

## AUGUST 1993

### COMMISSION DECISIONS AND ORDERS

08-03-93	Montana Resources, Inc.	WEST 92-343-M	Pg. 1527
08-10-93	Navajo Concrete Inc.	WEST 92-771-M	Pg. 1529
08-18-93	VP-5 Mining Company	VA 92-112-R	Pg. 1531
08-27-93	U.S. Steel Mining Company, Inc.	WEVA 91-1607	Pg. 1541
08-31-93	Consolidation Coal Company	WEVA 91-1964	Pg. 1555

### ADMINISTRATIVE LAW JUDGE DECISIONS

06-24-93	C.W. Mining Company (previously unpubl.)	WEST 92-204	Pg. 1559
08-02-93	Sec. Labor on behalf of Brian Moore, etc. v. Toler Creek Energy, Inc.	KENT 93-650-D	Pg. 1574
08-03-93	Sec. Labor on behalf of Joseph Smith, etc. v. Helen Mining Company	PENN 93-179-D	Pg. 1575
08-03-93	Consolidation Coal Company	WEVA 92-992	Pg. 1577
08-04-93	Sec. Labor on behalf of Earl Shackelford v. Hot Rod Coal Co., Inc., etc.	KENT 93-620-D	Pg. 1580
08-05-93	M A G Incorporated	WEVA 92-1021	Pg. 1583
08-09-93	Dolese Brothers Company	CENT 92-110-M	Pg. 1590
08-09-93	Consolidation Coal Company	PENN 92-854	Pg. 1599
08-09-93	Lloyd A. Partin v. Amax Coal Company	WEST 93-198-D	Pg. 1604
08-09-93	Diablo Coal Company	WEVA 93-307-R	Pg. 1605
08-10-93	Asamera Mineral (US) Inc.	WEST 92-802-M	Pg. 1607
08-10-93	Asamera Mineral (US) Inc.	WEST 93-105-M	Pg. 1609
08-10-93	Carl Schlegel, Inc.	LAKE 92-345-M	Pg. 1611
08-10-93	Beth Energy Mines, Inc.	PENN 92-587	Pg. 1621
08-11-93	Buffalo Crushed Stone, Inc.	YORK 92-117-M	Pg. 1641
08-12-93	Peabody Coal Company	LAKE 93-23	Pg. 1652
08-13-93	Consolidation Coal Company	PENN 92-814-A	Pg. 1659
08-13-93	Steele Branch Mining	WEVA 92-953	Pg. 1667
08-16-93	Peabody Coal Company	KENT 91-179-R	Pg. 1703
08-16-93	Sec. Labor on behalf of Cletis Wamsley, et al. v. Mutual Mining, Inc.	WEVA 93-375-D	Pg. 1707
08-18-93	L.M. Karnes emp. by J.H. Shears' Sons	CENT 92-333-M	Pg. 1713
08-18-93	Wilgar Land Company, Inc.	KENT 92-919	Pg. 1716
08-18-93	Sec. Labor on behalf of Kirby Senter v. Black Dragon Mining Company	KENT 93-796-D	Pg. 1718
08-18-93	U.S. Steel Group, Minnesota Ore	LAKE 92-265-RM	Pg. 1720
08-18-93	William Kroh v. UAE Coal Corporation	PENN 93-181-D	Pg. 1730
08-19-93	Brown Brothers Sand Company	SE 92-246-M	Pg. 1731
08-23-93	Donald R. Holder v. Nevada Gold Mining	WEST 93-361-DM	Pg. 1737
08-24-93	Cyprus Plateau Mining Corp.	WEST 92-370-R	Pg. 1738
08-27-93	Henry B. Salyers, et al. emp. by Middle Creek Energy Incorporated	VA 92-83	Pg. 1764
08-27-93	Peabody Coal Company	KENT 91-1370-R	Pg. 1788
08-31-93	Cougar Coal Company, Inc.	KENT 92-878	Pg. 1795

### ADMINISTRATIVE LAW JUDGE ORDERS

08-02-93	Husky Coal Company, Inc.	KENT 92-713	Pg. 1799
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### Reprint of ALJ Decision

07-08-93	W.J. Bokus Industries, Inc.	YORK 92-106-R	Pg. 1800
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AUGUST 1993

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

Secretary of Labor, MSHA v. C.W. Mining Company, Docket No. WEST 92-204.  
(Judge Cetti, June 24, 1993)

Secretary of Labor, MSHA v. Montana Resources, Inc., Docket Nos.  
WEST 92-343-M, WEST 92-705-M. (Judge Cetti, unpublished settlement decision  
of June 24, 1993)

Secretary of Labor on behalf of Ronny Boswell v. National Cement Company,  
Docket No. SE 93-48-DM. (Judge Melick, June 25, 1993)

Secretary of Labor, MSHA v. Navajo Concrete, Inc., Docket No. WEVA 92-746.  
(Chief Judge Merlin, unpublished Default Decision of July 7, 1993)

Secretary of Labor, MSHA v. W.J. Bokus Industries, Inc., Docket Nos.  
YORK 92-106-M, YORK 92-107-M. (Judge Weisberger, July 8, 1993)

Review was not granted in the following case during the month of August:

Secretary of Labor, MSHA v. Broken Hill Mining Company, Docket No.  
KENT 92-290. (Judge Koutras, July 13, 1993)





## COMMISSION DECISIONS AND ORDERS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 1993

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

v.

MONTANA RESOURCES, INC.

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:  
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:

Docket Nos. WEST 92-343-M  
WEST 92-705-M

## DIRECTION FOR REVIEW

### ORDER

The petition for discretionary review filed by the Secretary of Labor is granted. For the reasons set forth below, we vacate the June 24, 1993 Decision Approving Settlement and remand the case to the judge for appropriate proceedings.

On May 12, 1993, Montana Resources, Inc., filed a motion styled, "Respondent's Motion to Approve Settlement and Dismiss Proceedings." The motion and the letter to the judge conveying the motion indicate that the motion was not a joint motion. However, the last paragraph of the motion states, "Wherefore, the parties move the Commission to approve the above settlement agreement...." Motion at 7.

On May 21, 1993, the Secretary responded by letter to the judge advising that respondent's motion to approve settlement contained one paragraph that was not agreeable to the Secretary, "Respondent's language in paragraph 8 goes beyond the statement to which the Secretary agreed...." The Secretary concluded by stating that he "files his objection to paragraph 8, but approves of paragraphs 1-7 and 9." Letter at 1.

On June 24, 1993, the judge issued the subject decision approving the putative settlement without any reference to the disputed paragraph.

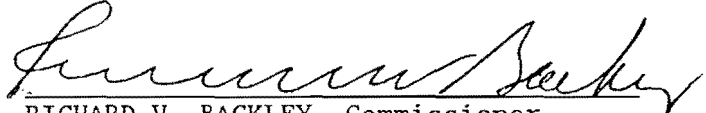
On the foregoing record, it is clear that respondent's motion was prematurely filed and should have been denied. The parties had not come to an agreed disposition of this matter. In Peabody Coal Co., 8 FMSHRC 1265 (September 1986), the Commission determined that:

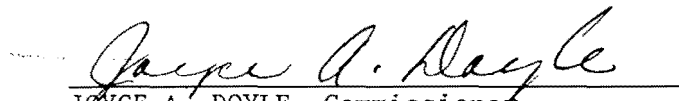
the record must reflect and the Commission must be assured that a motion for settlement, in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions.

Id. at 1266. See also Tarmon v. International Salt Co., 12 FMSHRC 1 (January 1990).

Accordingly, the decision approving settlement is vacated and the case is remanded to the judge for appropriate proceedings.

  
ARLENE HOLEN, Chairman

  
RICHARD V. BACKLEY, Commissioner

  
JOYCE A. DOYLE, Commissioner

  
I. 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 10, 1993

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEST 92-771-M  
 :  
NAVAJO CONCRETE INC. :  
 :

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

## ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"). On July 7, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Navajo Concrete Inc. ("Navajo") for failing to answer the proposal for assessment of civil penalties filed by the Secretary of Labor or the judge's February 19, 1993, Order to Show Cause. The judge assessed civil penalties in the sum of \$1,371.<sup>1</sup> For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On July 21, 1993, the Commission received a letter dated July 15, 1993, from Albert Lewis, Navajo's president, in which Mr. Lewis states that Navajo had sent a reply on October 21, 1992, to J. Ogden, an attorney in the Department of Labor's Office of the Regional Solicitor in Los Angeles, California. Under the Commission's procedural rules, the party against whom a penalty is sought must file its answer with this Commission within 30 days of service of the proposal for assessment of civil penalties. 29 C.F.R. §§ 2700.5(b), .29.

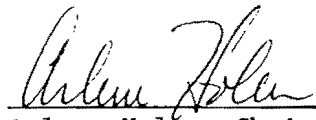
The judge's jurisdiction over this case terminated when his decision was issued on July 7, 1993. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a Petition for Discretionary Review with the Commission within 30 days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

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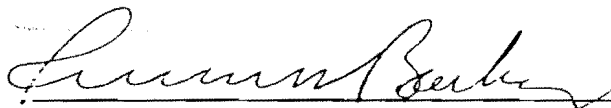
<sup>1</sup> The Secretary proposed that civil penalties in the sum of \$1,571 be assessed against Navajo. As noted in the judge's show cause order, on November 18, 1992, the Commission received a memorandum from the Office of Assessments for the Department of Labor's Mine Safety and Health Administration ("MSHA") indicating that \$200 of the penalties had been paid.

Navajo's July 15 letter to be a timely filed Petition for Discretionary Review, which we grant. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988). On the basis of the present record, we are unable to evaluate the merits of Navajo's position. In the interest of justice, we remand this matter to the judge, who shall determine whether default is warranted. See Hickory Coal Co. 12 FMSHRC 1201, 1202 (June 1990).

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



Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 18, 1993

VP-5 MINING COMPANY	:	
	:	
v.	:	Docket Nos. VA 92-112-R
	:	VA 92-113-R
SECRETARY OF LABOR, MINE SAFETY	:	VA 92-114-R
AND HEALTH ADMINISTRATION (MSHA)	:	VA 92-115-R

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

## DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The issues are whether the presence of an accumulation of methane behind stoppings along the bleeder entries of a gob<sup>1</sup> in a longwall section presented an imminent danger and whether VP-5 Mining Company ("VP-5") was complying with its ventilation plan in accordance with 30 C.F.R. § 75.316.<sup>2</sup> This case arose when an inspector of the Department of Labor's Mine Safety and Health

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<sup>1</sup> "Gob," in the context of this case, refers to the "space left by the extraction of a coal seam...." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms, at 497 (1968) (DMMRT). "Bleeder entries" are "panel entries driven on a perimeter of block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." DMMRT at 112.

<sup>2</sup> At all pertinent times, section 75.316 provided, in part:

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.... Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Section 75.316 was identical to section 303(o) of the Mine Act. The Secretary's ventilation standards have been revised effective August 16, 1992; ventilation plan provisions are now at sections 75.370 -.372.

Administration ("MSHA") issued two imminent danger orders and two citations to VP-5 after he determined that an area within the gob contained an explosive accumulation of methane. Commission Administrative Law Judge Gary Melick affirmed the orders and citations. 14 FMSHRC 1033 (June 1992)(ALJ) For the reasons set forth below, we affirm the imminent danger orders but vacate the citations.

I.

Factual and Procedural Background

The VP-5 mine liberates more than 20 million cubic feet of methane per day. The gob, known as the East Gob, is an inaccessible area resulting from the mining of seven longwall panels. The panels are each 4,800 feet long and, taken together, are about 6,800 feet wide. The gob is ventilated primarily by air that enters the gob along the longwall panel, flows through the gob, and exits through connector entries ("connectors") into bleeder entries. Air also exits through bore holes to the surface. This ventilation system is designed to dilute and render harmless any methane liberated at the longwall face or emitted in the gob.

As mining has progressed, development entries have been established using a continuous mining machine in advance of each longwall panel. Each development entry consists of four individual entries, and serves as the headgate entry when the longwall equipment is moved into the panel and then as the tailgate entry when the longwall is moved into the next panel. Connectors link each entry to the bleeder entries. Stoppings were constructed across many of the connectors and a few of the stoppings were equipped with regulators.<sup>3</sup> The development entries are consecutively numbered and, at the time the citations and orders were issued, the headgate was in the No. 9 development entry and the tailgate was in the No. 8 entry.

On March 25, 1992, MSHA Inspector Carl Duty inspected the mine pursuant to section 103(i) of the Mine Act, 30 U.S.C. § 813(i).<sup>4</sup> He measured the methane in the bleeder entries and determined that the methane level was less than 3% at all locations. Inspector Duty then took methane readings in each of the 32 connectors, about 2 feet from the stoppings, using a Rikon methane monitor. In some stoppings the regulators were open. The methane readings he obtained for development entries 1 through 6 ranged between 1.5% and 4.2%. The highest reading he obtained in each set of development entries was 3.2% for No. 1, 4.0% for No. 2, 4.1% for No. 3, 3.5% for No. 4, 3.5% for No. 5 and 4.2% for No. 6. Gov. Ex. 2. The inspector also took bottle samples of the air. Laboratory analysis of the bottle sample taken at the No. 6 Development

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<sup>3</sup> A regulator is a door, of any size, located in a stopping. The regulator can be opened or closed as needed. See DMMRT, at 910.

<sup>4</sup> Section 103(i) provides, in part, that mines liberating more than one million cubic feet of methane per day shall be inspected by an authorized representative of the Secretary at least once "during each five working days at irregular intervals."



showed 4.13% methane, 20.01% oxygen and .107% ethane. Gov. Ex. 3. Duty believed the measurements indicated that an explosive mixture of methane was accumulating in the gob and backing up to the longwall face. He believed that, because the methane in the gob could be ignited, an imminent danger existed. Accordingly, he issued an order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), withdrawing miners from the longwall section.<sup>5</sup>

Inspector Duty also issued a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), because he believed that the operator was not controlling methane in the gob as required by the mine ventilation plan. Later that day, Inspector Duty found the methane levels to be less than 3% at the same locations and he terminated the order.

On March 26, Inspector Duty returned to the mine and took methane readings at the same locations. The highest methane readings he obtained in each set of development entries were 3.0% for No. 1, 4.5% for No. 2, 3.8% for No. 3, 4.8% for No. 4, 4.6% for No. 5 and 5.2% for No. 6. Gov. Ex. 13. The inspector issued another imminent danger order and a citation alleging a

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<sup>5</sup> Section 107(a) of the Mine Act provides, in pertinent part:

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 order and citation both stated:

The bleeder system was not functioning properly in that the methane content at the bleeder connectors from [the] No. 2 development through No. 6 development ranged from 4.0 percentum at the No. 2 development to 4.2 percent at the No. 6 development. This is a significant increase in the amount of methane that is normally observed in these connectors indicating that the methane content in these areas are not being controlled.

Gov. Exs. 4 & 11.

violation of section 75.316.<sup>6</sup>

VP-5 filed notices of contest of the citations and orders and a hearing was held before Judge Melick on April 15, 1992. The judge credited the testimony of MSHA's witnesses that explosive concentrations of methane and ready ignition sources were present in the gob. 14 FMSHRC at 1040. On this basis, the judge concluded that "within the framework of the undisputed evidence, there was clearly an imminent danger...." 14 FMSHRC at 1041.

With respect to the citations, the judge concluded that the operator violated paragraph 10 of its ventilation plan because the methane content in the gob was not being adequately controlled. 14 FMSHRC at 1037-38. He found that the term "control" in paragraph 10 is ambiguous and may be subject to different interpretations. He also determined that the record contained insufficient evidence to draw any inferences as to MSHA's prior interpretation of this term. The judge affirmed the citations on the basis of the operator's own policy of shutting down the longwall whenever the methane level in the connectors reaches 4%. The judge determined that VP-5 recognized, as evidenced by its policy, that methane in the gob is not being adequately controlled when the methane level in the connectors reaches 4%. He concluded that VP-5's practice "establishes the meaning [of the term control] intended by the parties." 14 FMSHRC 1038.

The Commission granted VP-5's Petition for Discretionary Review of the judge's decision.

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<sup>6</sup> The order stated:

The bleeder system was not functioning properly in that 4.5 to 5.2 percentum of methane was present in the bleeder connectors from No. 2 development to No. 6 development. Permanent type stopping[s] were being erected in the bleeder connectors that prevent the air from being coursed through the gob area as approved by ventilation plan for this mine.

Gov. Ex. 15. The citation stated:

The bleeder system was not functioning properly in that 4.5 to 5.2 percentum of methane was present in the bleeder connectors from No. 2 development to No. 6 development. The approved ventilation plan was not being complied with in that permanent type stoppings were being erected in the bleeder connectors at the top of the No. 2 through No. 7 developments that prevents the gob area from being ventilated as approved by the MSHA District Manager.

Gov. Ex. 16.

## II.

### Disposition of the Issues

#### A. Imminent Danger Orders

Section 3(j) of the Mine Act defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Congress made clear that an imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978). Instead, the focus is on the "potential of the risk to cause serious physical harm at any time." Id. Congress intended to give inspectors "the necessary authority for the taking of action to remove miners from risk." Id.

The Commission adopted this reasoning in Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), where it noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." (citations omitted). The Commission noted further that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Id., quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). The Commission adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." 11 FMSHRC at 2164, quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (1975).

VP-5 argues that the judge failed to recognize that the Secretary offered no evidence as to the levels of methane and oxygen in the gob. VP-5 maintains that the Secretary and the judge improperly assumed that the quantity of methane and oxygen in the connectors, in the amounts measured by the inspector, indicated that there was an explosive mixture of methane in the gob. It contends that the inspector's measurements were not probative of the conditions in the gob. The Secretary contends that the judge correctly determined that the gob contained an explosive mixture of methane.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d) (2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Rochester & Pittsburgh, 11 FMSHRC at 2163, quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The judge evaluated the evidence as to the "three ingredients necessary for a methane ignition or explosion, i.e. fuel, adequate oxygen and an ignition source." 14 FMSHRC at 1040. The methane and

oxygen measurements in the connectors are not in dispute. The inspector measured methane concentrations as high as 4.2% on March 25. Bottle samples revealed that there was about 4.13% methane and .107% ethane. On March 26, the inspector measured methane levels as high as 5.2% and bottle samples confirmed the presence of 4.8% methane and .113% ethane. MSHA presented evidence, not disputed by VP-5, that methane in the presence of ethane can provide fuel for an ignition or explosion at levels below 5%. The bottle samples show that the oxygen concentration was 20.01% on March 25 and 19.89% on March 26. It is undisputed that this level of oxygen is sufficient to support an ignition or explosion.

The inspector inferred that, because he obtained methane readings above 4.0% in the connectors, there were explosive concentrations of methane in the fringe area of the gob.<sup>7</sup> VP-5's mine manager testified that these readings did not indicate the level of methane and oxygen in the fringe areas of the gob. The judge did not address how the methane/ethane/oxygen mixture in the connectors proved that there was an explosive mixture in the gob, but he credited the inspector's testimony. The record contains sufficient evidence to reasonably conclude, as did the judge, that the measurements of methane taken by the inspector in the connectors indicates that a large quantity of explosive methane was present in the fringe area of the gob. The inspector issued the imminent danger orders in large part because he had normally encountered about 3.0% to 3.5% methane in these connectors and he believed that the higher readings indicated that methane was building up in the fringe area of the gob.

VP-5 also challenges the judge's finding that ignition sources existed that could have ignited methane. VP-5 contends that conditions at the longwall face could not have ignited methane in the gob and notes that the judge did not make specific findings on this point. VP-5 also argues that the Secretary presented no evidence that a roof fall could have ignited methane in the gob. The Secretary argues that there is record support for the judge's findings.

The judge did not rely on the longwall face as an ignition source in reaching his conclusion that an imminent danger existed. 14 FMSHRC at 1040-41. He found that the undisputed testimony of Clete Stephan, MSHA's expert on mine ignitions and explosions, established that ignitions can be triggered by frictional heat from rocks sliding against one another during a roof fall. 14 FMSHRC at 1040. The judge also found that roof falls could be expected to occur in the fringe areas of the gob. *Id.* He concluded that "frictional heat" was an undisputed ignition source and based his imminent danger finding on the potential that a roof fall in the gob could propagate a mine fire or explosion.

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<sup>7</sup> Several of the Secretary's witnesses stated that the fringe areas adjacent to the connectors in a gob are subject to hazardous methane concentrations. The interior of the gob apparently does not present an ignition hazard because the methane concentrations are so high that there is insufficient oxygen to propagate a fire or explosion.

Stephan testified that "rock falls, if they generate enough heat, or energy, can ignite methane." Tr. 191. He stated that the Pocahontas coal formation is overlaid by massive sandstone beds that contain quartzite and that very little energy would be required to ignite the methane/ethane/oxygen mixture that was present in the gob. Tr. 194-95. He stated that the energy released by a roof fall in an area containing quartz crystals is sufficient to ignite methane. Id. Stephan testified that the conditions on the fringes of the gob are such that roof falls are highly likely. Tr. 197.

An MSHA accident investigation report, issued as a result of a methane ignition at the VP-5 Mine in 1991, indicates that the mine roof contains "shale and laminated sandstone." Gov. Ex. 8; see also Gov. Ex. 9. The report states that methane "was ignited by sparks generated from the cutting bits of the continuous mining machine striking a sandstone roll." Id. Sandstone, including laminated sandstone, contains quartz crystals.<sup>8</sup> Thus, substantial evidence supports the judge's finding that frictional heat was a potential ignition source in the gob.<sup>9</sup>

VP-5 also argues that the Secretary failed to establish that any existing hazard presented a danger that was imminent. It argues that the Secretary did not prove that the hazardous condition had a "reasonable potential to cause death or serious injury within a short period of time." VP-5 Br. 17, quoting Utah Power & Light Co., 13 FMSHRC 1617, 1622 (October 1991). The Secretary met his burden of demonstrating that the hazard present in the gob was imminent. The Secretary's evidence makes clear that the inspector reasonably concluded that the conditions in the fringe area of the gob presented an impending hazard requiring that the longwall be shut down immediately. Tr. 41-43, 196-97. We conclude that substantial evidence supports the judge's imminent danger findings.<sup>10</sup>

#### B. Citations

VP-5 contends that it fully complied with the Mine Act and the Secretary's safety standards because, pursuant to its ventilation plan, it provided sufficient ventilation in the gob to carry the methane away from the working areas of the mine through the bleeder entries. It maintains that the

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<sup>8</sup> Sandstone is defined as a "cemented or otherwise compacted detrital sediment composed predominantly of quartz grains...." DMMRT at 961.

<sup>9</sup> With regard to the order issued on March 26, the judge also concluded that miners working in the bleeders could have ignited the methane. Because we conclude that substantial evidence supports the judge's finding that frictional heat from a roof fall could have ignited the methane, we do not reach this issue.

<sup>10</sup> In Island Creek Coal Co., 15 FMSHRC 339 (March 1993), the Commission affirmed an administrative law judge's decision that vacated imminent danger orders issued as a result of methane measurements taken adjacent to a gob. The evidence offered by the Secretary in support of the imminent danger orders differed in Island Creek and the instant case. We have based our decision in each case on the evidence presented to the judge.

presence of methane in the bleeder entries at a level of less than 3% demonstrates that its ventilation controls were working. VP-5 argues that explosive mixtures of methane are to be expected in the gob because large quantities of methane are liberated at the longwall face but that the presence of methane in the gob does not, by itself, violate its ventilation plan.

The Secretary contends that levels of methane of 4% or more in the connectors establishes that the mine's ventilation system was not adequately controlling the level of methane in the gob. The Secretary argues that the presence of explosive levels of methane in the gob demonstrated that VP-5 was not complying with its ventilation plan.

The ventilation plan provision alleged to have been violated states: "Bleeder entries, bleeder systems, or equivalent means will be used in all active pillaring areas to ventilate the mined areas from which pillars have been ... extracted so as to control the methane content in such areas." Gov. Ex. 12 (emphasis added).<sup>11</sup> In reaching his conclusion that VP-5 violated its ventilation plan, the judge relied on VP-5's internal policies. The judge found that "when methane levels reach 4 percent in the bleeder connectors there has been recognition in VP-5 company policy and practice that the methane in the gob is not adequately controlled." 14 FMSHRC at 1038. He determined that this "policy and practice is entirely consistent with the Secretary's" interpretation of the ventilation plan. Id. The judge found that this evidence "establishes the meaning intended by the parties" and he concluded that VP-5 violated its ventilation plan. Id.

The Commission has held that, in plan violation cases, "the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition or practice violates the provision." Jim Walter Resources, 9 FMSHRC 903, 907 (May 1987). VP-5's witnesses explained, without contradiction, that, under its policy, the longwall is shut down when the level of methane entering the bleeders is greater than 4% in order to stop the liberation of additional methane at the longwall face. VP-5 established this policy because of a concern that, if high levels of methane enter the bleeders, the methane might not be sufficiently diluted in the bleeders to meet the requirement that air coursed through the gob contain no more than 2% methane at the point where it enters the main returns. 30 U.S.C. § 863(z)(2).<sup>12</sup> On March 25, Inspector Duty measured about 1.8% methane at that location.

Section 303(z)(2) of the Mine Act requires gob areas to be ventilated by bleeder entries. This provision states that "such ventilation shall be

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<sup>11</sup> This provision was taken directly from 30 C.F.R. 75.316-2(e), which was promulgated by the Secretary of the Interior on November 20, 1970. 35 Fed Reg. 17890. Under the Secretary's new ventilation standards, bleeder systems are covered by section 75.334.

<sup>12</sup> At the time the citations were issued, this requirement was set forth in the Secretary's safety standards at 30 C.F.R. § 75.329. Under the Secretary's new standards, this requirement is set forth at 30 C.F.R. § 75.323(e).

maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases." 30 U.S.C. § 863(z)(2). The provision of the ventilation plan taken from section 75.316-2(e) is designed, in large measure, to implement this language in the statute. The clear intent is to ensure that methane in the gob is forced into the bleeders and away from active workings. The Secretary admitted in his brief that the "purpose of bleeder entries is to dilute and carry away methane liberated by the gob so that the methane level is less than 2.0% before it goes into the main return." S. Br. 2. Nothing in the Mine Act, the Secretary's regulations or the ventilation plan indicates that methane must be diluted to a specific level before the air ventilating the gob enters the connectors.

VP-5 presented evidence that the gob was being ventilated in accordance with the mine's ventilation plan. Richard Ray, VP-5's ventilation expert, testified that the disputed plan provision requires that methane in the gob be moved into the bleeders so that it can be diluted and carried away. VP-5 conducted a pressure quantity ventilation survey, which it believes established that a satisfactory quantity of air was moving through the gob and adjacent bleeders on March 25 and 26. Tr. 285-90. Inspector Duty could not state what concentration of methane in the connectors would indicate that methane in the gob is being controlled as required by the plan, saying only that "[t]here's no set number" but 4% was too high. Tr. 45-47. The Secretary does not dispute that explosive levels of methane are often present in a gob. Tr. 203-04. The methane readings obtained by the inspector indicate low levels of methane in the connectors closest to the longwall face, the Nos. 7 and 8 development entries (Gov. Exs. 2 and 13), indicating that the methane was moving away from the face into the bleeders, as expected, and was not backing up to the face as feared by the Inspector.<sup>13</sup>

Paragraph 10 of the ventilation plan cannot be fairly read to include a requirement that methane be diluted to a concentration of less than 4% before it leaves the gob. The company's longwall shutdown policy does not introduce such a requirement into the ventilation plan. We conclude that substantial evidence is lacking for the judge's finding that VP-5's policy established that methane was not being adequately controlled if a concentration of more than 4% is detected in the connectors and that the Secretary failed to prove that the company violated its ventilation plan.

If the Secretary believes that air flowing through a gob should contain no more than 4% methane as it enters bleeder entries, he should consider promulgating a safety standard containing such a requirement. If the Secretary believes that this particular mine requires special provisions

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<sup>13</sup> The record indicates that Inspector Duty took his methane readings in a different location than the operator does in implementing this policy. The inspector measured the methane about 2 feet from the stoppings while the company measures for methane at the mouth of the connectors, where the connectors intersect with the bleeder entries, some 50 to 60 feet away. Tr. 33, 108-09, 274-76. The methane concentrations may be different at these locations.


concerning methane in the gob, he should seek amendment of the mine's ventilation plan to address that issue.


III.

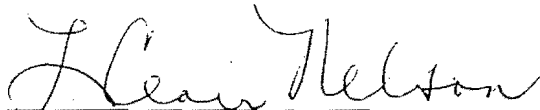
Conclusion

For the foregoing reasons, we affirm the judge's imminent danger findings, reverse his conclusion that VP-5 violated its ventilation plan and vacate citation Nos. 3800173 and 3800175.

  
Arlene Holen, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 27, 1993

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION

v.

U.S. STEEL MINING COMPANY, INC.

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Docket No. WEVA 91-1607

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

## DECISION

BY: Backley and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (the "Mine Act" or "Act"), the issue is whether U.S. Steel Mining Company, Inc. ("U.S. Steel") violated 30 C.F.R. § 75.512-2, a mandatory safety standard applicable to underground coal mines, requiring the examination and testing of electric equipment on at least a weekly basis.<sup>1</sup> Following an evidentiary hearing, Commission Administrative Law Judge Roy J. Maurer found that U.S. Steel

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<sup>1</sup> Section 75.512-2, entitled "Frequency of examinations," provides:

The examinations and tests required by § 75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition.

Section 75.512, entitled "Electric equipment; examination, testing and maintenance," which repeats section 305(g) of the Mine Act, 30 U.S.C. 865(g), provides:

All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

violated the standard. 14 FMSHRC 330 (February 1992)(ALJ). For the reasons that follow, the judge's decision is affirmed.<sup>2</sup>

I.

Factual and Procedural Background

U.S. Steel owns and operates the Gary No. 50 Mine located in West Virginia. On March 27, 1991, Larry Cook, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the mine. Cook inspected the records of U.S. Steel's examinations of underground electric equipment, which are required to be maintained by U.S. Steel. Cook determined from the records that high voltage disconnects, vacuum circuit breakers, transformers, and rectifiers were being examined on a monthly basis. Cook issued Citation No. 3741045, alleging that U.S. Steel violated section 75.512-2, because the above items had not been examined weekly.

Citation No. 3741045, as modified, states:

All underground electric equipment was not being examined weekly as required. Records of examinations for high voltage disconnects, vacuum circuit breakers, transformers and rectifiers show that weekly examinations were made for a three month period from October through December 1990. Beginning in January 1991 through this date (3/27/91) only monthly examinations were made and recorded.

Cook also found that the violation resulted from U.S. Steel's moderate negligence, because on July 18, 1990, another MSHA inspector issued a similar citation to U.S. Steel for failure to examine electric equipment on a weekly basis.

The Secretary subsequently proposed a civil penalty for the alleged violation and the matter proceeded to an evidentiary hearing before Judge Maurer. The judge held that U.S. Steel violated section 75.512-2 by failing to examine the items cited by Inspector Cook on a weekly basis. 14 FMSHRC at 333. The judge determined that the cited items were electric equipment within the meaning of the standard. Id. He also held that the Secretary's interpretation of the term "electric equipment" to include the items cited by the inspector is "reasonable and consistent with the objectives of the Mine Act." Id. Accordingly, the judge affirmed the citation and assessed a civil

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<sup>2</sup> The Commission's vote in this case is evenly split. Commissioners Backley and Nelson would affirm the judge's decision. Chairman Holen and Commissioner Doyle would reverse. For the reasons set forth in Pennsylvania Electric Co., 12 FMSHRC 1562, 1563-65 (August 1990), aff'd, 969 F.2d 1501 (3d Cir. 1992), we conclude that the effect of the split decision is to affirm the judge's decision.

penalty of \$20. Id. The Commission subsequently granted U.S. Steel's petition for discretionary review, which challenges the judge's decision.

## II.

### Disposition of the Issues

The issue in this case is whether high voltage disconnects, vacuum circuit breakers, transformers, and rectifiers (the "cited items") are "electric equipment" as that term is used in section 75.512, which requires that "[a]ll electric equipment ... be frequently examined, tested, and properly maintained." If the cited items are "electric equipment," then they must be examined and tested at least weekly under section 75.512-2. Section 75.512 specifies what must be examined and tested ("all electric equipment") while section 75.512-2 sets forth the frequency ("at least weekly").

U.S. Steel contends that the judge erred in disregarding the testimony of its expert witness, Randolph Slone, that the cited items are not "electric equipment" but, rather, are components of electrical circuits. Slone testified that electric equipment, for purposes of section 75.512, means "electrical equipment that does a physical task by converting electrical energy to mechanical energy." Tr. 53. U.S. Steel argues that because the cited items are components of electrical circuits that do not perform a physical task, such as propelling machinery or pumping water, they are not electric equipment and are not required to be examined weekly under the standard. In support of its position, U.S. Steel points to proposed electrical regulations issued by MSHA that would require weekly examinations only of low-voltage "mobile and portable electric equipment and circuits" and less frequent examinations of "stationary equipment and circuits." See 54 Fed. Reg. 50062, 50123 (December 4, 1989).

The term "electric equipment" is not defined in the Mine Act or in MSHA's regulations. In reaching his conclusion that the cited items are electric equipment, the judge relied, in part, upon the definition of "equipment (electrical engineering)" offered by the Secretary that is set forth in the IEEE Standard Dictionary of Electrical and Electronic Terms, published by the Institute of Electrical and Electronics Engineers (2d ed. 1977) ("IEEE Dictionary"). 14 FMSHRC at 332. That definition states, in pertinent part, that "equipment" is a general term that includes "materials, fittings, devices, appliances, fixtures, apparatus ... used as a part of, or in connection with, an electrical installation." IEEE Dictionary at 236. The cited items are undoubtedly included within this definition. In addition, Inspector Cook, who is an electrical engineer, testified that "electric equipment" is a broad term that applies to "any piece of equipment or installation associated with electrical energy underground." Tr. 17. He further stated that the term is broadly interpreted by the Secretary "to assure that there are no hazards associated with [an electrical] installation." Tr. 19. He testified that the items he cited are pieces of electric equipment notwithstanding the fact that they are also components of an electrical circuit. Tr. 27-28.

The judge reviewed the conflicting evidence presented by the parties and determined that the definition of "electric equipment" offered by MSHA is "reasonable and consistent with the objective of the Mine Act." 14 FMSHRC at 333. The judge adopted MSHA's broad definition in part because he concluded that a regulation should be interpreted to "harmonize with ... rather than conflict with the objective of the statute it implements." Id. quoting Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984).

The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(A)(ii)(I). See also Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989). "Substantial evidence" means "such evidence as a reasonable mind might accept as adequate to support a conclusion." See e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We conclude that the record contains substantial evidence to support the judge's finding that the cited items are "electric equipment" as that term is used in the standard. MSHA's interpretation of electric equipment is supported by the definition in the IEEE Dictionary, a recognized electrical dictionary that has been approved as a standard by the American National Standards Institute. The judge credited the testimony of Inspector Cook over that offered by Mr. Slone. Both witnesses are electrical engineers and, in general, the weight given to the testimony of an expert is committed to the broad discretion of the judge. Ludlow Corp. v. Textile Rubber Chemical Co., 636 F.2d 1057, 1060 (5th Cir. 1981). The testimony of Inspector Cook together with the definition in the IEEE Dictionary constitutes "such relevant evidence as a reasonable mind might accept" to support a conclusion that the cited items are electric equipment.

We also agree with the judge that interpreting the standard to include the four cited items is "reasonable and consistent with the objectives of the Mine Act." 14 FMSHRC at 333. Frequent examination and testing of electric equipment is required by section 305(g) of the Mine Act, 30 U.S.C. § 865(g). Sections 75.512 and 75.512-2 implement this statutory requirement "to ensure that operators observe and detect any potential electrical hazards and immediately correct any hazardous conditions on electric equipment." Sec. Br. 6. If the cited items are not electric equipment under section 75.512, then they would not be subject to any examination and testing requirement, because no other safety standard would require U.S. Steel to periodically examine and test the cited items for safety defects.<sup>3</sup> We give weight to the Secretary's interpretation of the section 75.512 in this case because it is reasonable, consistent with the purposes of the Mine Act and is supported by substantial evidence.<sup>4</sup>

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<sup>3</sup> The cited vacuum circuit breakers, however, apparently would be subject to monthly examination and testing under either section 75.800-3, for high-voltage breakers or section 75.900-3, for low-voltage breakers.

<sup>4</sup> The legislative history of the Mine Act provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977),  
(continued...)

U.S. Steel's argument that the cited items would be subject to less frequent examination and testing under new electrical standards proposed by the Secretary does not support its position in this proceeding. First, the proposed rulemaking was withdrawn by the Secretary on March 1, 1991, before Inspector Cook issued the citation at issue in this proceeding. See 56 Fed. Reg. 17561 (April 22, 1991). Second, the proposed rulemaking establishes that MSHA was considering changing the existing requirement for weekly safety examinations of all electric equipment to a less frequent examination requirement for certain types of electric equipment. Consequently, the Secretary's actions actually support his position that he has consistently viewed the scope of the safety standard to be inclusive and that the cited items are electric equipment subject to weekly examination.

U.S. Steel's second argument is that the judge "disregarded the undisputed testimony" that the citation issued by Inspector Cook was inconsistent with MSHA's interpretation of the safety standard, as evidenced by MSHA's prior enforcement actions and its interpretive manuals. Pet. for Disc. Rev. at 5-6.<sup>5</sup> U.S. Steel argues that the evidence establishes that it has examined the cited items on a monthly basis since at least 1970, and kept records of these electrical examinations as required by MSHA. U.S. Steel submits that MSHA has never cited U.S. Steel for failing to conduct weekly examinations despite the fact that MSHA's inspectors have regularly inspected these electrical examination records. U.S. Steel further alleges that MSHA has never interpreted this safety standard to require weekly examinations of the cited items and that MSHA has not changed the safety standard nor its interpretation of the standard. U.S. Steel characterizes the weekly examination requirement for the cited items as "a decision by a single inspector" rather than a valid interpretation of the standard or a change in MSHA policy. Id. In support of this argument, U.S. Steel asserts that MSHA's official interpretation of the standard in its Coal Mine Inspection Manual: Underground Electrical Inspections, Vol. IV, at 29 (June 1, 1983) ("Manual") is inconsistent with Inspector Cook's citation. As a consequence, U.S. Steel maintains that the Commission should not accept Inspector Cook's interpretation of the safety standard because it is inconsistent with MSHA's Manual and its prior enforcement of the safety standard at this mine and at other mines. In sum, U.S. Steel appears to be arguing, by implication, that because it relied to its detriment on MSHA's past enforcement actions and MSHA's Manual, the Secretary should be estopped from citing it for the alleged violation.

The record reveals that U.S. Steel had actual notice of the Secretary's interpretation of sections 75.512 and 75.512-2 at the time Inspector Cook

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<sup>4</sup>(...continued)  
reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637 (1978). See also Secretary of Labor v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989).

<sup>5</sup> U.S. Steel's Petition for Discretionary Review also constitutes its brief in this proceeding.

issued the subject citation. On July 18, 1990, more than eight months before Inspector Cook issued his citation, MSHA Inspector Randall Wooten, an authorized representative of the Secretary, issued a citation to U.S. Steel's Gary No. 50 Mine alleging a violation of section 75.512-2 for its failure to conduct weekly examinations of vacuum breakers, transformers and rectifiers. U.S. Steel did not contest the citation, paid the penalty proposed by MSHA, and began examining the cited equipment on a weekly basis. U.S. Steel's general maintenance foreman at the mine, Tom Bailey, testified in the present proceeding that U.S. Steel stopped complying with the July 1990 citation because it believed that the "violation was in error." Tr. 41. He testified that "we [were] fully aware that when we went back from the weekly to the monthly [examinations], that we probably would get another citation." Id. Inspector Cook testified that U.S. Steel conducted weekly examinations of the cited items following Inspector Wooten's citation, but that after December 28, 1990, it began examining them on a monthly basis again. Thus, U.S. Steel did not violate the safety standard in this case because it was unaware that MSHA required weekly inspections of the cited items under the safety standard, but rather because it intended to challenge MSHA's interpretation of the standard.

The Commission has held that a safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982)(citation omitted). In this case, however, U.S. Steel knew, as a result of Inspector Wooten's citation, that MSHA required it to examine and test the cited items weekly in order to conform with the standard. Although an operator is free to challenge MSHA's interpretation of a safety standard in a proceeding brought before the Commission, it cannot legitimately contend that it did not have notice of the conduct required if it has been cited previously by an authorized representative of the Secretary for a similar violation of the same standard.

In addition, the Commission has determined that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). As stated above, if the cited items are not subject to weekly safety examinations under section 75.512, they are not subject to any examination requirement under the Secretary's safety standards. U.S. Steel recognizes that it is important to regularly examine and test the cited items because it has been doing so on at least a monthly basis since at least 1970. With the exception of circuit breakers, however, monthly examinations are neither authorized nor required under the Secretary's safety standards. As a consequence, we conclude that a reasonably prudent person would have recognized that the cited items are covered by the Secretary's only applicable examination and testing standard, section 75.512, and that weekly examinations are therefore required pursuant to section 75.512-2.

The Commission has long held that evidence of prior inconsistent enforcement of a safety standard does not constitute a viable defense to a violation and that equitable estoppel does not generally apply against the Secretary. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981); Bulk

Transportation Services, Inc., 13 FMSHRC 1354, 1361 n. 3 (September 1991). An inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation of the standard that it concludes is correct. U.S. Steel Mining Co., Inc., 10 FMSHRC 1138, 1142 (September 1988). Thus, the fact that U.S. Steel was not cited prior to July 1990 for failing to conduct weekly examinations of the items cited by Inspector Cook is not a viable defense to liability. See Warren Steen Construction, Inc., 14 FMSHRC 1125, 1131 (July 1992). Finally, equitable estoppel would not be applicable under the facts of this case because, as stated above, U.S. Steel became aware that MSHA considered the cited items to be electric equipment at the time it received the first citation in July 1990. See Emery, 744 F.2d at 1417.

We conclude that the language in the Manual does not support the position of U.S. Steel. The Manual provides, in pertinent part, that section 75.512 "requires that each individual piece of electric equipment, including locomotives, personnel carriers, electric track switches and derails, compressors, car hauls, conveyor units, pumps, rock-dusting machines, battery-powered equipment and permissible equipment, be examined and tested." Manual at 29. We agree with the Secretary that the examples of electric equipment provided in the Manual "are not intended to be an all-inclusive list of the types of electrical equipment covered by the mandatory standard." Sec. Br. 6-7. We believe that the general words in the safety standard can be fairly read to include the cited items, in spite of the specific examples used in the Manual. Compare Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152 (November 1989). In addition, the Commission has declined to give legal effect to MSHA interpretive manuals that are inconsistent with the plain language of a safety standard. King Knob, 3 FMSHRC at 1420; See also Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-38 (D.C. Cir. 1986). In any event, the Commission has held that an MSHA interpretation of a safety standard that interferes with an operator's ability to ascertain the true standard of care "will not serve to negate liability for violative conduct" but is "properly considered in mitigation of penalty." U.S. Steel Mining Co., Inc., 6 FMSHRC 2305, 2310 (October 1984); Mettiki Coal Corp., 13 FMSHRC 760, 771 (May 1991). In this case, the judge assessed a civil penalty of \$20, a minimal penalty.

Finally, the record in this case does not contain sufficient proof to establish U.S. Steel's contention that MSHA has cited only the Gary No. 50 Mine for failure to examine and test the cited items on a weekly basis. U.S. Steel's witnesses Bailey and Slone testified that they know of no other instances in which an operator has been cited for failing to weekly examine and test electric equipment similar to the cited items. Slone testified that he called an unspecified number of mine operators about their experience under section 75.512 and was told that such operators had not been cited for failing to examine and test similar electric equipment on a weekly basis. This evidence does not establish U.S. Steel's allegation that the subject citation was an ad hoc "decision by a single inspector" to interpret the standard to require weekly examinations of the cited items at this mine only.<sup>6</sup>

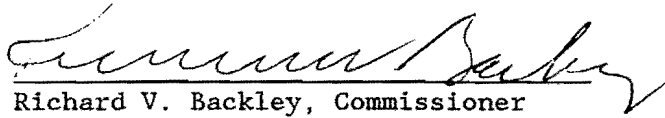
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<sup>6</sup> U.S. Steel also argues that the judge improperly disregarded two decisions that support its position in this case: Leckie Smokeless Coal Co., 5 (continued...)

III.

Conclusion

For the foregoing reasons, we would affirm the judge's decision.

  
Richard V. Backley, Commissioner

  
L. Clair Nelson, Commissioner

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<sup>6</sup>(...continued)

IBMA 65 (1975); and Mettiki Coal Co., 11 FMSHRC 2435 (December 1989)(ALJ). These cases do not address the issues raised in this case.



Chairman Holen and Commissioner Doyle, dissenting:

We respectfully dissent because, in our view, the reasonably prudent person familiar with the mining industry and the protective purposes of the Mine Act could not be expected to know that the cited items, as components of an electrical circuit, are subject to the requirements of weekly inspection of electric equipment set forth in section 75.512-2. We disagree that the failure of U.S. Steel Mining Company, Inc. ("U.S. Steel") to challenge an earlier citation estops it forever from challenging whether section 75.512-2 applies to the cited equipment. We do not share our colleagues' view that this case hinges on whether or not "the record contains substantial evidence to support the judge's finding that the cited items are 'electric equipment' as that term is used in the standard." Slip op. at 4.

A. Background

U.S. Steel was cited by the Secretary of Labor because it was examining and testing certain electrical apparatus on a monthly, rather than weekly, basis. The particular items were high voltage disconnects, vacuum circuit breakers, transformers and rectifiers. The Secretary has taken the position that those items are electrical equipment and, thus, governed by the weekly examination and testing requirements of section 75.512-2 as well as, in the case of the circuit breakers, by the requirements set forth in section 75.800-3.<sup>1</sup> U.S. Steel concedes that weekly examinations were not being done but asserts that, because the cited items were components of electrical circuits, they were subject only to monthly examination and testing.

The term "electric equipment" is not defined in the Mine Act or in the regulations. At hearing, the Secretary proffered a definition, not of "electric equipment" but of "equipment (electrical engineering)," set forth in the dictionary published by the Institute of Electrical and Electronic Engineers ("IEEE Dictionary"). Citing Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945), for the proposition that the Secretary's interpretation of his own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation," the judge found the Secretary's interpretation to be reasonable and consistent with the Mine Act. 14 FMSHRC at 333. He also found the requirements of section 75.800-3 to be in addition to the testing and examination requirements of section 75.512-2 and sustained the violation. Id.

