noted in the citation were abated. Further, although Johnson indicated that there was no water above the rails, and that the area was a little muddy, he noted that there was water in the ditches and the sumps. Also, he did not specifically indicate that the tracks were no longer below the mud as described in the citation.

Johnson indicated that on May 30, the conditions were worse and that the braces were torn out, the pipeline had broken, and the ditches were full of mud. He opined that the damage occurred as a consequence of a derailment, which, according to Underwood's testimony, had occurred during the midnight shift of May 26. On the other hand, Morgan indicated that on May 30, the switch looked worse than it had the day before. He also said there was more mud, pavement had been "torn up" (Tr. 149) and a brace bar had been torn.

The record does not contain testimony from witnesses who have personal knowledge as to what caused these conditions between May 29 and May 30. I find the opinion testimony as to the cause of the conditions to be too speculative to be relied upon, especially in light of the absence of testimony from persons who actually observed the train wreck on May 27.

Based on all the above, I conclude that Contestant has not adduced sufficient evidence to establish that it had abated all the violative conditions described in the citation. Nor has it established that the conditions observed by Jones on May 30, constituted a recurrence. Hence, I conclude that the section 104(b) withdrawal order is valid.

ORDER

It is ORDERED that the notice of contest be dismissed.



Avram Weisberger  
Administrative Law Judge

Distribution:

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Wanda M. Johnson, Esq., Office of the Solicitor, U.S. Department  
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nb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 14 1991**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-122
Petitioner	:	A.C. No. 46-01453-03940
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**

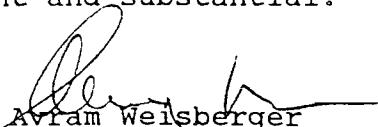
Appearances: Wanda M. Johnson, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, Virginia,  
for Petitioner;  
Walter J. Scheller, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to Notice, the case was scheduled for hearing on May 14, 1991. At the hearing, after the MSHA inspector testified, the parties conferred and indicated they had reached a settlement. The hearing was adjourned and the parties were allowed one week subsequent to receipt of the transcript of the hearing to file a Motion to Approve Settlement.

On August 5, 1991, Petitioner filed a motion to approve a settlement agreement. A reduction in penalty from \$1,600 to \$200 is proposed. I have considered the representations and documentation submitted in this case, along with the testimony 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 a penalty of \$200 within 30 days of this order. It is further **ORDERED** that Order No. 3113874 be modified to a Section 104(a) citation alleging a violation that is not significant and substantial.

  
Avram Weisberger  
Administrative Law Judge



**Distribution:**

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 15 1991

ARCH OF KENTUCKY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 91-14-R
	:	Order No. 3384420; 9/10/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 91-15-R
ADMINISTRATION (MSHA),	:	Citation No. 3388902; 9/12/90
Respondent	:	
	:	Mine No. 37
	:	Mine ID 15-04670
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 91-155
v.	:	A.C. No. 15-04670-03633
	:	
ARCH OF KENTUCKY, INC.,	:	No. 37 Mine
Respondent	:	

## DECISIONS

Appearances: Mary Sue Taylor, Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for the Respondent/Petitioner;  
Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs,  
Lexington, Kentucky, for the Contestant/Respondent

Before: Judge Koutras

## Statement of the Proceedings

These consolidated proceedings concern a proposal for assessment of civil penalty filed by the Secretary of Labor (MSHA), against the respondent mine operator (Arch of Kentucky, Inc.), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$390, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.202 (Docket No. KENT 91-155). Docket No. KENT 91-15-R, concerns a Notice of Contest filed by Arch challenging the legality and propriety of the citation, and Docket No. KENT 91-14-R, concerns a Notice of Contest filed by Arch challenging an imminent danger order issued by the inspector following the issuance of the contested citation.

The contested citation and order were consolidated for hearing in Pikeville, Kentucky, on July 24, 1991, with two additional cases involving these same parties. The parties appeared and presented testimony and evidence with respect to these additional two cases. With regard to the instant dockets, the parties informed me of their mutually agreed upon settlement disposition of the cases without the necessity of a full hearing, and their arguments were heard on the record.

#### Stipulations

The parties stipulated in relevant part as follows (Tr. 5-6):

1. The contestant/respondent is a large mine operator.
2. The contestant/respondent is subject to the jurisdiction of the Act and the presiding administrative law judge.
3. Payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

#### Discussion

##### KENT 91-155 and KENT 91-15-R

The contested section 104(a) "S&S" Citation No. 3388902, issued by MSHA Inspector Daniel L. Johnson at 10:50 a.m., on September 12, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. § 75.202, and the cited condition or practice is described as follows:

The mine roof is not adequately supported on the empty track entry starting 50 feet outby the seventh crosscut and extending inby approximately 400 feet. An unintentional roof fall has occurred in the intersection of the seventh crosscut and the mine roof has broken and sagged along the left rib for a distance of approximately 220 feet on the inby side. The mine roof has also broken down the right rib for a distance of approximately 200 feet inby the left rib break.

This citation is issued as a contributing factor to 107-A Order No. 3384420. Therefore no termination time is set.

KENT 91-14-R

The contested section 107(a) Imminent Danger Order No. 3384420, issued by Inspector Johnson at 4:50 p.m., on September 12, 1990, states in relevant part as follows:

An unintentional roof fall has occurred in the main empty track entry approximately seven-hundred and twenty feet inby the portal.

The following conditions constitute an imminent danger. The mine roof, for a distance of approximately two hundred feet inby the fall area has cut down the left rib and is sagging. The right rib has also cut approximately the same distance but is not sagging.

The operator does intend to recover the area. This order is issued to insure only those persons referred to in section 104-c of the Mine Act may work or travel in the area until the roof has been stabilized.

MSHA's counsel stated that after further consideration of all of the evidence in this case, including consultation with Inspector Johnson, who was present in the courtroom and available for testimony, MSHA has decided to vacate and modify the contested section 107(a) danger order to a section 103(k) order, and that Arch has agreed to withdraw its Notice of Contest challenging the section 107(a) order (Docket No. KENT 91-14-R).

With regard to the contested section 104(a) citation, MSHA's counsel asserted that MSHA has decided to vacate the citation, and counsel moved to withdraw its proposal for assessment of civil penalty, and Arch agreed to withdraw its contests.

In support of the motions for the aforementioned proposed dispositions of these cases, MSHA's counsel stated that the cited roof conditions resulted from an unintentional roof fall which occurred through no fault of the mine operator. Counsel pointed out that the operator barricaded the fall area and took immediate precautionary and corrective action, including the withdrawal of all mine personnel from the affected area. Counsel asserted further that under all of these circumstances, the inspector should have issued a section 103(k) control order rather than a section 107(a) imminent danger order, and that a violation of section 75.202, cannot be supported. Counsel confirmed that the proposed dispositions were made in consultation with the inspector and that he agreed that they were reasonable and proper in the circumstances (Tr. 6-8).

### Conclusion

After careful review of the pleadings, and the arguments presented by MSHA's counsel, and taking into account the concurrence of the inspector who issued the contested citation and order, the proposed settlement disposition of these cases was approved from the bench. My bench decision is herein reaffirmed and I conclude and find that the dispositions made and approved are in the public interest.

### ORDER

IT IS ORDERED THAT:

1. Docket No. KENT 91-14-R. The contested section 107(a) Order No. 3384420, September 12, 1990, IS VACATED AND MODIFIED to a section 103(k) order. The contestant's notice of contest is withdrawn and this case is dismissed.
2. Docket No. KENT 91-155. The contested section 104(a) "S&S" Citation No. 3388902, September 12, 1990, 30 C.F.R. § 75.202, IS VACATED, the proposed civil penalty assessment is withdrawn, and this case is dismissed.
3. Docket No. KENT 91-15-R. The contestant's notice of contest is withdrawn and this case 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

**AUG 21 1991**

PEABODY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 91-340-R
	:	Citation No. 3416696; 4/15/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 91-341-R
ADMINISTRATION (MSHA),	:	Citation No. 3416751; 4/16/91
Respondent	:	
	:	Docket No. KENT 91-342-R
	:	Citation No. 3416752; 4/17/91
	:	
	:	Martwick UG
	:	Mine ID 15-14074

**DECISION**

Appearances: David R. Joest, Esq., Peabody Coal Company,  
Henderson, Kentucky, for the Contestant;  
W. F. Taylor, Esq., Office of the Solicitor, U.S.  
Department of Labor, Nashville, Tennessee, for the  
Respondent.

Before: Judge Melick

These expedited Contest Proceedings were filed by the Peabody Coal Company (Peabody), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq., the "Act," to challenge three citations issued by the Secretary of Labor alleging violations of section 103(f) of the Act.<sup>1</sup> The citations resulted from Peabody's refusal to pay all

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<sup>1</sup> The citations are set forth in the Appendix hereto.  
Section 103(f) reads as follows:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative

of the miners' representatives who accompanied separate Mine Safety and Health Administration ("MSHA") inspection teams on regular inspections conducted on March 7, 1991 and March 19, 1991, at its Martwick Underground Mine. There is no dispute that a different miners' representative accompanied each of five separate MSHA inspection teams on March 7, 1991, and a different miners' representative accompanied each of four separate MSHA inspection teams on March 19, 1991, but that Peabody paid walkaround pay to only one such representative on each date. The issue is whether the other miners' representatives are also entitled to walkaround pay.

More particularly the evidence shows that on March 7, 1991, five federal inspectors arrived at Peabody's Martwick Mine to conduct a "regular" inspection mandated by section 103(a) of the Act. This inspection and the one conducted on March 19, 1991, were made during the latter portion of the January through March quarterly inspection period. These areas, Unit Nos. 1 and 4, had not been previously inspected during this inspection period.

The federal inspectors on the March 7 inspection, A. J. Parks (MSHA supervisor), William G. Branson (electrical inspect), Terry Cullen (roof control specialist), Darold Gamblin (Martwick's regular inspector), and Sam Martin, arrived at the mine at approximately 7:10 a.m. At about 7:30 a.m., MSHA supervisor Parks made individual inspection team assignments. The mine records were reviewed by the inspectors and miners' representatives, company representatives, and one state inspector entered the mine. With the exception of Electrical Inspector Branson, who traveled directly to the No. 4 Unit in a separate mantrip with Peabody's electrical supervisor, Robert (Bob) Epley, and miners' representative and electrical repairman, Artemaus Birchwell, the individual inspection teams entered the mine together and traveled to the 4th East panel. Upon arrival at the 4th East panel around 9:00 a.m., the individual inspection teams

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(footnote 1 continued)

of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

(with the exception noted above) separated to conduct an examination of separate and distinct areas of the No. 4 Unit.

The team members and the inspection responsibilities assigned were as follows: Supervisor Parks, State Inspector James Hawkins and Miners' Representative William D. Johnson, walked and inspected the entire length of the return air course entry of the No. 4 Unit, a distance of approximately 4200 feet. Electrical Inspector Branson, Miners' Representative and Electrical Repairman Birchwell, and Peabody's Electrical Supervisor Epley traveled directly to the No. 4 Unit and conducted an electrical inspection. Inspector Gamblin, Miners' Representative Cecil Phillips and Company Representative Steve Little walked and inspected the full length of the belt entry to the No. 4 Unit, again a distance of approximately 4200 feet. Roof Control Specialist Cullen and Miners' Representative Terry Bowman traveled by mantrip down the track entry to the face area of Unit No. 4 inspecting the roof and faces of the Unit. Inspector Martin and Miners' Representative Sam Sooke walked and inspected the entire 4200 foot intake air course entry.

Upon reaching the No. 4 Unit, the team led by Inspector Martin obtained rock dust samples in seven different locations. Each of the five separate inspection teams started their individual assignments at approximately 9:00 a.m. and reached the No. 4 Unit at about 11:30 a.m. Thereafter, each separate team assisted in completing the inspection of the unit, taking approximately 30 minutes. At noon on March 7, 1991, the separate inspection teams rendezvoused at the end of the track and traveled to the surface together, arriving outside at or near 12:45 p.m., and from this point until 1:30 p.m., the inspectors wrote citations for violations noted while underground. At 1:45 p.m., all members of the separate inspections teams (save Inspector Branson who had already held a close-out conference with Peabody officials and departed the mine at 1:45 p.m.) participated in a close-out conference.

On March 19, 1991, at 7:15 a.m. five federal inspectors arrived at the Martwick Mine to complete the quarterly inspection. Inspection teams were formed and entered the mine at 8:30 a.m. The teams entered the mine together and traveled to the 1st Northwest submain. Upon reaching this submain, at approximately 8:45 a.m., the teams separated and commenced their separate inspection assignments. The team members and the assigned inspection responsibilities were as follows: MSHA Supervisor Parks, Inspector Gamblin, and Miners' Representative Phillips walked and inspected the return air course entry to the No. 1 Unit, a distance of about 3300 feet, arriving on the No. 1 Unit at about 9:30 a.m. Inspector Mike Whitfield and Miners' Representative Bowman walked and inspected the full length of the intake air course entry to the No. 1 Unit, a distance of 3,300 feet. This team arrived on the No. 1 Unit at 9:35 a.m.



Electrical Inspector Branson, Miners' Representative Birchwell and Peabody Electrical Supervisory Epley traveled separate and apart from the other inspection teams and proceeded directly down the track entry by mantrip to the No. 1 Unit to conduct an electrical inspection in that unit. Inspector Ted Smith, Miners' Representative Sookey, and company Representative Little walked and inspected the belt entry to the No. 1 Unit traveling about 3,300 feet and arriving on the unit at 9:30 a.m.

The teams rendezvoused at the end of the track and thereafter departed the No. 1 Unit at about 12:45 p.m. While on the No. 1 Unit, a ventilation problem was discovered and Miners' Representatives Phillips and Sookey assisted in correcting the problem. Sookey devoted about 30 to 40 minutes in these endeavors.

The teams arrived on the surface at 1:10 p.m. and the federal inspectors wrote citations for the violations noted underground. At 1:30 p.m., a close-out conference was attended by all members of the inspection teams except Inspector Branson, who had conducted a separate close-out conference with Peabody officials and had departed the mine at 1:15 p.m.

It is not disputed that during the course of both of the underground inspections each team operated separate and apart, with no overlapping responsibilities or duplication of inspection efforts. On both dates the teams had distinct inspection assignments unique to that individual team. Physical barriers including stoppings separated the teams during much of the underground portion of the inspection.

All of the miners' representatives who participated in the pre-inspection activities, the inspections on March 7 and 19, and the post-inspection close-out conferences were scheduled to work at the mine at those times. Those unpaid representatives would have received their regular pay except for their participation in the inspection. Because Peabody refused to pay more than one miners' representative on each date Inspector Noffsinger issued the three section 104(a) citations at bar. There is no dispute that those miners listed in these citations were those not paid.

In Magma Copper Company v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit in affirming a decision of this Commission, held that under section 103(f) of the Act, when an inspection of a mine is conducted by more than one Federal Mine Safety and Health Administration (MSHA) inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners who is an employee of the mine operator may accompany each inspector without loss of pay. The cases at bar fall clearly within the ambit of the Magma decision.

In reaching this conclusion, I have not disregarded Peabody's argument that the Magma case is inapposite because the inspections in the instant cases occurred within the same mining unit. This distinction is, however, without legal significance. Clearly, the thrust of the Magma decision was that since each inspector was performing a separate and distinct inspection function, it was essential that each be accompanied by a separate representative of miners. It is of no material consequence then, whether the inspectors were performing their unique inspection functions in separate sections of a milling complex, as in the Magma case, or in separate sections of large underground mining units as in these cases, so long as those inspection functions were separate and distinct.

Indeed, while Peabody argues that the inspections on March 7, and 19, 1991, concerned only one "unit" on each respective date, each such "unit" was enormous. Reference to the mine maps makes this quite clear (See Joint Exhibits Nos. 1 and 2). In addition, in these cases the inspection teams were not only functionally separate but, because of stoppings between the entries travelled by the inspection teams, most of the teams were also effectively separated physically.

Under the circumstances, it is clear that Peabody violated the provisions of section 103(f) of the Act in failing to compensate the designated miners' representatives who accompanied an MSHA inspector during the noted inspections.

ORDER

Citation Nos. 3416696, 3416751 and 3416752 are affirmed and the Contests of those citations are dismissed.



Gary Mellick  
Administrative Law Judge

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## APPENDIX

Citation No. 3416696 charges as follows:

A violation of 103(f) of the 1977 Act has occurred because Sam Sookey has evidence (pay record) that he suffered loss of pay on March 7 and 19 for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.

Citation No. 3416752 charges as follows:

A violation of 103(f) of the 1977 Act has occurred because William D. Johnson (3-7-91) and Artemaus Birchwell (3-7-91 & 3-19-91) has [sic] evidence (pay record) that they suffered loss of pay for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.

Citation No. 3416751 alleges as follows:

A violation of 103(f) of the 1977 Act has occurred because Terry R. Bowman has evidence (pay record) that he suffered loss of pay (3-7-91 & 3-19-91) for time spent in the capacity of Miner Representative while traveling with an authorized representative of Secretary of Labor, (MSHA), during inspection.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**AUG 21 1991**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 91-56
Petitioner	:	A.C. No. 11-00585-03778
v.	:	
	:	Mine No. 10
PEABODY COAL COMPANY,	:	
Respondent	:	

**DECISION**

Appearances: Denise Hockley-Cann, Esq., and Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner; David S. Hemenway, Esq., Thompson & Mitchell, St. Louis, Missouri, for the Respondent.

Before: Judge Melick

This case is before me upon the 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," charging the Peabody Coal Company (Peabody) with one violation of the mandatory standard at 30 C.F.R. § 75.509 and proposing a civil penalty of \$1,100 for the alleged violation. The general issue before me is whether Peabody violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The withdrawal order at issue, Order No. 3032502, issued pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.509 and charges as follows:<sup>1</sup>

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<sup>1</sup> Section 104(d) of the Act reads as follows:

"(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any

Electrical work was being performed on a continuous-mining machine while the cont. miner was energized with 950 volts alternating current electricity. Power wires to the right cutting motor were being insulated and nonelectrical parts were being installed. Four-hourly maintenance men and one chief electrician was [sic] performing the work. The above condition was observed in the 2 North section off 7 West entries.