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<sup>1</sup> Section 75.800-3 reads, in relevant part:

(a) Circuit breakers and their auxiliary devices protecting underground high-voltage circuits shall be tested and examined at least once each month by a person qualified as provided in § 75.153;

Our colleagues affirm the judge's decision on the basis that the definition of "equipment" set forth in the IEEE Dictionary and the inspector's testimony constituted substantial evidence to support the judge's determination that the cited items were electric equipment. Slip op. at 4. They also find that U.S. Steel had notice of this requirement (a finding not made by the judge) because of an earlier citation by this same inspector for a similar violation. Slip op. at 5-6. They also assert that, with the exception of the circuit breakers, the cited equipment is subject to no other inspection requirements and, thus, the reasonably prudent person would have recognized that they are subject to weekly examination pursuant to section 75.512-2. Slip op. at 4-6.

#### B. Reasonably Prudent Person Test

Although the judge did not state that he found the regulation to be ambiguous, his deference to the Secretary's interpretation of the regulation implies that he did not find it clear on its face. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); Bowles v. Seminole Rock Co., 325 U.S. at 414. The Secretary effectively conceded that the regulation is ambiguous by arguing that deference is owed to his interpretation. Sec. Br. at 4. Apparently, our colleagues also find the regulation to be ambiguous. They have based their decision on the reasonableness of the Secretary's interpretation of the standard and on his interpretation of the term "electrical equipment." <sup>2</sup> Slip op. at 4.

While deference may be owed to the Secretary's reasonable interpretation of his regulations, "the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." Gates & Fox Co., Inc. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986). Accord Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982). Those governed by regulations have fair warning only when they can reasonably discern a regulation's meaning. Western Fuels-Utah, 900 F.2d 318, 327 (D.C. Cir. 1990) (Edwards, J., dissenting). A regulation "cannot be construed to mean what an agency intended but did not adequately express." Phelps Dodge Corp., 681 F.2d at 1193, quoting Diamond Roofing Co., Inc. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). "[I]n order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so ... uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" Ideal Cement Company, 12 FMSHRC 2409, 2416 (November 1990), quoting Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982).

In determining whether a regulation gives notice of what is required, the Commission has applied an objective standard, i.e., the reasonably prudent person test. The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Ideal Cement, 12 FMSHRC at 2416.

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<sup>2</sup> Nevertheless, citing King Knob, 3 FMSHRC 1417, 1420 (June 1981), our colleagues note that the Commission has "declined to give legal effect to MSHA interpretive manuals that are inconsistent with the plain language of a safety standard." Slip op. at 7.

### C. Regulatory Language and Manual Add to the Confusion

In order to determine whether the regulations would have put the reasonably prudent person familiar with the mining industry on notice that weekly rather than monthly inspections are required, one must read not only Subpart F-Electrical Equipment-General (section 75.500 et seq.) but also Subpart I-Underground High-Voltage Distribution (section 75.800 et seq.), Subpart J-Underground Low- and Medium-Voltage Alternating Current Circuits (section 75.900 et seq.) and MSHA's Coal Mine Inspection Manual: Underground Electrical Inspections, Vol. IV, (June 1, 1983) ("Manual"). After so doing, we can only conclude that the reasonably prudent operator familiar with the mining industry could not be expected to recognize that high voltage disconnects, circuit breakers, transformers and rectifiers, all undisputedly components of an electric power circuit (Sec. Br. at 5-6), must be inspected weekly.<sup>3</sup>

#### 1. Regulatory Language

Sections 75.500-.507 set forth permissibility and filing requirements with respect to "electric face equipment." Section 75.508 requires the operator to show on a map the location and electrical rating of "all stationary electric apparatus...including permanent cables, switchgear, rectifying substations, transformers...and settings of all direct-current circuit breakers..." Section 75.508-2 requires that any changes in the "electrical system" be recorded. If an operator is by now confused as to whether the cited items are "electric apparatus" or part of the "electrical system," section 75.509 indicates that the items are not "electric equipment," because that section is entitled "Electric power circuit and electric equipment; deenergization." It reads, in part: "All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment..." (Emphases added.)

The language in subsequent sections continues to draw the distinction between electric circuits and electric equipment. Section 75.511 deals with repair of "low-, medium-, or high-voltage distribution circuits and equipment." Section 75.518 covers "electric equipment and circuits" and requires that circuit breakers be installed so as to protect "all electric equipment and circuits." Section 75.518-1 again refers to "electric equipment and circuits." (Emphases added.) Sections 75.519 and 75.519-1 require that disconnecting devices be installed in all main "power circuits," while a separate section, 75.520, requires that switches or other controls be provided in all "electric equipment."

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<sup>3</sup> Our colleagues assert that, if the cited items are not subject to the weekly examination and testing requirements of section 75.512-2, then there is no requirement for examination and testing. Slip op. at 4. On this basis, they conclude that the reasonably prudent person would have recognized that the items were covered by section 75.512-2. Slip op. at 6. It is undisputed that a number of operators, as well as U.S. Steel, were examining items of this type on a monthly basis, pursuant to sections 75.800-3 and 75.900-3. 14 FMSHRC at 332, Tr. at 56-57.

In Subpart I-Underground High-Voltage Distribution, the Secretary has set forth requirements for high-voltage circuits and circuit breakers. The requirements of section 75.800-3, "Testing, examination and maintenance of circuit breakers; procedures" are more comprehensive than section 75.512. Section 75.800-3 sets forth monthly testing and examination requirements for high voltage circuit breakers and their auxiliary devices. Similarly, Subpart J sets forth the requirements for low and medium voltage circuits and circuit breakers, and also provides for monthly testing under section 75.900-3.

## 2. Manual

The relevant discussion in the Manual does not erase the distinction frequently drawn in the regulations between fixed electric circuits and electric equipment. It provides that:

each individual piece of electric equipment, including locomotives, personnel carriers, electric track switches and derails, compressors, car hauls, conveyor units, pumps, rock-dusting machines, battery-powered equipment and permissible equipment, be examined and tested.

Manual at 29. These examples are dissimilar to the cited fixed equipment and support the operator's view that the regulation is limited to "electrical equipment that does a physical task by converting electrical energy to mechanical energy." Tr. 53. The affirming commissioners recognize that the Manual "interferes with an operator's ability to ascertain the true standard of care." Slip op. at 7. They "agree with the Secretary that the examples of electric equipment provided in the Manual 'are not intended to be an all-inclusive list of the types of electrical equipment covered by the mandatory standard,'" and believe that the "standard can be fairly read to include the cited items, in spite of the specific examples used in the Manual." Slip op. at 7. (Emphasis added.)

Further instructions in the Manual suggest that the regulation does not address fixed electric equipment like the items cited. The Manual states that examination records required by section 75.512 "shall list separately each individual piece of electric equipment in the mine." Manual at 29. No explanation is provided as to how the operator is to identify separately each individual disconnect, circuit breaker, transformer, rectifier, or other component of the mine's electric system.

The record contains no evidence of interpretive bulletins, program policy letters, or other documents from the Secretary that would clarify for the operator what constitutes electrical equipment, electric apparatus, electrical installations, and electric power circuits. Nor does it contain evidence of documents that would put the operator on notice that a high voltage disconnect is more akin to a locomotive or personnel carrier than to a high voltage circuit breaker or that the items addressed under sections 75.512-2 and 75.800-3 are not mutually exclusive.

D. Definition Proposed in Litigation Is Not Relevant

At hearing, the Secretary proffered the definition of "equipment (electrical engineering)" set forth in the IEEE Dictionary in support of his position. The definition provides that equipment is "a general term that includes materials, fittings, devices, appliances, fixtures, apparatus, machines, etcetera, used as a part of, or in connection with, an electrical installation." IEEE Dictionary at 236. That definition, covering fixed installations, appears to include the cited items, but it is at variance with the examples in the Manual, which cover mobile equipment. The IEEE definition addresses the work of electrical engineers, not the work of miners. Its applicability to Section 75.512-2 is questionable because it fails to include many items listed among the examples in the Manual and usually considered by miners to be electric equipment, such as locomotives, rock dusting machines and personnel carriers. Further, there is no evidence in the record that the Secretary has formally or informally adopted the IEEE definition or that the reasonably prudent person familiar with the mining industry would also be familiar with the field of electrical engineering or its dictionary.

E. Previous Citation Does Not Estop Challenge

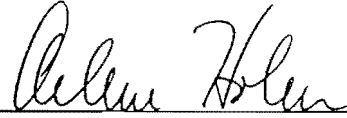
The judge did not address whether U.S. Steel had notice of a weekly inspection requirement. Our colleagues assert that a previous citation provided actual notice to U.S. Steel and, by implication, that its failure to challenge the earlier citation estops it forever from challenging what it now believes to be erroneous interpretation and enforcement by the Secretary.

If the regulation itself does not give notice to the reasonably prudent operator that weekly as well as monthly inspections are required, presumably there are many operators who are unaware of a weekly inspection requirement. Varying interpretations of the regulation might arise, depending on the enforcement actions of particular inspectors. Operators who chose to challenge a first, rather than a subsequent, citation might well escape liability for that citation. Operators who had been previously cited would be on notice of the Secretary's interpretation, but other operators would not be on notice.

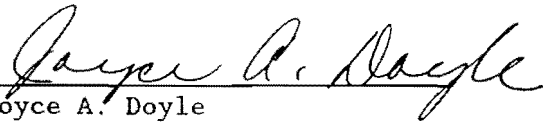
Arguably, notice to the entire mining industry could be provided by way of individual citations, but safety is ill-served by such an approach. It is the language of a regulation and not piecemeal enforcement action that should make clear to operators what is required of them.

F. Conclusion

The regulations at issue would, in our view, fail to put the reasonably prudent person on notice that electric circuits and their components, circuit breakers and their auxiliary devices, and electric apparatus (all terms used by the Secretary) are all really "electric equipment" and are thus subject to weekly examination. We would reverse the judge and vacate the citation.



Arlene Holen  
Chairman



Joyce A. Doyle  
Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 1993

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

v.

CONSOLIDATION COAL COMPANY

:  
:  
:  
:  
:  
:  
:

Docket Nos. WEVA 91-1964  
WEVA 91-1965

BEFORE: Holen, Chairman; Backley, Doyle 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 dispute between the Secretary of Labor and Consolidation Coal Company ("Consol") regarding whether Consol violated 30 C.F.R. § 75.1707 because a hole existed in a stopping between an intake escapeway and a track and trolley entry at its Blacksville No. 1 Mine.<sup>1</sup> Administrative Law Judge Avram Weisberger determined that Consol had not violated the standard and, accordingly, he vacated the citation. 14 FMSHRC 1450 (August 1992)(ALJ). The Secretary filed a petition for discretionary review challenging the judge's decision, which the Commission granted. For the reasons discussed below, we reverse the judge's decision and remand to the judge to determine whether the

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<sup>1</sup> 30 C.F.R. § 75.1707 is entitled "Escapeways; intake air; separation from belt and trolley haulage entries," and provides in part:

[T]he escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine for the entire length of such entries to the beginning of each working section, except that the Secretary or his authorized representative may permit such separation to be extended for a greater or lesser distance so long as such extension does not pose a hazard to the miners.

Section 75.1707 repeats the language of section 317(f)(4) of the Mine Act, 30 U.S.C. § 877(f)(4).

violation was significant and substantial ("S&S") and to assess a civil penalty.

## I.

### Factual and Procedural Background

Consol operates the Blacksville No. 1 Mine, an underground coal mine in West Virginia. On March 5, 1991, during an inspection of the longwall section of the mine, Gene Jones, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), observed an 8-by-16 inch hole in the No. 3 stopping. Tr. 18-19, 39-40. Constructed of 8-by-16 inch concrete blocks, the stopping was placed in a crosscut between an intake escapeway and an adjoining track entry. Tr. 22, 40, 42. The track entry was used to transport miners and materials into and out of the mine. Tr. 22. Inspector Jones placed an anemometer into the hole in the stopping and determined that air was coursing from the track entry to the intake escapeway at a rate of 344 feet per minute. Tr. 51, 53. The inspector testified that, if a fire occurred in the track entry, the smoke infiltrating the intake escapeway through the hole could be sufficient to cause carbon monoxide poisoning and visibility problems. Tr. 52-53. Accordingly, he issued Citation No. 3315803, alleging an S&S violation of section 75.1707.<sup>2</sup> The citation was terminated after the hole was sealed. G. Exh. 3. Consol subsequently challenged the citation, and the matter was heard by Judge Weisberger.

The judge found that, although there was a hole in the stopping, Consol had not violated the standard. 14 FMSHRC at 1456. The judge determined that section 75.1707 and its underlying statutory language do not set forth the "type or degree" of separation required, and that the legislative history of the standard provides no further clarification. 14 FMSHRC at 1455-56. Defining "separation" in accordance with its dictionary meaning, "to set or keep apart ... to block off: BAR, SEGREGATE ...," the judge concluded that the No. 3 stopping adequately separated the intake escapeway from the track entry because it was placed across the crosscut between the two entries. 14 FMSHRC at 1456, quoting, Webster's Third New International Dictionary, Unabridged 2069 (1986). Accordingly, the judge vacated Citation Nos. 3315803 and 3315865. 14 FMSHRC at 1459 (n.2 supra).

## II.

### Disposition of Issues

The Secretary argues that the judge erred in finding that Consol had not violated section 75.1707 because the judge failed to construe the standard in accordance with its purpose, and did not consider testimony regarding the hazards associated with the hole. S. Br. at 3-4, 6-7. Consol responds that

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<sup>2</sup> The parties stipulated that the decision on this citation would also apply to Citation No. 3315865, which also alleges a violation of section 75.1707. 14 FMSHRC at 1455. Citation No. 3315803 is included in Docket No. WEVA 91-1964, and Citation No. 3315865 is included in Docket No. WEVA 91-1965.



the judge correctly interpreted the standard because neither section 75.1707 nor its underlying statutory language require that an intake escapeway be reasonably airtight in order to be separated from a track entry. C. Br. at 4-5.

Section 75.1707 provides, in pertinent part, that "the escapeway required by this section to be ventilated with intake air shall be separated from the belt and trolley haulage entries of the mine...." 30 C.F.R. § 75.1707. It reiterates the language of section 317(f)(4) of the Mine Act, which was carried over without change from section 317(f)(4) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). The legislative history of the Coal Act clarifies the intended meaning of section 75.1707. The Senate Report reveals Congress's recognition of the importance of maintaining safe escapeways, stating that the Coal Act "[r]equire[s] at least two separate and distinct travelable passageways clearly marked as escapeways which shall be maintained in safe condition." S. Rep. No. 411, 91st Cong., 1st Sess. 35 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Congress, 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 161 ("Legis. Hist."). Congress also recognized that, in order to increase the safety of escapeways, they should be separated from areas in which fires often occur. The Senate Report explains that the Coal Act requires "that every underground mine furnish at a minimum two separate escapeways adequately ventilated and marked, one of which must be separated from haulage entries where many mine fires start." Legis. Hist. at 129. In addition, the Senate Report states that section 317(f)(4) "requires that all new mines separate the escapeway which is on intake air from the belt or trolley haulageway because mine fires often originate in these haulageways and within a relatively short time the air current is completely filled with smoke, and harmful matter." Legis. Hist. at 209. Thus, the express purpose of section 317(f)(4) is to ensure that intake air in escapeways remains uncontaminated by separating the escapeways from other entries, thus preventing smoke or other harmful matter from circulating to an adjoining escapeway in the event of a fire.

A standard must be construed in accordance with the intended purpose of the statutory language upon which it is based. We agree with the Secretary that, in order to effectuate its purpose, section 75.1707 must be interpreted to require separation of the intake air ventilating an escapeway from the airways ventilating haulage entries. The judge's construction of the standard, which requires some separation of the entries but allows free movement of air currents, thwarts the standard's purpose of maintaining only intake air in escapeways. Such a construction could lead to absurd results in that an intake escapeway could be considered "separated" from a haulage entry merely with a railing or chain link fence. We conclude, therefore, that the judge misconstrued section 75.1707.

We need not address Consol's argument that there is no requirement that an intake escapeway be reasonably airtight. The judge found that there was an 8-by-16 inch hole in the stopping separating the intake escapeway from the track entry. It is undisputed that in the event of a mine fire, such a hole could permit contaminated air to enter the escapeway, resulting in the risk of carbon monoxide poisoning and impaired visibility. Tr. 52-53. Thus, the air

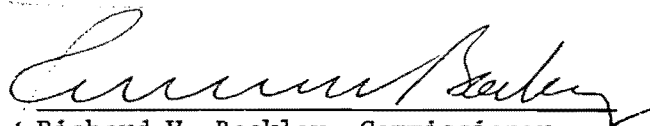
course ventilating the intake escapeway was not separated from the track entry airway. Accordingly, we affirm Citation No. 3315803.

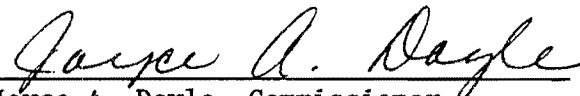
III.

Conclusion

For the reasons discussed above, we reverse the judge's determination that Consol did not violate section 75.1707. We remand this proceeding to the judge to determine whether the violation was S&S and to assess a civil penalty. The judge should take such further action with respect to Citation No. 3315865 as is consistent with this decision.

  
Arlene Holen, Chairman

  
Richard V. Backley, Commissioner

  
Joyce A. Doyle, Commissioner

  
L. Clair Nelson, Commissioner

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## ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
(303) 844-5266/FAX (303) 844-5268

JUN 24 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 92-204
Petitioner	:	A.C. No. 42-01697-03637
	:	
v.	:	Bear Canyon No. 1
	:	
C.W. MINING COMPANY	:	
Respondent	:	

**DECISION**

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Carl E. Kingston, Esq., Salt Lake City, Utah,  
for Respondent.

**Before: Judge Cetti**

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1988) ("Mine Act" or "Act"). The Secretary of Labor issued a citation to C.W. Mining Company (C.W. Mining) alleging a violation of 30 C.F.R. § 75.220(a)(1) (1991) <sup>1</sup> for operating a mine without an approved roof control plan.

It is C.W. Mining's contention that there was no violation of 30 C.F.R. § 75.220(a)(1), that the mine's old roof control plan was improperly revoked, that MSHA did not negotiate in good faith, that the mine's old roof control plan was adequate, more suitable and a safer roof control plan than the new current plan, that the current roof control plan was submitted by the operator to the MSHA district manager for approval under protest and for these reasons the citation charging the operator for operating the mine without an approved roof control plan should be vacated.

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<sup>1</sup> 30 C.F.R. § 75.220(a)(1) (1991), provides as follows:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

### SYNOPSIS

With the safety of the miners, my evaluation of the evidence and the established applicable law in mind, I find on careful review of the record that within the framework of the evidence presented, MSHA has carried its burden of proof on the critical central issues in this case and conclude the violation of 30 C.F.R. § 75.220(a)(1) was established.

### STIPULATIONS

At the hearing the parties entered into the following stipulations, which I accept.

1. C.W. Mining Company is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. C.W. Mining Company is the owner and operator of Bear Canyon No. 1 Mine, MSHA I.D. No. 42-01697 an underground coal mine.

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

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

5. The subject citations and orders were properly served by duly authorized representatives of the Secretary upon agents of C.W. Mining Company on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

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

7. The proposed penalty will not affect C.W. Mining Company's ability to continue business.

8. C.W. Mining Company is a medium size mine operator with 551,084 tons of production in 1990.

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

# I

C.W. Mining is the owner and operator of the Bear Canyon No. 1 Mine <sup>2</sup> in Huntington, Utah. The Bear Canyon Mine is an underground coal mine required by the Mine Act to operate under an approved roof control plan. At all times prior to October 23, 1991, the date the citation in question was issued, C.W. Mining operated the Bear Canyon Mine under a roof control plan approved by the Secretary of Labor. In June 1991, when its roof control plan came up for its six-month review as provided by 30 C.F.R. § 75.223(d), <sup>3</sup> MSHA proposed certain revisions of the plan that C.W. Mining found unacceptable. The parties communicated for several months particularly with respect to the two primary differences in the old plan and the new current plan. The two primary differences between the old plan and the new or current approved roof control plan are (1) the distance that the miners can mine before permanent roof bolts are installed and (2) the manner and sequence of the steps taken in pulling (extracting) pillars.

Under the old plan the operator was allowed to advance 120 feet where adequate top coal was available to provide temporary roof support between 120 foot bolting cycles. Only where adverse roof conditions were encountered or where insufficient top coal existed, was the operator required by the old plan to roof bolt every 20 feet and not allow miners in by the last row of roof bolts.

Under the new current plan, top coal irrespective of its thickness and strength cannot be used as temporary roof support and Respondent must be on a 20 foot bolting cycle at all times, regardless of the condition or the amount of the top coal. With respect to extracting pillars under the old plan, roof bolting the splits was not required when adequate top coal was available for support. Under the current plan, all pillar splits are required to be roof bolted, regardless of good or bad roof conditions and the required fender cut sequence is different than the sequence under the old plan. (Tr. 54, 88-89, 531, 601-602, 604).

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<sup>2</sup> This mine is also referred to by its former name the "Coop Mine" in the exhibits and the transcript of testimony.

<sup>3</sup> 30 C.F.R. § 75.223(d) provides:

(d) The roof control plan for each mine shall be reviewed every six months by an authorized representative of the Secretary. This review shall take into consideration any falls of the roof, face and ribs and the adequacy of the support systems used at the time.

Under the new current plan miners always work under a fully bolted roof. This follows from the fact that C.W. Mining under the current plan is limited to 20 foot cuts with a 20 foot roof bolting cycle. It is undisputed that 20 feet is the maximum distance Respondents' continuous miners is able to travel under remote control.

## II

### BRIEF PROCEDURAL AND FACTUAL HISTORY OF NEGOTIATIONS LEADING TO APPROVAL OF CURRENT ROOF CONTROL PLAN

In 1988 the regulations concerning roof support in 30 C.F.R., subpart C were revised. Section 30 C.F.R. 75.220(f) as revised mandated that existing roof control plans that conflict with the revised regulations meet the requirements of the revised roof regulations by September 28, 1988. C.W. Mining's president, superintendent and engineering consultant met with District 9 roof control specialist in early January 1989 and the roof control plan was reviewed and revised. This old plan was approved by the district manager on January 26, 1989. Thereafter, the roof control plan was reviewed by MSHA every six months and on each review was found to be adequate until August 9, 1991, when MSHA informed the operator that the roof control plan was inadequate. (Tr. 522-524). This is the same plan that was later rescinded by MSHA on October 23, 1991. The citation in question was issued the same day the plan was revoked when mining operations continued without an approved roof control plan. MSHA gave the operator several extensions to abate the citation to permit uninterrupted production until the citation was abated on November 4, 1991.

Abatement was accomplished by C.W. Mining submitting under protest the current plan which was approved November 4, 1991 by the MSHA district manager.

The sequence of the Bishop type negotiations in this case for a suitable roof control plan can be summarized as follows:

June 29, 1991, C.W. Mining sent to the MSHA District 9 Manager for the six months review its 22 page roof control plan for Bear Canyon #1 Mine last approved March 5, 1990. In the letter transmitting the plan C.W. Mining stated that it did not feel any changes were needed at that time. (Govt. Ex. 2).

August 9, 1991, MSHA sent a five page letter to C.W. Mining stating that on review by MSHA personnel the plan was found to be inadequate. The letter listed 30 "necessary" changes in the pillar section of the roof control plan and 10 "necessary" changes in the development section of the roof control plan. (Govt. Ex. 3). MSHA requested C.W. Mining to submit a new plan



by August 26, 1991 addressing the 40 concerns MSHA set forth in the letter.

August 22, 1991, C.W. Mining sent a letter to MSHA stating that the roof control systems set forth in the plan submitted for review had been used at the mine for 30 years and there had been no uncontrolled roof falls during that time. C.W. Mining once again asked that the submitted plan be approved with no change. The letter did not otherwise respond to the 40 concerns MSHA listed in its letter of August 9, 1991.

September 9, 1991, MSHA sent a second letter to MSHA (Govt. Ex. 6) requesting that C.W. Mining respond to and comply with MSHA's letter of August 9, 1991. This letter also informed C.W. Mining that if an acceptable plan was not received by the due date, September 30, 1991, that the plan may be rescinded and that any further mining activity would result in the issuance of a citation charging a violation of 30 C.F.R. § 75.220.

It is the Secretary's contention that as of September 9, 1991, all the requirements of the Bishop decision were fulfilled. MSHA nevertheless agreed to extend the deadline so that a face-to-face discussion could be held with C.W. Mining concerning the reasons that the roof control plan had to be revised. The due date was extended to September 24, 1991.

On September 24, 1991, a face-to-face meeting of mine management and MSHA was held in Price, Utah. Present at the meeting in Price included the following:

- Bill Stoddard - President of C.W. Mining
- Ken Defa - Superintendent of Bear Canyon No. 1 Mine
- Jerry Taylor - MSHA District Engineering Coordinator (Acting District Manager)
- William Ponceroff - MSHA District Roof Control Supervisor
- Tony Gabossi - MSHA Acting Subdistrict Manager
- Bill Ledford - MSHA Field Office Supervisor

At the meeting the need for full roof bolting was discussed in detail as well as other requested changes addressed in MSHA's second disapproval letter dated September 9, 1991.

On October 4, 1991, the district manager sent a follow-up letter to C.W. Mining recapping the discussion and agreement reached at the September 24, 1991, face-to-face meeting. The letter concludes as follows:

During a phone conversation with William Ponceroff, District Roof Control Supervisor, on September 30, 1991, Mr. Bill Stoddard,

President, C.W. Mining Co., agreed to submit an acceptable plan within two weeks. It is agreeable to extend the deadline for the submittal of an acceptable roof control plan to October 11, 1991.

As discussed in the meeting held on September 24, 1991, deadlines for ending the review process have been extended too many times. C.W. Mining Co. must make the necessary revisions and submit an acceptable roof control plan by October 11, 1991, or the currently approved roof control plan will be rescinded. Any further mining activities without an approved plan would be a violation of 30 CFR 75.220.

Be advised that the requirements for the Bishop decision and Program Policy Letter No. P89-V3 (copy attached) have been fulfilled. C.W. Mining Co. must have an acceptable roof control plan ready for submittal in order to prevent loss of production. The company may then contest the provisions of the roof control plan on the basis of a technical citation.

If you have any questions. please contact this office at (303) 231-5462.

Sincerely,

/s/ William A. Holgate

October 12, 1991, C.W. Mining submitted a "new revised" roof control plan (Govt. Ex. 12) which MSHA found unacceptable and rejected.

October 22, 1991, MSHA faxed to C.W. Mining 16 reasons why it found the "new revised" roof control plan unacceptable. (Govt. Ex. 13). The hard copy of the same date, October 22, 1991, in addition to specifying the reason the plan was unacceptable again recapped the history of negotiation and concluded as follows:

This requested revision is necessary to formulate a plan suitable to the present conditions and mining systems at the mine, and to ensure the health and safety of the miners when future mining occurs. Since all negotiations concerning the development of an acceptable roof control plan, in accordance

with 30 CFR 75.220, remain at an impasse, the currently approved roof control plan is rescinded. Any further mining activities without an approved plan is a violation of 30 CFR 75.220.

If you have any questions, please contact this office at (303) 231-5462.

On October 23, 1991, the date that the old roof plan was revoked and the citation issued for violation of 30 C.F.R. § 75.220, C.W. Mining submitted another revised roof control plan that was similar to the current approved plan. In its transmitted letter, C.W. Mining stated as follows:

Under protest we do agree to the enclosed plan as dictated by your office. We still believe the original roof control plan is just as safe, and in pillar extraction your system is less safe because it puts our people in the pillar splits where they are exposed to sloughing ribs and possible injury while bolting. It also forces us to extract more than one pillar at a time and will cause the pillars to load up and be more apt to cause out bursts.

We also feel more comfortable with the pillar extraction sequence we have used for over 30 yrs. with no serious accidents or injuries (sic) related to roof problems. We found it works better and has proven to be safer than other systems we have tried, including the system Mr. Ponceroff is forcing us to use.

In rebuttal to the C.W. Mining claim that MSHA dictated the new plan, counsel for the Secretary points to Mr. Ponceroff's testimony at the hearing as follows:

We did not dictate this plan. We approve plans, we don't say what goes in them. As long as they comply with statutory provisions and good mining principle as determined by the district and the representative of techs and the mining industry as a whole in relation to site specific instances in that mine, we approve them. [TR 95]

On October 29, 1991, the Mine Superintendent, Ken Defa, after a telephone conversation with Mr. Ponceroff, MSHA Supervisory Roof Control Specialist, sent MSHA revised plans concern-

ing the pillar extraction sequence that Mr. Ponceroff had requested. (Govt. Ex. 16).

October 30, 1991, the District Manager sent the mine operator, Mr. Stoddard, six detailed specific reasons the submitted roof control plan remained unacceptable. In response to the District Manager's letter, C.W. Mining that same day (October 30, 1991), faxed the six revisions to the plan that were specifically requested by the District Manager. (Govt. Ex. 19).

November 4, 1991, the MSHA District Manager approved the revised C.W. Mining roof control plan.

November 25, 1991, the District Manager corrected an inadvertent error on page 15 of the approved plan and reissued a new copy of the entire approved plan consisting of 18 pages. The approved plan included the disputed 20 foot roof bolting cycle and the new disputed pillar extraction procedure and fender cut sequence. (Govt. Ex. 35-A).

### III

#### DISCUSSION AND FINDINGS

Preliminarily it should be noted that in Dole, 870 F.2d 662 at 667 the court stated "[t]he specific contents of any individual mine [roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager." In Peabody Cole Company, 15 FMSHRC 389 (March 1993) the Commission held that "both the Secretary and the operator are required to enter into good faith discussions and consultation over mine plans." The Commission in Peabody, supra, further explained this process and quoted their decision in Carlson County, 7 FMSHRC 137 as follows:

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation

before the Commission. 7 FMSHRC at 1371  
(citation omitted) (emphasis added).

Section 302(a) of the Mine Act mandates each operator to carry out on a continuing basis a program to improve the roof control system of each mine as follows:

Sec. 302. (a) Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form within sixty days after the operative date of this title. The plan shall show the type of support and spacing approved by the Secretary. (Emphasis added).

30 U.S.C. § 862(a)

Upon review of the exhibits referenced above, the testimony of the witnesses and the records as a whole I find that both the operator and the Secretary negotiated in good faith and for a reasonable period of time over their legitimate differences. Nevertheless, the parties were unable to resolve their differences. Consequently, in order to continue production after revocation of the old plan the operator under protest submitted the revised current approved plan.

Although the operator and the Secretary in an attempt to resolve their legitimate differences negotiated in good faith and for a reasonable period of time, they remained at odds. In Dole supra the Court of Appeals at page 669 footnote 10<sup>4</sup> states that

---

4

Dole supra at footnote 10. We note that while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977),

while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan.

#### IV

#### MSHA'S REASONS FOR REVOCATION OF OLD PLAN

The reasons why the MSHA District Manager revoked the old roof control plan are summarized by MSHA in its Post-Hearing Brief, page 6 and 7, as follows:

The roof control plan was revoked for several reasons:

1. Under the old plan, men were allowed to work and travel under unsupported roof. Mining experience has shown that traveling under unsupported roof is the most hazardous conduct in mining. Roof falls are the largest cause of fatalities in underground mines today. Statistics show that persons are killed by going under unsupported roof. [TR 34-37; 126-127].
2. Under the old plan, C.W. Mining was only required to bolt when it believed that it was necessary, yet it is too difficult to know when it might be necessary to fully bolt. The transitional areas between good roof and bad roof can only be determined under the old plan by human judgment. Offset in the roof observed by Mr. Ponceroff indicates that the company was not successful in determining when the conditions were bad. They must be aware of the conditions, before someone goes under them, not after. The only way to avoid that is to fully bolt. [TR 40-44; 83-84].
3. Transitional areas between good roof and bad roof can only be determined under the old plan, by human judgment and the violation history at this mine shows that numerous citations and orders existed for failure to follow the roof control plan. Also preshift, and on shift violations were issued for failure to properly examine the mine roof, and an imminent danger order for a bad roof has been issued at this mine, further indi-

cating the unwillingness of the operator to keep the roof in good condition.

4. The operator maintained that 1 to 3 feet of top coal was the primary roof support at this mine. However, roof bolts were being installed systematically throughout all development sections. Hence the mine has agreed that the roof is bad in many locations.

5. Conditions of the mine observed by inspectors, District 9 specialists and MSHA technical support indicate that it is an extremely unsafe practice for the miners to work under roof that is not supported, since it is uncertain what a miner may encounter. All sections of the roof must be bolted before anyone goes under the roof.

6. History of Violations - roof falls at this mine. (Exhibit Nos. 1 and 4).

7. C.W. Mining had a particularized history of violations of its own Roof Control Plan. (Exhibit 25).

Based upon all of the information provided by the on site inspectors, the visits made by Technology Center experts, the history of this mine and the newly revised roof control regulations, Mr. Ponceroff recommended that changes be made in the old roof control plan. Those changes primarily related to a system of full-bolting. That is a system where the area is bolted before any miner is required to work or travel under the roof. The result of the recommendation was that C.W. Mining would be limited to 20 foot cuts with its continuous miner, since that is the distance that the equipment can travel under remote control. Under the old system, the miner operator could go under the roof in areas just cut, without supporting, and could develop a distance of more than 100 feet. Under the new plan with full bolting, the distance is reduced to 20 feet.

\* \* \* \* \*

The Commission has taken note of the fact that mine roofs are inherently dangerous and

that even a good roof can fall without warning. Consolidation Coal Company, 6 FMSHRC 34, 37 (January 1984). It has also stressed the fact that roof falls remain the leading cause of death in underground mines, Eastover Mining Co., 4 FMSHRC 1207, 1211 (July 1982), Halfway Incorporated, 8 FMSHRC 8, 13 (January 1986).

## V

Respondent presented considerable evidence to support its contention that its old roof control plan last approved by the District Manager on March 5, 1990, was adequate and appropriate for the particular conditions at the mine and therefore should not have been revoked. Respondent presented the testimony not only of its officials and employees but also the testimony of three federal coal mine inspectors to this effect. These MSHA coal mine inspectors were quite familiar with the particular conditions at the mine. Their testimony supports Respondent's contention that in most areas of the mine top coal was of adequate thickness and strength to be used as temporary roof support for the 120 foot cuts and bolting cycles used under the old plan. Evidence was also presented that a 20 foot full roof bolting cycle was used by C.W. Mining under the old plan when adverse roof conditions were encountered. The mine inspectors called by Respondent also testified that the pillar extraction procedure under the old roof control plan was safe and even safer than the pillar extraction procedure under the current approved roof control plan.

## VI

Respondent's expert witness Dr. Krishma Sinha, a geological engineer, based upon the tests he performed and his computer analysis of the results he obtained, testified that there was no added safety benefit in requiring roof bolts to be installed in 20 foot cycles over 120 foot cycles. Dr. Sinha's testimony was not persuasive. He did not take or supervise the taking of samples used in his analysis. He did not know who took the samples or even what part of the mine from where the samples were allegedly taken. (Tr. 993). He took neither tensile nor sheer strength tests. (Tr. 995). He assumed the material to be homogeneous. (Tr. 999). Mr. Ropchan the mining engineer employed by the MSHA Technology Center testified this assumption was a fatal miscalculation. Mr. Ropchan stated that Mr. Sinha's computer analysis failed to consider the joints and fractures of the coal. (Tr. 996-998, 1091).

The Secretary in support of his position presented the testimony of M. Terry Hoch, the mining engineer who heads the Roof Control Division of the MSHA Safety and Health Technology Center



in Pittsburgh (Tr. 381, Govt. Ex. 27); Jerry Davidson, a geologist employed by the MSHA Safety and Health Technology Center and David Ropchan, a mining engineer for the MSHA Safety and Health Technology Center since 1971. (Tr. 315). All of these experts visited the mine in question and made visual observations of the mine conditions.

David Ropchan testified that the method of pillar extraction used under the old plan was more dangerous than pillar extraction under the current plan since the old plan opened up more ground and thus exposed the miners to more unsupported roof. He stated that stress on the roof increases with the square of the span of the roof and when the roof span increases, tensile stress is greatly increased. (Tr. 1088-1089).

Jerry Davidson, the MSHA geologist, testified he did not consider pillar extraction under the old plan a safe way to extract pillars "because under the old plan a lot of ground (is) opened up" and practically no ground support was installed. Thus under the old plan the continuous miner operator, his helper and the shuttle car operator and possibly the section foreman would be exposed to a greater hazard of roof falls than under the current plan which involves "opening up" less ground.

Mr. Hoch who heads the MSHA Technology Roof Control Division testified that District 9, where the mine in question is located, was the only district that still has a roof control plan that permitted miners to travel under an unsupported coal roof or a roof supported only by head (top) coal. (Tr. 393-394). He explained that a coal roof cannot be a sole means of support because as a material, it is inconsistent, it is jointed, has cleats and, most importantly, can and will fall. (Tr. 448-449).

Mr. Hoch stated that the primary thrust of the 1988 revised roof control regulations was to "incorporate new technologies so that miners would not be required to work or travel in areas where roof was not supported. He stated that head or top coal can "mask" roof problems so you can't see hazards such as joints and fractures. He also stated that coal left on the roof can enhance the resistance to absorption of humidity increasing the dangers of roof falls.

Based on the testimony of the experts from the Safety and Health Technology Center and the undisputed fact that the operator was encountering changing adverse roof conditions in the mine that all parties agree required a 20 foot roof bolting cycle, I find that the new current roof control plan is suitable for the mine in question and is mine specific. It is not necessary or appropriate in this case to reach the question of whether the use of top coal alone to support the roof is proscribed by the present roof control regulations.

Respondent argues that its witness should be credited since its witnesses were more familiar over a longer period of time with the particular conditions at the mine and spent more time observing the mine in operation rather than MSHA's witnesses who were less familiar with the mine and who spent less time observing and examining the conditions of the mine. The Commission in Cyprus Tonopah Mining Corp., 15 FMSHRC 367 at 372 (March 1993) quotes from its earlier decision Asarco, Inc., 14 FMSHRC 941, at 949 (June 1992) as follows:

The Commission has recognized that:

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

Based upon their superior credentials I credit the opinion of the Secretary's Safety and Health Technology Center experts. Based upon their testimony and the undisputed fact that there were changing adverse roof conditions in the mine that required full roof bolting on 20 foot cycles, I find that the old roof plan was no longer suitable to the conditions of the mine in question and was properly revoked. On the same basis I also find the current approved roof control plan is suitable to the conditions of the Bear Canyon No. 1 Mine as contemplated by 30 C.F.R. § 75.220(a)(1) and section 302(a) of the Mine Act.

Consistent with the above findings and conclusions I find the violation of 30 C.F.R. § 75.220(a)(1) as charged in the citation was established. The violation is technical nature. Consequently the \$20 penalty MSHA proposes is appropriate.

#### ORDER

1. Citation No. 3582718 and the MSHA proposed \$20 penalty are affirmed.

2. Respondent shall pay a civil penalty of \$20 to the Secretary of Labor within 30 days of this decision and upon receipt of payment, this proceeding is dismissed.



August F. Cetti  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**AUG 2 1993**

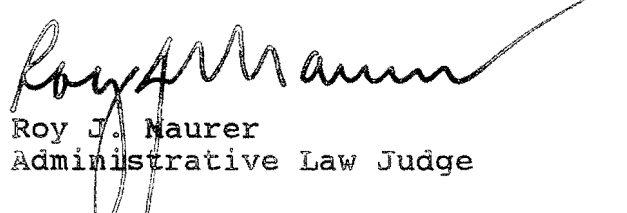
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA)	:	
ON BEHALF OF BRIAN MOORE,	:	Docket No. KENT 93-650-D
Applicant	:	
and	:	PIKE-CD 93-07
BRIAN K. MOORE,	:	
Intervenor	:	Mine No. 3
v.	:	
TOLER CREEK ENERGY, INC.,	:	
Respondent	:	

**ORDER OF DISMISSAL**

Before: Judge Maurer

All the parties to this proceeding have reached an amicable settlement and counsel have therefore jointly moved to dismiss this proceeding, with prejudice, on the basis of their settlement agreement.

Accordingly, and for good cause shown, the proposed settlement is approved, the motion to dismiss is **GRANTED** and the captioned proceeding is **DISMISSED**, with prejudice.

  
Roy J. Maurer  
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

**AUG 3 1993**

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 93-179-D
ON BEHALF OF JOSEPH A SMITH,	:	
Complainant	:	MSHA Case No. PITT CD 92-8
v.	:	
	:	Homer City Mine
HELEN MINING COMPANY,	:	
Respondent	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 93-180-D
ON BEHALF OF	:	
PAUL FORNEY,	:	MSHA Case Nos. PITT CD 92-09
RICK BUTLER,	:	PITT CD 92-10
LAWRENCE STOSSEL,	:	PITT CD 92-11
JOSEPH A. SMITH,	:	PITT CD 92-12
Complainants	:	
v.	:	Homer City Mine
HELEN MINING COMPANY,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**

Before: Judge Melick

These cases are before me upon Complaints of Discrimination and Petitions for Assessment of Civil Penalty under the Federal Mine Safety and Health Act of 1977 (the Act). The parties have agreed to settle the cases on the following terms:

1. Respondent admits that a violation of Section 105(c) occurred as alleged in the Secretary's Complaints of Discrimination filed separately in each case. The admission that a violation occurred is solely for purposes of settlement of these proceedings under the Mine Act, and does not constitute an admission by Respondent that it violated any other law, rule, procedure or contractual provision.

2. Respondent has agreed to pay a civil penalty in the amount of \$500 for each case, totalling \$1,000. The fact that the Homer City Mine has been closed was considered a mitigating factor with respect to the amount of civil penalty.

3. Superintendent Thomas Hofrichter agrees to attend a training session (not to exceed eight (8) hours of training), with MSHA to discuss the anti-discrimination provisions of the Mine Act, specifically walkaround rights and work refusals based on safety concerns. (The date, time and location of the meeting will be arranged by MSHA.)

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate. It is also noted that none of the individual complainants have objected to this settlement.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$1,0000 within 30 days of this order.



Gary Melick  
Administrative Law Judge

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\lh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 3 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-992
Petitioner	:	A.C. No. 46-01453-04013
v.	:	
	:	Docket No. WEVA 92-993
CONSOLIDATION COAL COMPANY,	:	A.C. No. 46-01453-04014
Respondent	:	
	:	Docket No. WEVA 92-1042
	:	A.C. No. 46-01453-04020
	:	
	:	Humphrey No. 7 Mine

## FINAL DECISION

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

Before: Judge Barbour

## STATEMENT OF THE CASE

On June 30, 1993, I issued a Partial Decision Pending Final Order in these matters in which I retained jurisdiction pending resolution by the parties of all issues pertaining to Citation No. 3108613, Docket No. WEVA 92-992, a citation issued pursuant to Section 104(a) of the Mine Act, 30 U.S.C. § 814(a). I did so upon the oral assurance of counsels that the parties fully expected to settle the matter based upon the then forthcoming decision of another Administrative Law Judge. Consolidation Coal Co., 15 FMSHRC, Docket No. WEVA 92-992, etc. (June 30, 1993) slip op. 3, 32.

The parties now have reached a settlement and the Secretary has filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement. The citation, initial assessment, and the proposed settlement amount is as follows:

## WEVA 92-992

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3108613	1/28/92	75.1003(c)	\$206	\$124

The Partial Decision Pending Final Order contains findings regarding applicable civil penalty criteria. Consolidation Coal Co., supra, slip op. 30-31. Citation No. 3548397, which was issued because the trolley wire at a mantrip station was not adequately guarded over one of two personnel carriers, which contains the inspector's finding that the violation of section 75.1003(c) constituted a significant and substantial contribution to a mine safety hazard ("S&S" violation). Counsel for the Secretary states that no evidence is available as to the height between the exposed personnel carrier and the unguarded wire, and therefore the Secretary does not believe he will be able to prove the S&S nature of the violation -- i.e., that a serious injury was reasonably likely to have resulted from the condition.

#### CONCLUSION

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

#### ORDER

Respondent IS ORDERED to pay a civil penalty in the settlement amount shown above in satisfaction of the violation in question and the Secretary IS ORDERED to modify Citation No. 3108613 by deleting the S&S designation and by changing the inspector's assessment of gravity in box 10.A. to "unlikely." Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and the modifications are to be made within thirty (30) days as well. In addition, the payment of the assessed civil penalties set forth in the Partial Decision and the modifications therein ordered are to be made within thirty (30) days of this proceeding. Consolidation Coal Co., Supra slip op. 32. Upon receipt of payment and completion of the modifications, these proceedings are **DISMISSED**.



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



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FALLS CHURCH, VIRGINIA 22041

AUG 4 1993

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), ON	:	Docket No. KENT 93-620-D
BEHALF OF EARL SHACKLEFORD,	:	
Complainant	:	BARB CD 93-14
v.	:	
	:	Mine No. 2
HOT ROD COAL COMPANY, INC.,	:	
a corporation; LITTLE BUDDY	:	
CORPORATION, a corporation;	:	
ROBERT HICKS, an individual;	:	
AND EARL RAMEY, JR., an	:	
individual,	:	
Respondents	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for Complainant; Charlie R. Jessee, Esq., Jessee & Read, P.C., Abingdon, Virginia, for Respondents.

Before: Judge Feldman

This expedited case is before me upon the request for hearing filed on behalf of the above named respondents under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," and under Commission Rules 45(c) and (d), 29 C.F.R. § 2700.45(c) and (d), to contest the Secretary of Labor's Application for Temporary Reinstatement on behalf of Earl Shackelford.<sup>1</sup> Commission Rule 45(d) provides:

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<sup>1</sup> Mr. Oppegard filed a Notice of Intervention in this proceeding pursuant to Commission Rule 4, 29 C.F.R. § 2700.4, seeking intervention on behalf of Shackelford as "the affected miner" in this proceeding. Rule 4(a) provides:

"Party status. A person, including the Secretary or an operator, who is named as a party or who is permitted to intervene, is a party. In a proceeding instituted by the Secretary under section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), the complainant on whose behalf the Secretary has filed the complaint is a party and may present additional

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought.

This matter was called for hearing on July 27, 1993, in Pikeville, Kentucky. Prior to the commencement of trial, the parties engaged in extensive prehearing negotiations. As a result of these negotiations, the parties advised me that they had reached settlement of all matters in dispute. The parties requested that the terms of the settlement remain confidential. The terms of this agreement are reflected in the transcript of this proceeding which is incorporated by reference. The parties' motion for approval of settlement was granted on the record.