The cited standard provides as follows:

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.<sup>2</sup>

There is no dispute in this case that the cited continuous miner was indeed energized at the time Federal Mine Safety and Health Administration (MSHA) Inspector John Stritzel arrived at

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(footnote 1 continued)

subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

<sup>2</sup> The Secretary in this case is proceeding solely on the theory that electric equipment must be deenergized only when performing electrical work in this case by allegedly insulating the power wires to the right cutting motor of the cited continuous miner.

the work scene at the 2 North 7 West section at approximately 8:50 a.m., on August 9, 1990. Stritzel has had extensive experience within the mining industry (including experience as a repairman on continuous miners) and with MSHA. He was previously advised by management that the continuous miner was "down" and as he approached to within about 10 to 12 feet of the miner, Stritzel observed four miners working on the machine. One miner was sitting in the operator's compartment, two were on top of the miner moving cover plates into position, and the fourth miner had electrical tape in his hands and was working on electrical lead wires. Stritzel was certain that the fourth miner was actually in the process of taping the power conductor which is one of the inner wires of the power cable.

When Stritzel asked if the continuous miner was deenergized, one miner responded "no" and another responded "yes." In light of the mixed response, Stritzel directed that all work be halted and he proceeded to check the power center to determine for himself whether the power cable had in fact been disconnected, locked out and tagged out. Maintenance foreman Randy Aymer accompanied Stritzel to the power center and they verified that indeed the power was "on." At that point, Stritzel told Aymer that he was issuing a section 104(d)(2) withdrawal order. Aymer explained to Stritzel that the cable had initially been locked out when they began work on the miner. Stritzel then explained to one of the chief electricians, Bill McGuire, that in order to abate the closure order it would be necessary to deenergize the miner and present a safety talk to the miners. McGuire then proceeded to instruct the miners regarding safe operating procedures when working on electrical equipment.

Stritzel thought that under the circumstances it was "reasonably likely" for a miner to be fatally injured through electrocution. He observed that the circuit breaker on the continuous miner is a mechanical device that is not "foolproof" and that it cannot be verified whether the power is indeed off. Stritzel based his conclusion that the violation was "significant and substantial" and of high gravity, upon his inference that the person who was taping the leads had necessarily earlier been working on bare wires. It is not disputed that 950 volts alternating current is sufficient to cause electrocution. Stritzel further concluded that the violation was the result of high negligence inasmuch as the repairmen were working under the supervision of a foreman, Randy Aymer.

On behalf of Peabody, repairman Robert Eggerman testified that he began working on the subject continuous miner during the third shift that day, to repair a broken bit motor lead wire. According to Eggerman, the power cable was unplugged and locked-out with a padlock. Eggerman testified that after the leads were repaired, the miner was then reenergized and found to be working correctly. When the inspector arrived, Eggerman was

leaning over the pump motor allegedly repairing hydraulic hoses. He maintains that while the miner was energized, he saw no electrical work being performed, and did not know whether electrical work was indeed then being performed. He maintains that he was not on top of the miner, but leaning on the side of it. He maintains that he did not see what coworker Grauer was doing at the time the inspector arrived.

Maintenance foreman Randy Aymer was maintenance supervisor on the third shift in charge of repairing the bit motor lead wire. According to Aymer, when the inspector arrived, miner William Grauer was in front of the floor jack bracket placing a protective covering or jacket on one of the water hoses. Aymer testified that when Inspector Stritzel asked if the machine was deenergized he responded "yes" because he in fact thought it was deenergized, and was not aware that it had been reenergized. Aymer acknowledged that he never protested or denied to Stritzel that electrical work was being performed on the continuous miner even when he was told that the order was being issued and even when McGuire was instructing the miners about the procedures to be followed when electrical work is being performed.

William Grauer, another repairman working on the continuous miner that shift, testified that all the work was done on the machine when he arrived except for placing protective jackets over the hydraulic hoses. He estimated that it was around 8:45 that morning when the inspector arrived. He was kneeling beside the continuous miner purportedly taping a hydraulic hose. In response to a question at hearing as to whether he heard the inspector inquire whether the machine was energized, he answered "not really." He conceded that the inspector could see the tape in his hands, but maintains that he was not taping electrical leads and that his hands were no closer than 15 inches from the exposed electrical leads.<sup>3</sup>

William Dowdy, another Peabody repairman testified that he was working in the cab area of the cited continuous miner at the time Inspector Stritzel arrived. He maintains that he saw no electrical work being performed while the machine was energized. He acknowledged, however, that no one protested or denied that electrical work was being performed on the energized miner when McGuire gave his safety speech.

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<sup>3</sup> Grauer also acknowledged that he was issued a letter of reprimand by Peabody for allegedly working on the electric leads of the energized continuous miner, but the reprimand was dropped at "step 2" of the disciplinary procedures for reasons not clearly established. Under the circumstances, this evidence, even if properly admissible, is of no probative value to this case.

Roger Ingram, another repairman, testified that during the third shift when he reported to the cited continuous miner he first verified that it was locked and tagged-out. At that time the leads were waiting to be bolted in. Ingram testified that he was the person who actually attached, bolted and insulated the three lead wires. He testified that he had completely covered the leads so that there was no need for Grauer to tape the leads any further. Ingram noted that Eggerman then gave up the keys and the power was returned at the power center to test the continuous miner. Ingram maintains no further electrical work was performed after the machine was tested and the motor found to be working. The breaker was then purportedly turned off and he was on top of the machine replacing some covers when the inspector arrived. Ingram maintains that he later argued with the inspector stating that he did not see a problem but the inspector denied that such a conversation ever occurred. Indeed Inspector Stritzel testified that no one at the mine denied that work was being performed on the electrical power leads until he received a telephone call days later from Grauer.

I find in this case that the Secretary has met her burden of proving the cited violation by a preponderance of the evidence. The testimony of Inspector Stritzel is completely credible. He was in position to clearly observe what was going on and has no reason to fabricate. Accordingly, I find that a miner, either William Grauer or another, was indeed taping the electrical leads at a time when the continuous miner was energized. While that miner was most likely Mr. Grauer, I do not, because of his lack of contemporaneous protestation, find his later denials after notice of reprimand to be credible.

The Secretary's evidence is additionally supported by the absence of any contemporaneous protestation or denial from any of the other miners to Inspector Stritzel's order to deenergize the continuous miner and upon his issuance of a withdrawal order for performing electrical work on energized electrical equipment. Moreover, as already noted, the sole undisputed protest arose only after one of the miners, William Grauer, was later issued a letter of reprimand for his alleged participation in the unlawful activity. Under the circumstances this belated protestation is, as already noted, without much credibility.

I do not, however, accept the inference of Inspector Stritzel regarding the gravity and "significant and substantial" nature of the violation. Stritzel based his conclusions of high gravity upon an inference that one of the repairmen must have been working on bare lead wires at some point in time while the continuous miner was energized. In this regard, I find credible that portion of the testimony of Eggerman, Aymer, and Ingram to the effect that the leads had already been attached and at least partially taped and insulated before the power was returned to the continuous miner for purposes of testing. It more reasonably



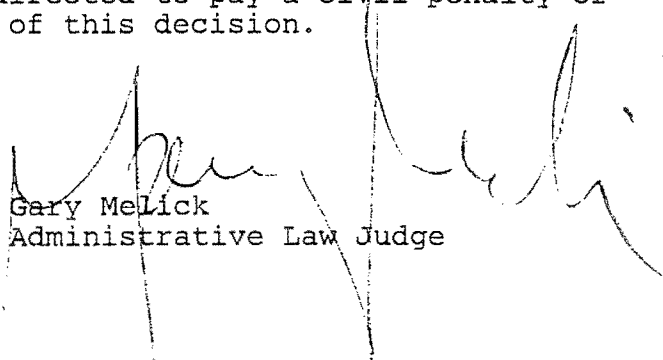
may be inferred that at the time the bare leads were being insulated and taped, the continuous miner was indeed locked out and deenergized. It would appear under the circumstances that the miner observed by Stritzel taping the leads was placing another layer of insulating tape upon leads that had already been initially insulated in part. Under the circumstances, I do not find sufficient evidence to support a conclusion that the violation was "significant and substantial" or of high gravity.

I also find credible the testimony of maintenance foreman Aymer that the continuous miner had been in fact earlier deenergized and locked out while electrical work was being performed. His initial response to Stritzel's inquiry as to whether the continuous miner was deenergized clearly suggests that he in fact believed that the miner was then deenergized. Accordingly, I find that while Aymer was negligent in failing to have controlling knowledge of the lock-out status of the continuous miner, this negligence was not of such an aggravated nature as to constitute "unwarrantable failure." See: Emory Mining Corporation, 9 FMSHRC 1997 (1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987).

Under the circumstances and considering the criteria under section 110(i) of the Act, I find that the civil penalty of \$300 is appropriate.

#### ORDER

Order No. 3032502 is hereby **MODIFIED** to a citation under section 104(a) of the Act, and that citation is **AFFIRMED**. Peabody Coal Company is hereby directed to pay a civil penalty of \$300 within 30 days of the date of this decision.

  
Gary Mellick  
Administrative Law Judge

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**AUG 21 1991**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-91
Petitioner	:	A.C. No. 46-01433-03952
v.	:	
	:	Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

**DECISION**

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

Before: Judge Melick

This case is before me upon the 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," charging the Consolidation Coal Company (Consol) with one violation of the mandatory standard at 30 C.F.R. § 75.1405 and proposing a civil penalty of \$147 for the alleged violation. The general issue before me is whether Consol committed a "significant and substantial" violation of the cited regulatory standard and, if so, the amount of civil penalty that should be assessed for the violation in accordance with section 110(i) of the Act.

The one citation at issue, Citation No. 3308635, alleges a "significant and substantial" violation and charges that "the cut off levers on the No. 1 and 9 supply cars in the 1 South mains (058) section are damaged and inoperative creating a hazard to persons who may have to uncouple the supply cars."

The cited standard provides as follows:

All haulage equipment acquired by an operator of a coal mine on or after March 30, 1971, shall be equipped with automatic couplers which couple by impact and

uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on March 30, 1970, shall also be so equipped within 4 years after March 30, 1970.

Consol does not dispute the violation but maintains that it was neither "significant and substantial" nor of high gravity. Frank Bowers, a coal mine inspector for the Federal Mine Safety and Health Administration (MSHA), explained that the existing cutoff levers on the cited supply cars were located at the ends of the cars at the sides, which enabled persons to uncouple the cars without going between the cars. He explained that, if working properly, by pushing the lever down, a chain uncouples the car. In this case, the chains were broken off the levers.

Bowers thought it was reasonably likely under the circumstances for a person to proceed between the cars to uncouple them and it would be reasonably likely to result in serious crushing injuries and lost fingers or legs. Bowers further testified that he had previously seen a miner at this mine position himself between two supply cars in attempting to uncouple the cars. This had occurred in spite of stickers on the cars warning miners not to proceed between the cars, in spite of the issuance of a safeguard at this mine prohibiting miners from uncoupling between cars, and in spite of purported safety messages and training sessions at which employees were allegedly trained against proceeding between rail cars to uncouple cars. While Bowers observed that a "safety bar" could be used to uncouple the cars from a safe position he did not see any such bar in the area at that time. Bowers also testified that the motorman told him that he did not then have such a safety bar available.

Bowers also concluded that the operator "should have known" of the violative condition because it was "pretty obvious" and that company policy requires that cutoff levers be checked on the cars before they enter the mine.

Within this framework, I conclude that indeed the violation was "significant and substantial" and of significant gravity. See Mathies Coal Company, 6 FMSHRC 1 (1984). In reaching these conclusions, I have not disregarded the testimony of Loveridge Mine Escort David Olson that warning stickers have been placed on mine cars warning miners not to proceed between the rail cars, and that supply cars are ordinarily furnished with a symbolic warning sticker. It is apparent, however, that the warnings were ignored by the Consol employee previously observed by the inspector between supply cars. The effectiveness of such warnings are therefore suspect.

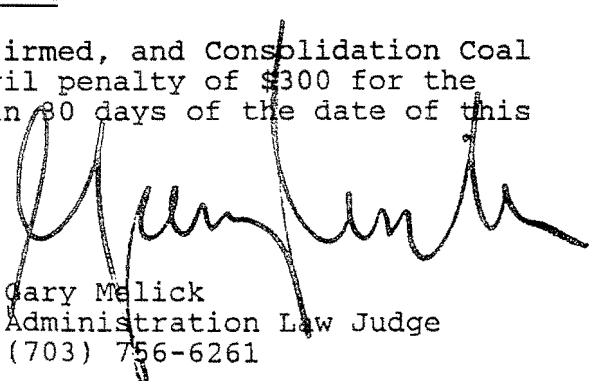
I have also not disregarded Olson's testimony that miners have been periodically advised in training sessions and in safety messages not to proceed between rail cars, and that he had never personally seen any employee between the cars. It is apparent, however, that this training and these messages were also ignored by the employee seen by Inspector Bowers proceed between the cars. While this evidence provides some mitigation, it is not of sufficient weight to negate the "significant and substantial" findings herein.

I have also considered the testimony of Olson that he observed a safety bar on the locomotive of the subject supply train at the time of the citation. However, even assuming that the safety bar was indeed present as Olson testified, and that such a bar could be used by miners to uncouple cars without proceeding between them, I do not find this evidence to be sufficiently mitigating to negate the "significant and substantial" and high gravity findings made herein.

In light of the undisputed testimony that the cited and admitted violative conditions were "obvious" and had been overlooked during Consol's inspection process, I must also conclude that the violation was the result of negligence. In particular I have also noted the existence of seven prior violations in the 10-month period preceding the instant citation of the same regulatory standard at issue herein and involving 19 inoperable automatic couplers. This evidence is not only relevant to the history criterion under section 110(i) but also reflects upon the ineffectiveness of the company inspection procedures and indeed is also a factor to be considered in evaluating operator negligence. Under the circumstances, and considering all of the criteria under section 110(i) of the Act, I conclude that a civil penalty of \$300 is appropriate.

#### ORDER

Citation No. 3308635 is affirmed, and Consolidation Coal Company is directed to pay a civil penalty of \$300 for the violation charged therein, within 90 days of the date of this decision.



Gary Mellick  
Administration Law Judge  
(703) 756-6261

Distribution:

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

Walter Scheller, Esq., Consolidation Coal Company, Legal Department 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 27 1991**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 91-193  
Petitioner : A.C. No. 15-13362-03582  
v. :  
: Mine No. 3  
R B COAL COMPANY, INCORPORATED, :  
Respondent :

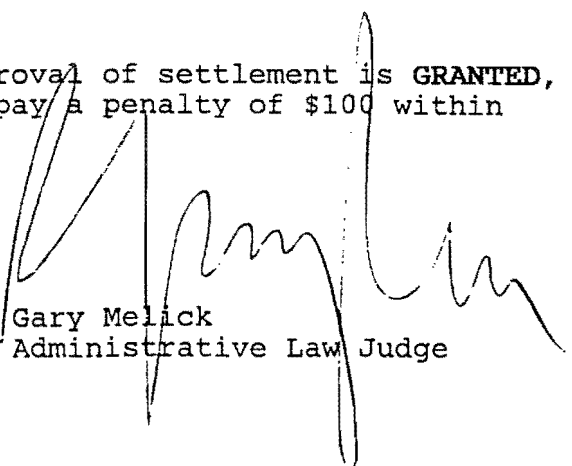
**DECISION APPROVING SETTLEMENT**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for the Petitioner;  
Susan C. Lawson, Esq., Forester, Buttermore,  
Turner & Lawson, P.S.C., Harlan, Kentucky, for the  
Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from \$300 to \$100 was proposed and Respondent noted that he would in the future send all of his dust samples by certified mail. 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 a penalty of \$100 within 30 days of this order.

  
Gary Melick  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 27 1991**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 91-60
Petitioner	:	A.C. No. 44-00649-03535
v.	:	
	:	Coronet Jewell Prep. Plant 2
JEWELL SMOKELESS COAL CORP.,	:	
Respondent	:	

**DECISION**

Appearances: Glenn M. Loos, Esq., U.S. Department of Labor,  
Office of the Solicitor, Arlington, Virginia;  
Joseph W. Bowman, Esq., Street, Street, Street,  
Scott & Bowman, Grundy, Virginia.

Before: Judge Weisberger

**I. STATEMENT OF THE CASE**

This case is before me based upon a petition for civil penalty filed by the Secretary (Petitioner) seeking a total penalty of \$59 for violations by Respondent of two mandatory standards set forth at 30 C.F.R. § 77.1301(c)(6) and 30 C.F.R. § 77.1301(c)(9). The Operator, (Respondent) filed an answer in which, in essence, it denied that the Mine Safety and Health Administration has jurisdiction over the facility in which the alleged violations occurred. In a telephone conference call initiated by the undersigned on April 25, 1990, with counsel for both parties, the parties agreed that they would each submit motions for summary decision in order to resolve the issues presented herein. The parties further indicated an intention to engage in discovery, and the parties were consequently allowed until July 31, 1991, to file their respective motions. On July 31, 1991, the parties each filed a motion for summary decision.

**II. FINDINGS OF FACT**

In their respective motions, the parties set out enumerated facts, which are adopted and are set forth below as follows:

1. Jewell Smokeless Coal Corporation is the owner and operator of the Jewell Equipment Shop which is the subject of this proceeding.

2. Federal Mine Safety and Health Inspector Leslie E. Slowey was acting in his official capacity when he issued Citations No. 3507039 and 3507040, except that Jewell Smokeless does not admit that Inspector Slowey had jurisdiction to issue the Citations at the equipment shop.