Without disclosing the precise terms of the agreement, the Secretary and Shackleford have agreed to withdraw the subject Application for Temporary Reinstatement and the underlying discrimination complaint with respect to Shackleford's employment at the No. 2 Mine. Shackleford has also agreed not to pursue any relief under Section 105(c) of the Act against any other operator

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fn. 1 (Continued)

evidence on his own behalf. A miner, applicant for employment, or representative of a miner who has filed a complaint with the Commission under sections 105(c)(3) or 111 of the Act, 30 U.S.C. 815(c)(3) and 821, and an affected miner or his representative who has become a party in accordance with paragraph (b) [the intervention provisions] of this section, are parties." (Emphasis added).

The plain meaning of Rule 4(a) does not provide for intervention by the complaining miner in an action brought under section 105(c)(2) of the Act as the complaining miner is already a party. In addition, Shackleford does not qualify as "an affected miner" under this rule section (as distinguished from the term "the affected miner" used as a basis for this intervention request) since it is clear that this designation refers to an individual other than the complaining miner who is already a party.

Consequently, Oppegard's intervention request was denied on the record. However, consistent with Rule 4(a), Oppegard was permitted to serve as Shackleford's representative for the purpose of presenting additional evidence not provided by the Secretary on Shackleford's behalf. (Tr. 3-4).

or business entity in which any of the named respondents have a business interest. Finally, the parties have agreed that the terms of their agreement will be performed within 14 days from the date of my written decision approving this settlement.

**ORDER**

Accordingly, **IT IS ORDERED** that the parties shall take appropriate action within 14 days of the date of this decision to fulfill the terms of their settlement agreement. As noted above, the terms of the settlement agreement approved herein are set forth in the transcript of this proceeding and are incorporated by reference. **IT IS FURTHER ORDERED** that, upon satisfaction of this agreement, the complainant's Application for Temporary Reinstatement **IS DISMISSED WITH PREJUDICE**.



Jerold Feldman  
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 5 1993**

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

v.

M A G INCORPORATED,  
Respondent

: CIVIL PENALTY PROCEEDINGS

:  
: Docket No. WEVA 92-1021  
: A.C. No. 46-08007-03523

:  
: Docket No. WEVA 92-1046  
: A.C. No. 46-08007-03524

:  
: Docket No. WEVA 92-1047  
: A.C. No. 46-08007-03525

:  
: Docket No. WEVA 92-1048  
: A.C. No. 46-08007-03526

:  
: Docket No. WEVA 92-1072  
: A.C. No. 46-08007-03529

:  
: Docket No. WEVA 92-1073  
: A.C. No. 46-08007-03528

:  
: Docket No. WEVA 92-1133  
: A.C. No. 46-08007-03530

:  
: Docket No. WEVA 92-1273  
: A.C. No. 46-08007-03531

:  
: Docket No. WEVA 92-1274  
: A.C. No. 46-08007-03532

:  
: Docket No. WEVA 93-113  
: A.C. No. 46-08007-03539

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: Docket No. WEVA 93-126  
: A.C. No. 46-08007-03544

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: Docket No. WEVA 93-127  
: A.C. No. 46-08007-03545

:  
: Docket No. WEVA 93-167  
: A.C. No. 46-08007-03548

:  
: Docket No. WEVA 93-176  
: A.C. No. 46-08007-03549

: Alloy Deep Mine #2

## DECISIONS APPROVING SETTLEMENTS

Before: Judge Koutras

### Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for fifty-four (54) alleged violations of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations. The respondent filed timely answers contesting the alleged violations, and in response to my prehearing orders, the parties advised me that they agreed to settle all of the violations. The petitioner has now filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlements. The citations, initial assessments, and the proposed settlement amounts are as follows:

#### Docket No. WEVA 92-1021

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728176	4/1/92	75.1714(a)	\$1,700	\$950
3728177	4/1/92	75.1714-3	\$1,700	\$950

#### Docket No. WEVA 92-1046

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728656	5/29/92	75.321	\$431	\$250

#### Docket No. WEVA 92-1047

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728051	5/12/92	75.303	\$595	\$350

#### Docket No. WEVA 92-1048

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728046	5/12/92	75.400	\$1,600	\$950
3728047	5/12/92	75.402	\$1,000	\$950

3728048	5/12/92	75.301	\$600	\$360
3728049	5/12/92	75.316	\$700	\$420
3728050	5/12/92	75.301	\$700	\$420

Docket No. WEVA 92-1072

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728923	6/2/92	75.400	\$3,300	\$1,600

Docket No. WEVA 92-1073

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728561	4/21/92	70.101	\$189	\$110
3728655	5/29/92	75.316	\$252	\$150
3728921	6/02/92	75.202(a)	\$252	\$150
3728928	6/07/92	75.220(a)	\$252	\$150
3728936	6/17/92	75.1101-23(c)	\$595	\$350
3728937	6/17/92	75.220(a)	\$252	\$150
3728938	6/17/92	75.220(a)	\$252	\$150

Docket No. WEVA 92-1133

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728924	6/2/92	75.316	\$1,500	\$850
3728934	6/16/92	77.1710(i)	\$50	\$30
3728935	6/16/92	75.316	\$900	\$530

Docket No. WEVA 92-1273

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3731442	7/21/92	75.202(a)	\$252	\$150
3731443	7/21/92	75.400	\$50	\$30
3731444	7/21/92	75.1107	\$168	\$100
3731445	7/21/92	75.1105	\$157	\$90
3731446	7/23/92	75.301	\$288	\$170
3731447	7/24/92	77.404(a)	\$252	\$150

Docket No. WEVA 92-1274

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3728939	7/15/92	75.1702	\$50	\$30
3731441	7/21/92	75.1103	\$595	\$350

Docket No. WEVA 93-113

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3731448	7/24/92	75.601	\$1,500	\$850
3731452	7/24/92	75.902	\$3,000	\$1,500
3731451	7/27/92	75.512	\$800	\$460
3731459	8/02/92	75.301	\$1,500	\$850

Docket No. WEVA 93-126

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3731860	11/19/92	75.202(a)	\$267	\$160
3732401	11/19/92	75.208	\$252	\$150
3732402	11/19/92	75.220(a) (1)	\$252	\$150
3732403	11/19/92	75.1704	\$50	\$30

Docket No. WEVA 92-127

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3732407	11/24/92	75.202(a)	\$252	\$150
3732408	11/25/92	75.1725(a)	\$252	\$150
3732409	11/25/92	75.503	\$204	\$120
3732410	11/25/92	75.400	\$157	\$90
3732411	11/25/92	77.400	\$157	\$90
3732412	11/25/92	77.205(a)	\$204	\$120
3732414	11/29/92	75.517	\$252	\$150
3732416	11/29/92	77.523	\$178	\$100
3732417	11/30/92	77.400(a)	\$147	\$80

Docket No. WEVA 93-167

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3732404	11/20/92	70.101	\$235	\$140
3732405	11/24/92	75.220(a) (1)	\$1,300	\$750
3732406	11/24/92	75.360(a)	\$1,300	\$750
3732425	12/03/92	75.203(a)	\$2,000	\$1,000



3732427	12/07/92	75.400	\$900	\$530
3732428	12/07/92	75.202(a)	\$900	\$530
3732429	12/07/92	75.362(b)	\$900	\$530
3732438	12/30/92	75.333(b)(1)	\$50	\$30

Docket No. WEVA 93-176

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
3732439	12/30/92	75.220(a)(1)	\$1,100	\$650

#### Discussion

The pleadings filed by the petitioner contain information concerning the six statutory civil penalty criteria found in section 110(i) of the Act. In response to my prehearing orders, and in the course of a prehearing conference, the parties confirmed that the respondent is a small mine operator, and the petitioner agrees that in view of the respondent's poor financial condition, as confirmed by the respondent's financial records, payment of the full amount of the initial proposed penalty assessments, in the aggregate, will adversely affect the respondent's ability to continue in business. The parties confirmed that no accidents or injuries resulted from the cited conditions or practices, and that all of the cited conditions were timely abated by the respondent.

In further support of the proposed settlements, the petitioner's counsel has confirmed that the mitigating circumstances advanced by the respondent in its answers in these proceedings are accurate and have been confirmed by the MSHA district office that has enforcement jurisdiction over the respondent's mining operation. In this regard, petitioner's counsel further confirmed that the respondent's management has acted in good faith and has taken remedial action by reorganizing its management and supervisory staff to insure continued compliance with MSHA's safety and health standards. Under all of these circumstances, the parties believe that the proposed settlements are reasonable and in the public interest, and should be approved.

#### Conclusion

After careful review and consideration of the pleadings and arguments in support of the proposed settlement of these cases, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, the motion filed by the petitioner IS GRANTED, and the proposed settlements agreed to by the parties ARE APPROVED.

ORDER

The total amount of the initial proposed civil penalty assessments is \$36,000, and the settlement amounts which have been approved total \$21,000. The respondent IS ORDERED to pay \$21,000, in satisfaction of the enumerated citations which have been settled in each of these cases. Payment is to be made to the petitioner (MSHA) in accordance with the following schedule which has been agreed to by the parties:

The respondent shall pay seven-thousand dollars (\$7,000), within thirty (30) days of the date of these decisions and Order. Payment shall be by check or money order made payable to the Mine Safety and Health Administration.

Within thirty (30) days after the initial payment of \$7,000, the respondent shall make a second payment of five-thousand dollars (\$5,000) to MSHA. Within thirty (30) days thereafter the respondent shall make a third payment of five-thousand dollars (\$5,000) to MSHA. A final payment of four-thousand dollars (\$4,000), shall be made by the respondent within thirty (30) days after the third payment is made.

The payments made by the respondent shall include a reference to the date of these decisions and Order approving the settlements and requiring payment.

These decisions will not become final until such time as full payment of the \$21,000, is made by the respondent to MSHA, and I retain jurisdiction in these proceedings until payment of all installments are remitted and received by MSHA. In the event the respondent fails to comply with the terms of the settlement, the petitioner may file a motion seeking appropriate sanctions or further action against the respondent, including a reopening of the cases. Upon receipt of all of the required payments, these proceedings are dismissed.

  
George A. Koutras  
Administrative Law Judge

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/ml

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041**

**AUG 9 1993**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-110-M
Petitioner	:	A.C. No. 34-00015-05509
	:	
v.	:	Hartshorne Rock Quarry
	:	
DOLESE BROTHERS COMPANY,	:	
AKA DOLESE BROS., A	:	
CORPORATION,	:	
Respondent	:	

Appearances: Ernest A. Burford, Esq., Office of the  
Solicitor, U.S. Department of Labor, Dallas,  
Texas, for the Petitioner;  
Peter T. Van Dyke, Esq., Lytle, Soule & Curlee,  
Oklahoma City, Oklahoma, for the Respondent

Before: Judge Fauver

**DECISION**

This is a civil penalty action under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. At the hearing the caption was amended to add to Respondent's name: "AKA Dolese Bros., a Corporation."

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. On January 12, 1991, employee Terry Allen was stringing cable above an overhead conveyor at Dolese's Hartshorne Rock Quarry, which is subject to the Act.

2. To hang the cable, Mr. Allen was hoisted in a manbasket connected to the load line of an 18 ton Lorain crane. It was not otherwise connected to the boom or crane. The crane was equipped with check valves and flow-restrictors, so that the boom would not fall if the hydraulic system failed. However, the crane was not equipped with a safety device, such as an anti-two-block device,<sup>1</sup> that would prevent the load line from breaking in a "two block" predicament. Without such a device, if the load line block were pulled up to the boom block ("two-blocking"), the load line could break in two, causing the manbasket to fall to the ground.

3. The boom was telescopic and could extend to 72 feet. When Mr. Allen finished one part of the conveyor and the boom was being extended, the hook block on the load line was pulled up against the boom block, creating a "two block" predicament. The pressure on the load line snapped the load line in two. Mr. Allen and the manbasket immediately fell about 19 feet to the ground. He sustained serious injuries involving multiple broken bones in both feet and a broken rib. The line would not have broken had the crane been equipped with an anti-two-block safety device.

4. Mr. Allen, a regular truck driver, was assigned for the day to help the plant electrician install cables above an overhead conveyor. Cable was to be strung from a two-story crusher building to a screening tower, about 23 feet above the ground.

5. Mr. Allen was wearing a safety belt secured to the manbasket. He also wore a hard hat and safety protective footwear.

6. The crane's load line was a 1/2 inch steel cable break-tested to 25,200 pounds.

7. The crane operator had an unobstructed line of sight to the manbasket and was in a position to see whether the load line was approaching a two-block predicament.

8. When the line holding the manbasket "two-blocked," Mr. Allen felt the basket rise a few inches, heard loud squeaking noises, looked up, and saw the line break. He immediately fell with the basket.

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<sup>1</sup> A "two-block" predicament occurs when the load line block is pulled against the boom block. With an anti-two-block device, pressure on the load line is stopped immediately. Without such a device, continued pressure on the line can snap it in two.

9. MSHA investigated the accident and issued Citation No. 3628634, charging a violation of 30 C.F.R. § 56.14211(d) as follows:

A serious accident occurred on January 12, 1991. There was no anti-two block device with automatic shutdown capabilities to prevent breaking the load line on the company No. 122071, Lorain LRT-18U hydraulic crane. The load hook and block was drawn into the boom-block, when the boom was extended, breaking the load line. An employee was working (standing) in a work basket attached to the load block. He and the basket fell about 19 feet to the ground causing severe injuries to both feet and his rib cage. MSHA Policy Letter No. P90-IV-4 explains that the aforementioned anti-two block device is necessary to achieve compliance with 30 C.F.R. § 56.14211(d).

#### **DISCUSSION WITH FURTHER FINDINGS**

This was a serious accident, involving serious injuries. Also, the accident could have resulted in death, grave neck or spinal injuries causing paralysis, or other permanent disability. The manbasket was suspended from the load line by a hook, and was not otherwise attached to the boom or crane. As the boom was extended, the load line block was pulled into the boom block and the pressure snapped the load line. The manbasket and Mr. Allen fell nearly twenty feet to the ground.

The Secretary has cited Respondent with a violation of 30 C.F.R. § 56.14211(d), which explains a requirement provided in subsection 56.14211(a) and other parts of § 56.14211. The applicable standard here is subsection 56.14211(a) as qualified by subsection 56.14211(d). Section 56.14211 provides:

#### **Blocking equipment in a raised position.**

##### **§ 56.14211**

(a) Persons shall not work on top of, under, or work from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally.

(b) Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. The equipment must also be blocked or secured to prevent rolling.

(c) A raised component must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

(d) Under this section, a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent.

(e) Blocking or mechanical securing of the raised component is required during repair or maintenance of elevated mobile work platforms.

MSHA Program Policy Letter No. P90-IV-2 (June 4, 1990), provided that a "work platform shall not be suspended from the load line or whip line when a crane is used to hoist, lower, or suspend persons." A few months later, this policy was changed by MSHA Policy Letter P90-IV-4 (September 5, 1990), superseding Policy Letter P90-IV-2. The new policy permits the practice of suspending a work basket from the load line of a crane if the equipment has a safety device such as an "anti-two-block device" to prevent the load line from breaking in a "two block" situation. The policy letter also recognizes an alternative compliance method: attaching the work basket directly to the boom (not the load line or whip line) provided the crane has "flow restrictions or check valves . . . [that] will prevent a free and uncontrolled descent of the boom and attached work platform . . . ."

## I

Respondent contends that § 56.14211 does not give clear and sufficient notice that supporting a manbasket solely by a load line requires an anti-two-block device, and that Policy Letter P90-IV-4 leaves "the clear impression that compliance could be achieved if a hydraulic crane was being used and the crane had flow restrictors or check valves."

Respondent thus argues that there was no violation of 30 C.F.R. § 56.14211 because the boom was protected against "free and uncontrolled descent" and § 56.14211(d) and MSHA Policy Letter P90-IV-4 do not specify how a manbasket is to be attached to the boom or crane.

I find that a manbasket is reasonably and logically a "raised component of mobile equipment" within the meaning of § 56.14211(d)<sup>2</sup> and "mobile equipment in a raised position" as used in § 56.14211(a). It therefore must be protected against accidental falling. Policy Letter No. IV-4-2 is a reasonable application of § 56.14211(d) in prescribing alternative methods of protecting a manbasket from free and uncontrolled descent, i.e., (1) attach the manbasket directly to the boom (which is required to have flow restrictions or check valves to prevent the boom from falling accidentally) or (2) if the manbasket is attached to the load line or a whip line, and not attached directly to the boom, equip the system with a safety device, such as an anti-two-block device, that will prevent breaking the load line in a two-block situation.

The Policy Letter is therefore a reasonable interpretation and application of the combined provisions of §§ 56.14211(a) and (d) and, being published by the promulgating agency, is entitled to deference.

Respondent violated § 56.14211(a) as qualified by § 56.14211(d) by suspending a manbasket solely from a load line without providing a safety device to prevent the line from breaking in a "two block" situation.

## II

Respondent contends that § 56.14211(d) and Policy Letter P90-IV-4 are unconstitutional as being "sufficiently vague to allow for official arbitrariness and discrimination in their enforcement." I find that §§ 56.14211(a) and (d) are a reasonable and clear safety standard requiring raised platforms, including manbaskets, to be protected against free and uncontrolled descent (accidental falling). Policy Letter P90-IV-4 is a reasonable interpretation and application of § 56.14211(d), showing alternative ways in which an operator may comply with § 56.14211 when using a crane to hoist a manbasket. Neither the regulation nor the Policy Letter is unconstitutionally vague.

## III

Respondent contends that the Secretary did not comply with his own regulations in proposing a special assessment against Respondent.

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<sup>2</sup> Under § 56.14211(d), a "raised component of mobile equipment" is considered in compliance with § 56.14211 if protected by a "load-locking device or a device which prevents free and uncontrolled descent."



The Act establishes a two-step civil penalty system. The Secretary proposes and the Commission assesses all civil penalties under the Act. 30 U.S.C. §§ 815(a) and (3) and §§ 820(a) and (i). When the Secretary issues a citation or withdrawal order to a mine operator, the Secretary must notify the operator of a proposed civil penalty for the violation cited. If the operator does not contest the proposed penalty, it becomes a final order of the Commission, not subject to review by any court or agency. Id.

If the operator contests the proposed penalty, the Secretary must file a petition for assessment of penalty with the Commission. The Commission then affords an opportunity for a hearing, subject to the due process requirements of the Administrative Procedure Act, and thereafter issues an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty or "directing other appropriate relief." Id.

Section 110(i) of the Act provides: "The Commission shall have authority to assess all civil penalties provided in this [Act]." 30 U.S.C. § 820(i). Penalty cases are de novo before the Commission, which is governed only by the criteria in § 110(i) of the Act. It may assess a penalty higher or lower than the penalty proposed by the Secretary. Once filed before the Commission, a penalty case may not be settled without approval of the Commission or presiding judge.

The Secretary, through MSHA, has promulgated regulations for calculating regular proposed penalties on the basis of a formula derived from the six criteria in § 110(i) of the Act. See: 30 C.F.R. Part 100.

Under § 100.5, MSHA may waive its regular assessment formula (§ 100.3) if it "determines that conditions surrounding the violation warrant a special assessment."

In Drummond Company, Inc. ("Drummond I"), 14 FMSHRC 661 (1992), the Commission held that it has jurisdiction in a civil penalty case to review the question whether the Secretary has complied with the Part 100 regulations in proposing a civil penalty. If it finds that a proposed civil penalty is inconsistent with the Part 100 regulations, it may remand the proposed penalty to the Secretary for recalculation.

In this case, after reinvestigating the accident MSHA elected to waive the regular formula in § 100.3 and to propose a special assessment under § 100.5. In its Narrative Findings for a Special Assessment, MSHA found that there was a violation of the cited safety standard, that the gravity of the violation was serious, and that the employee suffered severe injuries because of the safety violation. It proposes a civil penalty of \$5,000.00.

Section 100.5 provides that certain categories of violation may be considered for special assessment in MSHA's proposal of a civil penalty. One of these is: "Violations involving fatalities and serious injuries." § 100.5(a). Respondent contends that MSHA's special assessment is not appropriate because "the accident did not involve a fatality, nor did it involve a serious injury likely to result in a fatality." I find that MSHA met the requirements of § 100.5(a). The employee was in a metal work basket that suddenly fell 19 feet to the ground, causing multiple fractures in both feet and a broken rib. These were serious injuries. Also, mental anguish should be considered when an employee is jerked by a manbasket, hears threatening sounds, looks up, and sees his one support (the cable) snap in two, and then immediately crashes to the ground. It is clear from the nature of this accident that the employee could have been killed or suffered grave neck or spinal injuries causing permanent disabilities. Finally, I observe that it was only the height of the particular job that limited the fall to about 20 feet. The working height could have been 50 or 60 feet, depending on the job. Respondent's practice of suspending a manbasket solely from a load line without anti-two-block protection subjected workers to a risk of death or severe disabilities.

Respondent further contends that a special assessment is not warranted because Respondent reasonably believed that it was complying with § 56.14211, and did not know that MSHA interpreted that section as requiring an anti-two-block device when a manbasket is suspended on a load line. However, Policy Letter P90-IV-4 puts operators on notice that MSHA interpreted § 56.14211 as requiring a safety device, such as an anti-two-block device, to prevent the load line from breaking in a case such as the instant case. I find that Respondent had actual or constructive knowledge of Policy Letter P90-IV-4. Apart from such knowledge, Respondent was put on notice by §§ 56.14211(a) and (d) that it must provide a load-locking device or other safety device to prevent "free and uncontrolled" descent (accidental falling) of any "raised component of mobile equipment." This reasonably and clearly applied to manbaskets supported solely by a load line on a crane.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I find that a penalty of \$8,000.00 is appropriate for this violation. In assessing a penalty higher than the Secretary's proposal, I have considered the high gravity of this violation. "Two blocking" predicaments are highly hazardous, foreseeable, and can be observed by the crane operator. They are also mechanically preventable, by installing an effective safety device to prevent the line from breaking. Respondent's position that it was permitted by law to suspend a manbasket solely on a load line without a safety device to prevent the line from snapping in two, reflects a serious disregard for employee safety and the purpose of § 56.14211, which requires that "equipment in a raised position . . . [must be] . . . mechanically secured to prevent it from . . . falling accidentally." §56.14211(a). The Secretary also put Respondent on notice of this requirement in Policy Letter P90-IV-4, which plainly states that compliance can be achieved by: "[U]se of an anti-two-block device with automatic shutdown capabilities that will prevent breaking of the load or whip line in a two-block condition. \* \* \*"

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated 30 C.F.R. § 56.14211(a), as qualified by § 56.14211(d), by suspending a manbasket solely from the load line of a crane without a safety device to prevent the line from breaking in a "two-block" predicament.

#### ORDER

WHEREFORE IT IS ORDERED that:

1. Citation No. 3628634 is **AFFIRMED**.
2. Respondent shall pay a civil penalty of \$8,000.00 within 30 days of the date of this Decision.

  
William Fauver  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

AUG 9 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-854
Petitioner	:	A.C. No. 36-04281-03801
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Theresa C. Timlin, Esquire, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Daniel Rogers, Esquire, Consolidation Coal Company, Pittsburgh, Pennsylvania, for 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. § 75.516.

The citation at bar, No. 3699508, alleges a "significant and substantial" violation of the noted standard and, as amended, charges as follows:

The 550 Volt D.C. Trolley wire was not supported on well-insulated insulators and was in contact with combustible material in that the insulators failed to insulate the trolley wire's electrical current from the mine roof. The insulators that were installed for the J Mains Haulage at Mouth of 1-D, just outby 73" crosscut and just inby 75 crosscut failed allowing heat and sparks to track across the insulating material and to start heating the area where the hanger was supported. The hanger at 1-D had a small flame, at 73" crosscut the mine roof was heated up and a lot of smoke put out and at 75 crosscut there were sparks observed. This citation is issued in conjunction with 107-A order No. 3699507.

The cited standard reads as follows:

All power wires (except trailing cables on mobile equipment, specially designed cable conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires) shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs.

The essential facts in this case are not in dispute. On July 2, 1992, an inspection party consisting of MSHA Inspector Ron Hixson, Union Representative Marlon Whoolery, and Company Representative Pat Wise found "hot" trolley wire hangers at three locations in the Dilworth Mine. The 600-volt DC trolley wire at the Dilworth Mine is suspended from the mine roof by pipes inserted into the roof upon which insulated hangers are hung with "bull-dog" clamps. The trolley wires are attached to the hangers, which are designed to act as insulators (see Government Exhibit Nos. 1 and 2). These hangers have been installed approximately every ten feet for the five miles of trolley line throughout the mine.

As the inspection party approached J Mains air shaft 6 area they saw a one to three inch flame at the base of one of the hangers. Whoolery observed that the yellow plastic covering the trolley wire was on fire. The trolley wire was immediately deenergized and the hanger replaced. According to Whoolery, who actually removed and replaced the hanger, the insulation inside the hanger had completely burned out.

The inspection party found a second hot hanger at 73-1/2 crosscut. Hixson first smelled smoke some 500 to 660 feet before observing black billowing smoke coming from the mine roof above the hanger. The hot area of mine roof, about 2 feet in diameter, was picked-out and the area cooled with water before the old hanger was replaced. Whoolery, who also removed this hanger, observed that the insulation inside had become chalky white.

The third hot hanger was found at the No. 75 crosscut. According to Hixson the hanger was arcing with electrical current, like static electricity, along the base of the hanger. The power was again removed from the trolley wire and this insulator was also replaced. According to Whoolery, the insulated hanger was not in itself involved, but rather there was arcing from the bull-dog across the dirigo. Accordingly, Whoolery replaced only the dirigo.

According to Inspector Hixson, the hangers cited in this case were not performing as insulators. Carol Boring, electrical engineer for the MSHA Division of Safety, agreed,

concluding that the first two hangers cited in this case had already failed as insulators when they were discovered. She defined the term "insulator" as a material that provides protection by separating conducting surfaces by a dielectric substance or air space permanently offering a high resistance to the passage of current and to disruptive discharge through the substance of space (See Government Exhibit No. 4). With respect to the third cited hanger, Ms. Boring opined that the arcing across the dirigo showed initiation of a breakdown of both insulators. She concluded, therefore, that in all three instances the hanger systems were not providing insulation and thus were not "insulators" and were in violation of the cited standard.

The Secretary argues that there was a violation of the cited standard under either of two theories. First, that while there was no physical contact between the energized power wires and the combustible roof there was electrical "contact" in violation of the cited standard when electrical current tracked across the hangers and, second, that the hangers, when cited, were not in fact "insulators" as required by the cited standard.

In a recent decision involving the same standard at issue herein, Judge Weisberger, in Consolidation Coal Company v. Secretary, 15 FMSHRC 392 (March 1, 1993), cogently analyzed the relevant law as follows:

Section 85.516 supra requires that wires such as the trolley wires in issue shall be supported on 'well-insulated insulators and shall not contact combustible materials roof or ribs'. Hence, the plain language of Section 75.516 supra indicates that this Section is violated only if, (1) the insulators are not 'well-insulated' or (2) the trolley wires contact combustible material, roof, or ribs.

1. Well-insulated insulators

Section 75.516-1 defines well insulated insulators as meaning 'well-installed insulators'. At best, the evidence herein tends to establish that the insulators did not serve their intended purpose due perhaps to moisture. However, there is a lack of evidence to base a conclusion that the insulators were not 'well-installed'. There is no evidence in the record to base a conclusion as to the manner in which the insulators were installed. Indeed, the parties stipulated that the insulators at issue were 'well installed'. (Tr. 115) Thus, I conclude that the trolley wires were well insulated.

2. Trolley wires in contact with combustible material

Also, Section 75.516 supra is violated if the trolley wire comes in 'contact' with combustible material, roof or ribs. Section 75.516 supra contains the identical language that was set forth in Section 305(k) supra of the 1969 Act and which was incorporated in the 1977 Act. Neither the 1969 Act nor the regulations clarify as to whether section 305(k) (Section 75.516 supra) intended to prohibit physical or electrical contact between trolley wire and combustible material. However, enlightenment as to as to Congressional intent is found in the legislative history of the 9169 Act. The Senate Report, in its section by section analysis, indicates that section 206(g) of the Senate Bill, whose language was reiterated in Section 305(k) of the 1969 Act, requires that all power conductors be 'not allowed to touch combustible material, roof, or ribs.' (Legislative History, supra at 193). To the same affect, the House Report in its analysis of Section 305(l) of the House Bill whose language was reiterated in Section 305(k) of the 1969 Act, states that Section 305(l) requires that all underground power conductors be 'not allowed to touch combustible materials, roof, or ribs.' (Legislative History, supra, at 1079). Thus, I conclude that Congress intended that trolley wires not touch combustible material i.e. not come in physical contact with these materials.

I agree with Judge Weisberger's analysis that the Congress intended that trolley wires not touch combustible materials in the sense that they not come in physical contact with these materials. I therefore reject the Secretary's first theory of a violation. I note that the Secretary did not seek review of Judge Weisberger's decision.

In regard to the Secretary's alternate theory of a violation I note that rather than amend the convoluted definition in 30 C.F.R. § 75.516-1 that "well-insulated" insulators does not mean what it says, but rather means "well installed" insulators, the Secretary, with creditable creativity, now argues that the cited hangers, though admittedly obtained and originally installed as "insulators," were not in fact "insulators" at all because they failed to perform the insulating function of "insulators." Indeed, there is no dispute with the expert testimony of MSHA Electrical Engineer Carol Boring that the cited hangers had in fact become conductors of electrical current and were no longer performing the function of insulators. Since, according to the Secretary's regulations, "well insulated"

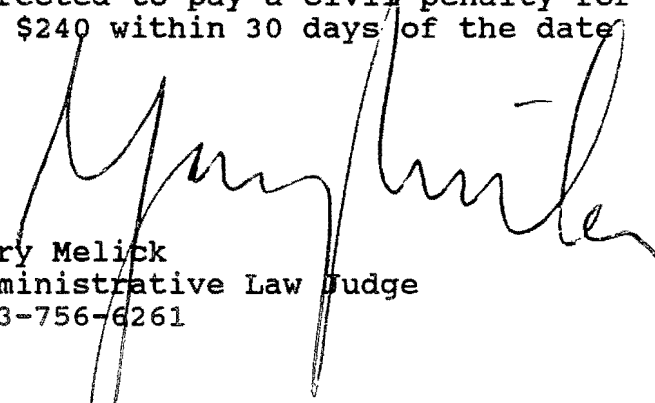


does not mean what it says but rather means "well installed," it is not redundant to read Section 75.516 as requiring well installed "insulators" that in fact are sufficiently well insulated to be considered "insulators." Since the hangers cited herein were in fact not performing the function of "insulators" they were not in fact "insulators" and accordingly did not meet the requirements of the cited standard.

The facts clearly support the Secretary's undisputed finding that the violations were "significant and substantial" and of high gravity. I accept the inspector's assessment of low negligence under the circumstances. There is no dispute that Consol had been running frequent infra-red scans of the hangers throughout the Dilworth Mine and that any of the hangers could fail at any time, particularly in this especially damp mine. Considering all available evidence under the Section 110(i) criteria, I find that the Secretary's proposed penalty of \$240 is indeed appropriate.

ORDER

Citation No. 3699508 is **AFFIRMED** as amended and the Consolidation Coal Company is directed to pay a civil penalty for the violation charged therein of \$240 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution:

Theresa C. Timlin, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Daniel Rogers, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

Robert H. Stropp, Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, D.C. 20005 (Certified Mail)

/lh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
(303) 844-5266/FAX (303) 844-5268

AUG 9 1993


LLOYD A. PARTIN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 93-198-D
	:	DENV CD 92-14
	:	
AMAX COAL COMPANY,	:	
Respondent	:	

**ORDER OF DISMISSAL**

**Before: Judge Lasher**

By letter mistakenly dated April 16, 1993 (the date should be July 16, 1993), counsel for Complainant, in confirming a telephone conversation held among him, Respondent's counsel, and me on July 13, 1993, had reiterated that a settlement has been reached between the parties in this matter. Complainant's attorney indicates in the subject correspondence that such "constitutes Mr. Partin's official request that his claims be withdrawn."

Pursuant to the Commission Procedural Rule 11 (29 C.F.R. § 2700.11) a party may withdraw such pleading at any stage of a proceeding with the approval of the Commission or a Judge. Since it appears the withdrawal is voluntary and based on appropriate grounds, approval is here **GRANTED**. Accordingly, this proceeding is **DISMISSED WITH PREJUDICE**.

  
Michael A. Lasher, Jr.  
Administrative Law Judge

Distribution: Certified Mail

Mr. Lloyd A. Partin, P.O. Box 3303, Gillette, WY 82717

Stephen H. Kline, Esq., KLINE & JENKINS, Equality State Bank Building, 19th and Pioneer, Suite 306, P.O. Box 1938, Cheyenne, WY 82003

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ek

# 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 1993

DIABLO COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 93-307-R
v.	:	Citation No. 4001352; 4/9/93
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 93-308-R
MINE SAFETY AND HEALTH	:	Order No. 4001353; 4/9/93
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 93-309-R
	:	Order No. 4001354; 4/9/93
	:	
	:	Docket No. WEVA 93-310-R
	:	Order No. 4001355; 4/9/93
	:	
	:	Docket No. WEVA 93-311-R
	:	Citation No. 4001356; 4/9/93
	:	
	:	Mine No. 2

## DISMISSAL OF PROCEEDINGS

On July 23, 1993, the Secretary served upon the Respondent and the Commission a motion to dismiss asserting the subject Notice of Contest was not timely filed. The motion states the contested citations and orders were issued to the operator on April 9, 1993, and that the Notice of Contest was served upon the Secretary and the Commission on May 12, 1993.

As the Secretary notes, Commission Procedural Rule 20(1) requires the operator to file a contest of a citation or order issued under section 104 "within thirty (3) days of receipt by the operator of the contested citation, order, or modification." 30 C.F.R. § 2700.20(b). Commission Procedural Rule 5(d) states: "When filing is by mail, filing is complete upon mailing . . . ." 29 C.F.R. § 2700.5(d). Thus, in this instance, the operator filed its contest thirty-three (33) days after the contested orders and citations were received by the operator.


The Secretary argues that late filing of the contest has deprived the Commission of jurisdiction and that these matters must therefore be dismissed. The Secretary quotes Chief Administrative Law Judge Merlin's statement that "a long line of decisions going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed." Prestige Coal Co., 13 FMSHRC 93, 94-95, citing to Freeman Coal Mining Corporation, 1 MSHRC 1001 (1970);

Consolidation Coal Co., 1 MSHRC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHRC 1029 (1979); aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988) Peabody Coal Co., 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC, 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990).

The Secretary correctly has stated the law. Even though Diablo Coal Company was but three (3) days out-of-time in filing its Notice of Contest, it's late filing has deprived me of jurisdiction and I must grant the Secretary's motion.<sup>1</sup>

Although, the Secretary's motion is granted, the issues Diablo Coal Company seeks to raise may be litigated in the civil penalty proceedings when the Secretary proposed civil penalty assessments for the violations alleged.

ACCORDINGLY, it is ORDERED that these cases be, and are hereby DISMISSED and the hearing previously scheduled in these matters is CANCELED.

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

Distribution:

Patrick DePace, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203  
(Certified Mail)

Donna C. Kelly, Smith, Heenan & Althen, 1380 One Valley Square, P.O. Box 2549, Charleston, WV 25329 (Certified Mail)

/epy

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<sup>1</sup> The Secretary further supports his motion by arguing the operator's use of first class mail rather than registered or certified mail, return receipt requested to file its Notice of Contest likewise deprives me of jurisdiction. Citing to 29 C.F.R. § 2700.7(c). I need not and do not base the dismissal of these matters upon this part of the Secretary's argument.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

AUG 10 1993

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 92-802-M
Petitioner	:	A. C. No. 45-02961-05553
	:	
v.	:	Cannon Mine
	:	
ASAMERA MINERAL (US), INC.,	:	
Respondent	:	

**ORDER ACCEPTING RESPONSE**  
**DECISION APPROVING SETTLEMENT**  
**ORDER TO PAY**

**Before: Judge Merlin**

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On April 26, 1993, the parties filed a motion to approve settlement of the one violation involved in this case. The parties sought approval of a reduction in the penalty amount from the original assessment of \$100 to \$50. On June 11, 1993, an Order Disapproving Settlement and Order to Submit Information was issued directing the parties to file additional information to support their motion. On July 12, 1993, the Solicitor submitted a letter to the undersigned accompanied by a detailed and comprehensive letter dated June 24, 1993 from the operator. Both letters further explain the circumstances of the cited violation.

The Solicitor points out that, as noted in the Disapproval of Settlement, the inspector's initial finding of high negligence was changed to ordinary negligence by the narrative findings of the Special Assessment. Information contained in the operator's letter justifies a finding of ordinary negligence. Thus, with respect to the alteration of the accident scene the operator advises that it contacted MSHA prior to altering the site and was given approval to move the piece of equipment in question from the accident scene. The operator's manager made a contemporaneous notation of this approval in his diary, a copy of which notation was attached to the letter to the Solicitor. In addition, the operator's assertion that there was only minimal change to the accident site, is uncontradicted. The Solicitor represents that the operator's contemplated testimony will undermine the credibility of the investigative report and that under the circumstances the recommended reduction in penalty amount is appropriate. In view of the explanations now in the record, I agree that negligence and gravity are less than originally

thought. Therefore, I accept the parties' representations and I conclude that the settlement is appropriate under the six criteria set forth in section 110(i) of the Act.

In light of the foregoing, it is **ORDERED** that the information filed July 12 is **ACCEPTED** as a response to the June 11 order.

It is further **ORDERED** that the recommended settlement be **APPROVED** and the operator **PAY** \$50 within 30 days of the date of this decision.

A handwritten signature in cursive script that reads "Paul Merlin". The signature is written in dark ink on a white background.

Paul Merlin  
Chief Administrative Law Judge

Distribution:

Douglas White, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Robert A. Friel, Esq., Office of the Solicitor, U. S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

Mr. Melvin J. Wattula, Manager, Asamera Minerals (US), Inc., P.O. Box 398, Wenatchee, WA 98801 (Certified Mail)

/gl

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

AUG 10 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-105-M
Petitioner	:	A. C. No. 45-02961-05557
	:	
v.	:	Cannon Mine
ASAMERA MINERAL (US), INC.,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**  
**ORDER TO PAY**

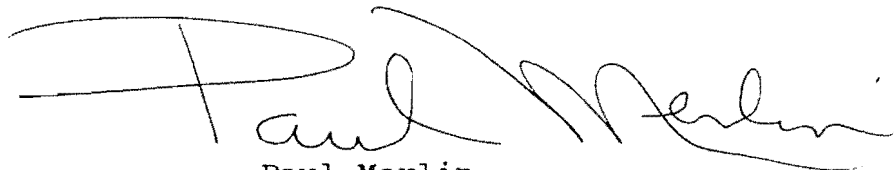
**Before: Judge Merlin**

An Order Disapproving Settlement and Order to Submit Information was issued in this matter on June 11, 1993.

The violation was cited for failure to report a methane ignition. The recommended settlement is \$20. The Solicitor and the operator have submitted additional information to support the settlement. According to this new information, the operator was unaware of the ignition at the time and as soon as it became aware of it, disciplinary action was taken against the supervisor who failed to report it. These factors decrease negligence. In addition, there do not appear to be any factors which would render this a significant and substantial violation under criteria adopted by the Commission. Consolidation Coal Company, 11 FMSHRC 1935 (October 1989). The parties are advised however, that reporting violations may be serious depending upon the circumstances.

In light of the foregoing, it is **ORDERED** that a settlement in the amount of \$20 be Approved.

It is further **ORDERED** that the operator **PAY** \$20 within 30 days of the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

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/gl



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 10 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 92-345-M
Petitioner	:	A.C. No. 20-02621-05505
v.	:	
	:	Docket No. LAKE 92-357-M
CARL SCHLEGEL, INC.,	:	A.C. No. 20-02621-05507
Respondent	:	
	:	Docket No. LAKE 92-389-M
	:	A.C. No. 20-02621-05506
	:	
	:	Allis Chalmers Plant No. 1
	:	
	:	Docket No. LAKE 93-77-M
	:	A.C. No. 20-02833-05504
	:	
	:	Docket No. LAKE 93-78-M
	:	A.C. No. 20-02833-05505
	:	
	:	Howe Road Plant

## DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois, for  
Petitioner;  
James L. Winckler, Esq., Moran, Bladen and  
Winckler, P.C., Lansing, Michigan, for Respondent.

Before: Judge Amchan

These cases are before me upon petitions for civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et. seq., for eight alleged violations of mine safety standards. This matter was heard in Lansing, Michigan on June 8, 1993.

After considering the record before me, I have assessed civil penalties of \$1,297<sup>1</sup>. Two of the citations allege violations due to Respondent's unwarrantable failure to comply with a mandatory safety standard pursuant to section 104(d)(1) of

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<sup>1</sup>A total of \$1,648 in penalties was proposed by the Secretary of Labor.

the Act. I have affirmed this allegation with respect to one of the violations but not the other. Several violations were alleged to be "significant and substantial" and, while I have affirmed that characterization with respect to some violations, I have vacated it with regard to others.

The penalties at issue are the result of citations issued by MSHA Inspector Gerald Holeman during two inspections of sites at which Respondent was working. The first inspection was conducted in Shiawassee County, Michigan, where Respondent had set up a portable crushing plant to produce gravel (Jt. Exhibit 1).<sup>2</sup> Four of the citations allege violations of 30 C.F.R. § 56.14107(a), which provides: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Citation No. 3887301 was issued for the absence of a guard on the back, top and right side of the self-cleaning tail pulley to the crusher feed conveyor, and the absence of a guard on the drive belts and headpulley of the same conveyor (Tr. 17-30). A \$50 penalty was proposed for this violation. Respondent does not contest the fact that these areas had no guard until after the citation was issued. However, it contends that there was no hazard to employees because the sides of the pulleys were protected by solid steel components of the machinery and the ends were protected by cross-bracing (Tr. 129-133). Similarly the company contends that two I-beams blocked access to the top of the pulleys (Tr. 132).

Respondent disagrees with Inspector Holeman's opinion that employees might contact the unguarded pulleys when shoveling debris that might fall underneath the pulleys or when lubricating the pulleys. Respondent's superintendent, John Warvel, convincingly testified that Carl Schlegel, Inc., by digging a hole next to its crusher for spillage, had eliminated any need for employees to get near the pulleys to shovel debris (Tr. 130-131). However, I am not persuaded that potential exposure while lubricating the machinery had been eliminated sufficiently to obviate the need for a guard.

Although Warvel testified that all lubrication is done by the company while its machinery is shutdown (Tr. 130-131), he did not convince me that this must always be the case. Given the unpredictability of human behavior, it is quite possible that an employee might attempt to save time and lubricate the machinery while it was operating, rather than shutting the equipment down;

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<sup>2</sup>This portable crushing plant was manufactured by Allis Chalmers Company, hence the references to "the Allis Chalmers plant" throughout the record.

therefore, I credit Inspector Holeman's testimony and find sufficient exposure to the pulleys to affirm the citation. See Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094 (September 1984).

Citation No. 3887302 was issued for the absence of a guard for the self-cleaning tail pulley on the crusher plant belt and the head pulley of the same conveyor (Tr. 30-36).<sup>3</sup> This violation was cited as a "significant and substantial" violation because Inspector Holeman believed that an injury was reasonably likely in that the unguarded hazardous areas on this conveyor were more accessible to employees than in other locations (Tr. 40-41). The unguarded self-cleaning tail pulley jutted out 1 foot beyond the equipment above it (Tr. 39, 135-136).

Respondent's Superintendent Warvel conceded that the tail pulley at this location needed a guard. In fact, he testified that the pulley had been guarded when used in another location a few days prior to the inspection. He had instructed his foreman, Roger Howard, to install a better guard (Tr. 135-136, 153-154).

The company contends that this citation and the other guarding violations should be vacated because inspector Holeman did not observe the machinery operate without proper guarding (Tr. 13, 104-105). The plant was shutdown the day of the inspection due to complaints from neighboring residents regarding dust. However, Holeman testified that respondent's foreman, Roger Howard, had told him that the equipment had been operated the day before the inspection (Tr. 15, 123). I find that Holeman was justified in inferring that the equipment had been run without proper guarding and I draw the same inference.

Superintendent Warvel testified that he assumed the guard had been on the equipment at this location the day before when the company had performed "test runs" of its machinery (Tr. 153-154)<sup>4</sup>. However, Mr. Warvel was not present at this worksite on the day in question (Tr. 155), and, thus, has no first-hand knowledge on this issue. I, therefore, credit Mr. Holeman's testimony, which is based upon a reasonable inference drawn from an admission from Respondent's foreman.

This citation was issued as a "significant and substantial" violation. Pursuant to Commission precedent, the Secretary, in

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<sup>3</sup>Each citation for lack of guarding pertains to a different conveyor. Failure to guard different locations on the same conveyor were grouped into one citation.

<sup>4</sup>Mr. Warvel's testimony on this issue is somewhat contradictory. He also stated that he did not know if the equipment had been operated without a guard (Tr. 136).

order to establish a "significant and substantial" violation, must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature Mathies Coal Company, 6 FMSHRC 1 (January 1984).

The only one of the above criteria at issue here is the likelihood of injury. There is no question that if an employee contacts an unguarded belt or pulley it is reasonably likely that he or she will sustain serious injury. Inspector Holeman differentiated this citation from the other guarding citations on the basis that the unguarded tail pulley was a foot outside of the superstructure of the equipment and, therefore, presented an opportunity for accidental contact without any unusual behavior on the part of an employee (Tr. 40-41). I find that this distinction is sufficient to warrant the conclusion that injury was reasonably likely and I find this citation to be a "significant and substantial" violation.<sup>5</sup>

Citation No. 3887303 alleges that the left side of the self-cleaning pulley to the crusher transfer conveyor was unguarded (Tr. 42-47). Respondent's superintendent, John Warvel, conceded that the area required a guard (Tr. 136-137). Inspector Holeman testified that injury was unlikely in that it would require an affirmative act to contact the unguarded pulley (Tr. 46). I affirm this citation.

Citation No. 3887304 alleges that the top of the self-cleaning tail pulley to the dust conveyor was unguarded (Tr. 49-53). An employee would have to get behind the bracing supporting the feed hopper to contact this pulley (Tr. 50). Inspector Holeman testified that there is a possibility that this

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<sup>5</sup>I declined to allow Respondent to introduce evidence that other firms in its industry had received citations for similar or identical violations, but that none of these citations had been characterized as "significant and substantial" (Tr. 71 - 76). I find such evidence irrelevant to the issues before me. Just as the Secretary is not estopped from issuing a citation because he has failed to cite an identical condition previously, he is not estopped from characterizing a violation as "significant and substantial" because he has not done so in the past. See Lancashire Coal Co., 12 FMSHRC 272 (ALJ Koutras, February 1990), and the cases cited therein.

Moreover, to allow such testimony would oblige me to determine whether the prior violations were distinguishable from the instant case. The appropriate manner to decide the "significant and substantial" issue in this case is to consider the facts of this case, rather than the facts of other cases.

could occur (Tr. 51-52). Although injury in this instance is clearly unlikely, it is sufficiently possible to warrant affirmation of the citation--given the possibility that an employee might try to lubricate the equipment or check the bearings while the equipment was operating.

#### The Front-End Loader

During his inspection of May 21, 1992, Inspector Holeman observed Foreman Roger Howard and another employee standing in front of an unoccupied front end loader (Tr. 53-59). The bucket of the loader was raised approximately one and a half feet above the ground and the two men were using it as a bench on which to work on a piece of metal (Tr. 54). Holeman issued Citation No. 3887305 on the basis of these observations alleging a violation of 30 C.F.R. § 56.14206(b). The standard requires that: "When mobile equipment is unattended or not in use, dippers, buckets and scraper blades shall be lowered to the ground . . . ."

This citation included a notation that the violation met the criteria set forth in section 104(d)(1) of the Act, implying that the violation was significant and substantial and was due to the operator's unwarrantable failure to comply with the standard (Exhibit P-5, block 12). Inspector Holeman opined that the bucket could suddenly drop and seriously injure an employee's foot (Tr. 55, 111-113). On balance, I find that an injury was not reasonably likely in that I am not persuaded that a sudden drop of the bucket was likely. Moreover, the only evidence supporting the finding of an unwarrantable failure to comply, or a high degree of negligence, as testified to by the inspector (Tr. 59-61), is Foreman Howard's statement to the inspector that he knew he shouldn't have been using the bucket in this manner.

The fact that Foreman Howard recognized a hazard after having it called to his attention does not establish an unwarrantable failure to comply with the regulation or a high degree of negligence. There is no evidence that he knew prior to his conversation with the inspector that this condition either violated the law or presented a danger. The record, at best, supports a finding of ordinary negligence which is insufficient for a finding of "unwarrantable failure". Emery Mining Corp., 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987). This citation is affirmed as a "non significant and substantial" violation of section 104(a).

Inspector Holeman also determined that the parking brake of the front-end loader being used by the employees in reference to Citation No. 3887305 was not fully effective (Tr. 62-65). On May 4, 1992, Foreman Howard had reported to higher management that the parking brake was not working properly (Exh. P-7). It had not been repaired between May 4 and the May 21 inspection

(Tr. 69, 142-143). When Mr. Holeman observed the loader it was parked on relatively level ground, straddling a hump (Tr. 76). The inspector asked that the parking brake be tested on a slope that he described as a 3 percent grade (Tr. 63-64). The brake failed to hold the vehicle, which rolled down the ramp (Tr. 64). Mr. Holeman issued Order No. 3887306 alleging a violation of 30 C.F.R. § 56.14101(a)(2), which provides: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

Mr. Holeman further found that the violation was due to the Respondent's unwarrantable failure to comply with the standard and that it was "significant and substantial"<sup>6</sup>. The unwarrantable failure finding was based on the fact that the defective condition of the parking brake had been reported to Respondent and that employees had been allowed to use the loader even though the defect had not been corrected.

Respondent's superintendent, Warvel, conceded that the parking brake had lost some, but not all of its effectiveness, due to grease on its linings (Tr. 141). He testified that he determined that the grade on which Inspector Holeman had the brake tested was 45 degrees, rather than 3 degrees (Tr. 141). He also testified that the front-end loader used the inclined roadway on which the brake was tested once or twice daily and that it was capable of holding in the areas in which Carl Schlegel employees were working (Tr. 140-143).

I find that the violation was both significant and substantial and due to Respondent's unwarrantable failure to comply with the standard. It is not necessary to resolve the conflict in testimony with regard to the slope of the ramp on which the brake was tested.<sup>7</sup> What is important is that Respondent was on notice that the parking brake was defective and continued to use it without objectively determining how much of the brake's effectiveness was lost. I find that once Respondent knew the brake was defective its conduct was "aggravated" in that it was taking a grave risk with the lives of its employees in

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<sup>6</sup>Inspector Holeman's testimony is not couched in terms of "unwarrantable failure"; however, Inspector Holeman clearly concluded that this violation met the criteria of "unwarrantable failure" (Tr. 69, Exhibit P-6, page 2).

<sup>7</sup>Nevertheless, I credit Inspector Holeman's testimony over that of Mr. Warvel. Mr. Warvel did not observe the test of the parking brake and Respondent has not clearly established that the ramp about which Mr. Warvel testified was the ramp on which the parking brake was tested. Testimony from Mr. Howard, who was present, would have been much more persuasive.

continuing to use the front-end loader without an objective determination of the extent of the defect. I, therefore, conclude that the violation herein was due to Respondent's unwarrantable failure to comply with the standard Peabody Coal Company, 14 FMSHRC 1258 (August 1992). Allowing Respondent to rely on a seat-of-the-pants determination that the defect would not endanger its workers is completely contrary to spirit of the Act. I find the higher penalties called for, when a violation meets the criteria of section 104(d)(1), are justified in this instance.

With regard to whether the violation was "significant and substantial", an accident resulting from the failure of the parking brake would clearly be likely to result in death or serious injury. Moreover, as the equipment was clearly defective and operated on steep inclines at least daily, I find the chance of an accident occurring was also reasonably likely.

#### The Howe Road Inspection

On August 21, 1992, Mr. Holeman inspected another site at which Respondent was engaged in a dredging operation. This worksite was located on Howe Road in Clinton County, Michigan. As during his previous inspection, the site was not actually producing on the day of his arrival due to a malfunction of the dredge (Tr. 119, 123).

Inspector Holeman observed a stacking conveyor with an elevated walkway next to, and parallel to it. Although the conveyor had a handrail along its sides, the end of the conveyor was open and Mr. Holeman concluded that the absence of a handrail exposed employees to a hazard of falling ten feet to a stockpile of sand (Tr. 81-90, 118).

Mr. Warvel testified that while he agreed that the end of the walkway should have been guarded, it was rarely used and that the potential fall distance was only seven feet (Tr. 143-144). I credit the testimony of Mr. Warvel in this regard, noting that Mr. Holeman did not measure the distance (Tr. 89).

I find that an accident was very unlikely in this instance due to the fact that the walkway was used infrequently and because the sides of the walkway were guarded. Moreover, given the fact that a fall would be onto a pile of sand, I find it unlikely that serious injury would result from this violation. I affirm the citation as a non "significant and substantial" violation.

During his inspection of the Howe Road plant, Inspector Holeman observed a 13-foot wide bridge constructed of culvert pipe and earthen material which did not have a berm on either side. The bridge was used by Respondent's equipment, including a

9-foot wide Caterpillar scraper, to cross a stream 10 feet below it (Tr. 95-101). The inspector issued Citation No. 4095665 which alleged a violation of 30 C.F.R. § 56.9300(a). That standard requires that: "Berms or guardrails 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."

Respondent is apparently most concerned with the "significant and substantial" characterization of the violation (Tr. 145). I find that all four elements of a "significant and substantial" violation have been established by the Secretary. Given the width of the bridge and the width of Respondent's equipment, I find that an accident was reasonably likely and that an injury, if one occurred, would likely be fatal or very serious.

### ORDER

#### Conclusions and Penalty Assessment

Section 110(i) of the Act requires the Commission to consider six factors in assessing civil penalties: the operator's history of previous violations, the appropriateness of such penalty to the size of Respondent's business, the negligence of the mine operator, the effect of the penalties on the operator's ability to remain in business, the gravity of the violations and the good faith of respondent in attempting to achieve rapid compliance with the Act.

The penalties for the violations alleged in this matter are relatively low to start with--all under \$1,000; four of the eight under \$100. Respondent has conceded that payment of the penalties would not put it out of business and objects primarily to the "significant and substantial" characterization of the violations (Tr. 168-169).<sup>8</sup> The size of Respondent's business, its history of previous violations, and its good faith in rapidly correcting the violations indicate that relatively low penalties, such as those proposed by the Secretary, are warranted in those instances in which the Secretary has established all the facts it

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<sup>8</sup>While Respondent lost over \$300,000 in 1988 and 1989, it is not the only business venture of David R. Schlegel, the President and sole officer. Despite losses in some years, the undersigned is left with the impression that the operation of Respondent company is economically advantageous for Mr. Schlegel and that the economic benefit derived from its operations would not be significantly compromised by payment of the penalties assessed in this matter. Mr. Schlegel draws a weekly salary of \$1200 from Respondent. In 1990 Respondent showed a profit of \$146,594 (Tr. 166-177).



alleges. The gravity and negligence issues must be addressed on a violation by violation basis.

Citation No. 3887301 - A \$25 penalty is assessed in light of the low gravity. A \$50 penalty was proposed.

Citation No. 3887302 - The \$147 penalty proposed by the Secretary is assessed in light of the likelihood of injury and obviousness of the hazard. This citation is affirmed as a "significant and substantial" violation.

Citation No. 3887303 - A \$25 penalty is assessed in light of the low gravity. A \$50 penalty was proposed.

Citation No. 3887304 - A \$25 penalty is assessed in light of the low gravity.

Citation No. 3887305 - A \$50 penalty is assessed. A \$300 penalty was proposed. This citation is affirmed as a violation of section 104(a) of the Act. The characterizations of "unwarrantable failure" and "significant and substantial" are vacated.

Citation No. 3887306 - An \$800 penalty is assessed, as proposed. This citation is affirmed as "significant and substantial" and as due to the unwarrantable failure to comply with a mandatory safety standard, pursuant to section 104(d)(1) of the Act.<sup>9</sup>

Citation No. 4095664 - A \$25 penalty is assessed due to the unlikelihood of an accident or serious injury. This is affirmed as a non "significant and substantial" violation.

Citation No. 4095665 - A \$200 penalty is assessed. Although a \$157 penalty was proposed, the likelihood of an accident and likely consequences of an accident warrant a higher penalty. This is affirmed as a "significant and substantial" violation.

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<sup>9</sup>This Citation was issued as a section 104(d)(1) order, predicated on the findings of "significant and substantial" and unwarrantable failure made with regard to Citation No. 3887305 (Exhibit P-6, pages 1 and 3, block 14). Since I have vacated those characterizations with regard to Citation Nos. 3887305, 3887306 is a citation rather than an order issued pursuant to section 104(d)(1) of the Act.

Respondent is hereby directed to pay civil penalties in the amount of \$1,297 within 30 days of the date of this decision.



Arthur J. Amchan  
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 10 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 92-587
Petitioner	:	A.C. No. 36-00840-03814
	:	
v.	:	Mine No. 33
	:	
BETH ENERGY MINES INC.,	:	
Respondent	:	

## DECISION

Appearances: Pamela W. McKee, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Steven C. Smith, Esq., Buchanan Ingersoll,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Barbour

In this case 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. ("Mine Act" or "Act"), charges Beth Energy Mines, Incorporated ("Beth Energy") with four violations of mandatory safety standards for underground coal mines found at 30 C.F.R. Part 75 and proposes the assessment of civil penalties for the violations. Two of the alleged violations are contained in citations issued by the Secretary pursuant to section 104(a) of the Act. 30 U.S.C. § 814(a). One is contained in a citation issued pursuant to section 104(d)(1) of the Act and one is contained in an order of withdrawal issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1). In addition to alleging violations of the standards, the section 104(d)(1) citation and order also allege that the violations constituted significant and substantial contributions to mine safety hazards (an "S&S" violation) and were caused by Beth Energy's unwarrantable failure to comply with the cited standards (an "unwarrantable" violation).

Beth Energy denied the alleged violations and the S&S and unwarrantable allegations, and a hearing on the merits was held in Pittsburgh, Pennsylvania. The general issues to be tried were whether Beth Energy violated the cited standards and, if so, whether the Secretary could prove the special findings of S&S and unwarrantable failure. In addition, and in accordance with Section 110(i) of the Act, if violations were established appropriate civil penalties would have to be assessed.

### SETTLEMENTS

Shortly before the commencement of the hearing the parties advised me that they had agreed to settle three of the four alleged violations. It was decided that counsel for the Secretary would state on the record the nature of the settlements and I indicated if I found the settlements to be appropriate I would approve them and order payment of the settlement amounts in my decision on the remaining contested violation.

<u>Citation No.</u>	<u>Date</u>	<u>Section</u> <u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
03705551	11/4/91	75.316	\$400	\$98

The citation alleged that the approved ventilation system and methane and dust control plan for the mine was not complied with in that a check curtain had been installed in an entry where the plan indicated a wall with a hole in it should have been. Counsel for the Secretary stated that the inspector who issued the violation believed that it was unlikely that an illness or injury would have occurred as a result of the violation and that no miners were affected by the violation. Counsel further stated that Beth Energy demonstrated its good faith by removing the check curtain upon the request of the inspector. Finally, counsel stated if the violation had been assessed on the basis of these facts the proposed penalty would have been \$98 rather than \$400. Tr. 14-15.

<u>Citation No.</u>	<u>Date</u>	<u>Section</u> <u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
03705552	11/4/91	75.1202	\$400	\$98

The citation alleged that the mine map was not kept up-to-date in that the aforementioned check curtain was not shown on the map. Counsel for the Secretary again noted that the inspector believed an injury or illness resulting from the violation was unlikely and that no miners were affected by the violation. She further stated that the check curtain was not shown on the map because it was viewed by Beth Energy as a temporary feature. Finally, counsel stated if the violation had been assessed on the basis of these facts the proposed penalty would have been \$98 rather than \$400. Tr. 15-16.

<u>Order No.</u>	<u>Date</u>	<u>Section</u> <u>30 C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
03705422	12/12/91	75.400	\$700	\$700

The order alleged that hydraulic oil 3/4 inch deep had accumulated in the right rear area of a roof bolting machine adjacent to an hydraulic pump. The machine was energized and there also was an accumulation of oil in the machine's rear tramming compartment, as well as an accumulation of coal and coal

dust mixed with oil on the machines's right and left front bolting arms and an accumulation of coal and coal dust mixed with oil under the machine's right rear corner. Counsel for the Secretary noted the inspector's finding that the violation was S&S and that the operator's negligence was "high". (Indeed, as previously stated, the inspector cited the violation in a section 104(d)(1) order, thus finding that the violation was the result of Beth Energy's unwarrantable failure.) Counsel also noted that Beth Energy had agreed to pay in full the proposed civil penalty of \$700.

In addition to addressing the above recited facts pertaining to the settled violations, counsel for the Secretary stated on the record information pertaining to the size of Beth Energy, the relevant history of previous violations at the Cambria Slope Mine No. 33 ("Mine No. 33") and the agreed fact that payment of assessed amounts would not affect Beth Energy's ability to continue in business. Tr. 17-18.

Having considered the Secretary's representations, I find that approval of the proposed settlements is reasonable and in the public interest, and pursuant to 30 C.F.R. § 2700.30 counsel for the Secretary's motion to approve the settlements is GRANTED. I will order payment of the settlement amounts at the close of this decision.

#### CONTESTED VIOLATION

<u>Citation No.</u>	<u>Date</u>	<u>Section 30 C.F.R.</u>	<u>Assessment</u>
03705626	12/9/91	75.1722(b)	\$600

Section 104(d)(1) citation No. 3705626 states in pertinent:

The guard provided on the inby end tight side of the #2 E East belt drive was not adequate to keep person [sic] from traveling along this tight side w[h]ere exposed drive rollers existed [.] This was a fence type guard and consisted of one turnbuckle and one strut leg in a cross manner that any person traveling along the tight side could step over. This area was wet and slippery. The belt was operating at the time observed.

Gov. Exh. B. As previously mentioned, the citation contains the inspector's S&S and unwarrantable findings. Finally, the citation states that it was issued at 9:45 a.m. on

December 9, 1991, and was abated at 11:30 a.m. on the same day when "A wire fence was installed to guard this location." Id.

On December 9, 1991, at 11:45 p.m. the citation was modified to state:

Due to information received in a discussion with Jim Pablic (Shift Foreman) Citation No. 3705626 is hereby modified . . . [add]ing the statement[:] This inadequate guard was installed by Jim Pablic (Shift Foreman) and would be very easy to recognize as a violation of the Health and Safety standards.

Gov. Exh. B 2. In addition, the assessment of negligence was modified from "low" to "high" and the section of the Act under which the citation issued was modified from section 104(a) to section 104(d)(1). Id.

#### **PARTIES' CONTENTIONS**

In her opening statement, counsel for the Secretary asserted she would establish the belt was inadequately guarded as charged, that a miner was reasonably likely to have been seriously or fatally injured due to the inadequate guard and that the foreman who erected the inadequate guard knew it did not meet the standard's requirements yet nonetheless decided to wait until his next shift -- some 16 hours later -- to install an adequate guard. Tr. 20-21.

Counsel for Beth Energy responded that Beth Energy did not deny it had violated section 75.1722(b). Tr. 21. Rather, he argued that a miner was not reasonably likely to be injured due to the violation because the guard in place was adequate to deter miners from traveling down the tight side of the belt and a sign warning miners of the dangers posed by a sump located in the vicinity of the guard would have deterred miners from trying to pass the area.<sup>1</sup> Moreover, counsel stated he would establish that the foreman had noticed the unguarded area on an idle day (a Sunday), had installed a temporary guard to apprise miners that the area was not guarded and, knowing that he would be returning on the third shift on Monday reasonably concluded it would be appropriate to install a permanent guard then. Tr. 21-22.

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<sup>1</sup> "Sump" is defined generally as "[a]ny excavation in a mine for collecting or storing water." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 1102 ("DMMRT").

## SECRETARY'S WITNESSES

### GENE RAY

Federal Coal Miner Inspector Gene Ray was the Secretary's first witness. Ray stated that he had been inspecting mines for the Secretary's Mining Enforcement and Safety Administration ("MSHA") for 14 years. Prior to working for MSHA, Ray had worked as an underground contract coal miner and as a salaried section foreman. Tr. 26-27.

On December 9, 1991, Ray conducted an inspection of Mine No. 33. Ray identified Citation No. 3705626 as a citation he issued during that inspection. Tr. 29-30. Ray stated that on December 9, he inspected the E East Belts, beginning with an inspection of the number one belt and concluding with an inspection of the number two belt and its drive (the No. E-2 belt drive).<sup>2</sup> To reach the belt drive Ray had traveled down the clearance side (wide side) of the number one belt. Thus he arrived at the No. E-2 belt drive from the clearance side. Tr. 33-37.

Ray explained that the clearance side of the No. E-2 belt drive was guarded by a chain link-type guard that screened the entire side of the belt drive and prevented miners from falling into or otherwise contacting the belt drive rollers. Tr. 37. (The rollers are depicted on R. Exh. 1 and include a discharge or tail roller on the outby end of the drive, a movable take up roller in the middle of the drive and a stationary takeup roller on the left of the drive. Tr. 38.) The clearance side fence measured 4 feet from the floor to the top of the guard, and it was hung perpendicular to the belt and extended from the discharge roller at one end to the takeup roller at the other end. *Id.* The sump was immediately adjacent to the stationary takeup roller and, according to Ray, at the time of the inspection the clearance side guard extended "a few feet" past the takeup roller toward the sump. Tr. 39.

Ray concluded that the clearance side of the No. E-2 belt drive was properly guarded and, as was his usual practice, he crossed to the other side of the belt drive (the "tight side") to continue the inspection. Because there was no crossover at the of the belt drive, Ray pulled a stop/start cord and crossed the

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<sup>2</sup> According to Ray, a new longwall had been installed on the section and Public was examining the belts to make certain everything was "O.K." before production started at midnight, December 9. Tr. 75, 99-100.

belt inby the belt drive and after the belt had stopped. Tr. 40. Once across, he restarted the belt by pulling the cord.<sup>3</sup>

As Ray proceeded outby toward the belt drive, he encountered a metal strut approximately 5 feet in length. The strut was crossed by a turnbuckle of approximately the same length. The strut and turnbuckle crisscrossed each other each other on the diagonal (a St. Andrew's cross) between the rib and the belt drive structure. Tr. 40-41.

Ray believed that the height of the entry was approximately 6 feet and that the crux of the cross was approximately 2 feet from the mine floor. Tr. 49. Although Ray did not recall the distance from the rib to the belt, he testified it was normally 42 to 48 inches. Tr. 50. (Ray admitted that he had taken no measurements and that his estimates were just that. Tr. 81.) Ray stated that he stepped over the cross, and took a few paces outby. Tr. 41. Ray maintained that the floor of the tight side walkway outby the crossed pieces was wet, muddy and slippery, and that he had to watch his footing so that he would not fall. Tr. 43, 54. When he looked up, he realized that he was standing next to the exposed stationary tail roller at the inby end of the belt drive. The roller was not guarded. Tr. 43.

Ray was taken by surprise to find himself at the tail roller. At Mine No. 33, the tight side of a belt drive usually was guarded by an area guard -- a fence or a piece of belt that blocked the approach to the belt drive in the tight side entry. Ray had expected to come across such a fence prior to reaching the belt drive. Tr. 54, 124. Realizing where he was, Ray maintained that he was "a little concerned for himself" so he turned, moved back inby the roller and stepped back over the crossed strut and turnbuckle. Tr. 43, 55.

Once over the strut and turnbuckle, Ray examined them again. He described what he saw: "To the best of my recollection it was a cross, and it was tied. One side was tied to the belt rope on the top . . . and I don't believe it was tied on the bottom . . . They was just laying on the bottom in a crossed fashion."<sup>00</sup> Tr. 44, 109. According to Ray, the cross was 5 to 10 feet inby the stationary tail roller. Tr. 45; See also Resp. Exh. 1 (blue "X").

When Ray found that the crossed pieces were tied he concluded that they were being used as a "guard" of some sort, although he had never seen such a guard before and did not believe miners would have recognized the pieces as a guard. Tr. 51, 62, 82. Usually, according to Ray, belt drives are

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<sup>3</sup> Ray testified that when he arrived in the area the belt was running and continued to run when he left. Tr. 111.



guarded by wiring or nailing a piece of at least 4 feet high chain link fence, between the rib and the belt. Tr. 51. He stated, "They fence that side off so you can't get in beyond there and get in where the exposed rollers are at." Tr. 52.<sup>4</sup> To pass by a fence type guard, miners loosened the wire, folded the fence up and moved it out of the entry. Tr. 53. In addition, the miners were trained to de-energize and stop the belt when in the vicinity of a belt drive. Tr. 62-63, 66. In Ray's opinion, at Mine No. 33 a fence would have alerted miners not to enter the belt drive area before de-energizing the belt. Tr. 122. In Ray's opinion, miners could not go under, over or around a fence type guard.

Ray believed that the crossed strut and turnbuckle did not adequately guard the exposed tail roller and that this constituted a violation of section 75.1722(b).<sup>5</sup> Tr. 56. He noted the standard required a guard at a conveyor-drive pulley to extend a distance sufficient to prevent a person from reaching behind and becoming caught between the belt and the pulley. The strut and turnbuckle did not fulfill this purpose because "you could step right over [them] and that would put you right in where . . . your whole body could come in contact with a roller." Tr. 57.

Ray identified a portion of MSHA's Program Policy Manual ("PPM") that he stated set forth MSHA's policy regarding acceptable guards. Gov. Exh. C. He recited the policy's requirement that guards "[b]e of such construction that openings in the guard are too small to admit a person's hand;" and stated that the crossed pieces did not meet this requirement because a miner could have stepped over the strut and turnbuckle and have gotten not only his hand but his entire body in the roller. Tr. 57-58. He also noted the policy's statement that a guard "[b]e of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body contacting the moving parts while the equipment is in motion;" and he testified that the strut and turnbuckle did not enclose any moving parts. Gov. Exh. C; Tr. 59. Further, Ray pointed out the policy's statement that "[i]nspector's should carefully examine each belt conveyor drive to determine whether all rollers are sufficiently

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<sup>4</sup> Ray testified Beth Energy abated the subject violation by installing such a fence across the entry. Tr. 70.

<sup>5</sup> Section 75.1722(b) states:

Gears at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to present a person from reaching behind the guard and becoming caught between the belt and the pulley.

guarded to prevent persons from becoming entangled between the rollers and the conveyor belt;" and explained that was what he had done. Id.

With respect to why a miner would have been in the area of the roller in the first place, Ray noted that operation of the conveyor belt produced coal dust that had to be cleaned up, that coal carried on the belt spilled from the belt and had to be cleaned up and that conveyor belts had to be replaced or repaired, as did supports for the roof above the belt drive or adjacent to it. Tr. 65. Miners would have had to enter the area to do these things. In addition, because of the amount of coal dust created at the drive, it frequently was necessary to spread rock dust and to hose the dust down. The sump was there to catch the residual when water was applied to the dust. Tr. 69. More important, on the same day Ray issued the subject citation, Ray also issued a citation for an accumulation of float coal dust in the belt drive area (or, as Ray put it, "at this very location") and miners would have had to enter the area to clean up the dust. Id.<sup>6</sup>

When he wrote the subject section 104(d)(1) citation, Ray believed that either a miner who was cleaning the belt or one who was examining it would likely have been injured due to the violation. Tr. 99. Ray understood it was a policy at the mine for belt examiners normally to travel the wide side but to cross to the tight side whenever it was necessary to check on something. Tr. 119-120. Ray indicated the presence of a hazardous loose rib, defective roof supports and hanging roof, or hot rollers would cause a belt examiner to cross to the tight side and be adjacent to the belt drive. Tr. 120-121.

Ray also acknowledged that if a miner crossed from the wide side of the belt to the tight side to clean the belt, he or she would stop the belt to cross and would restart it once on the tight side. In addition, it was a policy at the mine to stop the belt whenever a miner was adjacent to the belt drive. Tr. 96.

Ray believed that in order for a miner to be injured due to the cited condition, the miner would have had to step over the crossed pieces and walk through the wet area to bring himself or herself adjacent to the roller. In addition, the belt drive would have had to be energized so that the belt was moving and the roller was turning. Tr. 91-92. Ray acknowledged that if a miner was next to the tail roller, the belt should have been de-energized. However, he maintained that without an adequate guard (a fence) a person intent on what he or she was doing and

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<sup>6</sup> According to Ray, the accumulation existed on both the tight and wide sides of the belt and covered a distance 50 feet outby the belt drive and 400 feet inby the belt drive. Tr. 69-70.

therefore not concentrating on what lay ahead could "very easily" get into the area next to the roller, slip and become entangled in the turning roller. Tr. 67, 97, 124. If a miner slipped or fell, Ray believed it reasonably likely the miner would have been fatally injured.

Although the floor was slippery under and inby the pieces, there was no standing water immediately adjacent to the roller. Ray believed the sump did not cover the walkway on the tight side but was under the bottom belt. Tr. 84-85. Ray could not recall whether or not a sign stating "Danger Sump" was hung immediately inby the crossed pieces. Tr. 109. In any event, in Ray's view danger signs were not acceptable as guards because they did not prevent a person from contacting exposed rollers. Tr. 60.

After Ray observed the condition, he continued walking outby along the belt until he reached the end of the belt. There he met John Pauley, the assistant shift foreman. He told Pauley about the condition and stated that he was going to issue a citation. Tr. 68.

Later in the day, about 11:45 p.m., Ray was entering the mine as Jim Public, the shift foreman on the second shift (the 4:00 p.m. - 12:00 a.m. shift) was leaving. Ray stated that Public stopped him and asked if Ray had written the citation and, if so, why? Ray stated when he told Public crossed pieces were inadequate as a guard, a "pretty hefty discussion" ensued. Tr. 72.

During the discussion Public told Ray that he, Public, had installed the crossed pieces the day before (Sunday, December 8) and that he had planned to install a fence on the just finishing second shift. Tr. 72. "[B]ut," Ray quoted him as saying "you got there before I did." Id. Because Public was the one responsible for erecting the crossed pieces and because Public had planned to leave them in place on December 9 on the midnight to 8:00 a.m. shift and the 8:00 a.m. to 4:00 p.m. shift, Ray told Public he was going to modify the citation to one issued pursuant to section 104(d)(1) of the Act. Tr. 72-73.

Ray stated, "[T]hat's what upset me the most because if you find something on a Sunday and there is no production going on and the belt is not in operation . . . there's no excuse to leave a condition half abated or half fixed . . . and have a hazard like that when the belts are in operation [on Monday]. . . I just can't understand why anybody would do something like that."

Tr. 73-74. In Ray's opinion the maximum amount of time needed to fix the condition would have been one half hour. Tr. 77.

ROBERT NOVAK

Robert Novak, a shuttle car operator, union safety representative and a miner with approximately twenty years of experience at Mine No. 33 was the Secretary's final witness. Novak stated that he had occasion to travel various belt lines throughout the mine and was familiar with "tight side guarding." He testified that in his experience all of such guarding consisted of chain-link fencing, approximately 4 feet high and running from the rib to the belt drive. Tr. 131-132. The purpose of such fencing was to prevent inadvertent entrance to the belt drive area. Novak stated that he had never seen any other type of guarding used on the tight side. Tr. 133. Novak had not seen the crossed pieces erected by Public, but had he done so he would have thought "[i]t could have been a strut or something just laying there." Tr. 146.

Novak did not believe that the crossed pieces would have prevented him from entering the area. ("I would probably just step right over it." Tr. 134.) Nor would a "Danger Sump" sign have warned him of anything other than to look out for the sump. Tr. 136. Novak stated if miners were cleaning a coal spill on the tight side and they came to a fence and they wanted to go beyond the fence, the miners would have to take the fence down. If they wanted to go into the belt drive area they would then de-energize the belt drive. If a fence were not there, the miners "would probably continue on" and not de-energize the belt drive. Tr. 139.

On cross-examination, Novak was asked to look at a picture Beth Energy had taken of the strut and turnbuckle and the nearby roller. Resp. Exh. 3. (Beth Energy left the crossed pieces in place for some time after the citations was terminated and the picture was taken during this period.) Novak was then asked whether, in his opinion, if a miner had seen the crossed pieces and roller as depicted in the picture the miner would have realized he or she was approaching a belt drive? Novak responded he believed the miner would. Tr. 141. He also agreed that if a miner knew he or she was approaching a belt drive and stepped over the crossed pieces the miner would have known to turn off the belt drive. Tr. 142. Moreover, at Mine No. 33 the belt drives were lit by mercury-vapor lights. However, because the lights were located on the wide side, the tight side belt drive area would not have been as well lit as depicted in the picture. Tr. 144.

## BETH ENERGY'S WITNESSES

### JIM PABLIC

Jim Pablic, the shift foreman at Mine No. 33, was Beth Energy's first witness. He stated that he had started to work for Beth Energy in 1973 as a salaried employee. Subsequently, he earned his mine examiner's papers and began making underground examinations for the company. He then earned mine foreman's papers. Tr. 148-151.

Turning to the events of December 8, 1991, Pablic stated that on that date he was working the 12:00 a.m. to 8:00 a.m. shift as a foreman/mine examiner. Because it was Sunday, no coal was being produced and no other miners were working except another foreman and a miner who were supposed to check the pumps at the mine. Tr. 157. Three hours before the next shift, at approximately 5:00 a.m., Pablic began conducting a preshift examination for the oncoming shift. As part of that examination he examined the No. E-2 belt drive area. The belt drive was located in an area that he normally did not examine. However, he had been informed that he would be responsible for supervising the area the next day (Monday) so he stopped by the area to become familiar with it and to see if there was anything in need of correction. Tr. 158-159. The belt was not running. Tr. 163.

Pablic stated that he was on the wide side of the belt drive and that when he got to the sump he stooped and looked underneath the belt. He could not see a guard on the tight side. Tr. 162. Therefore, Pablic walked inby and crossed the belt about 30 feet from the belt drive. Pablic proceeded toward the belt drive expecting to find that the guard had been taken off and was somewhere in the area. It was not there and Pablic had no idea where it was. Tr. 163. Pablic stated that he looked for something he could use as a guard, but he found "absolutely nothing in the area." Id. Because it was Sunday he claimed that there was no way he could obtain a piece of chain link fence or a piece of belt to serve as a guard. Tr. 185. Therefore, he used materials he found on hand to build a "barricade." Tr. 164. The materials consisted of the strut and turnbuckle.

Pablic installed the pieces just inby the tail roller. Pablic testified that he secured both the top and bottom of the turnbuckle by hooking and wiring the top over steel rope and by tying the bottom with heavy gauge steel wire. He also tied the top of the strut to existing wire that was holding metal sheeting against the ribs. The bottom of the strut rested on the mine floor. Tr. 165-166, 170-171, 215. The distance from the floor to the roof in the entry was 5 1/2 feet, but steel beam roof supports extended down approximately 6 or 7 inches, so actual clearance was approximately 5 feet. Tr. 171-172.

Pablic maintained that he could not climb over the crossed pieces and because he wanted to check the guard at the other end of the belt drive he untied the strut and walk up the tight side. (Pablic stated that he is 6-feet-2-inches tall and has a 34 inch instep. Tr. 198.) Pablic retied the strut after examining the front guard and finding that it was in place. Tr. 184. Knowing that he could not step over the crossed pieces and had to untie the strut to go past, Pablic believed that anyone else coming up the tight side would have realized, since the pieces were wired in place, that the crossed pieces were "a barricade-type thing to keep somebody from physically going up through there." Tr. 184, 194-195.

According to Pablic, a plastic sign stating "Danger Sump" hung approximately 5 feet inby the crossed pieces. Tr. 173. (Pablic was certain it was there because he remembered cleaning float coal dust from it on Sunday. Id.) Pablic stated that as a practice Beth Energy did not install such signs at all sumps but that he had the sign installed when a previous belt drive was in the same area because he "felt that somebody coming up there could slip in that sump not realizing that there was a sump." Tr.183, 213-214.

Pablic believed that Ray remembered the crossed pieces to have been 5 feet further away from the tail roller than they actually were located. (In other words, Ray located them where the sign was hanging.) Pablic was sure Ray was wrong about the location of the pieces because he distinctly recalled wiring the top of the strut to the roof support leg inby the sign. Tr. 173-174. Pablic stated that approximately one week after the citation was issue he measured from the crossed pieces to the pinch point of the roller and found that the distance was over 36 inches. Tr. 175, 208. At that distance a miner could not reach through the crossed pieces and become caught in the roller. Tr. 174-175, 179. In addition, there was a metal pipe that was a part of the belt drive structure and that in combination with the crossed pieces would have inhibited a miner from contacting the roller. Tr. 175-176, 182. In Pablic's opinion, the roller was visible to anyone standing at the crossed pieces. Tr. 198. Also, the noise from the belt drive would have alerted someone that they were at a belt drive location. Tr. 198-199. The noise was different than the "hum" of belt rollers. Tr. 219.

Pablic was asked to describe the sump. He stated that it extended from rib to rib across the width of the entry. On the tight side the walkway was normally covered with "black, pasty, heavy, muddy material" from the sump. Tr. 177. In his opinion no person would have wanted to walk through the material. Tr. 200. In fact, a plank extended along the rib and when Pablic reached the sump he walked on the plank so as not to get his boots muddy. Tr. 230. However, the sump ceased at the belt roller and adjacent to the belt the tight side floor was cement.

(The belt drive mechanism rested on cement to facilitate cleaning it and the cement extended to the end roller and perhaps a bit beyond. Tr. 229.) Pablic did not recall "slipping or sliding or anything" when he walked adjacent to the tail roller. Id. Pablic testified he intended to return on Monday and install a permanent guard.

After erecting the crossed pieces, Pablic still had to finish this preshift examination, which he estimated required approximately one-half hour. 201. He acknowledged that there would have been two shifts loading coal before he had an opportunity to return. Tr. 185. Since the belts on E East Section would be his responsibility starting Monday, he knew that belt examiners and belt cleaners would be in the area. Each shift would have had one examiner in the area before he would have gotten back to the belt drive on Monday. Tr. 188-189. Belt examinations were conducted from the clearance side and if the examiners had to cross the belt to the tight side they would have stopped the belt, done what they had to do, go back to the wide side and restarted the belt. Tr. 189. The start-stop wires ran the length of the belt on the clearance side. They could have been used from the tight side as well, but it would be "a little tougher." Tr. 190.

The belt was cleaned from the clearance side with hoses. Tr. 191. Belt cleaners hosed everything down toward the sump. They shoveled as little as possible, but there were times when shoveling had to be done. If miners had to cross to the tight side to shovel a heavy spill at the belt drive they would have shut down the belt, although in any area other than the belt drive the belt cleaners would have let the belt run. Tr. 192-193.

Pablic acknowledged that he did not leave a message for the oncoming shifts concerning the lack of an adequate guard. Tr. 203. He also stated when the citation was abated by installation of a chain link fence, the fence was put up immediately inby the crossed pieces. Tr. 209.

#### ROBERT ROLAND

Robert Roland, a mine inspector for Beth Energy, was the company's second and final witness. Roland, who taught MSHA approved safety courses and who was familiar with Beth Energy's policies and procedures, stated that belts were cleaned by water hose directed from the wide side with the residue being washed into a sump and pumped out. Tr. 239. In addition, belts were examined from the wide side. Tr. 240. Beth Energy trained its miners to de-energize the belt if they had to go guarding for any reason. Id.

Roland testified that after the citation was issued he saw the crossed pieces erected by Pablic. Roland believed miners would have recognized them as a barricade and concluded that someone was trying to block their entrance to the area. If someone had to travel beyond the crossed pieces for some reason, company policy required them to de-energize the belt. Tr. 242.

The crossed pieces were left in place following issuance of the citation so that Beth Energy could obtain measurements of the pieces and the distances involved and prepare the drawings the company introduced as exhibits. Tr. 244.

### THE VIOLATION

Section 75.1722(b) requires guards at conveyor-drive pulleys sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.<sup>7</sup> Beth Energy does not contest the violation (Tr. 21) and I find that it existed as charged. Indeed, there was no guard at the tail roller and whether or not a fence-type guard or "area guard" alone would have met the requirements of the standard, the crossed strut and turnbuckle were not acceptable. They could have been gotten over and a person could have become entangled in the roller's pinch point.<sup>8</sup>

### S&S and GRAVITY

The Commission has held that a violation is "significant and substantial" if, based on the particular facts surrounding the violation, there exists a "reasonable likelihood that the hazard

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<sup>7</sup> A "pulley" is defined as, "A cylinder with a shaft for mounting so that it may rotate, used to change the direction or plane of belt travel." DMMRT at 875. Here, although the equipment requiring guarding was consistently referred to during the proceeding as a "roller" or "belt roller" or "tail roller," it is clear that its function was to change the direction of travel of the belt. Resp. Exh. 1.

<sup>8</sup> Previously, I have expressed the view that area guarding is incompatible with section 75.1722(b). Consolidation Coal Co., 15 FMSHRC \_\_\_\_\_, Docket No. WEVA 92-992, etc. (June 30, 1993) slip op. at 22-23. In that case MSHA's policy concerning whether or not area guarding was allowed had varied within the same MSHA administrative district depending upon the MSHA office responsible for inspecting the mine. The company had been advised first that such guarding was permissible and then, when jurisdiction over its mine changed to a different office, was told such guarding violated the standard. Here, in a case, arising in another MSHA administrative district, area guarding is permitted. While Emerson may have been right that foolish consistency is the hobgoblin of little minds, there is nothing foolish about uniform enforcement of government mandated regulations. Not only is such enforcement wise policy, it is required by the Act, a law that is, afterall, applicable to the nation as a whole.



contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). Further the Commission has offered guidance upon the interpretation of its National Gypsum definition by explaining four factors the Secretary must prove in order to establish that a violation is S&S.<sup>9</sup>

In this case, there is an admitted violation of section 75.1722(b). Further, the violation posed a discrete safety hazard in that failure to adequately guard the tail roller subjected any person who worked or traveled adjacent to the roller to the danger of coming into contact with the roller and of being caught in its pinch point. It is also clear that if such an accident occurred death or dismemberment reasonably could have been expected. Thus, the record establishes three of the four factors the Secretary must prove.

As is frequently the case when the alleged S&S nature of a violation is challenged, the question is whether the Secretary also has established a reasonable likelihood that the hazard contributed to will result in an injury? Or, as the Commission has put it, whether the Secretary has established that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 12 (January 1986). The relevant time frame for determining whether a reasonable likelihood of injury exists includes both the time that the violative condition existed prior to citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC at 12; U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

Beth Energy argues the Secretary has failed to prove that miners would have been exposed to injury by the violation had normal mining operations continued in that the evidence establishes that miners would have been unlikely to travel the tight side of the belt drive beyond the crossed pieces while the drive was operating. Beth Energy Br. 9.

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<sup>9</sup> In Mathies the Commission stated:

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

Mathies, 6 FMSHRC at 3-4.

The Secretary counters he has established that miners worked on the tight side of the belt to do various tasks that could have been required at any time had mining continued, that miners would not have recognized the crossed pieces as a guard and that, expecting a fence before coming to the belt drive, miners would have stepped over the crossed pieces and found themselves adjacent to the tail roller. Sec. Br. 8-11. Then, given the condition of the floor, they would have been reasonably likely to slip or fall and to have become entangled in the pinch point.

I find the Secretary has the better part of the argument. The Secretary is right in asserting the testimony establishes miners were required to work on the tight side of the belt. This is particularly true of those miners who had to clean up accumulated coal dust or coal spillage. Tr. 65. I note in this regard Ray's unrefuted testimony that he had cited Beth Energy for an accumulation of float coal dust in the area of the belt drive, including the tight side adjacent to the tail roller, on the same day and minutes prior to the time the subject violation was cited. Tr. 69, 139. While it is not clear from the record whether this accumulation could have been cleaned up by being hosed down from the wide side, it is certain, as Pablic admitted, that there were instances when clean up had to be done by shovel from both sides of the belt and I conclude that had normal mining operations continued, it would have been reasonably likely for a miner to have been assigned to work on the tight side of the belt drive to clean up accumulated coal dust or loose coal. Tr. 192-193

I also note that although the practice at the mine was for miners to shut off the belt while crossing, the belt was restarted once crossed and continued to operate while miners cleaned up accumulations and spills. Thus, I find that a miner assigned to clean up an accumulation or spill on the tight side of the belt would have done so while the belt was in operation.

I further note that it was a practice at the mine to guard belt drives with a fence-type guard. This being the case, I find persuasive Ray's and Novak's suggestion that miners would not have recognized the crossed pieces as a guard for the belt drive. I agree with Ray that miners would have been looking for a fence not a strut and turnbuckle. Further, I find entirely credible Ray's testimony that he was able to step over the crossed pieces, and whatever Pablic's problem that prevented him from doing so, I see no reason why other miners would have been impeded from following (almost literally) in Ray's footsteps. Thus, I conclude that any miner assigned to clean up an accumulation or a spill existing on the tight side both inby and outby the crossed pieces would have come to the crossed pieces and simply have gone over, them just as Ray did, placing himself or herself adjacent to the tail roller.

While it is true that Novak, when shown a photograph of the crossed pieces and the roller behind them (Resp. Exh. 3), agreed that a miner seeing them would have realized he or she was coming to the belt drive, it is not at all clear that the photograph depicts what a miner moving up the entry and assigned to a task would in fact have seen. Tr. 141. For one thing, the photograph was not established to have been taken in the same light as would have been available to a miner. Lights for the belt drive were positioned on the other side of the drive, and it is not certain that a miner on the tight side would have been able to discern the roller beyond the crossed pieces from the actual light available on the tight side. In addition, I believe it reasonable to assume that a miner assigned to clean up an accumulation or spill on the tight side would have been intent on his or her task and would not have been looking for components of the belt drive in the absence of a fence.

Nor do I find persuasive Public's testimony that the noise from the belt drive would have alerted an approaching miner to its presence. Rather, for me Ray's testimony that he did not realize the drive was there until he was virtually on top of it is more convincing -- and Ray had 22 years of underground mining experience. Ray was intent on watching his footing and I believe it reasonable to assume that a miner assigned to clean up duty would have been similarly intent on not slipping rather than on distinguishing the noise of the belt rollers from that of the belt drive.

Thus, I conclude that had normal mining operations continued it was reasonably likely that the miner would have been assigned to work on the tight side in the vicinity of the belt drive and that in carrying out his or her assignment would have proceeded over the crossed pieces and inadvertently placed himself or herself adjacent to the moving tail roller.

I also credit Ray's testimony that the floor in the vicinity of the roller was slippery and that a person could have fallen. Tr. 67. Public did not remember slipping or sliding, but whatever the condition of the floor immediately adjacent to the tail roller when the crossed pieces were erected and when the violation was cited, given the presence of the sump at the end of the tail roller and the fact that most accumulations were hosed to the sump, I conclude that had normal mining operations continued water from this clean up process would have made the footing next to the tail roller hazardous. In addition, a miner assigned to clean up an accumulation or spill and approaching the belt drive would have been concentrating on traversing the water, mud and muck of the sump area in addition to concentrating on his or her clean up duties. In other words, the condition of the floor would have contributed to the likelihood of a miner

becoming caught in the pinch point of the tail roller in two ways -- by distracting the miner so as to be unlikely to realize he or she was in the vicinity of the roller and by causing the miner to slip and to fall into the roller.

I therefore conclude the Secretary has established a reasonable likelihood that in the context of ongoing mining operations, a miner would have become caught in the pinch point of the tail roller.

In determining the gravity of the violation I must consider both the potential hazard to the safety of miners and the likelihood of the hazard occurring. As has been noted, the violation subjected the miners to possible death or dismemberment. In addition, the crossed pieces did not bar entry to the area adjacent to the tail roller and did not signal that the belt drive and tail roller lay beyond. Given the fact that miners were likely to be assigned to clean up accumulations and spillage on the tight side of the belt and that the floor adjacent to the tail roller was likely to be slippery, it was likely a miner could slip and become caught in the tail roller's pinch point. Therefore, I conclude the violation was serious.

#### UNWARRANTABLE FAILURE AND NEGLIGENCE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp. 9. FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991); citing Emery, 9 FMSHRC at 2001.

Pablic testified that he intended to return and have a fence-type guard installed the following day. Tr. 185. Beth Energy describes Pablic's actions as "excusable neglect," at most. Id.