3. True copies of Citations No. 3507039 and 3507040 were served upon Jewell Smokeless Coal Corporation or its agent as required by the Mine Act.

4. The proposed penalty assessments for Citations No. 3507039 and 3507040 are reasonable in light of the conditions stated in those citations, and such penalties will not adversely affect Jewell Smokeless Coal Corporation's ability to continue in business.

5. Citations No. 3507039 and 3507040, are true and accurate in their statement of the conditions existing at Jewell Smokeless Coal Corporation's machine shop on September 5, 1990.

6. The violations stated in Citations No. 3507039 and 3507040 were timely abated.

7. Jewell Smokeless Coal Corporation operates an equipment shop ("the shop") located north of Virginia State Route 638 and Dismal River near Vansant, in Buchanan County, Virginia. The exact location of the shop is indicated in green on the map attached as "Exhibit B" to the parties' motions.

8. The shop owns, and operates, maintains and repairs through its employees the following types of equipment: bulldozers, dump trucks, cement trucks, a hydoseeder, a vacuum truck, spreader trucks, a road grader, tractor trucks, a rollback trailer, a lowboy trailer, a gradeall, a crane, and loaders.

9. The shop has twenty-five employees: two supervisors, four carpenters, four mechanics and fifteen equipment operators.

10. From its inventory of equipment and employees, the shop supplies equipment and operators to Jewell Smokeless Corporation, and to Dominion Coal Corporation and Jewell Coal & Coke Co., affiliated companies. All work done by the shop for Jewell Smokeless Coal Corporation, Dominion Coal Corporation and Jewell Coal & Coke Co., is charged by the shop to the company for which the work is done.

11. Jewell Smokeless Coal Corporation operates a coal tipple which is located south of State Route 638 and on the north and south sides of Dismal River near Vansant, in Buchanan County, Virginia. The exact location of the coal tipple is indicated in red on the map attached as "Exhibit B" to the Parties' motions. Equipment and operators are supplied by the shop to Jewell Smokeless Coal Corporation for such things as road construction and maintenance and pond construction and maintenance. The shop

does not supply equipment or operators such as tippie equipment, tippie operators, tippie mechanics, car droppers, etc. When the equipment and operators of the shop are supplying services at the tippie of Jewell Smokeless Coal Corporation, they are subject to regulation by MSHA.

12. Dominion Coal Corporation operates several underground coal mines in Buchanan County, Virginia. The nearest mine to the shop is located approximately one and one-half miles from the shop, and the farthest mine is located approximately twenty miles from the shop. Equipment and operators are supplied to Dominion Coal Corporation for such things as mine construction and face-up work, road construction and maintenance, mine reclamation work, etc. The shop does not supply equipment or operators such as continuous miners, continuous miner operators, roof bolters, roof bolter operators, or other such underground mining equipment or operators. When the equipment and operators of the shop are supplying services at the mines of Dominion Coal Corporation, they are subject to regulation by MSHA.

13. Jewell Coal & Coke Company operates a coke manufacturing facility which is located south of Virginia State Route 630 and on the north and south sides of Dismal River near Vansant, in Buchanan County, Virginia. The exact location of the coke manufacturing facility is indicated in black on the map attached as "Exhibit B" to the Parties' motions. Equipment and operators are supplied by the shop to Jewell Coal & Coke Company for such things as construction, road construction and maintenance, clean-up activities, etc. When the equipment and operators of the shop are supplying services at the coke ovens of Jewell Coal & Coke Company, they are subject to regulation by OSHA.

14. The actual site of the shop consists of a road leading from State Route 638, a parking area for the shop employees and for equipment not in use or awaiting maintenance or repair, and two buildings, one of which contains an office and three repair bays, where maintenance and repair of the shop's equipment is performed. Two of the bays have grease pits. The other building has bays in which to park equipment, and is used primarily for the purpose of sheltering equipment during the winter and providing access to electrical outlets into which diesel engine heaters can be connected during cold weather. The shop through its employees performs maintenance and repair services on the shop equipment identified above at the shop site. No maintenance or repairs are done at the shop on mine equipment of Dominion Coal Corporation or tippie equipment of Jewell Smokeless Coal Corporation such as that previously identified.

15. The shop has separate supervision from any of the aforesaid mines, tippie or coke manufacturing facility, and has no MSHA mine identification number.



16. The only issue presented in this action is whether the equipment shop at which Inspector Slowey issued Citation No. 3507039 and 3507040 comes within the jurisdiction of the Mine Safety and Health Administration.

### III. DISCUSSION

The facts indicate that at the shop maintenance and repair services are performed on the following types of equipment: bulldozer, dump trucks, cement trucks, a hydroseeder, a vacuum truck, spreader trucks, a road grader, tractor trucks, a rollback trailer, a lowboy trailer, a gradeall, a crane, and loaders. These items of equipment are used at a coke manufacturing facility, which, when at that site, are subject to regulation by the Occupational Safety and Health Administration. In addition, they are used at a tippie and several mines in Buchanan County, Virginia, for road and pond construction and maintenance and mine construction and face-up work.

In analyzing whether the shop is within the jurisdiction of the Mine Safety and Health Administration, I take cognizance of the definition of a coal mine set forth in section 3(h)(i) of the Federal Mine Safety and Health Act of 1977, (The Act) in relevant part, as "lands . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface . . . used in, or to be used in . . . the work of extracting (coal) from (its) natural deposits . . . or the work of preparing." The Commission has indicated that although this definition is not without bounds it". . . is expansive and is to be interpreted broadly." (U.S. Steel Mining Co., Inc., 10 FMSHRC 146, at 149 (1988).) In this connection, the legislative history of the Act explicitly sets forth the Congressional intent with regard to a broad construction to be accorded the Act's definition of a coal mine. The Senate report on the bill that became the Act states as follows:

[T]he Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602.

The various equipment in question, being used to maintain

and construct roads at the site of mines, and in mine construction, are thus used in activities that perform an integral part of the work of extracting coal, given a broad construction to that term, as was done implicitly by the Commission in U.S. Steel, supra.<sup>1</sup> Accordingly, the shop wherein such equipment is parked, maintained, and repaired, is considered "within the scope . . . structures, facilities, . . . on the surface . . . used in, or to be used in . . . the work of extracting [coal] . . . or the work of preparing coal." (See, U.S. Steel, supra.)

In light of this conclusion Respondent's motion for summary decision is **DENIED** and the motion for summary decision by Petitioner is **GRANTED**. Inasmuch as the only issue presented for resolution was whether the citations 3507039 and 3507040 are within the jurisdiction of the Mine Safety and Health Administration, and inasmuch as that issue has been answered in the affirmative, judgment in this case shall be entered in favor of the Petitioner based upon the allegations contained in the petition for assessment of civil penalty.

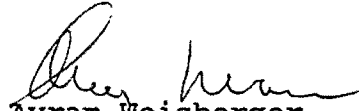
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<sup>1</sup>In U.S. Steel, supra, the Commission, was presented with the issue of whether a facility for the repair and maintenance of electrical and mechanical coal mining equipment was subject to the provisions of a mandatory standard requiring examinations of surface coal mines. In deciding this issue, the Commission took cognizance of the parties' stipulations that the facility in questions exists and functions to repair and maintain equipment used in, or to be used in, coal mines, that the facility has a separate mine identification number, and that it has a history of regulation and citation by MSHA. Based on these stipulations the Commission held that the facility "consists of land . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface . . . used in, or to be used in . . . the work of extracting [coal] . . . or the work of preparing coal and, therefore is a surface coal mine subject to the examination requirements of section 77.1713(a)" (U.S. Steel, supra at 149).

In the instant case, the shop does not have an MSHA identification number, and there is nothing in the record to indicate that it has a history of regulation and citation by MSHA. The absence of these factors herein do not distinguish the instant case from U.S. Steel, supra. Inasmuch as, according to the Act, supra, a facility, is a coal mine if it is used in the work of extracting or preparing coal, the critical element is the function of a facility, and not how it has been identified by MSHA or the Operator. In this connection, it is significant that in the instant case as in U.S. Steel, supra, the shop at issue repairs equipment used at a coal mine.

ORDER

It is ordered that Respondent's pay \$59 as a civil penalty for the violations set forth in the petition for assessment of civil penalty.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

Glenn M. Loos, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Joseph W. Bowman, Esq., Street, Street, Street, Scott & Bowman, P.O. Box 2100, Grundy, VA 24614 (Certified Mail)

nb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 27 1991

MICHAEL E. HOLLAND, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEVA 90-315-D  
: MSHA Case No. HOPE CD 90-17  
CONSOLIDATION COAL COMPANY, :  
Respondent : Amonate No. 31 Mine

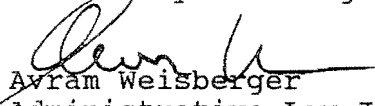
DECISION

Appearances: H. John Taylor, Esq., Rand, West Virginia for  
Complainant;  
Laura E. Beverage, Esq., Jackson and Kelly,  
Beckley, West Virginia for Respondent.