The Secretary counters that Pablic recognized the condition violated section 75.1722(b), that he did not inform the oncoming shifts about the presence of the condition and that he planned to leave the condition for over two working shifts until he returned. According to the Secretary, Pablic's failure to notify the oncoming shifts of the lack of an adequate guard and his

decision to allow the violation to exist until he returned constituted more than mere negligence and "enter[ed] the realm of aggravated conduct." Sec. Br. 16.

I agree with the Secretary and conclude the record fully establishes his contentions. Public purposefully left the tail roller without the guard required by section 75.1722(b). He knew the device he installed was inadequate, as shown by his decision to return and to install a fence-type guard. Public testified that because fencing materials to block off the tight side entry were unavailable in the vicinity of the belt drive and because it was a Sunday, he was unable to obtain the materials needed to correct the condition. Tr. 185. This may be, but it is no excuse for failing to advise responsible officials on the oncoming shift of the inadequate guard so they could give warning to miners and install an adequate guard before miners were exposed to the potential hazard. Public knew that coal would be produced on two shifts before he planned to return. He also knew, or should have know, that accumulations of coal dust, loose coal or spilled coal were reasonably likely to occur during those shifts in the vicinity of the belt drive and that such accumulations could well require the presence of miners to clean them up. Such miners would have been exposed to the danger of the unguarded tail roller and Public's failure to communicate left them to their peril.

Thus, the record contains no indication that Public gave appropriate priority to the violative condition. Rather, he allowed it to continue despite the fact that he knew or should have known miners were likely to be exposed to the risk of serious injury. Public's failure to advise oncoming management personnel of the inadequately guarded tail roller was not inadvertent. He acknowledged that although he had not seen the oncoming shift foreman there were other ways he could have advised him of the situation. Tr. 203. Subjecting miners on the next two shifts to the hazards created by the violation was inexcusable conduct on Public's part and establishes Beth Energy's unwarrantable failure to comply with the standard.

It is clear, as well, that in failing to take measures to assure that the violative condition was corrected Public failed to use such care as a reasonably prudent and careful person in his situation and with his background would have used. Public was Beth Energy's foreman and his negligence is attributable to the company. Therefore, I conclude also that Beth Energy was negligent in allowing the violation to exist.

#### **OTHER CIVIL PENALTY CRITERIA**

The parties have stipulated that Beth Energy was assessed a total of 672 violations at Mine No. 33 in the two years preceding issuance of the subject citation. In addition, it is worth

noting that 25 violations of section 75.1722 were cited during this period. This is a large history of previous violations, both in total number and in the number of violations of the guarding standard. In addition, Beth Energy is a large operator with a stipulated annual production of 5,740,168 tons of coal and the mine has a large stipulated annual production of 1,699,856 tons of coal. The parties have also agreed that any civil penalty assessed will not affect Beth Energy's ability to continue in business. Further, I find that once the citation was issued Beth Energy exhibited good faith in installing the fence used to abate the violation.


#### **ASSESSMENT OF CIVIL PENALTY**

The Secretary has proposed a civil penalty of six hundred dollars (\$600) for the violation of section 75.1722(b). Given the S&S nature of the violation and the unwarrantable failure of Beth Energy in allowing the violation to exist, as well as Beth Energy's large size and large history of previous violations, I find an increased amount to be appropriate, and I assess a civil penalty of eight hundred dollars (\$800.)

#### **ORDER**

Beth Energy IS ORDERED to pay civil penalties in the settled amounts set forth above. In addition, Section 104(d)(1) Citation No. 3705626, 12/9/91, is AFFIRMED and Beth Energy IS ORDERED to pay a civil penalty of eight hundred dollars (\$800) for the violation of section 75.1722(b) alleged therein. Payment of the settled and assessed amounts is to be made to MSHA within thirty (30) days of the date of this decision.

This proceeding IS DISMISSED.

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

#### **Distribution:**

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/epy

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 11 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 92-117-M
Petitioner	:	A.C. No. 30-00012-05516
	:	
v.	:	Docket No. YORK 92-128-M
	:	A.C. No. 30-00012-05517
BUFFALO CRUSHED STONE, INC.,	:	
Respondent	:	Wehrle Quarry

## DECISION

Appearances: James A. Magenheimer, Esq., U.S. Department of Labor, New York, New York, for Petitioner;  
Mr. Salvatore Castro, Safety Director,  
Mr. Gary Blum, Executive Vice-President,  
Mr. Jamie Hypnarowski, Senior Vice-President,  
Buffalo Crushed Stone, Inc., Buffalo, New York  
for Respondent.

Before: Judge Weisberger

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Subsequent to notice, the cases were scheduled and heard in Buffalo, New York, on May 5, 1993. Joseph Michael Denk, and Richard Leon Duncan, testified for Petitioner. Thomas Rashford, and Russel Price testified for Respondent. Post-hearing briefs were filed by Petitioner and Respondent, on May 24, and May 25, 1993, respectively.

## Findings of Fact and Discussion

### I. Citation No. 3869974

At the hearing, Petitioner made a motion to approve a settlement that the parties had agreed to regarding Citation No. 3869974, which alleges a violation of 30 C.F.R. § 56.1001. A penalty of \$50 was proposed initially by Petitioner. According to the parties' agreement, Respondent has agreed to pay the proposed penalty in full. Based upon the representations

presented at the hearing, including the statements made by the inspector who issued the citation, I find that the settlement is appropriate, considering the terms of the Federal Mine Safety and Health Act of 1977 ("the Act"). Accordingly, the motion is granted, and Respondent is ORDERED to pay \$50 for this violation.

II. Citations Nos. 3869950, 3869955, 3869956, 3869957, 3869958, and 3869959

A. Citation No. 3869950

1. Findings of Fact

(a) Respondent operates a stone quarry, known as the Wherle Quarry, which is an open pit.

(b) On May 5, 1992, Respondent was mining the second cut of the north face.

(c) Euclid R-50 haul trucks traversed a haul road from the plant to the north face where a Komatsu WA-800 front-end loader ("WA-800 loader") loaded crushed and broken limestone onto the trucks. The trucks then traveled the haul road back to the plant. This process was repeated continuously throughout the day. In addition, the WA-800 loader also traveled the haul road from the plant to the face at the beginning of the shift. At the end of the shift it traveled from the face back to the plant.

(d) A 300 foot single-lane section of the haul road was approximately 20 feet wide.

(e) The bucket of the WA-800 loader is approximately 16 to 18 feet wide.

(f) The Euclid R-50 haul trucks are approximately 15 feet wide.

(g) A vertical highwall, approximately 30 feet high, was on the right side of the haul road going from the face to the plant. On the left side there was a drop off of approximately 30 feet.

(h) On May 5, 1992, a berm on the left side of the road extended approximately 2 feet from the edge of the road. The berm consisted of large quarry stone approximately 1 foot in diameter, and loose material.

2. Further Findings of Fact and Discussion

(a) Violation of 30 C.F.R. § 56.9300(b)

At approximately 9:00 a.m., May 5, 1992, the subject site was inspected by MSHA inspector Joseph Michael Denk, in the company of his supervisor, Richard Leon Duncan, along with Russel Price, the miners' representative, and Thomas Rashford, the superintendent at the site.

According to Denk, the height of the berm on the haul road varied between 1 foot and 2 feet. Duncan indicated that in



limited areas the berm could have been more than 2 feet high, but that in most areas it was less than 2 feet. According to both Duncan and Denk, the berms were not as high as the mid-axle of the Euclid R-50 haul trucks,<sup>1</sup> and were much lower than the mid-axle point of the WA-800 loader which was approximately 50 inches. Neither Denk nor Duncan measured either the height of the berm, the mid-axle point of the Euclid trucks, or the WA-800 loader.

Denk issued a citation alleging a violation of 30 C.F.R. § 56.9300(b) which provides as follows: "Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." Rashford and Price, in essence, opined that the berm was adequate. Rashford indicated that the berm was up to the mid-axle height of the haul trucks "through the majority of the area". (Tr.100) However, he conceded that "the berms" may not be as high as "mid-axle height" in "spots", due to water run off. (Tr.96)

Based on all the above, I find that in the 300 foot section of the haul road that was limited to one lane of traffic, the berm did not reach the mid-point of the axle of the WA-800 loader which travels the road twice a day.<sup>2</sup> I thus find that the evidence establishes that Respondent herein did violate Section 56.9300(b) as alleged.

(b) Significant and Substantial

In essence, according to Duncan, who was with Denk on May 5, 1992, he had investigated two fatal accidents and numerous other accidents, resulting in injuries, wherein trucks had fallen down the edge of a road. He indicated that the narrow width of the one-lane portion of road in question, increases the hazard that a truck would not have been impeded by the berm that was in place. According to Duncan, driver inattention, or mechanical malfunction, could cause a truck to swerve off the road. On the other hand, Rashford testified that in the past 14 years that he has been employed at the quarry in question, no trucks have accidentally gone off the haul road.

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<sup>1</sup>Subsequent to the issuance of the citation in issue, measurements taken indicated a mid-axle height of approximately 31 inches.

<sup>2</sup>Denk testified that he was told that the WA-800 loader travels the haul road at the beginning of the shift, and at the end of the shift. Neither Rashford nor Price nor any other witness contradicted or impeached this testimony, therefore I accept it.

I conclude, based on the above, that the hazard of a vehicle going off the haul road was contributed to by the violation herein, i.e., a berm that was not as high as the mid-axle height of the WA-800 loader. Also, considering the width of the vehicles in question, and the narrowness of the single-lane section of the haul road, I conclude that an injury producing event, i.e. a vehicle going off the haul road as consequence of the low berm, was reasonably likely to have occurred. I thus find that the violation herein was significant and substantial, (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984); U.S. Steel Mining Co., 6 FMSHRC 1834, 3826 (1984)).

(c) Penalty

Rashford testified, in essence, that in the last 14 years there have not been any accidents involving trucks that fell off the haul road. The MSHA Mars Field Office was first given responsibility over the subject quarry on October 1, 1991. The first inspection by an inspector from this field office, was that performed by Denk on May 1992. According to Rashford, when the quarry was subject to the responsibility of the previous MSHA field office, he had always had been informed that the berm on the haul road had to be "adequate". He said that no one had told him that it had to be a specific height. Rashford indicated that it is Respondent's policy that employees are instructed to maintain the berm daily. Rashford's testimony in these regards was not contradicted. I thus find that Respondent's level of negligence herein was only "moderate". Taking this into account, as well as the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty of \$100 is appropriate for the violation of Section 56.9300(1), supra.

B. Citation Nos. 3869955, 3869956, 3869957, 3869958, and 3869959

1. Violation of 30 C.F.R. § 56.9301

In May 1992, five stockpiles of stone were located in the north quarry portion of Respondent's mine. These stockpiles were conical in shape, approximately 25 feet high, and accessed by way of a ramp. The top surfaces of the stockpiles were approximately 50 feet wide, and 50 to 60 feet long, and were flat on top. A vertical highwall abutted each stockpile on one side. A berm was located around the outer perimeter of each of the stockpiles. The berm consisted of stone from the stockpiles.

A WA-500 loader was used daily to maintain the berms. The mid-axle height of the WA-500 loader is approximately 36 inches. Denk estimated the height of the berm in question, in the highest areas, as approximately 1 foot. He did not measure the height of the berms.

On May 5, Denk observed a Mack 30 haulage truck dumping material over the edge of the stockpile. He did not measure the mid-axle point of this truck. Duncan observed the berms from a truck. At some point he was about 5 to 10 feet from the berms. According to Duncan, the stockpile berms were only about 12 inches high.

According to Rashford, the berms were 2 to 3 feet high along the "majority" of the perimeter of the stockpiles (Tr.110) (sic). Both Rashford and Price termed the berms "adequate", and Price said that he thought the berms were high enough for haul trucks.

Denk issued five citations alleging violations at each stockpile of 30 C.F.R. § 56.9301 which, as pertinent, provides that berms, "...shall be provided at dumping locations where there is a hazard of overtravel or overturning."

Both Duncan and Denk testified regarding the hazards of a vehicle going over the edge of a stockpile, and causing serious injuries to the driver of the vehicle. In this connection, Duncan indicated, in essence, that in backing up, it is very easy to misjudge the location of the edge of the top of the stockpile.

Taking into account the height of the stockpiles, and the fact that vehicles were observed dumping at the edge of a stockpile, I find that there was a hazard of overtravel or overturning. Section 56.9301, supra, provides, that in this situation a "berm" shall be provided. In order to evaluate whether the berms that were in place complied with Section 56.9301, reference is made to 30 C.F.R. § 56.9000 which defines a "berm" as "A pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." Section 56.9300(b) supra, provides that a berm shall be at least mid-axle height of the largest equipment that usually travels the roadway. According to the testimony of Denk, the berms in issue were not more than 12 inches high along the perimeter of the stockpiles. Duncan corroborated this estimate. In essence, Duncan opined that a berm less than the height of the mid-axle point of a vehicle used at the dump, would be insufficient to impede the progress of the vehicle.

Price opined that the berms were adequate, but did not specifically contradict Denk's estimate of the berms' height. Rashford's estimate that the berms were 2 to 3 feet high along the "majority" of the perimeter of the stockpiles, does not specifically contradict Denk's testimony, that in some area the berms were only 1 foot high. Further, even if the berms were between 24 and 36 inches high, they still were still less than the mid-axle point of the WA-500 loader, which is 36 inches. Accordingly, I conclude that the berms were inadequate as they were less than the mid-axle point of the vehicles that travel on

the stockpiles. Hence, I find that Respondent did violate Section 56.9301.<sup>3</sup>

## 2. Significant and Substantial

A WA-500 loader maintains the berms once a day. Also, in the normal operation of Respondent's quarry, haul trucks back up to the edge of the stockpiles. There is a 25 foot drop-off from outer edge of the stockpiles. Hence, the lack of adequate berms contributed to the hazard of a vehicle going beyond the edge of the stockpiles and turning over. Such an injury producing event certainly could have occurred. However, the top of the surface of each of the stockpiles was flat. There is no evidence that any of the vehicles in use on the stockpiles had any breaking or steering problem. Also, there is no direct testimony in the record, from anyone having personal knowledge based on observation, as to how close the various vehicles in use actually, in the normal course of operation, travel to the edge of the berms. Further, there is no evidence in the record that any vehicles have gone beyond the berms and dropped off the stockpiles. Within this framework, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event. Hence, I conclude that it has not been established that the violations were significant and substantial. I find that a penalty of \$50 is appropriate for each of the violations cited herein.

## IV. Citation Nos. 3869961, 3869962, 3869963, and 389965

### A. Citation No. 3869961

#### 1. Violation of 30 C.F.R. § 56.14107(a)

As observed by Denk, the pinch point of the self-cleaning tail pulley for the C-11 conveyor and its hub were exposed on both sides, because there was a gap of approximately 4 feet by 6-inches in the guard for the pulley. The opening was waist high and, according to Denk, a person greasing the pulley, or cleaning under the conveyor with a high pressure hose, would be within inches of contact with the pinch-point. Also, there was exposure to the protrusions on the wings of the self-cleaning belt which, according to Denk, can cause injury by sucking a

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<sup>3</sup>In essence, it is Respondent's argument, inter alia, that the failure of Denk to take measurements of the berms should provide the basis for finding no violation. Although I took this fact into consideration, I reject Respondent's argument since the weight of the evidence before me, as set forth above, establishes the height of the berms relative to the mid-axle point of the WA-500 loader (See, BethEnergy Mines, Inc., 15 FMSHRC 981, (June 29, 1993)).

person into the pulley, or tearing an extremity. He estimated the distance of the wing from the guard face as approximately 6 inches. Denk indicated that a walkway was within inches of the opening.

Denk issued a citation alleging a violation of 30 C.F.R. § 56.14107(a), which, as pertinent, provides that moving machine parts shall be guarded to protect persons from contacting gears, pulleys, and similar moving parts that can cause injury.

Rashford, in essence, testified that, normally, repairs and greasing are performed when the belt is shut down. Rashford opined that a person would have to intentionally reach into the opening 6 inches past the guard to be injured, and that a person falling accidentally against the conveyor would be protected from injury by the guard. He also testified that in the 14 years that he had worked at the quarry, no one was injured as a result of coming in contact with a pulley. Price testified that he was not aware of any accidents resulting from the opening in the guards.

Based upon the testimony of Denk, I conclude that inadvertent contact with the exposed pulleys can occur due to the proximity of the walkway, the large gap in the guarding which exposed the pulleys, and the location of this gap at waist level. Based on Denk's testimony, I conclude that an injury can result from inadvertent contact with the exposed pulleys. Accordingly, I conclude that Respondent violated 30 C.F.R. § 56.14107(a) as alleged.

## 2. Significant and Substantial

In the Citation at issue, Denk alleged that the violation was significant and substantial. At the hearing, Petitioner did not adduce evidence specifically addressed to this point. Although the record herein does establish the violation of a mandatory safety standard, and that this violation contributed to hazard of inadvertent contact with the exposed pulleys, the record fails to establish the reasonable likelihood of the occurrence of an injury producing event, i.e., inadvertent contact with the pulleys.<sup>4</sup> In this connection, I note Rashford's testimony that those most likely to come in contact with the exposed pulleys i.e., the persons who grease and repair the pulleys, perform their duties while the conveyor is not running. Also, the exposed pulleys are located six inches beyond the gap in the guarding. Further, there have not been any accidents at the conveyor resulting from inadvertent contact with the pulleys through openings in the guarding material. Thus,

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<sup>4</sup>Denk testified as follows on cross-examination regarding the likelihood of an injury producing event, i.e., a portion of a person's body inadvertently going through the hole in the guarding: "I can't even guess of the likelihood". (Tr.202).

considering these factors I conclude that the record as a whole fails to establish that an injury producing event was reasonably likely to have occurred. Accordingly I conclude that it has not been established that the violation herein was significant and substantial. (See U.S. Steel, supra, and Mathies, supra)

The record establishes the following: (1) there have not been any injuries in the past 14 years as a result of inadvertent contact with the pulleys through the exposed portion of the guarding; (2) employees who would be most likely to contact the pulley while applying grease or performing repairs perform these functions when the belt is not running; and (3) according to the uncontradicted testimony of Respondent's witnesses, the guards with openings have been in place for many years, and no citations had been issued on previous MSHA inspections. Taking these facts into account, I conclude that Respondent herein exhibited only a moderate degree of negligence regarding the violation herein. Also, considering the remaining factors set forth in Section 110(i) of the Act, I conclude that a penalty herein of \$50 is appropriate.

B. Citation No. 3869962

This Citation alleges a violation of Section 56.14107(a) in that there was a hole in a guarding approximate 6 inches by 6 inches on both sides of the guarding of a self-cleaning tail pulley, and that a pinch point was exposed. Respondent did not rebut the testimony of Denk with regard to the particulars of the Citation. Accordingly, for the reasons set forth above, (IV(A)(2), infra), I conclude that Respondent herein did violate Section 56.14104(a) as alleged.

Denk alleged this violation to be significant and substantial. For the reasons set forth above, (IV(A)(2), infra), I conclude that it has not been established that the violation was significant and substantial. A penalty of \$50 is appropriate for this violation.

C. Citation No. 3869963

As observed by Denk on the date of his inspection, a pulley for the No. 3 conveyor belt was located on the top level of the 2-E 2-W tower. Access to the tower was by way of a ladder. According to Denk, when a person gets off the ladder at the top of the tower, he is then approximately three feet from the guarding for the pulley. When observed by Denk, a half of the pulley was exposed i.e., there was a gap in the guarding approximately 4 feet by 6 feet. The pinch point of the pulley was exposed.

For the reasons set forth above, (IV (A)(1)(2) infra), I conclude that Respondent herein did violate Section 56.14107(a),

supra, as alleged, but that the violation was not significant and substantial. Also for the reasons set forth above (IV (A)(2), infra), I conclude that a penalty of \$50 is appropriate.

D. Citation No. 3869964

In essence, Denk testified that he saw two openings in the guarding of the self-cleaning tail pulley on the 4-X conveyor belt which exposed the pinch-point. He said one opening was approximately 6 inches by 1 1/2 feet, and another was 6 inches by a foot. Respondent did not specifically contradict this testimony. Essentially, for the reasons set forth above, (IV (A)(1)(2) infra), I conclude that Respondent did violate Section 56.14107(a), supra, as alleged, but that the violation was not significant and substantial. I find that a penalty of \$50 is appropriate.

E. Citation No. 3869965

In essence, Denk testified that a guarding on the C-10 dust conveyor self-cleaning tail pulley had an opening of approximately 6 inches by 2 feet on both sides of the guarding, leaving the pinch-point of the pulley exposed. For the reasons set forth above, (IV (A)(1)(2) infra), I conclude that Respondent did violate Section 56.14107(a), supra, as alleged but that the violation was not significant and substantial. I find that a penalty of \$50 is appropriate.

V. Citation Nos. 3869966, 3869969, 3869970, 3869972 and 3869973

A. Citation No. 3869966

Denk indicated that the drive for the 2 1/2 foot long shaft of the fan on the dust collector was unguarded, and completely exposed. The fan was not in the normal route of travel. However, according to Denk, it was located on a working surface i.e., the deck, and that persons work there to repair, grease, or service the fan. Hence, according to Denk, these persons could be exposed to the hazard of being caught between the rotating shaft, and the support members of the fan, located 4 or 5 inches away, inasmuch as the shaft was located 3 to 4 inches beyond the opening. Essentially, Respondent did not contradict these statements of Denk.<sup>5</sup> Accordingly, I find for the reasons set

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<sup>5</sup>It appears to be Respondent's position regarding Citation Nos. 3869966, 3869969, 3869970, 3869972, and 3869973, that inasmuch as Respondent's policy prohibits servicing this equipment during operation, and the area in question is not regularly traveled, the likelihood of contact with exposed hazards is very low. Even though contact might not be likely, it  
(continued...)

forth above, (IV (A)(1), infra) that Respondent did violate Section 56.14107(a), supra, as alleged. I find that a penalty of \$50 is appropriate.

B. Citation No. 3869969

Denk indicated that the No. 1 belt conveyor head-pulley drive shaft was unguarded. According to Denk, the shaft is located within inches of the main travelway along the belt. Hence, persons could be exposed to the hazard of inadvertent contact with the shaft, and could be hit by protrusions on the shaft and be injured. Essentially, Respondent did not contradict these statements of Denk. Accordingly I find, based upon Denk's testimony, that Respondent did violate Section 56.14107(a), supra. I find that a penalty of \$50 is appropriate.

C. Citation No. 3869970

Denk indicated that as observed by him, the stacker belt conveyor head pulley drive shaft was not guarded. He explained that persons walking on the walkway would be exposed to the hazard of contact with moving parts. In the main, his testimony was not contradicted or rebutted. I thus conclude that it has been established that Respondent violated Section 56.14107(a), supra, as alleged. A penalty of \$50 is appropriate.

D. Citation No. 3869972

Essentially it was Denk's testimony that the radial stacker conveyor head pulley drive shaft was not guarded. Essentially, Respondent did not rebut this testimony. Thus, I conclude that Respondent did violate Section 56.14107(a), supra, as alleged, and that a penalty of \$50 is appropriate.

E. Citation No. 3869973

According to the uncontradicted testimony of Denk, there was a 6 foot by 4 inch gap on both sides of the guarding on the bottom of a self-cleaning tail pulley, exposing the pinch point of the pulley. The pulley was out of the normal path of travel, as it was above the actual travelway. It also contained an extended grease fitting. However, due to the size of the gap, and the exposure of the pinch-point, it is conceivable, though not likely, that this violation could have led to inadvertent contact with the pulley. Hence, essentially for the reasons set forth above, I conclude that Respondent did violate Section

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<sup>5</sup>(...continued)  
is clear that such contact can occur. Hence, Respondent's argument is rejected in deciding the issue of the violation of Section 56.14107(a), supra.



56.14107(a), supra, as alleged. In mitigation of Respondent's negligence I note Rashford's uncontradicted testimony that the guarding came from the manufacturer with the gap as observed by Denk. A penalty of \$20 is appropriate.

ORDER

It is hereby ORDERED that Respondent pay a total penalty of \$820, and it is ORDERED that the following Citations be amended to reflect the finding that the violations alleged therein are not significant and substantial: Citation Nos. 3869955, 3869956, 3869957, 3869958, 3869959, 3869961, 3869962, 3869963, and 3869965.



Avram Weisberger  
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 12 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 93-23
Petitioner	:	A.C. No. 11-02440-03673
v.	:	
	:	Marissa Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

**SUMMARY DECISION**

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 its approved dust control plan under the standard at 30 C.F.R. § 75.316.<sup>1</sup>

The citation at bar, No. 4051293, charges as follows:

The approved dust control plan for this mine was not being followed at the 202-0 designated area sample location located at the transfer point where the 1st Sub Main north belt dumps onto the main east belt. This transfer point is located at 59 crosscut in the main east belt entry. The designated area sample location for this transfer point is on the south side of the main east belt an approx. 15 feet west of the transfer point. A dust pump was observed gathering a sample for this location with the pump positioned on the north side of the main east belt and on the east side of the 1st Sub Main north belt approx. 10 feet north of head roller. With the pump in this location an accurate sample would not be possible. The air movement in this area is in the outby direction in both the 1st Sub Main North and the main east. This air movement would carry airborne dust away

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<sup>1</sup> These provisions, in effect when the charges at issue were brought, were subsequently repealed November 16, 1992, and replaced by 30 C.F.R. § 75.307.

from the dust pump. The concentration of respirable dust from this designated area was 1.8 milligrams and 1.1 milligrams on last two sampling cycles.

In conjunction with motions for summary decision, the parties agreed and stipulated to certain facts. These stipulations are attached hereto as Appendix A. It is undisputed that on September 21, 1992, an authorized representative of the Secretary issued Citation No. 4051293 at Peabody's Marissa Mine alleging that Peabody failed to comply with its approved dust control plan in violation of 30 C.F.R. § 75.316. During his September 21, 1992, inspection of the Marissa Mine, the inspector found a dust collection pump collecting a sample at a transfer point between two conveyor belts. This was a designated area for dust sampling, but the pump was located at the wrong position for sampling this area in that the pump was upwind of the transfer point instead of downwind as required by the plan and at a less dusty location than the proper sampling point. When the pump was discovered in the wrong location it was shut down prior to the end of the shift. However, it is undisputed that Peabody intended to take a sample for the designated area in question at the improper location. It is also undisputed that under 30 C.F.R. § 70.208(a), Peabody had until September 30, 1992, to take a sample for the designated area in question.

It is well-established law that an operator can be cited for failure to comply with its approved dust control plan. Zeigler Coal Company v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976). The plan in this case sets forth the locations for taking dust samples for designated areas. The requirements to take dust samples in designated areas is governed by 30 C.F.R. § 70.208(a), which requires, in essence, that the operator take one valid sample in each bimonthly period.

In addition, 30 C.F.R. § 75.209(d) provides that:

all respirable dust samples collected by the operator shall be considered taken to fulfill the sampling requirements of part 70, 71 or 90 of this title, unless the sample has been identified in writing by the operator to the District Manager, prior to the intended sampling shift, as a sample to be used for purposes other than required by part 70, 71 or 90 of this title.

Since it is undisputed that Peabody did not identify in writing to the MSHA District Manager, prior to the intended sampling shift at issue, that the dust sample at issue was intended for purposes other than those required by Part 70, 71 or 90 of the Secretary's regulations, it is clear that the dust sampling in this case, which had begun

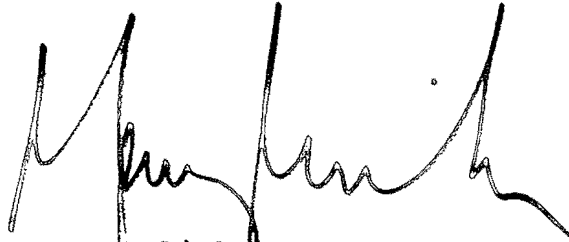
in a location other than that specified in the approved dust control plan and was intended to be submitted for the designated area, was in violation of the plan as charged.

Peabody contends that the dust control plan is violated only if, and when, a dust sample collected at an improper location or in an improper manner is actually submitted to MSHA for analysis or if no proper sample is collected and submitted within the allowed sampling time period. However, the essence of this violation is the improper location of the dust sampling with the intent to submit the sample for the designated area under 30 C.F.R. § 70.208(a), contrary to the dust control plan and not within the exception provided by 30 C.F.R. § 75.209(d) -- not the submission of a defective sample.

Based upon the information available, I find a civil penalty of \$100 to be appropriate. It is not disputed that the incorrect placement of the dust pump in this case was unintentional, though the proper sampling location was clearly marked. Since the dust conditions would have been underreported at the cited location, the violation could have had serious consequences for exposed miners.

ORDER

Citation No. 4051293 is **AFFIRMED** and the Peabody Coal Company is directed to pay a civil penalty of \$100 within 30 days of this decision.



Gary Melick  
Administrative Law Judge  
703-756-6261

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lh

## APPENDIX A

1. On September 21, 1992, Ronald G. Zara (the "inspector") an authorized representative of the Secretary of Labor, issued citation number 4051293 at Respondent, Peabody Coal Company's Marissa Mine, Randolph County, Illinois, alleging a violation of 30 C.F.R. 75.316 in that Respondent had failed to comply with its approved dust control plan.

2. [Omitted]

3. During his inspection of Marissa Mine on September 21, 1992, the inspector observed that a dust collection pump at the transfer point at which the 1st North Submain conveyor belt discharges coal onto the Main East belt and the east side of the 1st North Submain belt approximately 10 feet north of the head roller. The pump was gathering a sample.

4. Under the approved dust control plan in effect for Marissa Mine on September 21, 1992, the designated sampling location for the 1st North Submain-East transfer point was on the south side of the Main East belt approximately 15 feet west of the transfer point. The dust pump was collecting a sample in the wrong location and was upwind from the transfer point. The proper location of the designated area is downwind from this same dust generating source and was clearly marked on September 21, 1992. No sample was being collected in the proper location.

5. The inspector found the dust pump in the wrong location and the dust pump was shut off prior to the end of the shift for which the sample was being collected.

6. Under 30 C.F.R. § 70.208(a), Respondent was required to take a respirable dust sample at each designated area within a bi-monthly period, but not on specified days. September 21, 1992 was not the last day available for sampling at this location under the terms of the plan.

7. Under 30 C.F.R. § 70.209(d), all respirable dust samples collected by the operator shall be considered taken to fulfill the sampling requirements of Part 70, 71 or 90 unless the sample has been identified in writing by the operator to the District Manager, prior to the intended sampling shift, as a sample to be used for purposes other than required by Part 70, 71 or 90.

8. Respondent did not identify in writing to the District Manager, prior to the intended sampling shift, that the sample that was cited on September 21, 1992 was intended for purposes other than those required by Part 70, 71 and 90.

9. The Secretary contends that, pursuant to 30 C.F.R. §70.209(d), a violation of the requirements of an operator's approved dust control plan occurs if a dust pump is set in a location other than that specified in the plan and begins collecting a respirable dust sample at that location when the operator did not identify, in writing, to the District Manager, prior to the sampling shift, that the sample was to be used for purposes other than those required by Part 70, 71 or 90.

10. Respondent, Peabody Coal Company, contends that the requirements of the approved dust control plan are violated only if a dust sample collected at an improper location or in an improper manner is actually submitted to the Mine Safety and Health Administration for analysis or if no proper sample is collected and submitted within the sampling time allowed under the plan.

11. Collection of the dust sample described in citation had commenced but had not been completed at the time the inspector issued the citation.

12. At the time the dust collection pump referred to in the citation was set out and switched on, and up until the time the pump was discovered in the wrong location, it was Respondent's intent to collect a respirable dust sample for submission pursuant to Respondent's Bi-monthly dust sampling obligations under 30 C.F.R. Part 70.

13. [Omitted]

14. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

15. Respondent, Peabody Coal Company, owns and operates the Marissa Mine, a bituminous coal mine located in St. Clair County, Illinois.

16. Respondent's operations affect interstate commerce.

17. The Marissa Mine produced 1,972,612 tons of bituminous coal from January 1, 1991 through December 31, 1991.

18. Respondent, Peabody Coal Company, produced over 10,000,000 tons of bituminous coal at all of its mines from January 1, 1991 through December 31, 1991.

19. The payment of the \$50 single penalty assessment will not affect Respondent's ability to continue in business.

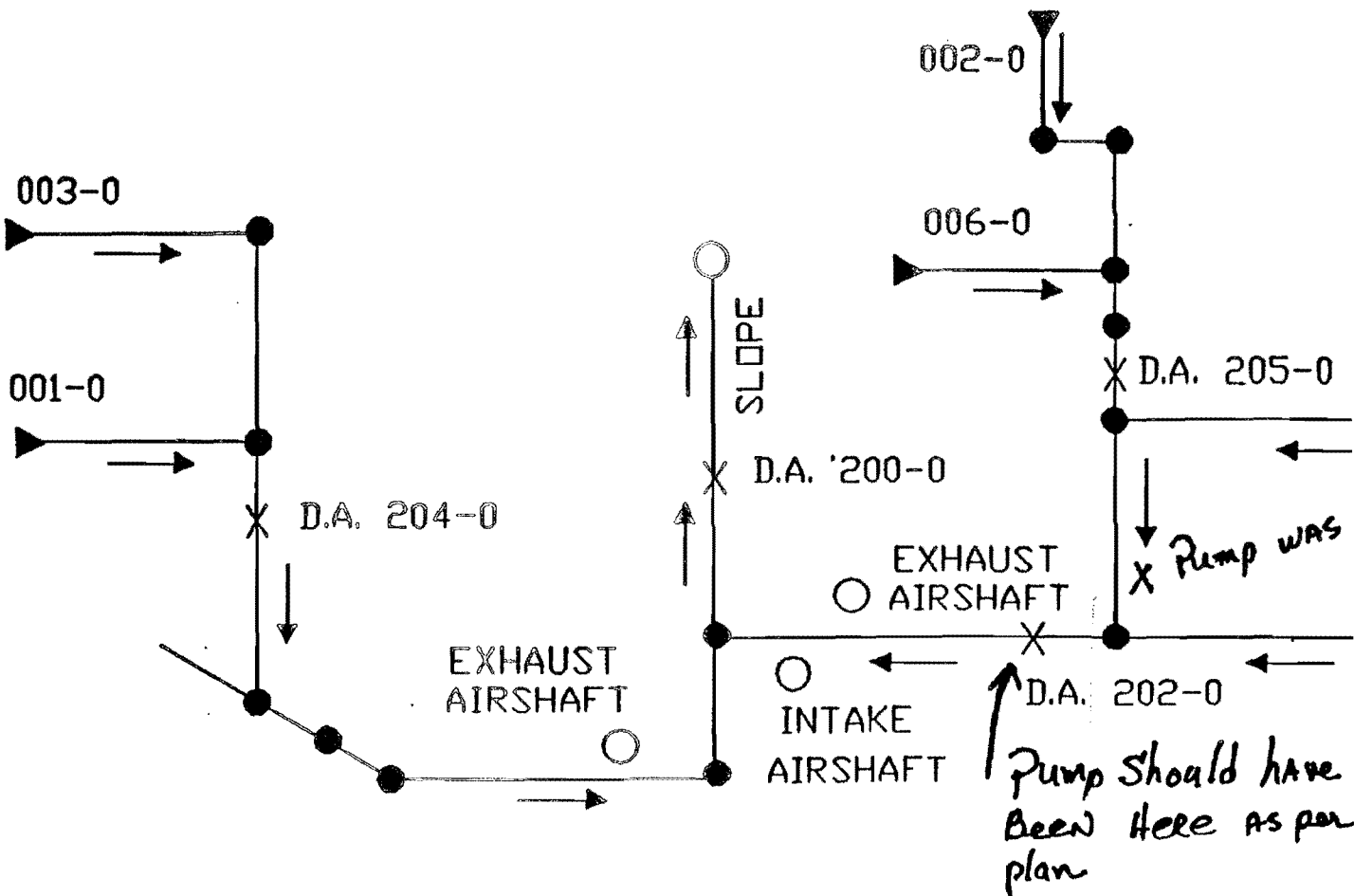
20. The location where the dust-sampling pump was found on September 21, 1992, which was the subject of Citation No. 4051293, was upwind from the transfer point, in a less dusty location than the proper location for designated area 202-0, which was downwind from the transfer point, and therefore was at a more favorable location for Respondent.

21. The attached mine "stick map" is a true and accurate depiction (not drawn to scale) of the locations where the dust-sampling pump, which is the subject of Citation No. 4051293, was found on September 21, 1992, and for where it should have been located according to Respondent's approved dust control plan.

22. The bimonthly dust-sampling period required by 30 C.F.R. § 70.208 for a designated area for the period in which Citation No. 4051293 was issued on September 21, 1992 through September 30, 1992.

(Copies of the citation and the approved dust control plan, Exhibits A and B to the Joint Stipulation, have been omitted from the stipulations.)

1658



MINE OPENING ○  
 TRANSFER POINT ●  
 LOADING POINT ▲  
 DIRECTION OF AIR →  
 AIR REGULATOR R  
 DESIGNATED AREA X  
 DA REMOVED BY MSHA ⊗

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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 13 1993**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION,	:	Docket No. PENN 92-814-A
Petitioner	:	A.C. No. 36-04281-03790
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Docket No. WEVA 92-1207-A
	:	A.C. No. 46-01968-04027 R
	:	
	:	Blacksville No. 2 Mine

**DECISION**

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

Before: Judge Feldman

The above captioned proceedings are before me as a result of petitions 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). These cases were called for hearing on June 22, 1993, in Washington, Pennsylvania. The parties' stipulations concerning my jurisdiction to hear these matters and the pertinent facts associated with the civil penalty criteria contained in section 110(i) of the Act are of record. At the hearing, the parties moved to settle Citation No. 3702203 which is the subject of Docket No. PENN 92-814-A. The parties' motion was granted on the record and the approved settlement agreement is incorporated in this decision. The parties' post-hearing briefs with respect to remaining Docket No. WEVA 92-1207-A have been considered in my disposition of this proceeding.

**Docket No. WEVA 92-1207-A**

Docket No. WEVA 92-1207-A concerns Citation No. 3315474 issued by Inspector John Baniak on March 11, 1991, for violation of the mandatory health and safety standard contained in section 75.1405, 30 C.F.R. § 75.1405,<sup>1</sup> based upon his observations of inoperable uncoupling devices on ten mine cars observed at the rotary dump at the respondent's Blacksville No. 2 Mine.<sup>2</sup> Inspector Baniak attributed this violation to a moderate degree of negligence on the part of the respondent. The Secretary initially proposed a civil penalty assessment of \$259.00.

At trial, the respondent stipulated to the fact of occurrence of this violation. (Tr. 11-13). The Secretary now argues that the degree of the respondent's culpability, manifested by the numerous mine cars cited for violation and a history of similar violations, warrants the imposition of a larger penalty than that initially proposed. The respondent asserts that the subject violation should not be designated as significant and substantial as inoperable decouplers have not resulted in any recent serious injuries.

In view of the respondent's stipulation to the fact of the violation, the pertinent facts can be briefly stated. The Blacksville No. 2 Mine is a shaft mine. Coal extracted from the face is loaded on a belt and transported to the tipple. There the coal is loaded into mine cars that are coupled together for transportation over the loaded track to the rotary dump where the cars are inverted and unloaded. (TR. 105). The unloaded cars then proceed to the empty track where groups of cars are

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<sup>1</sup> Section 75.1405 provides, in pertinent part, that "[a]ll haulage equipment ... shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment." (Emphasis added).

<sup>2</sup> Docket No. WEVA 92-1207-A was reassigned to me from Judge Melick on June 8, 1993. Prior to this reassignment, in an Order released April 20, 1993, Judge Melick denied the Secretary's Motion for Summary Decision. At the commencement of trial, the Secretary presented oral argument in support of his request to renew his Motion for Summary Decision. (Tr. 17). The motion was denied. (Tr. 32-33).

uncoupled and transported back to the tippie by the motorman. (Tr. 36-42). The cars are uncoupled by mine personnel using a handle located at the end of each car. The handle is attached to a chain which goes through a metal eye. Pressing down on the handle raises the chain disengaging the cars. (Tr. 46-47).

Inspector Baniak testified that of the ten cars cited in Citation No. 3315474, eight had broken chains and two had broken eyes. The handles on these cars were inoperable and in the down position. (Tr. 48). Baniak stated that in order to decouple these cars, a miner would have to go between the cars, which weigh approximately 15 tons when loaded, to manually raise the metal eye or use a bar to raise the eye to separate the cars.<sup>3</sup> This could subject the miner to serious foot or hand injuries if an extremity was caught in the eye or lever. (Tr. 50). A miner could also sustain critical or fatal crushing injuries if the motorman started the train of cars without being aware that a miner was in between cars in the process of manually decoupling. (Tr. 50-51). Baniak referred to two previous fatal accidents associated with miners positioned between mine cars. (Tr. 57-58).

#### Significant and Substantial

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

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed

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<sup>3</sup> Baniak referred to these safety bars as "sissy bars." (Tr. 62). He stated: that these bars were not always readily available (tr. 60); that using these bars sometimes required the miner to go between cars to position the bar in the eye (tr. 52); that use of these bars is more time consuming than manual decoupling (tr. 62); and that these bars cannot be used if the eye is broken (tr. 53, 60). (See fn. 6, infra).

to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In evaluating the potential for serious injury, the hazard created by the violation must be viewed in the context of continued mining operations, i.e., the frequent necessity to decouple mine cars. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). In this case, the hazard contributed to by the violation is, in essence, the attractive nuisance created by defective decoupling devices. Consequently, miners are tempted to go between coal cars to attempt manual decoupling. Decoupling occurs routinely at the tipple and at the rotary dump. (Tr. 102-103). Disengaging mine cars is also necessary in the event of a derailment. Jeffrey Todd Moore, the respondent's safety supervisor, testified that such derailments occur approximately once each month. (Tr. 167). Baniak testified that he has observed miners between cars attempting to uncouple them. (Tr. 56).

The significant and substantial issue as it pertains to this violation is not a matter of first impression. In addressing similar violations committed by this respondent, Commission Judges have consistently concluded that defective decoupling devices pose a discrete safety hazard that is likely to contribute to serious or fatal injuries. See Consolidation Coal Company, 14 FMSHRC 1450 (August 1992); Consolidation Coal Company, 13 FMSHRC 1314 (August 1991).

Moreover, the potential fatal consequences of the violation in issue are not speculative. On April 11, 1974, an employee of the respondent's Monitor No. 4 Mine was fatally injured attempting to uncouple haulage cars. The fatal injuries were sustained when the victim reached between cars to manually disconnect them because of inoperable decoupling devices. Pittsburgh Coal Company (Division of Consolidation Coal Company), 1 FMSHRC 1468 (October 1979). In Pittsburgh, the Commission concluded that "all uncoupling devices [must] be maintained in operable condition" so as not to induce a miner to go between haulage equipment. 1 FMSHRC at 1469.

Despite the inoperable decoupling devices that contributed to the April 1974 fatality of an employee, the respondent contends that the passage of time, purportedly without the reoccurrence of serious injury under similar circumstances,

transforms this violation into a less serious transgression.<sup>4</sup> Such an interpretation gives new meaning to the term "remedial nature" of the Mine Act and cannot be reconciled with the legislative intent. The fact that a serious injury associated with inoperable decouplers may not have recently occurred at the respondent's Blacksville No. 2 Mine is fortuitous and must not be considered as a mitigating factor.<sup>5</sup> See Ozark-Mahoning Company, 8 FMSHRC 190 (February 1986). Significantly, the history of a relevant fatality is a testament to the serious risk posed by this violation.

I am similarly unconvinced by the respondent's assertion that the training provided to mine personnel and the warning "CAUTION -- STAY OUT" stenciled between the mine cars (as depicted in Gov. Ex. 2) are appropriate mitigating circumstances.<sup>6</sup> (Tr. 104). As the Commission has stated,

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<sup>4</sup> In his opening statement, counsel for the Secretary presented uncontroverted evidence of 66 mine cars cited for defective decoupling devices at the respondent's Blacksville No. 2 Mine from March 1990 to March 1991, the 12 month period preceding the issuance of Citation No. 3315474. The respondent argues that the absence of injuries despite the frequency of violations is evidence that an injury is not likely to occur.

<sup>5</sup> The respondent contends that there has not been a relevant injury in its Blacksville No. 2 Mine during the past seven years. (Respondent's post-hearing brief, pages 2-3.) This argument is specious in that it fails to consider whether relevant injuries have occurred in other mines that illustrate the serious hazards associated with defective decouplers. In addition, I reject the notion that a showing of an actual relevant serious injury is a prerequisite to establishing a significant and substantial violation.

<sup>6</sup> The respondent also referred to "sissy bars" that are located at various locations throughout the mine that can be used to raise the metal eye to decouple cars. Moore testified that these bars enable miners to decouple without extending themselves between mine cars. (Tr. 165-166). The effectiveness of these bars as a substitute for operable automatic decoupling devices is questionable. Moreover, I suspect that a miner tempted to go between cars despite caution signs may be disinclined to use a "sissy bar" if one were available. Thus, this alternative method of decoupling does not offset the significant and substantial nature of the violation in issue.

"[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." Eagle Nest, Inc., 14 FMSHRC 1119, 1123 (July 1992). Therefore, the significant and substantial designation in Citation No. 3315474 shall be affirmed.

### **Negligence**

The Secretary, citing several factors, seeks to increase the respondent's underlying degree of negligence associated with Citation No. 3315474 from moderate to high. In this regard, the Secretary points to the respondent's history of previous violations as evidence that the respondent had notice of the violative condition. Significantly, despite testimony that the respondent has a policy of marking and removing from service cars with defective decouplers (tr. 169), the cited cars remained in service at the time of Baniak's inspection. (Tr. 28-29). Moreover, as noted above, the respondent's reliance on training to discourage miners from positioning themselves between cars does not overcome the apparent absence of an effective maintenance program for the decouplers given the history of violations.<sup>7</sup> (Tr. 27). Accordingly, I find that the Secretary has established by a preponderance of the evidence that the respondent's continued operation of the subject mine cars manifested a high degree of negligence.

### **Civil Penalty**

In considering the statutory criteria for assessing civil penalties contained in section 110(i) of the Act, I note that the respondent is a large operator with a history of similar violations. The fact that these violations have persisted despite the imposition of previous penalties and the high degree of negligence and serious gravity associated with this violation warrant a civil penalty in excess of the minimal penalty initially proposed. I also note that the initial proposed penalty was cumulatively assessed in that the subject citation noted ten mine cars in violation. However, applying the facts of this case to the statutory criteria, I conclude that an individual assessment for each violative decoupling device is the

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<sup>7</sup> The respondent conceded that it is obliged to provide proper training to all personnel and that such training is not exculpatory with regard to liability imposed under the Mine Act. (Tr. 173-174).

appropriate sanction.<sup>8</sup> Therefore, I am imposing a civil penalty of \$3,000 for the numerous violative conditions noted in Citation No. 3315474.

Docket No. PENN 92-814-A

Finally, as noted above, the parties moved to settle Citation No. 3702203, the only citation in issue in Docket No. PENN 92-814-A. The terms of the proffered agreement call for the Secretary to modify the subject citation from a 104(d)(1) citation to a 104(a) citation, thus reducing the respondent's underlying degree of negligence. The significant and substantial designation for this citation remains. The respondent has agreed to pay a civil penalty of \$500. This settlement agreement is consistent with the criteria in Section 110(i) of the Act and was approved on the record.

ORDER

Accordingly, Citation No. 3315474 is modified to reflect a high degree of negligence and is **AFFIRMED** as modified. The settlement agreement modifying Citation No. 3702203 from a 104(d)(1) citation to a 104(a) citation is **APPROVED**. Consequently, the respondent is **ORDERED** to pay a total civil penalty in the amount of \$3,500 in satisfaction of the two violations in issue. Payment is to be made within 30 days of the date of this Decision, and, upon receipt of payment, these docket proceedings are **DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal stroke extending to the right.

Jerold Feldman  
Administrative Law Judge

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<sup>8</sup> This result is consistent with Judge Weisberger's assessment of \$200 for each car cited for defective decouplers in Consolidation Coal Company, 14 FMSHRC at 1455.

**Distribution:**

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 13 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-953
Petitioner	:	A.C. No. 46-00506-03527
v.	:	
	:	Surface Mine No. 927
STEELE BRANCH MINING,	:	
Respondent	:	

## DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Petitioner;  
Roger L. Sabo, Esq., Schottenstein, Zox & Dunn,  
Columbus, Ohio, for the Respondent.

Before: Judge Koutras

## Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of \$9,500 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.404(a). The respondent filed an answer contesting the alleged violation and a hearing was held in Charleston, West Virginia. The parties filed posthearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

## Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute a violation of the cited mandatory safety standard, (2) whether the violation was "significant and substantial", and (3) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### Discussion

This matter concerns an accident that occurred at the respondent's mine site on April 23, 1991, when the operator of a Model 16 Caterpillar Road Grader, (Rayburn Browning), suffered fatal injuries when he jumped from the machine and was run over by the right front tire. According to the information developed during the course of the accident investigations, Mr. Browning had completed his grading duties and was driving the grader, with the blade in the raised position, up a haulage road toward the equipment parking area. The grader engine stopped for some unknown reason while he was travelling up the roadway and it began traveling backward down the grade. Mr. Browning jumped from the machine and was run over, and the machine continued in the reverse direction down the roadway and it came to rest against the highwall in an upright position. After the conclusion of the MSHA investigation, MSHA Inspectors Donald R. Mills and James E. Davis issued the contested section 104(a) "S&S" Citation No. 2956461, on April 29, 1991, and the cited condition or practice states as follows:

The investigation of a fatal surface machinery (Grader) accident at this mine revealed that the Caterpillar grader involved, Model No. 16, Serial No. 49G915, was not maintained in a safe operating condition, in that based on the specifications of the manufacturer the fully charged accumulator provides for approximately five brake applications after the diesel engine had been shut off. The investigation revealed through testing that only one brake application was provided after the diesel engine was shut off. Also, the brake pressure gauge, located on the instrument panel in the cab of the grader (Company No. 03309) was found to be inoperative. The operator removed the grader from service for repair.

### Stipulations

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

1. The respondent owns and operates the subject mine, and the mine is subject to the Act.

2. The presiding Administrative Law Judge has jurisdiction to hear and decide the matter.
3. The inspectors who issued the contested citation are duly authorized representatives of the Secretary of Labor, and a true and authentic copy of the citation was served on the respondent.
4. The imposition of the proposed civil penalty assessment will not affect the ability of the respondent to continue in business.
5. Although the mine may no longer be in operation, at the time of the events in issue in this proceeding, the respondent's mining operation was a small-to-medium size operation.

#### Petitioner's Testimony and Evidence

Donald R. Mills, retired former MSHA inspector, testified that he was employed as an electrical inspector before retiring and that he also served as an accident investigator. He stated that he was trained to inspect heavy equipment, including braking systems and steering systems, and that the training took place at the Beckley Academy and in the field offices (Tr. 22-23).

Mr. Mills confirmed that he visited the mine on April 25, 1991, to assist in the investigation of a fatality involving a road grader. He was part of an accident team that included MSHA inspectors, the UMWA, and company representatives. He explained how the investigation was conducted, and he confirmed that the grader was moved from the area where it had come to rest against the highwall and moved to another location where it was restarted and the brakes examined (Tr. 24-26). He confirmed that the brakes held the machine on a grade with the engine running when it was tested (Tr. 26). He identified a copy of the citation that he issued, including the extensions and modifications (Exhibit P-2; Tr. 28-31).

Mr. Mills stated that after the grader was tested on a grade where the accident occurred, it was taken to a larger level area for further testing. He stated that he directed the investigation and that a mechanic from Walker Machinery Company provided the tools and gauges used to test the grader. Mr. Mills stated that the investigation revealed that with the engine in the off position there was only "one brake application" on the machine. He explained that "when you hit the brake pedal one time with your foot, you only had the one. On the second, third, fourth application, you had no braking ability whatsoever" (Tr. 32). He further explained that "the manual states if the accumulator is fully charged, it has approximately five brake applications"

(Tr. 33). He reiterated that with the engine running, one brake application would hold the machine and that as long as the engine is running, a pump provided hydraulic pressure for brake application (Tr. 34). However, when the engine quits, there is a loss of hydraulic brake pressure, but the braking system is supposed to continue functioning when the engine quits (Tr. 35).

Mr. Mills identified a copy of a portion of the grader equipment manual which was faxed to his office, and he quoted the manual portion which states that "Fully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off" (Exhibit P-3; Tr. 37).

Mr. Mills confirmed that he cited a violation of section 77.404(a), which requires that machinery be in safe operating condition, and he believed that the failure to provide approximately five brake applications once the engine had been shut off rendered the machine unsafe "because you can never tell when the engine is going to shut down for any reason; contaminants in the fuel, dirt, water. When you have an engine shut down, if a brake don't work, you're in trouble. It's as simple as that" (Tr. 41).

Mr. Mills determined that the violation was significant and substantial "because this grader is operated uphill, downhill, ten percent grades, on the level, around curves. Any terrain they encounter at the job, this machine is used on it" (Tr. 42). The cited condition would affect the performance of the grader "by simply not providing brake application in the event of an emergency", such as a loss of power if the engine shuts down going uphill, downhill, or around curves (Tr. 42). Mr. Mills confirmed that the grader is equipped with a park brake, and he stated that the park brake is designed to secure the machine once it has been brought to a stop and that its primary function is to secure the machine in place once the operator has stopped it. The park brake will operate with the engine off because it is a mechanical device activated by a lever within reach of the operator. He believed that a park brake could possibly stop the machine while it was moving but did not know whether it was designed to stop the weight of the machine in question (Tr. 43-45).

Mr. Mills stated that he based his finding that the violation caused the fatality on the fact that the machine was operating on a 9.6 or 10 percent grade, and a statement made in the course of the investigation that the accident victim (Browning) had stated that the engine shut off on the hill and he could not hold his brakes (Tr. 46). Mr. Mills identified a copy of the accident report of investigation, and he confirmed that he

was familiar with it (Exhibit P-5; Tr. 48). He confirmed that he did not write the report, but that he assisted in the investigation, has read the report, and he agreed with it (Tr. 49-51).

Mr. Mills confirmed that the report indicates that "the service brake was not maintained in a safe operating condition" (Tr. 52). He explained that the accumulator, along with other component parts, make up the machine braking system. In his opinion, "the cause of this accident I believe to be the accumulator not being fully charged" (Tr. 52). He stated that "if you're driving up a hill and your engine stalls and your brakes doesn't hold, you've got a problem" (Tr. 53). He explained that with the engine shut off, only one brake application was left, and if the operator pumped the brake pedal after the first application, there was nothing to provide further brake application with the engine shut off (Tr. 53). He also indicated that the brake pressure gauge, which has red and green light signals, was inoperative, and he conceded that a defective gauge could give false signals as to the condition of the brakes (Tr. 55). He stated that after the machine was removed from the initial testing area at the scene of the accident and taken "to the top", the brake gauge did not work because "it should have been in the green" (Tr. 56).

Mr. Mills confirmed that he made a negligence finding of "moderate" (Tr. 57-58). He stated that he discussed the machine manufacturer's specifications with the respondent's master mechanic, Wiley Queen, and that Mr. Queen told him he did not know about the manual requirement for five brake applications (Tr. 59). Mr. Mills did not believe that the accident caused the violation because there was no damage to the braking system and it held the machine on the hill where the accident occurred (Tr. 59). He confirmed that the citation was abated after a new brake gauge, accumulator, and four braking assemblies were installed on the machine (Tr. 61).

On cross-examination, Mr. Mills confirmed that he did not conduct the employee interviews during the accident investigation, and that MSHA Inspector James Davis conducted the interviews and summarized what the employees told him (Tr. 63). Mr. Mills explained that he heard some of the statements made by employees intermittently and that he was "in and out" of the interview room (Tr. 64-65). Mr. Mills stated that it was his job to inspect the grader, and that other individuals were present when this was done (Tr. 66).

Mr. Mills identified a copy of a Caterpillar/Walker Machinery Incident Report (Exhibits P-5 and R-5), and confirmed that he had seen it (Tr. 67). He confirmed that the respondent's report was an attempt to recreate what took place at the time of the accident. He stated that the "skid marks" shown in MSHA's

report is an indication that they were caused by "tires sliding" similar to "when a car hits it's brakes and it will skid" (Tr. 70).

Mr. Mills stated that on the afternoon of April 24, 1991, he checked the grader hydraulic oil level and found that it was five-and-one-half inches above the bottom of the tank, that the fuel level was ten inches from the top of the tank, the engine oil was full, the transmission was full, and the differential oil was full. He also determined that the front wheels were turned approximately twenty to thirty degrees to the left, the transmission selector was in second speed forward, the hydraulic control levers were in the "hold" position, and the machine blade was approximately 16 inches above ground level, indicating that the machine was not actually doing any grading work at the time of the accident. The park brake was in the "off" position, and the engine governor, which is the accelerator/decelerator pedal located on the floor of the operator's cab, was in the "shut off" position (Tr. 71-74).

Continuing with his explanation of the tests on April 24, Mr. Mills confirmed that the report states that "The grader was started and brief initial system function tests performed" and that the "systems appeared to be functioning properly" and that the park brake was set and held the machine at the grade location which was approximately 10 degrees. The report also reflects that the machine was moved under its own power to another location with safety tractors attached. The following day, additional tests were made, and the pressure on the wheels was determined to be 650 psi with the engine running. When the engine was shut off, the pressure was again 650 psi on the first application, and "after that, we got zero pressure" (Tr. 75). Mr. Mills also indicated that the nitrogen precharge in the brake accumulator was tested, and it indicated 600 psi, and that the park brake held the machine while it was moving (Tr. 76).

Mr. Mills confirmed that he is an electrical inspector and is not a certified mechanic, but that he does a lot of work with electrical power equipment in connection with heavy equipment accident investigations (Tr. 77). Referring to the grader manual in question, Mr. Mills stated that a fully charged accumulator should provide approximately five brake applications, and in his opinion "approximately" includes a range of six to three applications, but not less than three (Tr. 78). He stated that a Walker Machinery representative informed him that an accumulator which provided three brake applications needed to be repaired (Tr. 79).

Mr. Mills stated that the Caterpillar grader in question has an operator's manual, a service manual, and a parts manual. He confirmed that he has his own operator's manual, and that he was also familiar with the lubrication maintenance guide (Tr. 79-80).

He confirmed that in the course of his investigation he did not consult the operator's manual or the parts and lubrication manual, and he did not know whether the same phrase "approximately five applications" is found in those manuals (Tr. 81). Mr. Mills stated that he would not expect mine management to test the machine on a grade by starting the engine and then shutting it off to ascertain the number of applications provided by the accumulator (Tr. 83).

Mr. Mills explained that the accumulator's function is to build up pressure for the application of the brakes, and it stores energy and may assist in putting the brakes in a quicker mode so that the machine can stop quicker. A further function of the accumulator is to store energy and provide braking application when the engine isn't building up enough pressure to apply the brakes with the oil pressure (Tr. 84-85). He confirmed that the grader braking system is located on the four rear wheels, and that the front wheels have no braking system, but he was not familiar with the industry standards or requirements for graders (Tr. 92).

Mr. Mills reviewed some of the conclusions found in the accident report prepared by Inspector Davis. Mr. Mills confirmed that once the grader was started during his investigation, it did not stall again. He also confirmed that his investigation determined that the accident victim was an experienced and safe grader operator who conducted daily checks of his equipment (Tr. 98). Mr. Mills was also told that the grader operator would report any problems to one of the mechanics and that the grader involved in the accident was one that was normally not used (Tr. 98). He confirmed that the report reflects that Mr. Browning shut down the grader that he normally operated because of a problem (Tr. 99-100).

Mr. Mills confirmed that he did not check the grader maintenance records as part of his accident investigation (Tr. 116-117). He also confirmed that he did not advise the respondent as to what needed to be done to abate the violation and only pointed out what was wrong with the braking system. The decision to replace all of the brake pads was made by the respondent, and neither Mr. Mills or any of the other MSHA inspectors told the respondent what needed to be done before they would certify the grader as operable (Tr. 123-124).

In response to further questions, Mr. Mills stated that he "heard a little bit" of some of the interrogation of people during MSHA's investigation, and that he also heard about certain statements by the accident victim that the brakes had failed while he was operating the machine. He could not recall when he heard this, and he thought that a foreman may have made the statement (Tr. 125-126). Referring to the sketch and skid marks shown in MSHA's accident report, Mr. Mills stated that the marks

could have been caused by something other than braking, but that he did not see the marks and was not looking for them because he concentrated on the machine (Tr. 131).

#### Respondent's Testimony and Evidence

William Roberts, equipment manager, Geupel Construction Company, testified that this company is a construction and mining company engaged in highway construction, coal mining, and grading and drainage projects, and it was the operator of the mine involved in this proceeding. His duties included "overseeing the equipment, repairs, and purchasing and selling of equipment" (Tr. 136). He confirmed that there were two motor graders on the property, that he "has been involved" with graders since 1964, and he explained what the grader was used for and how it is operated (Tr. 137-140). He also confirmed that there are three manuals for the Model 16 Caterpillar grader (Tr. 141).

Mr. Roberts identified exhibit R-6, as the operating and maintenance manual for the grader, and it contains information concerning the functions of the machine, the grease points, and instructions for its safe operation. Referring to page 92, of the manual, he described the brake accumulator and how it operates (Tr. 141-143).

Mr. Roberts identified exhibit R-8, as the grader lubrication guide and maintenance manual, which is used by the equipment operator and mechanics for routine and normal maintenance and minor repairs (Tr. 144-145). He stated that a mechanic or lubrication man would service the machine and that the operator would keep the mechanic or foreman advised as to any problems with the equipment (Tr. 145). Mr. Roberts referred to page 9 and 45 of the manual in question and quoted from the information pertaining to the brake accumulator (Tr. 145-146).

Mr. Roberts identified exhibit R-9, as a portion of the grader service manual titled "Hydraulic System and Brakes Specifications", and he stated that the manual is used by mechanics who are making major repairs on the machine (Tr. 147). Referring to page four of the manual, and in particular the sentence that reads "Fully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off", Mr. Roberts stated that he has not been able to find any manual instruction that states that one is supposed to test the brake accumulation system for five applications after the engine has been shut off (Tr. 148). In response to a question as to how one would test the grader, Mr. Roberts responded as follows at (Tr. 149-150):

THE WITNESS: The way you would make this test is that, of course, you would normally have your machine at



operating temperature, your oil warm, and what have you. You would start the engine and assume that everything is working properly. Then you shut the engine off and you make a brake application, let off of it, make another brake application, let off of it.

JUDGE KOUTRAS: Have you ever done such a test in your experience?

THE WITNESS: Yes.

JUDGE KOUTRAS: All right, Mr. Sabo.

BY MR. SABO.

Q. When you make that application, does it matter what shape or form the grader is in?

A. You mean the rest of the grader?

Q. Yes. I mean, does it matter whether it's on an incline or slope --

A. No. It has no bearing on that.

Q. Does the operator in the field know that he would test this way or test an accumulator? How would he know what to do?

A. I don't really know whether he would or not.

Q. There is nothing within the manual that you found that talks about a testing procedure after the engine is shut off.

A. That is correct.

Mr. Roberts explained that after the citation was issued the accumulator was inspected by a Walker Machinery representative and "the accumulator was working properly. It still had a nitrogen charge in it, the proper amount. But for some reason, they thought we ought to replace it and so we put the new accumulator on". He further explained that the new accumulator "did not help the situation any as far as increasing the amount of the applications that you would take . . . you know, the applications of the brake system with the engine shut off. And then from that point, on, we took and changed all four brake assemblies on the machine. I'm assuming that they come up to the five applications. I don't even know this" (Tr. 151). He further explained as follows at (Tr. 152-153):

So the only thing it could possibly be that changes the amount of applications is the wear in the disk which controls -- as the disk wears a little more, the piston, the hydraulic piston, has to travel farther to make the application, which, in turn, reduces the amount of applications that you get out of the accumulator.

The accumulator, itself, is not -- you know, is not a very big thing. The accumulator basically was not put on the machine for excess applications. There is other manufacturers's that make -- have a similar setup to this that don't even mention how many applications that you should have after the engine is shut off. It's strictly -- they're put on there as a function to make the brakes work.

There is always, with the engine running, there is always a precharge (phonetic) amount of oil to apply the brakes, to give somewhere for the pump, when it builds up the pressure, to relieve itself.

Again, I'll go back to the water tank business. If you had a water tank, you know how your water pump kicks on and kicks off. If you didn't have a chamber like this to hold a surge of oil, you would be getting into the same thing on the brakes.

And it's just strictly a reserve amount of oil for a brake application, more than it is -- it says approximately five applications. So whatever approximately is just depends on -- as the brakes wear, it doesn't mean they're inoperable, but this amount of applications you have you lose till the -- well, it can get to the point that you could -- Well, you just wouldn't even have any brakes with one application. I mean, if the brakes are wore out, they're wore out. It's not the case on this machine.

Mr. Roberts did not know how long the condition existed, and he stated that the machine had previously been inspected by Federal and state inspectors in February, 1991, and that it had been operated only 18 hours since those inspections. He did not know if the prior inspections included the accumulator or the braking system. Other than a daily walkaround inspection by the machine operator, Mr. Roberts was not aware of any inspection records for the machine, and he has never seen any daily walkaround inspection reports (Tr. 155). He confirmed that the machine operator is not required to be familiar with the service manual, but that a mechanic and an operator would be expected to comply with any applicable manual instructions and to correct any problems (Tr. 156). He did not know if the accumulator precharge

pressure check required every 500 service meter hours by the manual, at page 92, and a "recharge if necessary" was ever done for the grader in question (Tr. 157).

In response to questions concerning the need for brake applications after the machine engine is off, Mr. Roberts responded as follows at (Tr. 157):

A. I have no idea. Like I say, there is other manufacturers that make the same system that do not even mention this part of it.

Q. On those other pieces of equipment, do the brakes work with the engine off?

A. I don't know this. They would have the same -- they would have the same tendency to work as this does. It would depend on, strictly, how big an accumulator they put on and this, that and the other thing, you know.

Q. Well, in your experience with heavy equipment, do the brakes usually work with the engine off?

A. To be truthful with you, I never tried.

And, at (Tr. 160-161):

Q. Am I to understand that you don't know whether or not the brakes can stop this equipment or the accumulator -- am I to understand if the engine quits, that you don't know whether or not the accumulator and brakes together will stop it?

A. Oh, it will stop it, but that is not what he asked me. He asked me if I had ever tried to stop one. I've never tried to stop one without the motor running.

Q. Didn't he also ask you a question, if the accumulator would not function, would it stop the equipment after the engine quit?

A. No. If he did, I didn't understand it that way.

Q. Well, let me ask you that question.

A. If the accumulator is not functioning and the engine is stopped, the machine would not stop.

Q. It would not stop.

A. No. You have no brake pressure. You would have no pressure to apply the brakes, and it would not stop.

Thomas Goodney, self employed consulting engineer with his own company, Forensic Engineering Services, was admitted as an expert witness, and he confirmed that his work includes conducting accident investigations, testifying at trials as an engineering expert, and doing road grader design work. He confirmed that he is a licensed engineer in the State of Wisconsin, and his biographical data, including his education and experience, is a part of the discovery responses submitted in this case (Tr. 162-164).

Mr. Goodney confirmed that he is a member of the Society of Automotive Engineers (SAE) and that he served on a committee that drafted industry brake standards for off highway machines such as scrapers and graders, and he explained the standards and the three braking systems for a grader (Exhibit R-11; Tr. 164-167). He confirmed that he participated in the accident investigation and reviewed the MSHA investigation report, the Walker machinery report, and the grader manuals, including the information regarding the brake accumulator (Tr. 168).

Mr. Goodney explained that the brake accumulator is a device for storing oil under pressure so that when the brakes are applied, there is an immediate source of oil to apply the brakes. The accumulator also serves as a "cushion" that allows the accumulator charging valve to function in that the pressure is allowed to vary between 850 and 1200 pounds per square inch, thereby allowing the oil to be stored for future use. He explained how the accumulator is charged through a continuous pumping system, and he stated that with a normal operating system, the oil pressure at any one time with the engine running will be between 850 and 1200 psi (Tr. 169).

Mr. Goodney stated that the grader service brake does not function as an emergency braking system, and he explained that the emergency brake is a completely separate device that is applied by a separate handle similar to a car emergency brake. The emergency brake also serves as a park brake (Tr. 170-171). With regard to the service manual reference that states that a fully charged accumulator should provide approximately five brake applications after the engine has been shut off, Mr. Goodney stated as follows (Tr. 172):

A. That is really a very loose number, because at any moment in time, the accumulator may be charged at twelve hundred psi, or at another moment in time, if it's toward the lower end, it may be eight hundred fifty psi. And with all of the variables of the system concerning pressure, brake wear, and so forth, the number of applications is very much different. So it's

not specified with any degree of thoroughness in the manual, because it is something that is very difficult to measure and to have a direct handle on.

Mr. Goodney explained that the greatest factor that would cause an accumulator not to provide five braking applications would be a lack of precharge pressure because "the accumulator will not function at all. It will not provide any oil whatsoever" (Tr. 173). He stated that the proper method for testing an accumulator to determine whether it is functioning properly is to attach a gauge to the charging port at the top of the accumulator to measure the pressure (Tr. 173). He confirmed that the Walker Machinery report reflects that the accumulator was tested more than once (Tr. 174). He further explained the testing information found in the grader manuals (Tr. 174-176).

Mr. Goodney stated that an accumulator is not unique to the Caterpillar grader in question, and that other manufacturers use it. He explained the function of the nitrogen in an accumulator and stated that "it is the medium that allows compression by the oil to store a given amount of oil" (Tr. 176). He further stated that the accumulator provides a quick response when the brake pedal is applied by instantly making oil available to fill the voids in each wheel piston assembly and allows for immediate brake application without the valve cycling that directs oil to the accumulator (Tr. 177).

On cross-examination, Mr. Goodney confirmed that he was being compensated at an hourly rate by the respondent for his hearing appearance. He stated that a piece of equipment should be operated as directed by the manufacturer's manual, and that it is important that braking function in general is available when the machine engine is off. He confirmed that the grader in question has three different braking systems, and that in addition to the complex service brakes, the emergency brake and park brake are combined together into a simple mechanically applied system. He believed that it was possible to use the park brake while the grader is rolling downhill, and that this was done when the grader was tested and it stops the machine (Tr. 184). Although one function of a park brake on a car is to secure it while it is in place, a secondary function "is your emergency brake in the event of complete loss of your hydraulic brake on your car" (Tr. 185).

Mr. Goodney confirmed that he has never operated a grader such as the one in question, but he has operated similar and slightly smaller ones. If he were operating a grader which was rolling downhill with the engine off his first reaction would be to apply the foot service brake pedal. He confirmed that the service brakes on other equipment will operate with the engine off, but only "for a limited number of applications". When asked if he would consider the cited grader to be in a safe operating

condition if he tested it and found only one brake application, he responded as follows (Tr. 186-187):

A. I wouldn't consider it unsafe. As long as the park brake, emergency brake, was working, in good working order it's still a safe machine to operate. If you take the SAE document as the minimum performance standard for a machine, in my opinion, if this machine meets the requirements of the SAE document, the minimum performance, then you can't say it's an unsafe machine. You may say it's something I should have repaired or I should fix if you know it should have five applications, but I certainly wouldn't call it an unsafe machine.

Q. If you were operating this machine on a nine degree grade regularly, every day, would you be willing to say it was safe to operate it even if only one brake application would work with the engine off?

A. I think the record shows that you have one brake application with this machine. And, also, the record shows that the park brake was capable of stopping this machine on that grade.

Mark Potnick, Director of Human Resources, Geupel Construction Company, testified that his duties include "overall safety programs, loss control, labor relations, benefits, and personnel". He stated that the respondent coal company was in operation for approximately two years, and that the mining was completed and terminated and the mine is no longer operational (Tr. 192). He confirmed that the company had a mine safety program, and that he was the company's primary representative during the accident investigation. He identified Exhibit R-4, as a copy of the company accident investigation report that he prepared, and he explained his participation in the investigation (Tr. 194-197).

Mr. Potnick stated that the grader was examined as it rested against the highwall on the day of the accident, April 23, 1991, and the decelerator switch was in the off position, and the fluid levels were checked. The grader was examined again the next day, April 24, 1991, at the accident area under operating conditions, and the service brakes, and emergency and park brakes were tested and the wheels locked and stopped the machine on the steepest grade where it was tested (Tr. 198).

Mr. Potnick stated that during the investigation he interviewed foreman Jim Sword, who was Mr. Browning's supervisor, and Mr. Sword told him that Mr. Browning stated that "the engine quit and I jumped off and the wheels ran over me" (Tr. 199). Mr. Sword said nothing about Mr. Browning mentioning the braking

system, but a truck driver who was in the area listening to the conversation between Mr. Sword and Mr. Browning mentioned to MSHA Inspector Davis that he overheard Mr. Browning mention the brakes (Tr. 199-200).

Mr. Potnick stated that Inspector Davis informed him that in order to abate the citation the accumulator had to be replaced and the brakes needed to be repaired to comply with the number of brake applications mentioned in the manual (Tr. 200). Mr. Potnick identified Exhibit R-7, as an MSHA inspection report dated March 12, 1991, reflecting the results of an inspection conducted by Inspector Noel Keith of all of the mine equipment, and the grader in question was not cited at that time for any violations, and it had only been operated for two shifts, or 16 hours, subsequent to the prior inspection, and before the accident involving Mr. Browning (Tr. 203).

Mr. Potnick stated that he received a copy of MSHA's accident report (Exhibit P-5), approximately a year ago in another proceeding concerning additional citations that were issued as a result of the accident in issue in this case (Tr. 203-205).

On cross-examination, Mr. Potnick confirmed that when the grader braking systems were tested during his investigation with the engine running they were fully operational. He also confirmed that at the time of the accident, the grader engine quit for some unknown reason. Although he believed that the emergency brake would have stopped the grader, when the grader was inspected after the accident the emergency brake was not applied and it does not appear that Mr. Browning attempted to use that brake (Tr. 210).

In response to further questions, Mr. Potnick stated that the accumulator was not checked with the grader under power during his investigation immediately after the accident "because if you have brakes and it stops, then your accumulator is working" (Tr. 211). He stated that the accumulator was checked a day or two later after the grader had been tested under operating conditions and that "everything worked" (Tr. 211).

Mr. Potnick stated that during the joint testing of the grader, the engine was shut off and the service brakes were applied with one application, and they locked the wheel and stopped the machine (Tr. 213). The machine was then taken to the top of the hill, and when asked how the hydraulic pressure testing of the accumulator was conducted, he replied as follows at (Tr. 214-215):

A. Okay. After this operational check, the grader was then taken to the top of the hill and was placed in the

yard area. A day or so later, MSHA came back. Walker equipment people came back. Our personnel were there. The grader was then checked.

It was at that time, as the grader sat still, that the various components were again checked for pressures. This was the first check they had done for various spec's. They checked pressures at the wheels. They checked pressure on the accumulator tank and the pressure on the accumulator tank was right up to spec.

It was when the investigators or mechanics applied the brake pedal after power was shut off, they found that they had one application at that point in time, one brake application. It was let up. It was applied again and there was no brake resistance.

And it was at that time that they then attempted to state that the one application, as opposed to the five or approximately five that is listed in the manual, made the machine unsafe.

#### Petitioner's Arguments

The petitioner asserts that mandatory safety standard 30 C.F.R. § 77.404(a), imposes liability upon the respondent regardless of its knowledge of unsafe conditions. Peabody Coal Company v. Secretary of Labor, 1 FMSHRC 1494, 1495 (October 1979). Citing Secretary of Labor v. Southern Ohio Coal Company, 13 FMSHRC 912, 916 fn.2 (June 1991), quoting Secretary of Labor v. Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982), the petitioner relies on the Commission's ruling that a violation of section 77.404(a), is based upon "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. . . ."

The petitioner argues that the respondent violated mandatory safety standard 30 C.F.R. § 77.404(a), by allowing the cited road grader in question to be operated while failing to maintain it in safe condition in that the accumulator provided for only one application of the brakes with the grader engine off. In support of its position, the petitioner asserts that the respondent presented no evidence to contradict the testimony of Inspector Mills that only one brake application was provided for after the grader engine was shut off, and that the inspector's observation is corroborated by a statement made by an equipment serviceman (James Trent) in a report he prepared upon inspecting the grader on April 24, 1991, as part of MSHA's accident investigation (Exhibit R-5).



The petitioner further asserts that the service manual for the grader specifically indicates that when in proper operating condition, the braking system should provide for approximately five brake applications after the engine has been shut off (Exhibit P-3). The petitioner points out that Inspector Mills was informed by Walker Machinery that if only three applications were provided for, repairs would be necessary, and that Mr. Mills, who has received extensive training on heavy equipment braking systems, determined that the conditions which he found were not in compliance with the service manual.

The petitioner cites the testimony of equipment manager William Roberts, who is employed by the respondent's parent company, Geupel Construction, that a mechanic charged with maintaining the grader should be familiar with, and is expected to comply with, the service manual and is expected to correct conditions which are out of compliance with the service manual. The petitioner also cites the testimony of respondent's braking system expert, Thomas Goodney, that equipment should be operated according to the service manual specifications, and his acknowledgment that similar equipment made by other manufacturers provided for a number of braking applications with the engine off. Acknowledging the fact that the service manual does not indicate that exactly five brake applications must be provided for the system to be working properly, the petitioner concludes that the fact that only one application was provided for must be considered out of compliance with the service manual.

The petitioner asserts that although the fact that the grader was not in compliance with the service manual is not definitive evidence that it was not in safe operating condition, the Commission has rejected the attempt to distinguish between defective and unsafe equipment, citing Secretary of Labor, v. Propst and Stemple, 3 FMSHRC 304 (February 1981). Accordingly, the petitioner concludes that it must be presumed that any equipment which is defective is unsafe, and that the uncontradicted evidence in this case clearly establishes that the grader was defective in that only one brake application was provided with the engine off.

Even without acknowledging that defective equipment is presumed to be unsafe, the petitioner concludes that the evidence clearly establishes that the condition cited by Inspector Mills rendered the grader unsafe to operate. In support of this conclusion, the petitioner asserts that while the brakes operated properly with the engine on, brake function remained necessary in the event the engine failed. The petitioner cites the facts in this case that show that it is possible for the grader engine to go off without warning, and that with the accumulator not functioning properly, the operator would be unable to stop the grader with the service brakes when the engine was off. The petitioner cites the testimony of equipment manager Roberts who

testified that "if the accumulator is not functioning and the engine is stopped, the machine would not stop. You have no brake pressure. You would have no pressure to apply the brakes, and it would not stop" (Tr. 161).

Acknowledging the fact that the grader parking, or emergency brake, which is an alternative braking system, was not found to be in unsafe or defective condition, the petitioner maintains that the parking or emergency brake is not designed to stop the grader in an emergency. Further, although expert witness Goodney testified that the parking brake would have stopped the grader if it had been applied, the petitioner points out that Mr. Goodney acknowledged that an operator's initial reaction would be to attempt to activate the service brakes, and that Mark Potnick, who conducted an accident investigation for the respondent, concluded that the park brake had not been applied at the time of the accident.

The petitioner concludes that given the fact that the grader was operated on a curvy, steep road, that the engine could shut off at any time without warning, that the parking brake is not designed to stop the grader in an emergency, and that an operator's first reaction in an emergency will be to attempt to activate the service brakes, it is apparent that the failure of the service brakes to provide for more than one application with the engine off was a hazard which warranted corrective action according to the standard delineated in Alabama By-Products, supra, and served to make the grader unsafe to operate.

In response to the respondent's suggestion that the force of the accident may have actually damaged the braking system such that the accumulator could no longer provide for more than one application of the brakes with the engine shut off, the petitioner cites the inspector's testimony that the accident did not cause extensive damage to the grader, and could not have caused the condition which he cited. The petitioner also cites the respondent's own accident investigation report that the only damage to the grader was a cracked rear cab glass and two broken engine mounts.

In conclusion, the petitioner argues that considering the fact that equipment which is not maintained as specified in the manufacturer's service manual is defective and therefore presumed to be unsafe, and the clear evidence that the conditions observed by Inspector Mills did create a hazard which rendered the grader unsafe to operator, and that the accident which occurred reveals precisely why this condition was unsafe, it has established that the condition of the braking system rendered the road grader unsafe, and therefore, in violation of 30 C.F.R. § 77.404(a).

## Respondent's Arguments

The respondent argues that the petitioner has failed to carry its burden of proving that the cited grader in question was operating in an unsafe condition. The respondent takes the position that Inspector Mills issued the citation after concluding that the failure of the accumulator to provide approximately five brake applications once the engine had been shut off rendered the grader in an unsafe condition in violation of section 77.404(a). However, the respondent points out that this standard requires machinery and equipment to be maintained in safe operating condition, and it suggests that the basis for the citation was that the equipment was unsafe when it was not operating. In support of this conclusion, the respondent cites the testimony of Inspector Mills that the braking system is supposed to work with the engine off, and that it did not provide the approximate five brake applications once the engine had been shut off.

The respondent points out that after the accident, the grader brakes were tested and found to be at the appropriate psi pressure. Further, after the grader was started on the steepest part of the grade, the service brake held the grader after it was stopped, and that the "park brake" was then set and also held the grader at that grade.

The respondent cites the testimony of braking expert Thomas Goodney explaining the Society of Automated Engineers (SAE) brake standards for graders, and his explanation of the three-part grader braking system consisting of the service brake, which is the primary system for stopping the vehicle, the emergency stopping system used to stop a vehicle in the event of any single failure in the service brake system, and the parking system which is used to hold the stopped vehicle in a stationary position.

The respondent cites the SAE reports describing the emergency brake application, and Mr. Goodney's explanation that it is desirable to have the emergency braking system separate from the service braking system. Respondent cites Mr. Goodney's testimony that the SAE does not accept the accumulator as an emergency braking system because in the event of any single part failure there must be a separate emergency brake system, and for this reason, the separate system is used. Respondent also cites Mr. Goodney's testimony that the approximate number of five accumulator applications has nothing to do with any industry standard for an emergency braking system, nor does it have anything to do with an emergency application.

The respondent asserts that although there are three Caterpillar grader manuals, only one, not used by the operator or mechanic, refers to approximately "five" applications, and that there is nothing in the service manual used by the shop mechanic

that deals with testing the accumulator five times after engine shut off. The respondent further notes that there is nothing in the service manual stating that the accumulator has to be capable of operating five times after the engine is off, let alone to test for this. The respondent also notes that the operator's manual advises that a "slight amount of nitrogen leakage is normal" and that "low accumulator precharge will reduce the number of reserve brake applications but may not noticeably affect the brake performance during its normal operation". Conceding that the manual advises the operator to check the accumulator precharge pressure every five hundred service hours and to recharge if necessary, the respondent points out that nowhere is the operator advised that the accumulator should function for a period of five times, or be tested to see that it does, or to start the engine and check the accumulator five times.

The respondent maintains that if the accumulator is fully charged, as it claims it was, the manual provides that the accumulator will have approximately five braking operations. Since the accumulator was fully charged, the respondent concludes that it did what was required. The respondent further concludes that merely because the accumulator does not work "approximately" five times in the off position does not mean the vehicle is in an unsafe operating condition. In support of this conclusion, the respondent maintains that the accumulator has nothing to do with the safe operation of the grader at all, and it cites the testimony of equipment manager Roberts that the installation of a new accumulator on the grader did not change the situation as far as the number of applications were concerned. The respondent points out that as confirmed by Mr. Goodney and Mr. Roberts, other manufacturers make similar graders and mention nothing about the applications of the accumulator, and it cites the testimony of Mr. Goodney that "so long as the emergency brake was working, this grader was a safe machine and not in an unsafe operating condition "(Tr. 186).

Although the citation makes reference to an inoperative brake pressure gauge, the respondent asserts that there was no contention at the hearing or in any MSHA reports that the pressure system gauge in any way contributed to any fatality, and that all tests reflected that the system was fully charged and under pressure. Further, since the grader struck the highwall, the respondent believes there is no way to tell whether the pressure braking system was damaged by the accident. However, the respondent concludes that this would appear to be the case since the grader had only been run sixteen operating hours since it was inspected by MSHA in February, 1991, and the operator (Rayburn Browning) made daily vehicle checks and there was no indication that the gauge in question was not working.

Finally, the respondent argues that the negligence of the employee grader operator Rayburn Browning, cannot be imputed to the respondent, that a special "Commission" assessment is not appropriate in this case, that the penalty was not assessed within a reasonable time, and that since the respondent has ceased its operations, it is inappropriate to impose any penalty.

### Findings and Conclusions

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.404(a), for not maintaining the cited Caterpillar grader in a safe operator condition. Section 77.404(a), provides as follows: "(a) mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately".

In Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982), the Commission held that equipment is "unsafe" under 30 C.F.R. § 75.1725(a), which is identical to section 77.404(a), when a "reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation".

In Southern Ohio Coal Company, 12 FMSHRC 1627 (August 1990), I affirmed a violation of section 77.404(a), after finding that two broken metal plates, or track pads, on a D-7 Caterpillar bulldozer crawler track which was used by the operator as a means of mounting, dismounting, and servicing the machine, rendered the machine unsafe to operate and required its immediate removal from service. I rejected SOCCO's argument that the broken condition of the cat pads did not render the machine inoperable or unsafe to operate because the primary purpose of the track pads was to provide machine traction which was not affected by the broken pads, and that section 77.404(a) did not apply to a stumbling or tripping hazard created by the broken pads. I also concluded that notwithstanding the fact that the purpose of the track was to provide machine traction, the tracks, including the pads, were an integral and functional part of the machine used by the operators to mount, dismount, and service the machine, and could not be divorced from the safety requirements found in section 77.404(a).

On appeal, the Commission affirmed my decision, Southern Ohio Coal Company, 13 FMSHRC 912 (June 1991), and rejected SOCCO's contention that in order for section 77.404(a) to apply, the unsafe condition must render the equipment unsafe to operate, and that since the use of the dozer tracks as a walkway did not

involve the "operating condition" of the dozer, any stumbling or tripping hazard created by the broken pads was not within the scope of section 77.404(a).

Citing its holding in Ideal Cement Co., 12 FMSHRC 2409, 2414-15, (November 1990), that "the integrity of a machine is not defined solely by its proper functional performance but must also be related to the protection of miners' health and safety", the Commission stated as follows in Southern Ohio Coal Company, 13 FMSHRC 915:

If a machine cannot be used safely by miners, the machine is not in "safe operating condition". Thus, a dozer is not in "safe operating condition" if miners are unable to enter and exit the dozer's cab without risking injury. Because the dozer's tracks serve as the only walkway for the operator to mount and dismount the dozer and to check the fuel, oil, transmission fluid and water level, we conclude that the dozer's track pads were within the scope of section 77.404(a) and that the dozer was not in "safe operating condition". In so concluding we find that a "stumbling and tripping hazard" is covered by the standard.

In a prior case involving the same loader which was cited in the instant case, Commission Judge Weisberger affirmed a violation of section 77.404(a), based on a determination made by Inspector Mills during his accident investigation, that the grader steering wheel had between 270 to 300 degrees of slack in that the wheel had to be turned to that extent in order for it to respond and that a delay in steering could cause an accident should this occur while the vehicle was being driven around a blind curve. Steel Branch Mining, 14 FMSHRC 871 (May 1992). In making his determination, Inspector Mills did not drive the grader, and did not start the engine. He simply turned the wheel and observed between 270 to 300 degrees of slack through which the steering wheel had to be turned before the wheels responded.

On Appeal of the decision, Steel Branch asserted that since the grader was equipped with "hydraulic steering", slack is always present when its engine was off and that such slack is eliminated when the grader was running. Since the grader was not operated during the inspection by Mr. Mills, Steel Branch contended that the inspection of the Steering wheel was deficient and that section 77.404(a) addresses only "the condition of the . . . vehicle while it is operating". Steele Branch also relied on the fact that its head mechanic who drove the grader sometime prior to the accident did not perceive excess slack, and that when he replaced all loose parts after the accident, he believed "it wasn't that loose . . . to cause it to be unsafe to operate".

In affirming the judge's decision, the Commission concluded that substantial evidence supported his determination that the excessive play exhibited by the steering wheel rendered the grader unsafe to operate, and it pointed out that there was no dispute that the grader was operating at the time of the accident and that Steel Branch did not assert that the steering wheel slack was caused by the accident. Steel Branch Mining, 15 FMSHRC 597, 600 (April 1993).

In the instant case, it is undisputed that the grader engine quit for some unknown reason while it was being operated by Mr. Browning. When the engine quit, the loader was being driven up an inclined haulage road in the direction of an equipment parking area. Respondent's witness, Mark Potnick, who participated in the investigation, confirmed that the loader engine quit for some unknown reason, and that when he interviewed Mr. Browning's supervisor, foreman Jim Sword, Mr. Sword told him that Mr. Browning stated to him that the engine quit and he jumped off the loader and was run over by the wheels.

At the conclusion of the investigation, which included an examination and testing of the other grader brakes, MSHA Inspector Mills concluded that the grader was not being maintained in a safe operating condition. Mr. Mills relied on the provisions of the grader manufacturer's equipment manual that indicated that the grader's fully charged brake accumulator should provide approximately five brake applications after the loader engine has been shut off.

The grader service manual provides a schematic drawing of the grader brake system components, including the accumulator, and it states as follows at page "Group 70, Page 1" (Exhibits P-3 and R-9):

Accumulator (5) is the pressure source or brake actuation. Its accumulation of oil, under nitrogen pressure it released to apply the brakes whenever the brake pedal is depressed. The accumulator is maintained in the charged condition by accumulator charging valve (7). After the accumulator is fully charged, accumulator charging valve (7) directs all pressure oil from the large section of hydraulic oil pump (2) into the power control hydraulic circuit. Fully charged, the accumulator provides for approximately five brake applications after the diesel engine has been shut off. (Emphasis added).

The brakes (4) are actuated by pressure oil directed from brake control valve (6). When brake control valve (6) pedal is depressed, pressure oil from the accumulator is directed to the oil actuate wheel brakes (4).

The service manual also contains detailed information explaining the operation, removal, installation, assembly and disassembly of the brake accumulator, as well as the procedures for checking and charging the dry nitrogen gas used in the accumulator. I take note of the fact that the service manual information concerning the grader hydraulic system and brakes refers to the parking brake and the wheel brakes, and it does not use the term "emergency" brake. The parking brake is described as follows at page "Group 170, Page 1" (Exhibit R-9):

The parking brake is a mechanically operated, internally expanding shoe brake mounted on the front of the range transmission. The brake is manually applied by a hand lever located to the left of the power control levers. Expanding shoes act against a brake drum, which is bolted to the range transmission output shaft.

The parking brake lever is connected by mechanical linkage to a lever on the brake cam. When the hand lever is operated, the linkage moves, actuating the brake lever and, through action of a brake cam, forces the brake shoes out against the brake drum.

The grader operation maintenance guide, at page 41, states "To stop the motor grader apply the foot brake" (Exhibit R-6). The guide also contains detailed information concerning the parking brake but does not use the term "emergency" brake. The brake accumulator cylinder is mentioned at page 93, and it states as follows:

The brake accumulator cylinder is lubricated with oil and charged with dry nitrogen gas under pressure when assembled.

A slight amount of nitrogen leakage is normal. Low accumulator precharge reduces the number of reserve brake applications but may not noticeably affect brake performance during normal operation. Check the accumulator precharge pressure every 500 service meter hours and recharge if necessary.

The grader lubrication and maintenance guide, at pages 9 and 45, mentions the brake accumulator and reflects that the nitrogen precharge pressure should be checked (Exhibit R-8).

According to the evidence and testimony in this case, the accumulator is a device whose primary function is to provide an immediate source of oil under pressure for a quick and immediate responsive brake application to quickly stop the machine when the brake pedal is applied. A secondary function of the accumulator is to provide a margin of safety by facilitating the storing of



oil for future brake applications. The accumulator, along with the foot brakes, and the emergency, or park brake, and other component parts, constitute the grader braking systems. Respondent's equipment manager William Roberts stated that the accumulator is installed on the loader "As a function to make the brakes work".

During the inspection and testing of the brakes in the course of the investigation, Mr. Mills found that the foot brake held the machine in place on a grade with the engine running with only one application of the foot pedal. However, when further brake testing was conducted with the grader engine shut off, Mr. Mills found that only one brake application was provided when the pedal was applied, and that upon a second, third, and fourth application, or pumping of the foot brake pedal, there was "no braking ability whatsoever" and that there was nothing to provide further brake application with the engine shut off. Since the grader equipment manual indicated that a fully charged accumulator should provide for approximately five brake applications after the engine was shut off, Mr. Mills concluded that the lack of more than one braking application when the brake pedal was applied during the testing rendered the loader unsafe to operate and constituted a violation of section 77.404(a).