On August 13, 1991, Complainant moved to withdraw his pleadings in this case, and to withdraw his claims against Respondent. Based on the assertions of counsel which were presented orally on the record on August 13, 1991, Complainant's Motion is allowed.

It is ORDERED that this case to be DISMISSED with prejudice.

It is further ORDERED that the Complainant's claims against the Respondent, as articulated in his complaint, his five-page statement to the investigator and his responses to discovery, are hereby DISMISSED with prejudice to the Complainant. This Order specifically includes any claim by the Complainant that the Respondent has discriminated against him on the basis of his Part 90 status, that the Respondent has discriminated against him by requiring him to wear metatarsal boots, and that the Complainant has engaged in a protected work refusal by refusing to wear metatarsal boots.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

H. John Taylor, Esq., 5823 Midland Drive, Rand, WV 25306  
(Certified Mail)

Laura E. Beverage, Esq., Jackson & Kelly, 1600 Laidley Tower,  
P. O. Box 511, Beckley, WV 26801 (Certified Mail)

nb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 27 1991**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-192
Petitioner	:	A.C. No. 46-01453-03947
v.	:	
	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**

Appearances: Robert Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;  
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearings Petitioner filed a motion to approve a settlement agreement and to dismiss the case. The Secretary vacated Citation No. 3307355 for insufficient evidence. A reduction in penalty from \$212 to \$135 was 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 a penalty of \$135 within 30 days of this order.

Gary Melick  
Administrative Law Judge



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 29 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 91-20
Petitioner	:	A. C. No. 41-02632-03531
	:	
v.	:	Docket No. CENT 91-21
	:	A. C. No. 41-02632-03532
TEXAS UTILITIES MINING COMPANY,	:	
Respondent	:	Docket No. CENT 91-63
	:	A. C. No. 41-02632-03534
	:	
	:	Martin Lake Strip

## DECISION APPROVING SETTLEMENT

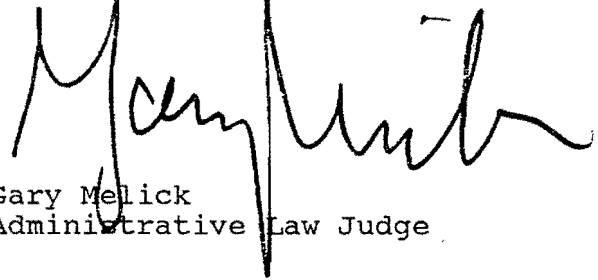
Appearances: Ernest Burford, Esq., Office of the  
Solicitor, U. S. Department of  
Labor, Dallas, Texas, for the  
Petitioner;  
Christopher R. Miltenberger, Esq.,  
Worsham, Forsythe, Sampels &  
Wooldridge, Dallas, Texas, for the  
Respondent.

Before: Judge Melick

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). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the cases. She moved to vacate Citations No. 3415948, 3415949, 3415953, 3415957, 3416128 and 3416129, on the grounds that MSHA could not locate the inspector's notes of the related inspections and the inspector had insufficient independent recollection of the related conditions. She therefore noted that there was insufficient evidence to support the citations.

With respect to the remaining citations a reduction in penalty from \$1,022 to \$358 was proposed. I have considered the representations and documentation submitted in these cases, 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 a penalty of \$358 within 30 days of this order.



Gary Mellick  
Administrative Law Judge

Distribution:

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

Christopher R. Miltenberger, Esq., Worsham, Forsythe, Sampels &  
Wooldridge, Thirty-Two Hundred, 2001 Bryan Tower, Dallas, TX  
75201 (Certified Mail)

/fas

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

AUG 29 1991

WEST ELK COAL COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 90-365-R
v.	:	Citation No. 3584095; 8/16/90
	:	
SECRETARY OF LABOR,	:	Mt. Gunnison No. 1 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine I.D. 05-03672
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 91-131
Petitioner	:	A.C. No. 05-03672-03595
	:	
v.	:	Mt. Gunnison No. 1 Mine
	:	
WEST ELK COAL COMPANY, INC.,	:	
Respondent	:	

DECISION  
ORDER DISMISSING CONTEST PROCEEDING  
ORDER TO PAY

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
David M. Arnolds, Esq., Denver, Colorado,  
for Respondent.

Before Judge Cetti:

Statement of the Proceeding

These consolidated proceedings concern a Notice of Contest filed by the Contestant, West Elk Coal Company, Inc. (West Elk),<sup>1</sup> pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Act), challenging the captioned citation issued by MSHA. The civil penalty proceeding concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Beaver Creek for the alleged violation of 30 C.F.R. § 75.316 stated in the above captioned citation and for the alleged violation of 30 C.F.R. § 75.1106-3(a) stated in Citation No. 3584147.

---

<sup>1</sup> Now Mountain Coal Company, successor by merger to West Elk Coal Company, Inc., and Beaver Creek Coal Company.



After notice to the parties, the matter came on for hearing on the merits before me at Glenwood Springs, Colorado. The parties introduced oral and documentary evidence and fully litigated both citations. After both sides rested, the Judge from the bench, in open court informed the parties as to his decision based on the record and the evidence presented at the hearing that the alleged violation of 30 C.F.R. § 75.1106-3(a) was not S&S. The parties then conferred off the record and advised the court they had reached an amicable settlement agreement concerning both citations.

Citation No. 3584095

Respondent's counsel stated for the record that the reason West Elk contested Citation No. 3584095 was because of the impression West Elk received from the citation that MSHA was seeking to require the operator to receive specific approval from MSHA every time the operator installed a bleeder system. In light of the testimony of Mr. William G. Denning, MSHA's supervisory mining engineer, that such specific MSHA approval is not required as long as the operator complies with the requirements of the mine's ventilation plan, West Elk agreed to withdraw its contest of the citation. West Elk concedes that it mistakenly made cuts in the left barrier that should not have been made. West Elk, therefore, accepts the citation pursuant to the settlement agreement as a Section 104(a) non-S&S violation with a penalty of \$20 as originally proposed by the Petitioner.

Citation No. 3584147

With respect to Citation No. 3584147, the Judge at the conclusion of the hearing advised the parties that the evidence was insufficient to establish the S&S characterization of the alleged violation of 30 C.F.R. § 75.1106-3(a). The parties after conferring, informed the court they had reached an amicable settlement and moved for approval of the agreed settlement of the citation as a Section 104(a) non-S&S violation with a \$20 penalty.

The settlement agreement appeared reasonably proper and consistent with the evidence presented at the hearing. The settlement of both citations was approved and the approval of the settlement agreement is hereby affirmed.

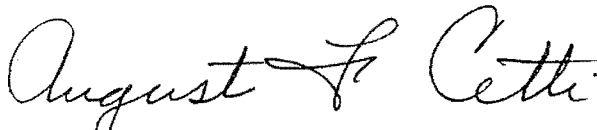
ORDER

1. Citation No. 3584095 is **AFFIRMED** as a § 104(a) non-S&S violation of 30 C.F.R. § 75.316 and a civil penalty of \$20 is **ASSESSED**.

2. Citation No. 3584147 is **MODIFIED** from a § 104(a) S&S to a § 104(a) non-S&S violation, and a civil penalty of \$20 is assessed.

3. Contest Proceeding Docket No. WEST 90-365-R is **DISMISSED**.

4. Respondent is **ORDERED TO PAY** the approved penalty in the sum of \$40 to the Secretary of Labor within 30 days of this Decision. Upon receipt of such payment the above-captioned civil penalty proceeding is **DISMISSED**.



August F. Cetti  
Administrative Law Judge

Distribution:

David M. Arnolds, Esq., Thomas F. Linn, Esq., WEST ELK COAL COMPANY, INC., 555 - 17th Street, 20th Floor, Denver, CO 80202  
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sh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

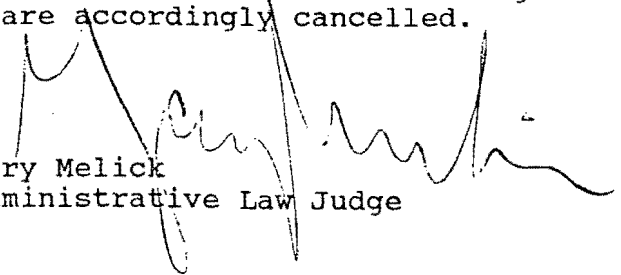
**AUG 30 1991**

RONALD TOLBERT,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 86-123-D
	:	
CHANEY CREEK COAL CORPORATION,	:	
Respondent	:	
	:	
ODELL MAGGARD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 86-1-D
	:	MSHA Case No. BARB CD 85-48
CHANEY CREEK COAL CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-51-D
Complainant	:	MSHA Case No. BARB CD 85-48
v.	:	
	:	Dollar Branch Mine
DOLLAR BRANCH COAL CORPORATION,	:	
Respondents	:	
	:	
and	:	
	:	
CHANEY CREEK COAL CORPORATION,	:	
Respondents	:	

ORDER OF DISMISSAL

Before: Judge Melick

The Complainants, in essence, request approval to withdraw their Complaints in the captioned cases on the basis of a mutually agreeable settlement agreement. In addition, the proposed civil penalty of \$1000 has been paid in full. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. These cases are therefore dismissed and the hearings scheduled for September 10, 1991, are accordingly cancelled.