Although Mr. Potnick testified that during the initial testing of the grader brakes during the investigation, one application of the foot service locked the brakes and stopped the machine, he confirmed that no further applications of the brakes were attempted or made at that time (Tr. 214). However, upon further investigation a day or so later, in the presence of the MSHA inspectors, the Walker Equipment Company personnel, and the respondent's personnel, Mr. Potnick confirmed that when the brakes were tested with the engine shut off, only one brake application was available, and when the brakes were applied a second time "there was no brake resistance".

The respondent's assertion that the accumulator "has nothing to do with the safe operation of the grader at all" is not well taken and it is rejected. Although Mr. Roberts indicated that the installation of a new accumulator did not change the situation with respect to the number of braking applications with the engine shut off, he went on to explain that all four brake assemblies were also changed on the machine, and he assumed, but did not know, that five braking applications were provided after this post-accident abatement work was completed.

As noted earlier, Mr. Roberts confirmed that the purpose of the accumulator was "to make the brakes work". He also confirmed that he had no idea about the need for brake applications after the machine engine is off, and he conceded that in his experience with heavy equipment he never tried the brakes with the engine shut off to determine whether the brakes worked. He also

conceded that if the accumulator is not functioning and the engine is stopped, the machine would not stop because of the lack of brake pressure to apply the brakes.

Inspector Mills was of the opinion that the accident occurred because the accumulator was not being fully charged, and he indicated that when it was tested, the accumulator nitrogen precharge indicated 600 psi, and when the engine was shut off, the pressure was 650 psi on the first brake application, and "after that we got zero pressure". Respondent's expert engineer Thomas Goodney testified that the number of braking applications provided by a fully charged accumulator with the engine shut off would depend on a number of variables, including pressure and brake wear. He also indicated that an accumulator may be charged at any moment in time at 1,200 psi, and at another time, "if it's toward the lower end, it may be 850 psi". Mr. Mills found 600 psi during the accumulator nitrogen precharge test, which is below "the lower end", and with the engine off, he found 650 psi on the first brake application, and zero pressure after that, Mr. Goodney agreed that the greatest factor that would cause an accumulator not to provide fine braking applications would be a lack of precharge pressure because the accumulator "will not function at all" and "will not provide an oil whatsoever". It would appear to me that Mr. Goodney's testimony lends support to Mr. Mill's conclusion that the accumulator was not fully charged.

Mr. Goodney further testified that if one were aware of the fact that the brake accumulator should provide for five brake applications, and it only provided for one such application, he would have the accumulator repaired. Inspector Mills testified that a representative of the Walker Machinery Company informed him that an accumulator that provided three braking applications needed to be repaired. A report of April 25, 1991, prepared by Walker Machinery mechanic James Trent, who assisted in the testing of the grader during the investigation, states in relevant part follows (Exhibit R-5, attachment):

. . . . .Checked number of applications readily available from the accumulator with the engine off. Pressing and releasing the brake pedal with the engine off, supplied oil to the brake packs only once. Pressure at that time was approx. 620 psi. Thereafter the pressure was zero. The number of braking applications that is normally supplied by the accumulator with the engine off is five applications.

Inspector Mills confirmed that the tools and gauges used to test the grader during the investigation were provided by the Walker Machinery Company mechanic. Mr. Goodney explained that the proper testing method of the accumulator to determine if it is functioning properly is to attach a gauge to the charging port at the top of the accumulator to measure the pressure, and he

confirmed that his review of the Walker Machinery Company report reflects that the accumulator was tested more than once. I find no evidence to support any conclusion that the accumulator testing by Mr. Mills was faulty or improper. Indeed, Mr. Robert indicated that the way to test the grader would be to turn on the engine, let it warm up, then shut it off and "make a brake application, let off of it, make another brake application, let off of it". It would appear to me that this is precisely how Mr. Mills tested the grader. I conclude and find that the testing of the loader braking system with the engine off was a reasonable and logical method for determining whether the machine service braking system, which included the critical accumulator, would stop the machine in the event of engine stoppage.

The respondent's suggestion that the loader pressure braking system may have been damaged in the accident when the loader drifted back and came to rest after it struck the highwall is rejected. The credible and un rebutted testimony of Inspector Mills reflects that there was no collision damage to the loader braking system as a result of the accident, and as noted by the petitioner, the respondent's accident report reflected that the only damage to the grader was a cracked rear cab glass and two broken engine mounts.

The respondent suggests that the citation cannot stand because section 77.404(a) only required the loader to be maintained in a safe condition while it was in operation, and that Mr. Mills determined that it was unsafe because of the failure of the accumulator to provide approximately five braking applications with the engine off, and believed that the braking system is supposed to work when the engine is off. The respondent's argument is rejected. It is undisputed in this case that at the time of the accident, the grader was in operation and that the engine subsequently quit for some unknown reason.

The respondent advanced a similar argument in the prior proceeding involving the same loader when it took the position that the failure of Inspector Mills to test the loader steering wheel mechanism while the grader was in operation rendered the citation deficient and failed to establish that the loader was unsafe while it was being operated. The respondent's argument was rejected by the Commission in its decision affirming a violation of section 77.404(a).

A similar defense was also raised in the Southern Ohio Coal Company case, supra, where it was argued that stumbling and tripping hazards created by broken bulldozer track pads did not involve the unsafe operating condition of the dozer and did not fall within the scope of section 77.404(a). The Commission rejected this argument in affirming my finding of a violation of section 77.404(a).

I find little merit in the respondent's arguments concerning the absence of any information provided in one of the three grader manuals with respect to the testing of the accumulator. As correctly pointed out by the petitioner, equipment manager Roberts confirmed that the mechanic charged with maintaining the grader should be familiar with and is expected to comply with the service manual and is expected to correct conditions which are out of compliance with the manual, and Mr. Goodney agreed that equipment should be operated according to the manual specifications. Inspector Mills confirmed that the respondent's master mechanic was unaware of the manual provision concerning the five braking applications provided by the accumulator (Tr. 59). While it is true that the manual uses the term "approximately" five braking applications, I cannot conclude that the inspector's interpretation of that term to include a range of six to three braking applications is unreasonable. Further, notwithstanding the absence of any specific testing information in the manual, equipment manager Roberts described how he has tested the machine for proper braking applications with the engine off, and that test is similar to the one used by the inspectors.

The respondent's assertion that the accumulator was found to be fully charged, and therefore functioned properly and provided what was required in terms of braking applications is not well taken. Although the Walker Machinery report of April 26, 1991, reflects that the accumulator nitrogen charge without any oil pressure was within the 600 psi specification, the report for the previous day on April 25, 1991, indicates that with the engine off, the initial 620 psi pressure made available to the brakes by the accumulator on the first braking application had reduced to zero pressure after the first application. Mr. Potnick confirmed that the accumulator was not checked with the grader under power during his investigation immediately after the accident because the brakes worked and stopped the machine and he concluded that the accumulator was functioning properly. However, since the primary purpose of the accumulator is to provide additional braking capability beyond the first application of the service brake after the engine shuts down, the fact that the first application of the service brake stopped the machine under power is not particularly significant, nor does it support any conclusion that the accumulator was functioning properly. It seems clear to me that in this case the accumulator provided only one brake application with the engine off, rather than the "approximately" five called for by the service manual.

Mr. Goodney described the grader emergency braking system as "a simple drum-type brake with simple mechanical linkage to the brake" that also functions as a park brake. He further indicated that the emergency brake is similar to that on a car in "which you apply a separate handle which puts a separate brake on" (Tr. 170). He was of the opinion that as long as the park brake was in good working order, the machine would not be unsafe to

operate even though the service brakes had only one available braking application. Although Mr. Goodney believed that it was possible to use the grader emergency brake while the machine is rolling downhill, and that this was done when it was tested, Inspector Mills indicated that the park brake is designed to secure the machine in place after it has come to a stop. He confirmed that the park brake was set during the initial testing of the grader on a grade and that it held the machine. Mr. Mills did not indicate that the park brake was applied while the machine was actually rolling downhill, as suggested by Mr. Goodney, and I find no evidence that the testing included allowing the grader to roll free on a grade and then bringing it to a stop while it was rolling by activating the park brake. The respondent's accident investigation report reflects that the parking brake was operative and stopped the grader on a grade, and an "incident report" explaining some of the testing reflects that after the grader was started, the "park brake was set and held at that grade location" (Exhibit R-4 and R-5).

The SAE ground vehicle standards for braking performance for graders reflects that the service braking system is the primary system for stopping and holding the machine. The emergency stopping system is described as the system used for stopping in the event of single failure in the service braking system, and the parking system is described as the system to hold stopped machinery stationary (Exhibit R-10). Although Mr. Goodney believed that the grader park brake would stop the machine while it were rolling downhill, he agreed that if he were operating the machine while rolling downhill, his first reaction would be to apply the foot service brakes. Inspector Mills confirmed that the grader park brake was in the "off" position when he inspected the machine after the accident, and this was confirmed by Mr. Potnick who indicated that the park brake was not applied and that it did not appear that Mr. Browning attempted to use that brake.

The respondent's assertion that the operative grader park brake rendered the grader safe to operate pursuant to section 77.404(a), notwithstanding the failure of the service braking system accumulator to provide for more than one service brake application with the engine turned off, is rejected. I conclude and find that the purpose of the park brake is to hold the grader in place after it has been brought to a stop by activating the foot service brakes which served as the primary braking method for stopping the machine. The fact that the park brake was operative, and held the machine in place on a grade during the post-accident testing, is not relevant to the issue of whether or not the failure of the brake accumulator, which is an integral and critical component of the primary service braking system, provided for more than one braking application of the

service brakes after the grader engine quit while it was being operated by Mr. Browning, rendered the grader unsafe pursuant to section 77.404(a).

I believe that one can reasonably conclude that in the event of unexpected engine failure, the first instinct of the operator would be to attempt to stop the grader by depressing the foot service brakes, the primary braking system designed to stop the loader under operating conditions. Although the service brakes may have functioned properly with the engine running, it seems clear to me that continued and quickly available braking function becomes critical and necessary in the event of unexpected engine failure or stoppage, particularly when the equipment is being operated on a steep roadway. The evidence in this case establishes that with the engine off, the brake accumulator only provided for one application of the brake. According to the service manual, a fully charged accumulator should provide approximately five braking applications after the engine is shut off. This was corroborated by the mechanic who participated in the testing of the grader during the investigation, and his report concluded that five braking applications are normally supplied by an accumulator with the engine shut off. Further, braking expert witness Goodney agreed that an accumulator that provided for only one braking application should be repaired, and Inspector Mills indicated that an accumulator that provided or only three braking applications should be repaired.

I conclude and find that the grader brake accumulator is a critical and integral component of the machine's braking system and that it was intended to function and provide more than one braking application in the event of an unforeseen or unexpected engine stoppage. Based on all of the credible evidence and testimony adduced in this case, including my previously made findings and conclusions, I conclude and find that the grader brake accumulator in question was defective and not in proper operating condition in that it failed to fully function and provide the necessary braking capability when the machine engine quit, thereby rendering the grader unsafe to operate within the meaning of section 77.404(a). Accordingly, I further conclude and find that a violation of section 77.404(a), has been established, and the contested citation IS AFFIRMED.

#### Significant and Substantial Violations

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

illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

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

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

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

The respondent's posthearing brief does not specifically address the "significant and substantial" (S&S) violation issue presented in this case. Inspector Mills believed that the cited condition caused the fatal accident in question, and he concluded that the violation was S&S because the grader was operated over curved and hilly roadway grades and that the failure of the

accumulator to provide for more than one braking application would affect the operation of the loader by not providing it with critical braking capability in the event of engine failure while it was traveling over such roadways.

Citing the appropriate "S&S" precedent Commission case decisions, the petitioner takes the position that all of the required elements for a significant and substantial violation of section 77.404(a), have been shown in this case. In support of its position, the petitioner asserts that a violation of section 77.404(a), occurred because the respondent allowed a machine in an unsafe operating condition to remain in use. The petitioner further asserts that the violative grader condition was such that it contributed to a discrete safety hazard in that the failure of the accumulator to provide more than one braking application resulted in the grader having no adequate primary braking system with the engine off. Notwithstanding the fact that the grader brakes worked properly with the engine on, the petitioner believes that the accident itself shows why it was important to have some braking capability with the engine off. Agreeing that no one determined why the engine quit, the petitioner asserts that given the fact that the grader was operated on a road with many curves and grades, all braking systems must be maintained in order to prevent a situation in which the grader cannot be controlled.

The petitioner further asserts that there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury, and points out that the inspector concluded that the violation resulted in the fatality. Conceding the fact that none of the investigations unequivocally stated the cause of the fatality, the petitioner nonetheless believes that the facts in this case suggest that the inspector's conclusion is correct and that the loader engine failure resulted in a chain of events which led to the fatality. In support of this conclusion, the petitioner advances what it believes to be a plausible scenario after the loader engine quit which culminated in Mr. Browning's jumping of the loader and being run over by the machine.

Apart from the fatality which occurred in this case, the petitioner concludes that the discrete hazard created by the failure of the accumulator to provide for more than one braking application with the engine off, particularly when the grader is operated over an inclined roadway with many curves, presented a reasonable likelihood that the hazard created would result in an injury. Since the grader is a large mobile vehicle, the petitioner further concludes that any accident or brake failure involving such a large machine would reasonably likely result in an injury of a reasonable serious nature.

After careful consideration of all of the evidence and testimony adduced in this case, including the arguments advanced



by the petitioner, which I find persuasive and adopt as my findings and conclusions with respect to the "significant and substantial" nature of the violation, I conclude and find that the violation which has been affirmed was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

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

The parties stipulated that the respondent was a small-to-medium sized mine operator when the violation was issued in this case, and that the payment of the proposed civil penalty assessment would not affect its ability to continue in business. In the absence of any evidence to the contrary, I adopt these stipulations as my findings and conclusions on these issues.

#### History of Prior Violations

An MSHA computer print-out reflects that for a two-year period beginning November 20, 1989, and ending April 28, 1991, the respondent was assessed for thirty-seven (37) violations, and paid civil penalty assessments totalling \$6,122. Included in this history are seven (7) prior violations of section 77.404(a), the details of which are not known or documented in this case. For an operation of its size, I cannot conclude that the respondent's compliance record is such as to warrant any additional increase in the civil penalty assessment that I have made for the violation which has been affirmed.

#### Good Faith Compliance

The record reflects that the cited grader was removed from service by the respondent and repaired. I conclude and find that the violation was timely abated by the respondent in good faith.

#### Gravity

In view of my findings and conclusions affirming the violation as a "significant and substantial" violation, I conclude and find that the violation was serious.

#### Negligence

The respondent's assertion that any negligence on the part of grader operator Browning cannot be imputed to the respondent is rejected. As noted by the Commission in the prior Steel Branch Mining case, supra, at 15 FMSHRC 600, fn. 5, the Commission has held repeatedly that an operator is liable for violations of mandatory standards committed by its employees.

It would appear from the evidence developed by the inspector in the course of his investigation that Mr. Browning was an experienced and safe grader operator who conducted daily checks of his equipment. The inspector indicated that Mr. Browning shut down the grader which he normally operated because of some problem, and proceeded to operate the grader involved in the accident, a grader that he normally did not operate.

In support of the inspector's moderate negligence finding, the petitioner asserts that the respondent is liable for maintaining machinery in safe operating condition regardless of its knowledge of unsafe conditions, but agrees that what the respondent knew or should have known is relevant in determining the appropriate penalty. In this case, the inspector believed that the respondent was responsible for maintaining its equipment in safe operating condition and in compliance with the manufacturer's specifications. The inspector's un rebutted testimony indicated that the respondent's master mechanic admitted that he was unaware of the service manual recommendation that the accumulator should provide approximately five brake applications with the grader engine off, and equipment manager Roberts testified that he was unaware of any accumulator pressure checks ever being made for the grader, and had no knowledge that the grader accumulator had ever been tested.

The petitioner concludes that since Mr. Roberts believed that the only cause for the failure of the accumulator was wear in the brake disc, it was incumbent on the respondent to check this out, and that the respondent's failure to present any evidence that the accumulator had ever been tested reflects that it had no method of prevention maintenance which could have detected the condition prior to the accident. Under the circumstances, the petitioner further concludes that the cited condition supports a finding of moderate negligence.

I agree with the petitioner's arguments, and I conclude and find that the violation was the result of a moderate degree of negligence on the part of the respondent. The respondent's reliance on MSHA's prior inspection of the grader, which did not result in violations, as a defense to the violation, or to support a finding of no negligence on its part, is rejected. The inspector's moderate negligence finding is affirmed.

#### Civil Penalty Assessment

The respondent's assertion that the Commission imposed the "special" civil penalty assessment for the violation in question is erroneous. The assessment was proposed by the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), an agency separate from the independent Commission. The proposed assessment was calculated by MSHA following its assessment procedures found in Part 100, Title 30, Code of Federal Regulation. It is

well settled that the presiding judges is not bound by those assessments regulations, and is free to impose a penalty on a de novo basis, taking into account the civil penalty criteria found in section 110(i) of the Act.


The respondent's assertion that since it has ceased operations, it is inappropriate to impose any civil penalty assessment for the violation this case is rejected. The Act mandates the imposition of a civil penalty assessment when a violation of any mandatory safety or health standard has occurred. Further, the fact that an operator ceases any mining operation at one location does not necessarily mean that it does not intend to continue mining at some future time, either at the same location using the same equipment, or at some other location using the existing equipment.

The respondent's suggestion that no civil penalty should be assessed in this case because of the inordinate delay between the time the citation was issued and the date of the issuance of the proposed penalty assessment is rejected. The record reflects that the respondent informed MSHA of its assessment contest and request for a hearing on May 28, 1992, and that the petitioner's filing of the proposed civil penalty assessment with the Commission followed on July 16, 1992. In any event, the respondent presented no evidence to establish that it was prejudiced by any delays in this matter, or that it was in any way prevented or adversely affected in presenting its defense to the citation, including calling its own witnesses and cross-examining the inspector.

On the basis of the foregoing findings and conclusions, the facts presented in this case, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$4,500 is reasonable and appropriate for the violation.

#### ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$4,500, for the violation which has been affirmed. Payment shall be made to the petitioner (MSHA) within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

  
George A. Koutras  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**AUG 16 1993**

PEABODY COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 91-179-R
	:	Citation No. 3419830; 2/11/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Martwick Underground Mine
ADMINISTRATION (MSHA),	:	Mine I.D. No. 15-14074
Respondent	:	

**DECISION**

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

Before: Judge Melick

This case is before me upon remand by the Commission by orders dated March 25 and April 30, 1993, to determine (1) whether the previously approved ventilation plan for the Peabody Coal Company (Peabody) Martwick Mine is not now suitable to the conditions of that mine and (2) whether the ventilation plan provision now advocated by the Secretary is suitable to the Martwick Mine. In this proceeding the Secretary bears the burden of proof on these issues. See, Secretary v. Peabody Coal Co., 15 FMSHRC 381, 389 (1993); Secretary v. Peabody Coal Co., 15 FMSHRC 628 (1993).

Under the previously approved ventilation plan Peabody was permitted to conduct roof bolting in its deep cut entries without line curtain and without any prescribed minimum ventilating air in the entry. Under the Secretary's proposed modification, as amended at hearings on June 17, 1993, without objection to the amendment itself, Peabody would be required to extend the line curtain into deep cut entries during the roof bolting phase of the mining cycle to within 4 rows of bolts outby the row being installed and would be required to maintain 3,000 cubic feet per minute (cfm) ventilating air at the inby end of the line curtain.

There is no dispute that the Martwick Mine, a medium-sized mine, liberates large volumes of methane and, as a result, is subject to the 15-day spot inspections applicable

under Section 103(i) of the Act to mines liberating more than 200,000 cubic feet of methane during a 24 hour period. It is further undisputed that methane is liberated from the working units of this mine and recent tests performed by Peabody showed liberation of 11,131 cubic feet of methane per 24 hours from the face of the No. 7 entry of the No. 1 Unit. In addition, the methane concentrations during the testing period on May 27, 1993, reached a maximum of .3 percent. These tests were performed, however, with partial line curtain in place and approximately 648 cubic feet per minute of ventilating air at the end of the line curtain 32 feet from the face.<sup>1</sup> The samples were obtained approximately 12 inches from the face and 12 inches from the roof of the No. 7 entry. A similar test performed in the No. 2 Unit No. 6 entry under similar conditions resulted in a similar maximum concentration of .3 percent methane.

Additional tests performed under the direction of Mine Safety and Health Administration (MSHA) Senior Mining Engineer Charles D. Campbell demonstrated, through the use of a tracer gas, the air flow patterns in a typical entry at the Martwick Mine under the previously approved ventilation plan and under the proposed MSHA modification (see Government Exhibit Nos. 5A, 6A and 9A). Campbell is a graduate civil engineer and registered professional mining engineer with significant experience in mine ventilation. He conducted the tracer gas tests at the Martwick Mine along with two other MSHA ventilation specialists, Mark Shultz and Louis Stanley. In summary, under conditions permitted by the preexisting ventilation plan the studies show virtually no air movement within approximately 25 feet of the face (Government Exhibit No. 9A). The studies show that even with a modified deflector curtain (which was not required under the previous plan) there was virtually no air movement within approximately 20 feet of the face. On the other hand, with the changes in the ventilation plan now proposed by MSHA, the ventilating air clearly sweeps the face area.<sup>2</sup> It may reasonably be inferred from these tests that, under conditions permitted by the previously approved plan, methane liberated at the face would not be diluted, removed, or rendered harmless,

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<sup>1</sup> Under the previously approved ventilation plan roof bolting would have been permitted without any line curtain in the entry (See Government Exhibit No. 5A).

<sup>2</sup> At hearing the Secretary represented that subsequent to the initial hearings, he has further liberalized his proposed requirements by permitting the line curtain to be extended to within four rows of roof bolts outby the row being installed by the roof bolting machine. Under the original proposal the curtain was required to have been extended to within two rows of bolts outby the row being installed.

but would be left in an unventilated area to accumulate in increasing concentrations while the roof bolting machine operated in its phase of the mining cycle.

It is undisputed that an electrically operated roof bolting machine, such as used in the Martwick Mine, could provide a source of methane ignition if it were in an impermissible condition, should the drill strike rock and cause sparking or should the roof bolt strike rock or the face plate while being inserted. The extreme potential hazard is, of course, the presence of explosive concentrations of methane with oxygen and an ignition source.

In summary, the evidence shows that the Martwick Mine liberates large volumes of methane, that methane is indeed liberated from face areas particularly in newly cut faces and that such methane could reasonably be expected to be liberated during the roof bolting phase of the mining cycle. Further, it is reasonable to infer from the tests performed by the Secretary that under conditions permitted to exist under the previously approved ventilation plan, little or no methane present in the area 20-to-25 feet outby the face area would be diluted, removed or rendered harmless, that the roof bolting machine would be permitted to operate in the vicinity of such unventilated areas and that the roof bolting machine could at any time become an ignition source.

Under these circumstances wherein the Secretary has objectively identified a measurable safety hazard that is not addressed by the previously approved ventilation plan I find that the Secretary has met her burden of proving that such plan is not now suitable for the Martwick Mine. The Secretary has, I find, also met her burden of proving that his proposed modifications address the above safety hazard by requiring ventilation adequate to dilute, remove and render harmless the subject hazard of methane gas and therefore such modifications are indeed suitable to the Martwick Mine.

While it is not necessary to the decision in this case since Peabody has waived the opportunity to present cost estimates towards a cost-benefit analysis, I note that the Secretary's proposed modifications are essentially without cost or of only minimal cost to Peabody. Under either the previously approved ventilation plan or the proposed modification the brattice curtain must be in place to within 10 feet of the continuous miner during the cutting cycle. Since that curtain would ordinarily remain in place until the next phase of the mining cycle, the roof bolting phase, three to four rows of roof bolts could be inserted before any additional line curtain need be hung. That curtain would, in any event, ordinarily have to be extended again when the continuous miner returns for its next cutting cycle. Thus, in any event, the

cost of implementing the Secretary's proposed modifications to Peabody's ventilation plan are minimal or nonexistent while the benefit toward the safety of miners is significant.

In any event, I find that the Secretary's proposed modification to the Martwick Mine ventilation plan is indeed "suitable" to the mine and the previously approved plan is no longer suitable. Citation No. 3419830 is accordingly **AFFIRMED** and Contest Docket No. KENT 91-179-R is **DENIED**.



Gary Melick  
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 16 1993

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. WEVA 93-375-D
CLETIS R. WAMSLEY, AND	:	MSHA Case No. HOPE CD 93-01
ROBERT A. LEWIS,	:	MSHA Case No. HOPE CD 93-05
Applicant	:	
	:	Docket No. WEVA 93-376-D
v.	:	MSHA Case No. HOPE CD 93-02
	:	
MUTUAL MINING, INC.,	:	Mutual Mine I
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Patrick L. DePace, Esq., Office of the Solicitor,  
U. S. Department of Labor, Arlington, Virginia,  
for the Applicant;  
W. Jeffrey Scott, Esq., Grayson, Kentucky, for the  
Respondent.

Before: Judge Amchan

On December 22, 1992, Cletis R. Wamsley and Robert A. Lewis filed discrimination complaints with the Mine Safety and Health Administration (MSHA) alleging that they were discharged from their employment in retaliation for safety activity in violation of section 105(c) of the Act. On July 6, 1993, MSHA filed an Application for Temporary Reinstatement on behalf of the two employees, which was received by the Commission on July 7. On July 19, Respondent requested a hearing on the MSHA application, which was conducted in Charleston, West Virginia, on August 5, 1993.<sup>1</sup>

Pursuant to the procedural rules of the Commission, 29 C.F.R. § 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miners' complaints were frivolously brought. The Secretary of Labor has the burden of proving that the complaints were not frivolous. In the instant case it is clear that the Applicant has established a prima facie case of discrimination. I also find that despite some evidence

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<sup>1</sup> Commission rules specify that a hearing on a temporary reinstatement application should be held within ten days of the request for a hearing. However, due to scheduling conflicts, August 5 was the first day on which it was feasible to conduct the hearing in this matter.

rebutting the prima facie case, the record as a whole establishes that the complaints were not frivolous.

On Thursday, December 17, 1992, the United Mine Workers safety committeemen, Cletis Wamsley and John Taylor, conducted an inspection, or "safety run" of Respondent's surface mine in Holden, Logan County, West Virginia (Tr.14-15). At the end of their inspection Mr. Wamsley and Mr. Taylor presented a list of safety defects to Respondent (Tr. 15). The next day, Friday, December 18, 1992, the committee submitted the same list to the Mine Safety and Health Administration and requested an inspection of their employer's facility, pursuant to section 103(g) of the Act (Tr. 15, Exh. G-1).

On Monday morning, December 21, 1993, MSHA began its inspection of Mutual Mining's worksite (Tr. 18, Exh. G-3). That afternoon twelve of Respondent's twenty-four employees were laid off (Tr. 20). Among those laid-off were all three members of the Union Safety Committee, Cletis Wamsley, Robert Lewis, and John Taylor<sup>2</sup> (Exh. G-2).

The Applicant has established a prima facie case of discrimination with regard to the discharge of Mr. Wamsley and Mr. Lewis. There is no question that complainants engaged in protected activity. Both men were members of the Union safety committee. Mr. Lewis informed his foreman on December 16, that he was going to participate in the Union safety inspection on December 17 (Tr. 66). Although he did not participate in the physical inspection due to illness, he did assist in planning for the inspection and was obviously identified with the inspection by Respondent (Tr. 61-66). Moreover, as a member of the committee, he participated in the decision to present the union request for a section 103(g) inspection to MSHA (Tr. 63). Mr. Wamsley participated in the union inspection as well as the request for inspection to MSHA (Tr. 14-15). He, as well as a management representative, also accompanied the government inspector during the course of the MSHA inspection on December 21, 1992 (Tr. 18-19, 95-97).<sup>3</sup>

Respondent was aware of the safety activity. When MSHA began its inspection on December 21, it provided company officials with the list of alleged safety defects prepared by the Union. Allan Roe, the job superintendent for Respondent commented that the list was the same one presented to him by the

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<sup>2</sup>Mr. Taylor has been reinstated by Respondent (Tr. 37-38).

<sup>3</sup>The management representative, Foreman Wayne Thornbury, maintained radio contact with Superintendent Allan Roe, advising him constantly as to which pieces of equipment MSHA regarded as violative of the Act and its regulations (Tr. 99).

Union safety committee a few days earlier (Tr. 25). It was, therefore, obvious to Respondent that Wamsley and Lewis were participants in asking for MSHA inspection.

Mr. Lewis and Mr. Wamsley suffered an adverse action. They were both discharged on the day of the MSHA inspection, hours after the company became aware of the section 103(g) complaint (Tr. 20). The timing of the discharges creates an inference that the lay-offs were related to their protected activities.

The miners' prima facie case is weak with regard to evidence of anti-safety animus, often a factor in finding a retaliatory discharge. Mr. Roe, Respondent's job superintendent, allegedly told Mr. Lewis and Mr. Wamsley that he regarded union safety complaints as "suggestions" (Tr. 17). A foreman, Wayne Thornbury, apparently once warned that Union safety complaints would result in all of Respondent's employees losing their jobs (Tr. 58). I find neither remark to be an indication of animus that would indicate a desire to retaliate against the complainants. On the other hand, Respondent, which was having a degree of financial problems at the time of the inspection, clearly was less than happy to experience the section 103(g) inspection by MSHA. I draw an inference of animus from the timing of the discharge--despite the fact that Respondent had experienced section 103(g) inspections in the past and had not retaliated against any of its employees in those instances. The fact that an employer has not retaliated in the past for protected safety activity does not preclude the possibility of retaliation in the present--particularly given the financial situation of the Respondent at the time of the instant inspection.

There is considerable evidence which supports Respondent's contention that the December 21, 1992 discharge of Mr. Wamsley and Mr. Lewis was not motivated by a desire to retaliate for their initiation of the MSHA inspection. The company has established that it anticipated reduced demand for its coal from Island Creek Coal Company for whom it is a contract miner (Tr. 128, 171-173, 193).<sup>4</sup> Respondent had also learned on November 30, 1992, that a \$486,250 judgment in favor of the United Mine Workers' Pension Fund had been rendered against it (Tr. 183-187, Exh. R-1). That month Mutual Mining also received a \$240,000 judgment against it in favor of Eastern Kentucky Explosives Company (Tr. 187-188). However, possibly the most persuasive

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<sup>4</sup>Respondent, however, has not established that its expectations for a reduction in coal purchased by Island Creek was realized. The record indicates that Respondent is producing and selling the same amount of coal since the lay-offs as it did before the lay-offs (Tr. 213). Under the terms of its contract with Island Creek, which has since been purchased by Consolidation Coal Company, Respondent could sell coal to other customers only with permission from Island Creek (Tr. 173).

evidence supporting the company's position is the fact that when Wamsley and Lewis were laid-off, ten other employees were also laid-off, nine of whom apparently did not engage in safety activity (Exh. G-2).<sup>5</sup>

If one considers only the facts known to Mr. Wamsley and Mr. Lewis when they filed their discrimination complaints, the complaints are obviously "not frivolous". The two miners had no reason to believe that any lay-offs were being planned (Tr. 24, 67) and knew only that as soon as the MSHA inspectors finished their walkaround inspection on December 21, that they were discharged. For Wamsley and Lewis to conclude that there was a relationship between the discharges and their safety activity was reasonable.

If one considers in addition the evidence adduced at hearing and asks whether the Secretary has a reasonable basis for proceeding further with the complaints filed by Wamsley and Lewis, the issue is a closer one. As Respondent contends, it is not that easy to conclude that a company would discharge half its workforce, including nine employees who did not engage in protected activity to get rid of Wamsley and Lewis. Nevertheless, the Respondent's evidence does not exclude such a possibility.

"Red" Hatton, Respondent's manager, testified that the decision to lay-off employees at Mutual's Holden worksite was made the day of the inspection (Tr. 202-203). Thus, this is not a case in which the employer has convincingly shown that the lay-offs were planned far in advance of the protected activity and couldn't possibly be related to that activity. Similarly, Superintendent Allan Roe testified that on December 21, 1992, he

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<sup>5</sup>Respondent has also raised two other reasons for the lay-off which the undersigned finds totally unpersuasive. First is the fact that part of Mutual Mining's activities at the worksite, designated as "Job #2" had almost been completed. Respondent's manager, Astor "Red" Hatton conceded that this had very little, if anything to do with the December 21, 1992 lay-off (Tr. 209). Superintendent Roe also mentioned the possibility of a strike occurring at the expiration of the wage agreement between the United Mine Workers and the Bituminous Coal Operators in February, 1993. Respondent has provided no persuasive rationale as to why it would be economically advantageous for it to lay-off employees in anticipation of a strike. Indeed, it would seem that it would be more advantageous to mine the maximum amount of coal before the strike took place, in anticipation of shortages that might occur during the strike.

made some changes to original list of employees to be laid off (Tr. 149-150).<sup>6</sup> What stands out in Mr. Roe's testimony is that while the original list went just far enough to capture Mr. Lewis and Mr. Wamsley in the lay-offs, he added the names of five employees with greater seniority because he was advised by Respondent's labor consultant that the original list "wouldn't work" (Tr. 136-137). Since these five employees were subsequently recalled (Tr. 150-151), there is a possibility that the change was made so that the dismissal of Mr. Lewis and Mr. Wamsley would not stand out in light of their protected activity.

Moreover, the fact that Respondent may have had legitimate motives for laying off some employees, does not rule out the possibility that it laid off Mr. Lewis and Mr. Wamsley for retaliatory reasons, or a combination of legitimate and illegitimate reasons. The undersigned believes that the Secretary should be allowed to probe further into Respondent's motivation, if he proceeds further with the discrimination complaints. Given the fact that Lewis and Wamsley are the two most senior employees who were not recalled, it is conceivable that the lay-off and recall was structured to capture these two employees and that, but for their safety activity, only those employees hired in 1991 would have been discharged for economic reasons (See exhibit G-2). Indeed, Mr. Wamsley testified that this is precisely what he believes occurred. (Tr. 28-29).

Another factor that casts some doubt on Respondent's position is the fact that its employees have continued to work ten hour days, Saturdays and through vacations since the lay-offs (Tr. 47-52, 195). The undersigned believes that the Secretary should be allowed further opportunity to probe the legitimacy of the lay-off of Mr. Wamsley and Mr. Lewis in light of the overtime being worked by those employees who were retained.

In conclusion, I find that the Applicant has established a prima facie case of a retaliatory discharge in violation of section 105(c) of the Act. In a hearing on the merits of this discrimination case, the burden of proof would thus shift to Respondent to rebut that prima facie case or affirmatively establish that Mr. Wamsley and Mr. Lewis would have been laid off even if they had not engaged in protected activity. Secretary on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803 (April 1981). Although Respondent has introduced some evidence tending to rebut the prima facie case, it has not

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<sup>6</sup>The testimony of Mr. Roe is not totally consistent with that of Mr. Hatton with regard to the planning of the lay-offs. Whereas Roe indicated that lay-offs had been contemplated by Respondent for several months prior to December 21, Hatton testified that no decision to lay-off any employee was made until the morning of December 21, 1992 (Tr. 122-3, 203).

done so in a manner so convincing as to persuade the undersigned that it would necessarily prevail on the merits in a hearing on the discrimination complaint. Thus, its evidence in this proceeding falls far short of persuading me that the Secretary's case is a frivolous one.

ORDER

Respondent is hereby ordered to reinstate Cletis Wamsley and Robert Lewis to the positions from which they were discharged on December 21, 1992, or to an equivalent position, at the same rate of pay and with equivalent duties.



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

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

AUG 18 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 92-333-M  
Petitioner : A.C. No. 23-02000-05505-A  
: :  
v. :  
: Stockton Quarry Mine  
L. M. KARNES, Employed by :  
J. H. Shears' Sons, :  
Incorporated, :  
Respondent :

## DECISION APPROVING SETTLEMENT

Before: Judge Barbour

### Statement of the Proceeding

This proceeding concerns proposals for assessment of civil penalties filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The parties now have decided to settle the matter, and the Secretary has filed a motion pursuant to Commission Rule 30, C.F.R. § 2700.30, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3901563	10/16/91	56.6001	\$150	\$-0-
3901573A	10/17/91	56.15005	\$150	\$75
3901573B	10/17/91	56.11001	\$100	\$50

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size, ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 3901563, Petitioner notes that the citation was issued because explosives were not being stored in a suitable magazine or a safe location. The Petitioner states on an investigation into the facts surrounding the alleged violation has revealed: (1) Respondent

did not create the condition and was not employed at the mine when it came into existence; (2) neither Respondent nor his miners uses explosives in performing their duties at the mine; (3) Respondent took appropriate steps to bring the condition to the attention of his superiors; (4) when his superiors failed to rectify the problem, Respondent took independent steps substantially reducing the exposure of the miners to the danger posed by the condition; and (5) Respondent did not have authority to remedy the condition. The Petitioner argues given these circumstances the purposes of the Mine Act are not served by pursuing a civil penalty against Respondent and the citation should be vacated.

With respect to Order No. 3901573A and Citation No. 3901573B, which allege that Respondent was working 18 feet above ground without a safety belt and line and that safe means of access was not provided to the work area, Petitioner stated that: (1) a belt and line was not provided to Respondent, (2) Respondent made good faith efforts to abate the conditions.

Finally, Petitioner notes that Respondent is not permanently employed and is working presently on a sporadic basis.

#### CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the suggested vacation of Citation No. 3901563 and the suggested reduction in the penalties assessed for the remaining subject violations are warranted and in the public interest. Pursuant to 30 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is **APPROVED**.

#### ORDER

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in question, and Petitioner IS ORDERED to vacate Citation No. 3901563. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is **DISMISSED**.

*David F. Barbour*

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

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**AUG 18 1993**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-919
Petitioner	:	A.C. No. 15-10396-03557
V.	:	
	:	Docket No. KENT 92-920
WILGAR LAND COMPANY, INC.,	:	A.C. No. 15-10396-03558
Respondent	:	
	:	No. 3 Mine

**DECISION APPROVING SETTLEMENT**

Appearances: Mary Sue Taylor, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Barry Johns, Wilgar Land Company, Inc., Robinson Creek, Kentucky, for 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 hearings, the parties filed a motion to approve settlement agreement and to dismiss the cases. A reduction in penalty from \$2,755 to \$1,000 was proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is consistent with the criteria 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 \$1,000 in equal monthly installments commencing on September 1, 1993, and continuing on the first day of each month thereafter until fully paid.

  
Gary Melick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**AUG 18 1993**

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA)	:	
on Behalf of KIRBY SENTER,	:	Docket No. KENT 93-796-D
Applicant	:	
v.	:	PIKE CD 93-05
	:	
BLACK DRAGON MINING COMPANY,	:	No. 1 Mine
Respondent	:	

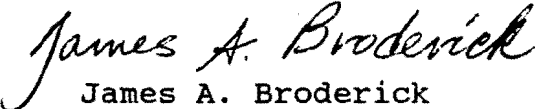
**ORDER GRANTING MOTION TO WITHDRAW**  
**REQUEST FOR HEARING**  
**AND**  
**ORDER OF TEMPORARY REINSTATEMENT**

On August 13, 1993, Respondent, who had filed a request for a hearing on the Secretary's Application for Temporary Reinstatement of Kirby Senter, orally moved to withdraw its request for hearing, based on the Secretary's representation that the complaint in this case would be filed on or before September 10, 1993.

Premises considered, the motion is **GRANTED**, and the hearing scheduled in Pikeville, Kentucky on August 18, 1993, is **CANCELED**.

I have considered the Secretary's application, including the affidavit of Lawrence M. Beeman, Chief of Technical Compliance and Investigation Division, MSHA, and determine that the miner's complaint to the Secretary was not frivolously brought.

Accordingly, **IT IS ORDERED** that Respondent shall, effective August 12, 1993, reinstate Kirby Senter to the position of a continuous miner operator at the Black Dragon No. 1 Mine or to an equivalent position with the same pay, duties and benefits he would receive had his employment not been terminated, and to continue him in that position pending action on the Secretary's complaint for permanent reinstatement.

  
James A. Broderick  
Administrative Law Judge

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**dcp**

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

AUG 18 1993

U.S. STEEL GROUP, MINNESOTA	:	CONTEST PROCEEDING
ORE OPERATIONS,	:	
Contestant	:	Docket No. LAKE 92-265-RM
	:	Order No. 4097118; 3/23/92
v.	:	
	:	Maintenance Dept. 21-00819
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
and	:	
	:	
UNITED STEELWORKERS OF	:	
AMERICA, LOCAL 1938,	:	
Miners	:	

## DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois;  
for Respondent;  
William M. Tennant, Esq., General Attorney,  
U.S. Steel, Pittsburgh, Pennsylvania,  
for Contestant;  
James Ranta, Staff Representative, United  
Steelworkers of America, Virginia, Minnesota,  
for Miners.

Before: Judge Barbour

In this proceeding arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq., U.S. Steel Group, Minnesota Ore Operations, is contesting the validity of an imminent danger order of withdrawal issued pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a), and an associated citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), for violation of a mandatory safety standard, 30 C.F.R. § 56.14211(b), and designated as a significant and substantial contribution to a mine safety hazard (an "S&S" violation). A hearing was held and the parties submitted posthearing briefs.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 1992, Federal Mine Inspector Arthur J. Toscano and Ronald E. Brendle, a supervisory mine inspector accompanying Toscano, conducted an inspection at U.S. Steel Group, Minnesota

Ore Operations' ("U.S. Steel") Minntac Plant, a surface taconite operation, located in St. Louis County, Minnesota. Toscano and Brendle were driving in an automobile leaving the mine for lunch, when Brendle observed Michael J. Brohman, a railroad ore car repairman at the plant, bending under a railroad ore car. The car was in a half-raised position. Brohman was bent at the waist near a wheel with his upper torso under the ore car. Brohman remained in this position for about 10 seconds and then moved to another wheel where he did the same thing.

Brendle stated to Toscano that Brohman's position looked "extremely dangerous," so Brendle and Toscano stopped and got out of the automobile to further observe Brohman. They saw Brohman lower the ore car, and raise another ore car and start to bend under the other car. At that point, a train stopped in the inspectors' line of vision (the inspectors were about 100 feet from Brohman), and the inspectors walked around the train to the work site and asked Brohman what job assignment he was doing.

Brohman stated that he was inspecting the ore cars -- a job that mostly required the inspection of brakes, wheels, air cylinders, and rocker pivot areas. The inspectors asked Brohman if he had to lift up the ore cars to do the job, and Brohman stated that he did. They asked Brohman to show them how he did it, and Brohman pulled an air control valve handle on a third ore car. The handle activated a compressed air system that raised the ore car 5 to 6 feet (in a half-up, pivoted position with all wheels on the track). Brohman explained he inspected the brakes and wheels while the ore car was in this position.

Toscano noticed that the ore car's compressed air system had leaked and that the car was slowly creeping downward. Toscano asked Brohman if he had the ore car blocked or mechanically secured to keep it from falling on him. When Brohman answered he did not, Toscano told Brohman that it was a very unsafe practice and Toscano issued an imminent danger withdrawal order, pursuant to section 107(a) of the Mine Act, to prevent him from doing the job without first blocking the ore car from unintended motion.

Minutes later, the inspectors spoke with Bill Holmes, a U.S. Steel supervisor, and Randy Pond, a U.S. Steel safety engineer for the maintenance and mining departments. Both knew of "a light-weight aluminum prop which was supposed to have been used to block these cars when they're out in the field to be inspected the way that [Brohman] . . . was inspecting them." Tr. 16. After the order of withdrawal was issued, Holmes instructed the employees to use aluminum props when inspecting railroad ore cars.

In conjunction with the order of withdrawal, Toscano also issued a citation, because the ore car was not blocked or mechanically secured in accordance with 30 C.F.R. § 56.14211, a

mandatory safety standard for surface metal and nonmetal mines. Section 14211(b) provides, in part: "Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering." Under 30 C.F.R. § 56.14211(d), "a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent." In addition, Toscano found that the violation was S&S.

#### **IMMINENT DANGER**

Section 107(a) of the Mine Act, 30 U.S.C. § 817(a), provides that if, upon inspection or investigation of a mine, an imminent danger exists, an order shall be issued requiring the operator of the mine to withdraw persons from the area until the imminent danger no longer exists. Section 3(j), 30 U.S.C. § 802(j), defines an imminent danger as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Commission has noted that "the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger." Rochester & Pittsburg Coal Co., 11 FMSHRC 2159, 2163 (November 1989) (citation omitted). The Commission has observed that use of the word "imminent" means the danger must be "ready to take place[;] near at hand[;] impending . . .[;] hanging threateningly over one's head[;] menacingly near." Utah Power & Light Co., 13 FMSHRC 1617, 1621 (October 1991) (citation omitted). The Commission also has noted that the courts have held that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." 11 FMSHRC at 2163 (emphasis omitted), quoting Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277, 278 (4th Cir. 1974). Finally, the Commission has adopted the Seventh Circuit's holding that an inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." Id. at 2164 (emphasis omitted), quoting Old Ben Coal Corp. v. Interior Bd. of Mine Op. App., 523 F.2d 25, 31 (7th Cir. 1975); see also Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (August 1992) (quoting same).

I conclude Toscano properly found an imminent danger and properly issued the order of withdrawal pursuant to section 107(a). The testimony establishes that each ore car is equipped with two air cylinders and one air control valve on each side of the car, which operate the dumping mechanism. The air is supplied by an air compressor on the locomotive and transferred



to the ore cars through metal pipe with rubber hose connections. Each air control valve has three positions -- charge, lap (which doesn't allow air in or out), and exhaust. The air cylinders are activated to the lifting position by pulling a handle attached to the air control valve. Pushing the handle releases the air and allows the cylinders to "float" back to the down position. One valve controls both cylinders. There is no solid, air-tight car because air always escapes between the seals of the pressurized piston.

The evidence establishes, and I find, that it takes about 7 to 10 seconds to lower an ore car by pushing the valve handle, and that without pushing the handle and if an airline ruptures, it takes approximately 30 seconds for the car to drift down. See Tr. 57-59. The evidence further establishes, and I find, that without pushing the handle and without a defective airline, it takes over one minute for an ore car to gradually lower, leaking air, from the fully raised position. Finally, I find that the clearance between the box chassis and the pillow assemblies on the wheel trucks is 20 inches, with 6 inches of clearance at the pivot arm assembly. There is no clearance at the perch between the wheels. I also find that an empty ore car weighs 40 tons.