  
Gary Melick  
Administrative Law Judge

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 30 1991

PEABODY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 91-179-R
	:	Citation No. 3419830; 2/11/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Martwick UG Mine
ADMINISTRATION (MSHA),	:	Mine ID 15-14074
Respondent	:	
	:	Docket No. KENT 91-185-R
	:	Citation No. 3419831; 2/21/91
	:	
	:	Camp No. 2 Mine
	:	Mine ID 15-02705

## DECISION

Appearances: David R. Joest, Esq., Peabody Coal Company,  
Henderson, Kentucky, for the Contestant;  
W. F. Taylor, Esq. Office of the Solicitor, U.S.  
Department of Labor, Nashville, Tennessee, for  
Respondent.

Before: Judge Melick

These expedited Contest Proceedings were filed by the Peabody Coal Company (Peabody) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge two citations issued by the Secretary of Labor alleging violations of the mandatory standard at 30 C.F.R § 75.316 for operating the cited mines without approved ventilation plans.<sup>1/</sup> The citations were taken to

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<sup>1</sup>Citation No. 3419830 reads as follows:

The mine is presently operating without an approved ventilation. [sic] Plans which were submitted December 28, 1990, January 10, 1991, and February 7, 1991, were considered to be not suitable for approval. Written notification from the District Manager of MSHA.

District 10 was mailed to the operator stating the changes needed in the plan. These were mailed January 10, 1991, and January 30, 1991, as of this of time a suitable plan has not been submitted.

obtain review of the disapproval by the Federal Mine Safety and Health Administration (MSHA) District Manager of ventilation plans submitted by Peabody. The underlying dispute involves the ventilation of "deep cuts" of up to 34 feet during the roof bolting cycle of the mining process. In particular MSHA is seeking in these ventilation plans a provision requiring that during the roof bolting cycle line brattice will be maintained to the second row of roof bolts located outby the working face and with a minimum of 3000 c.f.m. of air behind the line brattice. A diagram of the proposed requirement is displayed in Contestant's Exhibit Q at pages 23 and 24 and attached hereto as Appendices A and B respectively. These provisions will hereafter be noted as the "roof bolting ventilation requirement".

In challenging the citations at bar Peabody has maintained that the roof bolting ventilation requirement was not mine specific to the particular conditions of the subject mines but was of such a general nature and was applied generally to all mines throughout the MSHA district without consideration of specific mine conditions so as to be subject to the rulemaking process of mandatory safety standards--and was therefore improperly imposed in the ventilation plan approval process.

This issue was decided in a bench decision at bifurcated hearings in these cases and is set forth below with only non-substantives changes:

JUDGE MELICK: I am prepared to rule on the issue before me now. Let me just give some background of the law as it relates to the ventilation plan approval process.

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Cont'd footnote 1

Citation No. 3419831 reads as follows:

The mine is presently operating without an approved ventilation plan. Plans which were submitted November 31, 1990, January 4, 1991, February 1, 1991 and February 19, 1991, were considered to be not suitable for approval. Written notification from the District Manager of MSHA District 10 was mailed to the operator stating the changes needed in the plan. These were mailed December 1990, January 14, 1991. February 2, 1991, and telephone conversations were held with the operator agents as meeting concerning the plan was held in the MSHA office February 19, 1990.

The institution of a ventilation, methane and dust control plan through the process of Secretarial approval and operator adoption is set forth in Section 303 of the Act and under 30 C.F.R. 316 Section 75.316, which essentially reiterates the provisions of the Act. The purpose of the approval-adoption procedure is to provide a plan whose provisions are effective and suitable to the conditions and mining system of a particular mine. Once a plan is approved and adopted, the provisions of the plan are enforceable at the mine as though they were statutory safety standards. The authority for that proposition is of course Zeigler Coal Company v. Kleppe, 536 F.2d 398, (D.C. Cir, 1976).

The bilateral approval-adoption process which supplements the Acts rulemaking procedures involves consultation and negotiation between MSHA and only the affected operator, whereas generally applicable standards are the product of notice and comment rulemaking pursuant to Section 101 of the Act. The scope of a mine-specific plan is restricted to the mine in which the plan will be implemented, whereas a rulemaking safety or health standard applies across-the-board to all affected mines.

In the Zeigler case, the court held that the approval-adoption procedure is not to be used by the Government to impose general requirements of a variety well-suited to all or nearly all coal mines. It upheld the operator's right to contest MSHA's requirement for a plan provision that relates not to the particular circumstances of its mine but, rather, imposes a provision of a general nature which should be addressed and formulated in rulemaking proceedings.

In the Carbon County Coal Company decisions of the Commission, 6 FMSHRC 1123 in 1984, and 7 FMSHRC 1368 in 1985, the Commission found the Zeigler analysis to be "persuasive and compelling" and held that the provisions of 30 C.F.R. Section 75.316 do not permit MSHA to impose, as a condition of approving an operator's ventilation plan, a general rule applicable to all mines.

The specific issue then before me at this time is whether the ventilation plan provisions that are now at issue regarding the ventilation of deep cuts at the Martwick and Camp Number 2 Mines are specific to the particular conditions of the subject mines, or whether those provisions are of such a general nature as to be subject to the rulemaking process of mandatory safety standards and therefore ought not to be imposed through

the ventilation plan approval process. I am persuaded by the evidence in this case presented today that MSHA's insistence upon the inclusion of these particular ventilation requirements, that is the extension of line brattice and a certain minimum ventilating air in areas of deep cuts during the roof bolting cycle at the Martwick and the Camp Number 2 Mines is not a general requirement subject to the rulemaking procedures but rather is mine specific. The testimony of all the MSHA witnesses as well as the testimony of Martiwick mine superintendent, Mr. Jernigan, supports this position.

The relevant MSHA witnesses detailed a number of specific criteria that were in fact, and presumably will continue to be, examined on a mine-by-mine basis to resolve whether or not these particular requirements are going to be needed in a ventilation plan. I find Mr. Jernigan's corroborating testimony particularly compelling in this case that he was told by Mr. Casteel [MSHA Chief of Engineering Services] and Mr. Stanley [MSHA Ventilation Specialist] that the reason for the new requirements implemented at the Martwick Mine was its high methane liberation and that mines with deep cuts were being examined on a mine-by-mine basis.

This conclusion that this is a mine specific requirement is further supported by the evidence that two mines within MSHA District 10 having comparatively low methane liberation have not been required to incorporate in their plans the new provisions that have been required at the Martwick and Camp No. 2 Mines in these cases, and they apparently will not be required to incorporate those provisions in their current plans now under review.

So within the framework of that evidence I have no difficulty concluding that the provisions at issue here are mine specific and not generally applicable to all mines either in MSHA District 10 or generally applicable to all other mines. I would comment with respect to the number of operator witnesses who testified of having no recollection or having a different construction or other interpretation of what may have been said at the MSHA-Peabody meetings but I discount that testimony in light of Mr. Jernigan's testimony in particular. Apparently there may have been semantical problems, maybe people heard what they wanted to hear and did not hear what was actually spoken. There may not have been as clear an understanding during these meetings but I have no difficulty concluding as I have concluded.

Now, I would like the parties to meet further to try to resolve this problem either tonight and/or before commencing trial tomorrow. I don't believe that, particularly based upon the preliminary discussions this morning and what counsel came back to me with, that Peabody has really been seriously forthcoming with negotiations on resolution of this problem. Maybe now based upon this preliminary ruling a more serious consideration can be given to this. I will certainly consider that in evaluating whether there have been good faith negotiations which will be the next issue to be reached tomorrow morning. So I would ask counsel to get together and arrange for continuing discussions. We will commence back here at least initially in this courtroom. We may get another courtroom with better ventilation, but we'll initially meet here at 9 o'clock tomorrow morning. So that concludes today's proceedings.

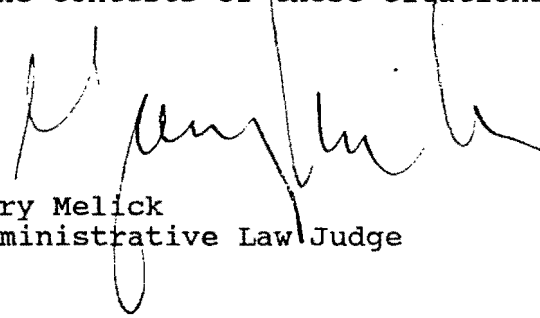
Under the Carbon County Coal Company, 7 FMSHRC 1367 (1985), decision, MSHA and the mine operator are under a duty to "negotiate in good faith and for a reasonable period concerning a disputed provision" in a ventilation plan. The Secretary maintains in this regard that not only did Peabody fail to negotiate in good faith but that Peabody failed to negotiate at all.

It is clear from this record that Peabody has maintained from the beginning of this controversy that the proposed changes could not be imposed by the ventilation plan approval process without an applicable mandatory standard. I believe that this position was based upon good faith reliance on a decision of a Commission Administrative Law Judge holding that similar proposed provisions in a ventilation plan were, under the circumstances of that case, not proven to be mine specific but rather were shown to have been generally applicable and were therefore subject to the rulemaking process of mandatory standards. See Peabody Coal Company v. Secretary, 10 FMSHRC 12 (1988).

However good faith reliance on a colorable legal position must be distinguished from good faith negotiations. From the record in this case thus far it is apparent that Peabody has been relying upon this position as a basis for not negotiating regarding the specific underlying safety issue. It is therefore clearly premature for the Commission to intervene in the approval-adoption process. See Carbon County Coal Company, supra.; Secretary of Labor v. Penn Allegh Coal Company 3 FMSHRC 2767 (1981); and Bishop



Coal Company, 5 IBMA 231, 1 MSHC 1367 (1975). The citations at bar must accordingly be affirmed and the Contests of those citations dismissed.



Gary Melick  
Administrative Law Judge

Attachments

Distribution:

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Counsel, 1951 Barrett Court, P.O. Box 1981, Henderson, KY  
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W. F. Taylor, Esq. Office of the Solicitor, U.S. Department of  
Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215  
(Certified Mail)

/ml

APPENDIX A

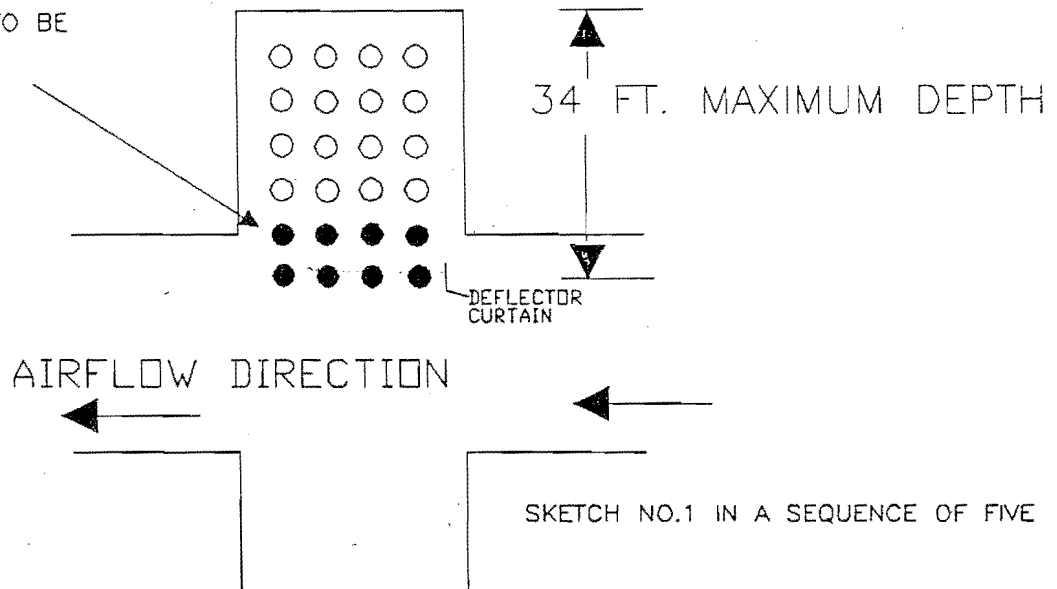
TYPICAL VENTILATION DRAWINGS

FOR  
MARTWICK UG MINE  
I.D.NO. 15-14074

FACE VENTILATION REQUIREMENTS  
FOR  
ROOF BOLTING OPERATIONS

NOTE:

FIRST ROW OF BOLTS TO BE  
INSTALLED IN NEW CUT.



WHERE ROOF BOLTING IS BEING DONE, LINE BRATTICE  
WILL BE MAINTAINED TO THE SECOND ROW OF BOLTS  
LOCATED OUTBY THE WORKING FACE. A MINIMUM OF  
3000 C.F.M. OF AIR WILL BE MAINTAINED BEHIND THE  
LINE BRATTICE.

LEGEND

- CURTAIN
- AIRFLOW
- ROOFBOLT
- DEFLECTOR CURTAIN
- PROPOSED ROOFBOLT

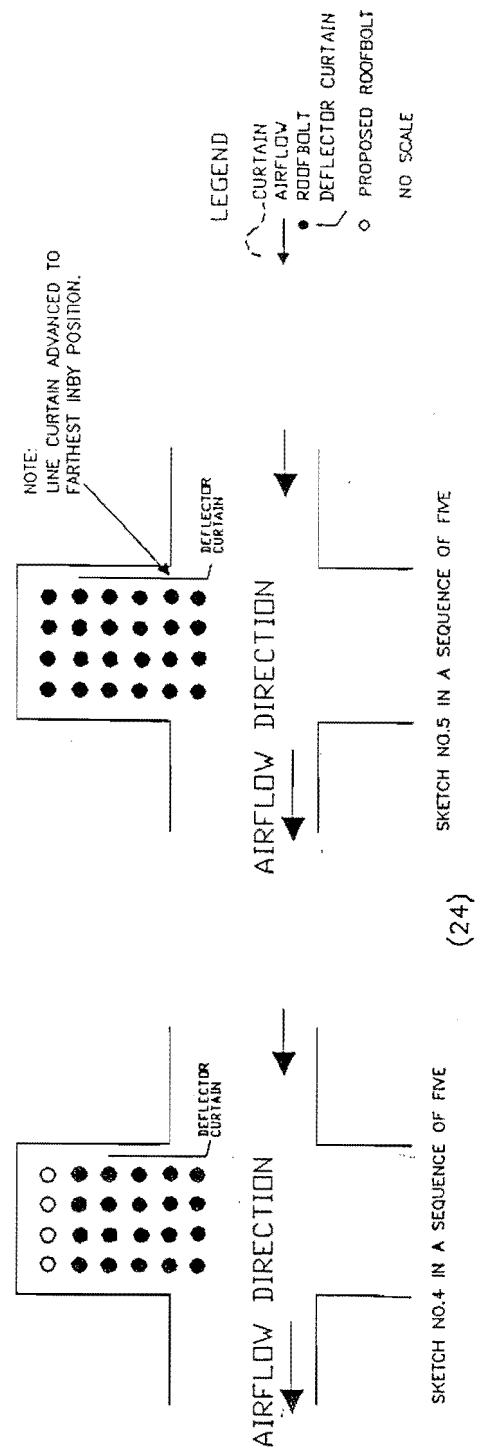
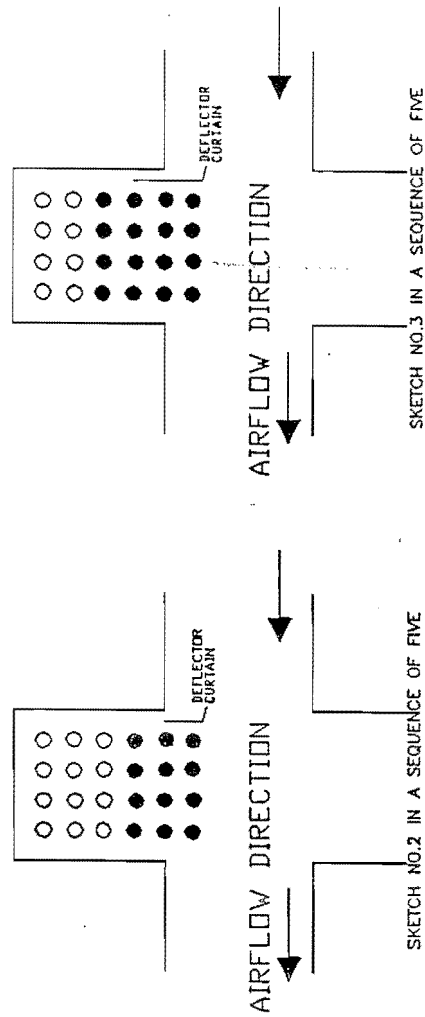
NO SCALE

# APPENDIX B

## TYPICAL VENTILATION DRAWINGS

FOR  
HARTWICK UG MINE  
I.D.N.D. 15-14074  
FACE VENTILATION REQUIREMENTS  
FOR  
ROOF BOLTING OPERATIONS

SEQUENCE DRAWINGS SHOWING ADVANCEMENT OF LINE BRATTICE  
AS ROOF BOLTING PROGRESSES.



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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FALLS CHURCH, VIRGINIA 22041

**AUG 30 1991**


RONALD LEE SHRIVER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 91-1772-D
	:	MORG CD 91-02
	:	
CONSOLIDATION COAL COMPANY,	:	Osage No. 3 Mine
Respondent	:	

**ORDER OF DISMISSAL**

Before: Judge Weisberger

Complainant's Motion to Withdraw Complaint and to Dismiss is granted.

It is ORDERED that this case be DISMISSED with prejudice.

  
Avram Weisberger  
Administrative Law Judge

**Distribution:**

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Walter J. Scheller III, Esq., Consolidation Coal Company, 1800  
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