Toscano testified that the air control valve handle is positioned near a set of wheels where someone with a tool or part of his clothing could bump the handle and release the car onto himself. Toscano noted that Brohman was wearing a long jacket (below his waist) that could possibly snag on equipment if he leaned over. In addition, Toscano testified that the ground conditions surrounding the ore car, i.e., tracks and spillages of ore, constitute tripping hazards that might cause someone to fall towards the ore car. Toscano also stated that blown components in the air system, e.g., a blown valve, a blown air line, or a bad leak in an air receiver tank, could cause the air system to fail and the car to rapidly descend. Toscano knew of hydraulic cylinder failures where there had been serious injuries. Toscano also knew of an accident involving an air cylinder used to control a chute with ore in it -- a hose, the fittings, and the connections blew and the cylinder failed.

Toscano, however, had no experience working with the rocker cars and was not familiar with the design of the ore car and its air system. Toscano did not inspect the ore car for problems with air lines or the air system -- he only heard air leaking and observed the car drifting down.

Brohman, on the other hand, has been a car repairman for twenty years. He testified that he could hear air leaks when the ore car was raised and could judge whether or not it was safe to go underneath the car. He stated that if the ore car had an air problem, it would not go to the raised position.

Brohman also stated that once the car had been raised, it was not likely to experience an air problem and drop because the mechanics of the compressed air system restricted air from escaping at one time. Brohman testified that no one could inadvertently activate the valve handle to cause the car to lower because the handle is located out of the way (one would have to lean into the car) and he had never known an air line to break, or a cylinder to fail when it was unloaded. Brohman was aware of a dump cylinder exploding during repair. However, the cylinder was under extreme pressure and, in any event, a miner would not be under an ore car when it was being dumped with a load.

When Brohman made his inspections, the ore cars were empty. Brohman and another car repairman each inspected about ninety cars per day. In an inspection, Brohman looked at the wheels, brakes and the undercarriage, as well as the floor beams, and air cylinders. Everything could be inspected without raising the car, but Brohman raised it to look at the undercarriage. Brohman stated that there was ample time to make minor adjustments when an ore car was in the raised position. It took Brohman about ten seconds to change a set of brake shoes -- positioning himself over the side frame. Brohman had done it this way (without blocking or securing) for twenty years -- it was a common, standard procedure at the plant.

Edward A. Muha, area manager of maintenance at the Minntac Plant for eleven years, testified regarding the compressed air system that raises the ore cars. Each car has four dump cylinders and two dump valves. The valves control the entry and release of air in the cylinders. The pipes supplying air to the cylinders are 1-1/4 inch in diameter and the exhaust dump valves are 1-1/2 inch in diameter. He testified that air would exhaust faster through the dump valve than through a broken line because the line is narrower than the valve. Thus, if air lines were disconnected or otherwise broken, it would be impossible to get a free and uncontrolled descent of the ore car. Further, if one dump cylinder failed, the other would still work, and if both cylinders fail at once a car still would not fall free and uncontrolled because the volume of air charging the bottom sides of the dump cylinder would cushion the drop. Regarding maintenance performed on ore cars at Minntac, Muha testified that he was aware of only one dump valve that had been replaced. He acknowledged that the valve seats had been replaced, but stated that this was as part of regular maintenance.

The Senate Report for the Mine Act states: "The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time." S. Rep. No. 181, 95th Cong., 1st Sess. at 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human

Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

In challenging the validity of the withdrawal order, U.S. Steel argues that the air system used to raise and lower the ore car is not subject to such failure or accidental activation that is likely to cause "free and uncontrolled" descent of the car. I agree, but I do not conclude this means the order was invalidly issued.

Based on Brohman's testimony that the valve handle was located out of the way, I find that it was unlikely that the valve handle would have been inadvertently activated. Unlike Toscano, Brohman was totally familiar with the mechanics and configuration of the ore car, and his testimony in this regard is credible. Further, I conclude that the failure of a cylinder, a cylinder valve, or an air line was unlikely given Muha's and Brohman's testimony and the lack of any evidence offered by the Secretary of such failings on empty ore cars while they were being inspected. I also conclude that the evidence fully supports finding that given the mechanics of the compressed air system, free fall of the car was unlikely. Muha's testimony regarding the effect of the restricted air lines on the descent of a car if the lines ruptured and the cushioning effect of air in the cylinders if the cylinders failed was persuasive.

Nevertheless, even assuming everything about the system was functioning normally, it is clear to me that Brohman had placed himself in an imminently dangerous position. It is undisputed that the 40 ton, raised ore car was not blocked before Brohman went under it to perform the inspection and any quickly accomplished and necessary repairs. The "safety devices" preventing the raised ore car from an uncontrolled descent were (1) the width of the air pipe and the exhaust dump valve, which were too narrow to allow all the air to escape at once, (2) the second cylinder which would still be working if the other cylinder failed, and (3) the volume of air charging the bottom sides of the pistons which would cushion the drop if both cylinders failed. However, none of these devices prevented the ore car from descending due to normal leaks in the air system, a descent that took approximately one minute from the fully raised position and when Brohman was first observed under the car, the car was but half raised; and none of these devices prevented the ore car from a complete descent onto Brohman if for some reason he had been unable to get out from under the car, e.g., loss of consciousness, injury restricting movement, snagged clothing, etc. (I do not accept that there is adequate clearance under the car to assure safety. As I have found, clearance varied from 20 inches to none.)

When Brohman worked under the unblocked ore car, danger was quite literally "hanging threateningly over [Brohman's] head,"

creeping nearer with each passing second. No intervening malfunction of the equipment or outside activation of the equipment was necessary to initiate the hazard. Compare U.S. Steel Group, Minnesota Ore Operations, Docket No. LAKE 92-247-RM (6/16/93) (ALJ Barbour) 11-12. Had Brohman been caught under the car, he would have been lucky to escape with only serious injuries, and it bears emphasis that an accident was not just a speculative possibility, for without any malfunction whatsoever, the ore car was in the process of lowering toward Brohman. Under these circumstances, I conclude that Brohman's failure to block the ore car against motion reasonably could have been expected to cause him serious physical harm or death.

**VIOLATION OF 30 C.F.R. § 56.14211(b)**

To prevent a raised component of mobile equipment from accidentally lowering, section 14211(b) requires that the component be blocked or mechanically secured before persons perform work "on top of," "under," or "from" it. The mandatory safety standard considers a component blocked or mechanically secured if a functional load-locking device or a device which prevents "free and uncontrolled descent" is used. 30 C.F.R. § 56.14211(d).

Brohman testified that it is standard policy to use a stand (prop) as a means of blocking the ore car when making a repair, but the stand is not required when making an inspection. Brohman stated that the purpose of the stand is "to do . . . major repairs." Tr. 77. When making inspections, Brohman stated he went under the car "[j]ust a little bit, just for a few seconds." Id. Sometimes Brohman made running repairs on the ore cars, e.g., changing the brake shoes. Muha testified that "car repairmen are . . . sent out to inspect the cars and make minor repairs, change brake shoes, et cetera." Tr. 91. Muha testified that the prop is used only for repair and not for inspection because the man doesn't put himself in a precarious position and it is not a free and uncontrolled descent. "[B]ut when the man is putting himself in a position where he needs to be under there and do some minor repairs, [the prop] is used." Tr. 96. (Brohman and Muha appear to be at odds over whether the stand was used for "major" repairs only or was also required for "minor" repairs. In any event, both agreed it was not required for inspections -- a position I reject when, like Brohman, a miner puts all or part of his body under a car during the inspection.) Muha further stated that the inspector is not supposed to go under the car when he's inspecting. He's supposed to make the inspection from the outside (Tr. 96-97) because "if there are leaks, . . . [the cars] come down and that's the only reason." Tr. 101.

I conclude that Brohman violated section 14211(b) by not blocking the ore car before he leaned under it to perform his

inspection. The regulation requires the component to be blocked or mechanically secured before persons perform work. It is true that Brohman was not conducting the inspection in an area where repair work was usually performed and that Brohman did not anticipate he would be required to perform major repairs to the car while in the field. However, the regulation does not distinguish between work performed during a field inspection and work performed in a maintenance shop, nor does it distinguish between minor and major repairs. Brohman positioned himself under the raised and unblocked car to inspect it. Brohman's testimony makes clear that inspection of the undercarriage was a preliminary step to any repair work that had to be done and, I therefore conclude, inspection was a part of the work cycle. Because section 14211(b) applies to all work performed under a raised component of mobile equipment, it applies both to inspection and any subsequent repair that Brohman would have had to make, and the ore car should have been blocked or secured against motion.

#### **SIGNIFICANT AND SUBSTANTIAL**

Under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), a "significant and substantial" 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." The Commission has held that a violation is significant and substantial within the meaning of section 104(d)(1) 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). The Commission has stated:

Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger . . . . At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes--mere existence of a violation, and existence of an

imminent danger, the latter of which contains elements of both likelihood and gravity.

Id. at 828 (emphasis omitted). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained:

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

The Commission also has held that the significant and substantial nature of a violation must be determined in the context of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). The Commission has emphasized that "the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis omitted).

Because I have concluded that Brohman's conduct constituted an imminent danger and a violation of a mandatory safety standard, I conclude that it also constituted a significant and substantial violation. The evidence establishes that there was a safety hazard contributed to by the violation in that there was a possibility of the ore car lowering onto Brohman. Moreover, any injuries Brohman would have suffered reasonably could have been expected to be at least of a serious nature. Had normal mining operations continued there would have been a reasonable likelihood of an event in which there would have been an injury.

#### FINDINGS AND CONCLUSIONS

Based on the foregoing, I hold that Order/Citation No. 4097118 issued on March 25, 1992, validly states a condition or practice constituting an imminent danger, and properly sets forth a violation of section 56.14211, and validly states that the violation was of a significant and substantial nature.

ORDER

Accordingly, Order/Citation No. 4097118 is AFFIRMED.

*David F. Barbour*

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**AUG 18 1993**

WILLIAM KROH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 93-181-D
v.	:	MSHA Case No. WILK CD 93-01
	:	
UAE COAL CORPORATION	:	Harmony Mine
ASSOCIATES,	:	
Respondent	:	

**DECISION APPROVING SETTLEMENT**

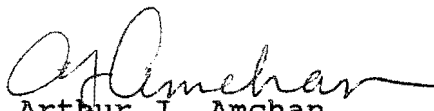
Before Judge Amchan:

This case is before me pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties have filed a stipulation of settlement.

I have reviewed the stipulation and find that it is consistent with the public interest.

**ORDER**

WHEREFORE IT IS ORDERED that the stipulation of settlement is APPROVED. Upon payment of the amount set forth in paragraph 1 of the stipulation, this case is DISMISSED.

  
Arthur J. Amchan  
Administrative Law Judge  
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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

AUG 19 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-246-M
Petitioner	:	A.C. No. 09-00265-05515
	:	
v.	:	Junction City Mine
	:	
BROWN BROTHERS SAND COMPANY,	:	
Respondent	:	

## DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Atlanta, Georgia,  
for Petitioner;  
Carl Brown, Brown Brothers Sand Company,  
Talbotton, Georgia, for Respondent.

Before: Judge Barbour

This civil penalty proceeding was initiated by the Secretary of Labor ("Secretary") against Brown Brothers Sand Company ("Brown Brothers") pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The issues are whether Brown Brothers violated three mandatory safety standards for surface metal and non-metal mines and, if so, the amount of the civil penalty to be assessed for each violation. A hearing was held in Talbotton, Georgia.

At the commencement of the hearing the parties stipulated to the following:

1. Brown Brothers is subject to the Mine Act and the Commission's jurisdiction;
2. Brown Brothers is a small sand mine operator employing nine to ten persons;
3. The Secretary's hearing exhibit P-1 is a computer printout reflecting Brown Brothers' history of prior violations, which shows five prior citations during the period from August 12, 1989 to August 11, 1991;
4. Each of the citations was timely abated by Brown Brothers in good faith.

See Tr. 3-4.

### DISCUSSION

On February 12, 1992, MSHA Inspector Earl Goldsberry issued three citations to Brown Brothers. On March 13, 1992, the Secretary proposed civil penalties of \$50 for each alleged violation. Brown Brothers contested the citations. On April 10, 1992, the Secretary amended the proposed civil penalties from \$50 to \$20. Exhibit R-1; Tr. 48-50.

<u>Mine Act Section</u>	<u>Citation Number</u>	<u>Date</u>	<u>30 C.F.R. Section</u>
104(a)	3601852	02/12/92	56.12001

Citation 3601852 alleges that Brown Brothers used an incorrect type and capacity of fuse in a circuit transmitting power from a power cable to an air compressor. The citation states: "The 10/4 AWG power cable suppl[y]ing 220 volts to the air compressor located beside the employee house was fuse[d] with 200 amp fuses." Exhibit P-2. The citation alleges a violation of section 56.12001 which states:

Circuits shall be protected  
against excessive overload by fuses  
or circuit breakers of the correct  
type and capacity.

Inspector Goldsberry testified that he followed the National Electric Code to determine the correct type and capacity of fuses or circuit breakers, and that under the code a 30 amp fuse was required in this instance. Tr. 15, 21. He testified that the circuit was "over-fused . . . [I]f a fault would occur on that wire[, the fault] . . . would burn the wire in two, and possibly energize . . . a piece of metal equipment or create a fire hazard." Tr. 14-15. He further testified that the correct type and capacity of fuse would prevent such an occurrence because "a 30 amp fuse would have opened up and not damaged the circuit." Tr. 15.

Goldsberry considered the risk of injury unlikely, based on the nature of the condition and the amount of limited exposure of employees to the condition, but if injury had occurred, he believed a fatality through electrocution, reasonably could have been expected. Id. He did not find the violation constituted a significant and substantial contribution to a mine safety hazard (an "S&S" violation). He regarded the degree of Brown Brothers' negligence as moderate, based on the electrical background of Brown Brothers' employees. Tr. 21-22. Goldsberry stated that if Brown Brothers employed an electrician, he would have held the operator to a higher standard. Tr. 22.

Carl Brown, the owner and operator of Brown Brothers, testifying on behalf of the company, stated that Goldsberry

failed to notice other violations that Brown indicated were in existence when Goldsberry conducted the inspection. In so doing, Brown appeared to be attempting to impeach Goldsberry's competence as an inspector. Tr. 45-46.

There is no dispute, however, about the existence of the alleged violation, and I therefore find Brown's attack on Goldsberry's credibility (if that is what it was) to have been irrelevant. I further find that use of the incorrect fuse created a potential safety hazard, but I conclude that the violation was not serious. I agree with Inspector Goldsberry that an injury was unlikely to occur because of the lack of employee exposure. I also conclude that Brown Brothers was negligent in failing to use the correct type and capacity of fuse.

I find the Secretary's amended proposed assessment of \$20 appropriate, based on the non-serious nature of the violation, Brown Brothers' negligence, Brown Brothers' stipulated small history of previous violations, its small size, its good faith abatement of the violation, and the lack of effect of the penalty on Brown Brothers' ability to continue in business.

<u>Mine Act Section</u>	<u>Citation Number</u>	<u>Date</u>	<u>30 C.F.R. Section</u>
104(a)	3601854	02/12/92	56.12008

Citation 3601854 alleges that Brown Brothers used an improper fitting around a power cable where the cable entered an air compressor. The citation states: "The 220 volt power cable to the air compressor located near the employee house did not enter the metal frame of the switch box through a proper fitting." Exhibit P-3. The citation alleges a violation of section 56.12008 which states:

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

Inspector Goldsberry testified that the standard protects against strain on electrical connections and prevents mechanical damage that could occur if the cable moved on sharp edges. Tr. 26. The fitting causes the cable to be tight through the hole with no maneuvering room. Id. Goldsberry testified that here the cable had no fitting whatsoever. He was of the opinion that regardless of the fact that the cable was not damaged and

was fully protected by insulation, it still should have been protected by a fitting where it entered the compartment to comply with the standard. Tr. 30-31.

Goldsberry testified that the air compressor was located in an open area and there was no evidence of any frequency of personnel coming in contact with it during the course of a workday. Tr. 29, 31. Goldsberry was told that the air compressor was only used occasionally, when a trucker needed air in a tire. Tr. 31-32. The area surrounding the compressor was dry. Tr. 31.

Goldsberry determined that injury was unlikely to occur as a result of the condition because of the limited exposure of personnel to the condition and because of the dry nature of the surrounding area. However, if an injury had occurred, he believed that death by electrocution reasonably could have been expected. Tr. 27. The violation was not designated as S&S. Brown Brothers' negligence was rated as moderate, for the same reason as Citation No. 3601852. Id. The condition was promptly abated by disconnecting the air compressor from the power cable. Tr. 27-28.

Again, there is no dispute about the existence of the violation and I find that it occurred as alleged. I further find that use of the improper fitting created a potential safety hazard, but I agree with Goldsberry that the violation was not serious. As Goldsberry noted, the air compressor was located in a dry area and there was no evidence of any frequency of personnel coming in contact with it during the course of a workday. I also conclude that Brown Brothers was negligent in failing to use the proper fitting.

I find the Secretary's amended proposed assessment of \$20 appropriate for the same reasons as previously set forth for Citation No. 3601852.

<u>Mine Act Section</u>	<u>Citation Number</u>	<u>Date</u>	<u>30 C.F.R. Section</u>
104(a)	3601853	02/12/92	56.12013(b)

Citation 3601853 alleges that Brown Brothers used a power cable that had an inadequate splice. The citation states: "The power cable suppl[y]ing 220 volts to the AC Lincoln Welder had a splice that was not insulated to a degree at least to the original insulation and will not exclude moisture." Exhibit P-4. The citation alleges a violation of section 56.12013(b) which states, in part:

Permanent splices and repairs made  
in power cables, including the ground  
conductor where provided, shall be:

\* \* \*

(b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture;

Inspector Goldsberry testified that the splice in the welder's power cable "wasn't a very well made splice, just some tape put around it; and the outer jacket hadn't been replaced around the conductors." Tr. 34. He testified that the danger of a "sloppy splice" was that someone could possibly step on it and be electrocuted. Id. Goldsberry testified that MSHA and the regulation require a splice that will exclude moisture and is insulated. Tr. 38. In Goldsberry's opinion, the cited splice would not exclude moisture because the tape around the individual conductors was not tightly wrapped and the cable's three phase wires were not wrapped as a unit to simulate the cable's missing outer jacket.

Brown testified that Brown Brothers' personnel wear rubber boots. Tr. 47. Goldsberry testified that wearing rubber boots would reduce the risk of being electrocuted. Tr. 39-40. Goldsberry guessed that the welder would be used approximately once a day, and he noted that there was a house over the welder, but that anyone going inside the house would be subject to stepping on the splice. Tr. 41-42.

Carl Brown testified that Brown Brothers had done its own work for ninety years, and that the company could not hire electricians, except for special assignments. Tr. 47-48.

Goldsberry determined that injury was unlikely because of limited access to the equipment and the splice. Also, the area was kept dry. Tr. 34-35. Goldsberry did not find the violation was S&S, and he rated the degree of Brown Brothers' negligence as moderate. The condition was abated by remaking the splice. Tr. 35.

As with the previous violations, there is no dispute about the existence of the alleged conditions, and I find Brown Brothers violated the standard as charged. I further find that the inadequate splice created a potential safety hazard but that the violation was not serious. Access to the welder and splice was restricted, the welder and the splice were protected from the weather, and Brown Brothers' personnel wore rubber boots, all which decreased the risk of injury. I also conclude that Brown Brothers was negligent in allowing the violation to exist.

I find the Secretary's amended proposed assessment of \$20 appropriate for the same reasons as previously set forth for Citation Nos. 3601852 and 3601854.

**ORDER**

Brown Brothers IS ORDERED to pay civil penalties of twenty dollars (\$20) each, totaling the sum of sixty dollars (\$60) for the violations cited in sections 56.12001, 56.12013(b), and 56.12008 respectively. Payment of the assessed amounts is to be made to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this matter is **DISMISSED**.



David F. Barbour  
Administrative Law Judge  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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AUG 23 1993

DONALD R. HOLDER,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 93-361-DM
v.	:	WE MD 93-06
	:	
NEVADA GOLD MINING, INC.,	:	Sleeper Mine
Respondent	:	

ORDER OF DISMISSAL

**Before:** Judge Morris

The parties reached an amicable settlement in the above case and Complainant requested that his complaint be dismissed.

For good cause shown, the motion is **GRANTED** and the case is **DISMISSED**.

  
John J. Morris  
Administrative Law Judge

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AUG 24 1993

CYPRUS PLATEAU MINING CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEST 92-370-R
	:	Citation No. 3850267; 3/10/92
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 92-371-R
ADMINISTRATION (MSHA),	:	Order No. 3588140; 3/12/92
Respondent	:	
	:	Star Point No. 2
	:	Mine I.D. 42-00177
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-485
Petitioner	:	A.C. No. 42-00171-03633
v.	:	
	:	Star Point No. 2
	:	
CYPRUS PLATEAU MINING CORPORATION,	:	
Respondent	:	

**DECISION**

Appearances: R. Henry Moore, Esq., Pittsburgh, Pennsylvania,  
for Contestant/Respondent;

Margaret A. Miller, Esq., Office of the Solicitor  
U.S. Department of Labor, Denver, Colorado,  
for Respondent/Petitioner.

Before: Judge Morris

These consolidated cases are contest proceedings and a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 2801, et seq. (the "Act").

After notice of the parties, a hearing commenced in Salt Lake City, Utah, on April 13, 1993.



The parties filed post-trial briefs.

WEST 92-371-R

Ventilation Tubing

In this case Cyprus Plateau Mining Corporation ("Cyprus") contests MSHA Order No. 3588140. The order was issued under Section 104(d)(1) of the Act to the Star Point No. 2 Mine on March 12, 1992.

The order, under the heading captioned "Condition or Practice" alleges the following:

As a result of a 103(g)(1) complaint it was determined that in the 3rd Right Working Section (two entry system) a mine opening had been holed into a permanently supported entry. The Section Foreman told the crew to hang the ventilation tubing. One member of the crew asked him if he wanted a row of roof bolts installed first, and another member of the crew asked if he wanted jacks set. The foreman said it was quitting time and that they were going to hang the tube and go home. The unsupported area in the breakthrough was approximately 15 to 20 feet long. The approved Roof Control Plan states when a mine opening holes into a permanently supported entry, no work shall be done in or inby such intersection until the new opening is either permanent supported or timbered off with at least 1 row of timbers or jacks.

The order further alleges Cyprus violated 30 C.F.R. Section 75.220(a)(1) which provides:

75.220 Roof Control Plan

(a) (1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

ISSUES

The issues are whether MSHA's order described with particularity the nature of the violation as required by Section 104(a) of the Act. Further issues are whether Cyprus violated the regulations. If such violations occurred, were they S&S, unwarrantable, and what penalties, if any, should be assessed.

Section 104(a) of the Act provides as follows:

Sec. 104.(a) If, upon inspection or investigation, the Secretary of his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

### STIPULATION

At the commencement of the hearing the parties stipulated as follows:

1. Cyprus Plateau Mining Corporation is engaged in mining and selling of bituminous coal in the United States, and its mining operations affect interstate commerce.
2. Cyprus Plateau Mining Corporation is the owner and operator of Star Point No. 2 Mine, MSHA I.D. No. 42-00171.
3. Cyprus Plateau Mining Corporation is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation and order were properly served by duly authorized representatives of the Secretary upon an agent of respondent 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 Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The proposed penalties will not affect Respondent's ability to continue business.
8. The operator demonstrated good faith in abating the violations.

9. Cyprus Plateau Mining Corporation is a large mine operator with 1,574,629 tons of production in 1991.

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 and order.

#### EVIDENCE

**WILLIAM M. TAYLOR** has been a coal mine inspector since 1982. He is experienced in underground mining.

On March 12, 1992, with MSHA inspector Dale Smith he visited the Cyprus Mine in Carbon County, Utah.

The visit was undertaken because he had received a complaint filed under Section 103(g) of the Act. The complaint did not involve imminent danger. Mr. Taylor removed Complainant's name from the 103(g) form before giving it to the company.

It was alleged the violation mentioned in the 103(g) had occurred in September 1991.

Mr. Taylor and Mr. Smith separately interviewed the five men who were on the crew. Those interviewed were Eric Chiaretta, Mark Stevens, Seldon Barker, Sheldon Anderson, and Robert Powell (section foreman).

Exhibit M-2 is a diagram Mr. Taylor made after his interview with the miners. The "Xs" shown on M-2 are the permanent roof supports and the area without roof bolts has been colored in yellow. About 15 to 22 feet of the entire area was unbolted. On the day of the alleged violation the Powell crew had mined through the crosscut into the No. 2 entry. Mr. Taylor identified on M-2 with an orange pen the area where the miners were hanging tubing. In Mr. Taylor's opinion five miners had undoubtedly worked in the unsupported area after they had broken through the intersection. In addition, it would not be possible to hang tubing without being under an unsupported roof.

The company's Roof Control Plan as it relates to unsupported openings at intersections states as follows:

Q. UNSUPPORTED OPENINGS AT INTERSECTIONS:

When a mine opening holes into a permanently supported entry, room or crosscut, or when new openings are created by starting a side cut, no work shall be done in or inby such intersection until the new opening is either permanently supported, timbered off with at least one (1) row of temporary support (posts or jacks) or at least one (1)

row of permanent supports are installed across the opening in the bolting pattern.

In Mr. Taylor's opinion, installation of the tubing itself can cause miners to be under unsupported roof. Further, exposure to unsupported roof and resulting roof falls cause more fatalities than any other hazard in coal mines.

The inspector further testified as to accidents involving unsupported roofs that occurred in the late 1970's in this mine.

Mr. Taylor believes that the situation was due to the operator's unwarrantable failure because in his opinion it meets the criteria for such a violation. Further, it was an S&S violation.

In Mr. Taylor's opinion, the failure to use bolts or jacks supports the unwarrantable failure allegation. Mr. Taylor did not know who the individual was who stated to the foreman that bolts or jacks should have been installed. However, he believed it was stated by one of the witnesses he interviewed. According to Mr. Taylor's notes, the unsupported area was 15 to 20 feet.

Mr. Taylor agrees the time of the alleged violation of the Roof Control Plan and the filing of the 103(g) complaint was six months (September to March).

Section 75.222(e) contains criteria for a Roof Control Plan for unsupported openings at intersections. The plan itself refers only to the term "work." "Travel" is not included in the plan.

Mr. Taylor further agrees that the place of the violation, as shown from his notes, was either the 2nd Right or the 3rd Right section.

**SELDON L. BARKER** is employed at the Cyprus Mine as a shuttle car operator. He was involved in hanging the ventilation tubing on the day of this incident involving the Robert Powell crew. They were working in the RIGHT section and it could have been 2d Right or 3d Right. There is about a 500-foot difference. However, there is no difference in the roof.

This incident occurred toward the end of the graveyard, a production shift.

Mr. Barker identified the location of the roof bolter in No. 2 entry (marked in blue on Exhibit M-2).

The ventilation tubing itself is two feet in diameter and about 10 feet long and it takes two tubes to cross a 20-foot-wide intersection.

The area marked in yellow on Exhibit M-2 is the last cut between No. 1 and No. 2 entry.

The ventilation tubes insert one into the other, male to female. A miner holds the first tube and it takes two or three people to hang it. They were hanging it as fast as they could. Mr. Barker did not recall any conversation regarding unsupported roof nor did he hear anyone say anything about installing roof support.

Mr. Barker was not sure if he was under any unsupported roof when he was hanging the ventilation tubing but the nature of the job could possibly put him under such unsupported roof.

Mr. Barker knows you don't go out past unsupported roof and expose yourself to the hazard of having it fall on you.

The weakest part of the roof is the first few feet of the breakthrough and that portion falls regularly.

It is the supervisor's decision to decide if jacks or roof bolts should be set.

Mr. Barker was not sure if he was under unsupported roof and he didn't tell the foreman to install jacks or roof bolts. It took about five minutes to get the tubing up.

**ERIC CHIARETTA** was a Cyprus roof bolter in September 1991 and he was familiar with the incident involving Robert Powell as the supervisor.

They were working in the 2nd Right or 3rd Right and they were at the end of the graveyard shift, which is an eight-hour shift.

Mr. Chiaretta was a roof bolter on the Powell crew. He identified the location of the roof bolting machine as being 15 feet outby the intersection.

Mr. Chiaretta was present when they discussed hanging the tubing and he agreed with the statements of witnesses Taylor and Barker.

In September 1991 at the time of the incident, the crew hung three to four pieces of ventilation tubing and there were five to six of them involved. Powell also assisted.

Gary Groom, a member of the group, asked Powell if he wanted to put in a row of bolts. Groom is no longer in the State of Utah, and he did not testify at the hearing.

Mr. Chiaretta did not remember being under unsupported roof but such a possibility exists. You could go into such an area.

If unsupported roof falls it can cause a fatality. The roof in this mine was fair to poor. The 2nd Right and/or 3rd Right area consists of a lot of mud and siltstone and it has fair top.

Prior to September 1991, normally the miners would support any unsupported area and then hang ventilation tubing. There were jacks available on the roof bolting machine.

Ventilation tubing can obscure your view of any roof hazard as it is being installed. The roof bolts were four six-inch plates.

**SHELDON P. ANDERSON** has been a Cyprus mechanic for 13 years and is familiar with the incident that occurred in September 1991 at the time they holed through the No. 2 entry. He had discussed this incident with Inspector Taylor. About 500 feet separates 2d Right and 3rd Right.

After they broke through into the No. 2 entry, the area was not supported. The unsupported area of the roof was 12 to 15 feet and the distance across the intersection was 19 to 20 feet.

The crew hung at least three pieces of tubing. While hanging the tubing, Mr. Anderson might have had his arm out under the unsupported roof. He recognizes that it is an unsafe practice to work under unsupported roof.

Mr. Anderson stated that the day after this incident occurred it was discussed and decided that in the future they would install jacks or roof bolts before installing ventilation. Mr. Powell was present and he said they were in a hurry. Mr. Anderson knew it wasn't right. It took about five to six minutes to hang the tubing. Mr. Anderson was nervous about testifying. Mr. Powell didn't force him to do anything that was unsafe. There was a possibility that he was under unsupported roof. The conversation they had about this matter was at a regular safety meeting. It may have been the following week. Mr. Powell said, "We were all responsible"; but he didn't think it was unsafe.

**LEE E. SMITH**, an MSHA field office supervisor is an individual experienced in underground mining and roof control plans.

Mr. Smith identified Exhibit M-5 which he helped draft. M-5 are the MSHA regulations relating to 30 C.F.R. Part 75 entitled "Safety Standards for Roof, Face and Rib Support." It is the final rule effective January 27, 1983.

It is MSHA's intention, according to Mr. Smith, to prevent travel under all roof and the agency feels very strongly about any miners working or traveling under such unsupported roof. M-5 requires permanent or temporary supports on five-foot centers before "any other work or travel in the intersection." On the other hand, the operator's Roof Control Plan only contains the term "work".

According to Mr. Smith, the term "work" means any activity and the purpose of the Roof Control Plan is to prevent all exposures under unsupported roof.

#### CYPRUS EVIDENCE

**ROBERT POWELL**, section foreman is experienced in underground mining.

In September 1991 Mr. Powell was supervisor of the 2nd Right section. In that section the conditions of the roof were good. They were taking 40-foot cuts.

Mr. Powell identified the production exhibit for September 13 in the 2d Right section. (Ex. R-1). He did not know what date the ventilation tubing incident occurred.

The roof in the 3rd Right section is the same as the 2d Right section. But without knowing the exact location, Mr. Powell cannot search out a production report.

Ventilation tubing is taken down to keep the continuous miner from chewing it up; then it is restored to ventilate the face.

Mr. Powell vaguely remembers the incident being discussed. There were no miners under the unsupported roof and it took two to three minutes to put the tubing back up. The crew was not at risk.

The term "work" as is used in the Roof Control Plans means mining with a continuous miner or roof bolting. Preshift exams are also included as well as rock dusting, testing the roof, gas checks, etc. No one from Cyprus said that definition was wrong.

Mr. Powell agrees the roof bolter was sitting outside the entry. If Mr. Groom had come to him in September 1991 and said it was unsafe to put up ventilation tubing without putting up jacks, they would have set jacks. He does not recall any such conversation with Messrs. Groom and/or Chiaretta. Setting jacks involves a greater risk than hanging ventilation tubing.

Mr. Powell does not dispute that in September 1991 the incident as described by Chiaretta occurred. There was only one occasion in September when the holing through occurred as described by the witnesses. Mr. Powell indicated the crew was never under unsupported roof; it is not a safe mining practice to be under such roof.

**ROBERT A. LINDSEY** is a Cyprus scoop operator who he has four years underground experience. He is familiar with this incident and with the conditions at the time. He recalls that three ventilation tubing pieces were hung and they had been lying against the ribs to

keep the continuous miner from tearing them up. The only tubing was down the middle of the crosscut.

Mr. Lindsey did not go out under any unsupported roof nor did he see anyone else do so; there was no adverse roof in the area. No one suggested that roof bolts or jacks be installed in the unsupported crosscut.

Mr. Lindsey remembers that incident happened at the end of the shift. He believed it was highly unlikely he would have stepped out; however, an arm or leg or part of his body could have been under the unsupported roof. This incident occurred in 2d Right.

It is now the policy of Cyprus not to go beyond the last open crosscut.

**CARL J. DOWNARD** is a miner helper. He did not remember hanging the ventilation tubing. Further, he didn't hear anyone complaining about installing bolts and jacks.

The crew was in 2d Right with Mr. Powell. At the later safety meeting, Mr. Groom expressed concern that the activities were unsafe but he didn't know if Groom or Chiaretta had said anything to Mr. Powell, who was also at the safety meeting. Mr. Powell said it wouldn't happen again in any event.

**RICHARD TUCKER** is the senior safety representative for Cyprus. Mr. Tucker has hung ventilation tubing; it is not difficult to hang. The adjustments are made by the miner simply swaying with the tubing.

Mr. Tucker believed this violation was not S&S nor was it unwarrantable.

After Cyprus received the order in this case, it attempted to change its Roof Control Plan to establish a different definition of the term "work".

Mr. Tucker admitted that there was no reason to believe that this incident had not happened. He initially learned about it when MSHA's order was issued. The Roof Control Plan does not permit miners to go inby under unsupported roof at intersections.

The primary responsibility for safety rests with the superintendent. Mr. Powell was not disciplined as a result of the incident in question.

Mr. Tucker further agreed that no part of the body of a miner, such as an arm or leg can go under unsupported roof under any circumstances. Roof bolts support a six-inch by six-inch area.



Cyprus agrees that hanging tubing in by an unsupported intersection can be safe or unsafe depending on the roof conditions.

The witness introduced a citation issued by an Inspector Ganser which was neither S&S nor unwarrantable. (Ex. R-2.) Mr. Tucker was not able to make an estimate as to whether it was safe for miners to do what they did in this case because he didn't know the conditions of the roof. He determined that there was a violation of the Roof Control Plan from what he has been told and this is why he asked Cyprus to change its definition of "work."

He believed there is reason for disagreement concerning the definition of "work." He did not believe hanging tubing constituted work and it's okay to go under unsupported roof to do things that are not considered to be "work". According to the Roof Control Plan, when you go into an area it depends on whether the roof is safe. However, no miner should ever be exposed to unsupported roof.

Mr. Tucker, who has worked with other MSHA districts, indicated that miners will go in by unsupported roof for preshift, for ventilation and for rock dusting.

**WILLIAM TAYLOR** was recalled to testify concerning the "Ganser" citation. When this citation was issued, the jacks were present although they were six feet two inches apart (not five feet as required); also, it was not shown that anyone was working in the area.

He indicated the difference between the "Ganser" citation and this citation was that the Powell crew was in a hurry and was tired. Mr. Taylor believed the MSHA office had probably talked to him about the correct citation, particularly, in view of the fact that there were two "Ganser" citations.

#### EVALUATION OF THE EVIDENCE

As a threshold matter, Cyprus argues the Secretary failed to comply with the particularity requirements of Section 104(a) of the Act. In this case it is true that the Secretary failed to establish the exact date and place of the alleged violation. The violation may have occurred September 13, 1991, or on some other date in September. In addition, it may have occurred on 2d Right or 3rd Right.

The Commission ruled that the primary reasons for the specificity requirements are "for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter. Jim Walters Resources, Inc., 1 FMSHRC 1827, 1829 (November 1979). See also Cyprus Tonopah Mining Corporation, 15 FMSHRC 367 (March 1993) wherein the Commission repeated its view that the re-

quirement serves the purpose of allowing the operator to discern what conditions require abatement and to adequately prepare for a hearing.

The record shows the witnesses who testified for the Secretary and Cyprus knew what event was being discussed and what actions were taken. Some witnesses testified the incident took place in 2d Right and some testified it was 3rd Right. The sections are in the same area of the mine, about 500 feet apart. (Tr. 97, 105, 152). Everyone agreed it occurred in September 1991. (Tr. 105, 152).

Section foreman Powell acknowledged there was only one "hole-through incident." While he only "vaguely" recalled it, he testified at length concerning the facts.

In this case abatement of the violative condition was not involved.

Cyprus failed to show any prejudice and the specificity section does not warrant a dismissal of this case.

In this case there is no direct evidence that any miners were under unsupported roof when installing the ventilation tubing. However, it is clear that the work (hanging the tubing) was being done "inby" <sup>1</sup> the intersection without the new opening being supported in any manner. Such work constitutes a violation of the roof control plan.

The credible evidence establishes such "inby" work and on the record I enter the following:

#### FINDINGS OF FACT

1. Sheldon L. Barker, a shuttle car operator, was involved in hanging the vent tube. (Tr. 103, 104).
2. Mr. Barker agreed with Mr. Taylor as to the location of the roof bolting machine. (Tr. 106).
3. The crew was hanging at least two vent tubes across the 20-foot intersection. (Tr. 108).
4. The area marked in yellow on M-2 is the last cut between No. 1 entry and No. 2 entry. (Tr. 108, 109).

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<sup>1</sup> "Inby" has been defined as "toward the working face, or interior of the mine." A Dictionary of Mining, Mineral and Related Terms, at 572.

5. They hung the tubing at the end of the shift and they were in a hurry to get out of there. (Tr. 110).

6. Mr. Barker "can't really be sure" if he was out under unsupported roof when hanging the tubing. (Tr. 112-113).

7. There is a "good possibility" that from the nature of the hanging the vent he might be out under the unsupported roof. (Tr. 113).

8. Eric Chiaretta stated five or six miners were hanging three or four lines of tubing. Mr. Charietta couldn't recall if he "was actually out in the intersection or not," but "the possibility was there to step out." (Tr. 136). While hanging the tubing you are not standing still. (Tr. 136). There was 15 to 20 feet of unsupported roof. (Tr. 137).

9. Sheldon Anderson hung the tubing. To hang the tubing "you may have an arm sticking out" or you "may move with the tube." (Tr. 151, 154).

Section foreman Powell asserts it was not "work" within the meaning of the roof control plan to hang the tubing. In addition, they were never under unsupported roof. [Mr. Powell's views of the roof control plan are erroneous. Hanging tubing is "work" in by any unsupported intersection.]

Mr. Tucker seeks to persuade the Judge that the hanging of vent tubing is relatively "very easy." (Tr. 303). I am not persuaded since it is overhead work, an effort is being made to insert one sleeve into another, vision is limited, and miners must move and sway with the tubing. Those factors cause me to conclude that there is a reasonable likelihood these miners would be under the unsupported roof. It may well be that witnesses Powell and Lindsay did not go under unsupported roof when hanging the tubes. However, the likelihood still exists and therein lies the violation.

#### SIGNIFICANT AND SUBSTANTIAL

A violation is properly designated as being 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 a reasonably serious nature.

See also Austin Power Co. V. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), affg. 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007, 2011-2012 (December 1987).

The evidence establishes factors (1), (2) and (4) of the Mathies formulation. In connection with paragraph (3) of Mathies, Cyprus asserts the S&S allegations fail because the evidence did not consider the specific roof conditions in the entry and other factors related to the likelihood of a roof fall. (Tr. 62-63, 92-93, 95). I agree. Chiaretta described the roof as "fair to poor." However, the inspector did not discuss the roof conditions with the miners. Although additional roof support was used, the inspectors were not present at the time of the hole-through. As a result there was no evidence of paragraph (3) of Mathies.

A credibility issue arises concerning the two citations issued by Inspector "Ganser." These two citations were not S&S. However, I give the Ganser citations zero weight. Basically, the facts in the Ganser citations were not the same as involved here.

The S&S allegations should be stricken.

#### UNWARRANTABLE FAILURE

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

In this case, Mr. Powell interpreted the roof control plan to mean that certain activities including pre-shift examinations establishing ventilation or preparing the mine by rockdusting, scaling

bad rib, sound testing the roof, or gas checks were permitted inby an unsupported opening. (Tr. 246, 262).

Mr. Powell's interpretation is somewhat supported by the criteria in 30 C.F.R. § 75.222(e). While the criteria refer to "work or travel," the Cyprus roof control plan refers only to "work." (Tr. 90). The absence of "travel" on Cyprus's work plan suggests that some activity could be permitted inby an unsupported roof.

As previously stated, Mr. Powell's view is erroneous. In view of the hazards involved by roof falls I agree with Mr. Smith's opinion that all exposures to unsupported roof are prohibited. (Ex. M-5).

However, a good faith belief (although mistaken) that no violation existed excludes the imposition of an unwarrantable failure finding, Florence Mining Co., 11 FMSHRC 747, 753 (May 1989); Southern Ohio Coal Co., 11 FMSHRC 138, 143 (February 1988); Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990).

For these reasons the unwarrantable failure allegations are stricken.

A credibility issue arose as to whether some crew members may have suggested to Mr. Powell, the crew foreman, that roof bolts or jacks be installed before rehangng the tubing. While these facts were alleged in Order No. 3588140, Inspector Taylor could not recall if anyone made such statements during his interviews. In addition, Mr. Taylor's notes did not reflect such statements. Messrs. Barker, Anderson, Kindsey, and Downard were not aware of any such conversation. (Tr. 112, 124, 155, 280-182, 295). In sum, I credit Mr. Powell's testimony that he did not recall anyone in general or specifically Mr. Chiaretta or Mr. Groom, questioning him about setting jacks or bolting the area before installing the tubing. (Tr. 244, 249, 252, 261). Mr. Powell has been an underground miner for 20 years. If anyone had requested him to install temporary or permanent support, he would have done so. (Tr. 251, 261-262).

#### CIVIL PENALTIES

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

Cyprus is a large operator with 1,574,629 tons of production in 1991.

The penalty set forth in this order is appropriate and will not affect the operator's ability to continue in business.

The prior history is favorable to Cyprus as the company had only 13 violations assessed for the two-year period ending March 9, 1992.

The operator was negligent in that its section foreman should have known of the requirements of the roof control plan.

Since miners could have been exposed to the unsupported roof, the gravity should be considered as high.

In view of the circumstances, abatement was not involved on this record.

For the above reasons, Order No. 3588140, is **MODIFIED** to a 104(a) citation, which citation is **AFFIRMED**.

**WEST 92-370-R**

**Shuttle Car Brakes**

In this case, Cyprus contests Citation No. 3850267 issued under the provisions contained in Section 104(d)(1) of the Act.

The citation under the heading captioned "Condition or Practice" alleges the following:

As a result of a 103(g)(1) complaint it was determined that the #8 off standard Joy shuttle car was operated on the 3rd South Active Working Section in an unsafe condition. The foot brakes on the shuttle car were inoperative. An agent of the operator knew the condition existed and permitted the shuttle car to be operated in an unsafe condition for the purpose of producing coal.

The citation further alleged that the above condition or practice constituted a violation of 30 C.F.R. Section 75.1725(a), a mandatory safety standard. It is further alleged that the violation was of such a nature that it significantly and substantially contributed to the cause and effect of a mine safety and health hazard. The regulation allegedly violated provides as follows:

**75.1725 Machinery and equipment; operation  
and maintenance.**

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

The principal actors in the shuttle car/brake incident were Seldon Barker (car operator), Paul Downard (spell boss), and Bill Burton (shift foreman).

### EVIDENCE

**WILLIAM TAYLOR** received a 103(g) complaint. It alleged a shuttle car had been operated without brakes. Mr. Taylor traveled to the mine on March 10 and gave the company a copy of the complaint. It indicated that on February 12, 1992, this incident occurred in 3rd south.

Mr. Taylor met with company representatives Hansen, Gunderson, and Salerno and they helped him interview company workers in the foreman's office.

Mr. Taylor interviewed Seldon Barker, Bill Burton and Paul Downard. Barker told Mr. Taylor that the brakes on the shuttle car kept getting worse and within two hours before the end of the shift the operator could push the brakes all the way down and they did not respond.

The shuttle car operates from the face to the feeder breaker. In this distance it travels one crosscut and goes around pillars; the maximum distance travelled would be 400- to 700 feet. There were two shuttle cars in use in this section that traveled to the feeder breaker. [A shuttle car normally carries 8 to 10 tons.]

Mr. Barker told Inspector Taylor he almost ran over a man coming out of a crosscut. However, he was able to stop. Mr. Barker complained that there were "no brakes" but he agreed to run the equipment for the last two hours if Mr. Downard informed those on the shift that the brakes were not operating. Mr. Downard agreed to this arrangement. Mr. Barker also told Supervisor Burton that he had "brake problems."

Mr. Taylor believed this was a violation of 30 C.F.R. § 75.1725(a) because the service brakes were not operational. The regulation requires an operator to remove equipment from service that is in an unsafe condition.

The operator of the shuttle car normally sits in the direction of travel and to tram the equipment he would move it in a reverse direction.

There are panic bars or emergency brakes provided on the shuttle car. Mr. Barker indicated the emergency brakes worked. In a normal mining cycle the shuttle car operator used the service brakes to stop the shuttle car.

On February 12 the area where the shuttle car was operating was sloped; driving the shuttle car around the corner would present a hazard. In Mr. Taylor's opinion, if this equipment continued to operate, it was reasonably likely that an accident would occur. Supervisors Downard or Burton could have taken this equipment out of service.

Mr. Taylor issued this citation as an unwarrantable failure since he felt it was an aggravated situation for the foreman to allow this equipment to operate. The same reason applied to the second level supervisor.

There are only three ways to stop a shuttle car: using a foot pedal, emergency brake, or the service brakes. The ability to use an emergency brake did not affect Mr. Taylor's S&S evaluation.

Mr. Barker told Mr. Downard he would continue to operate the shuttle car for the two hours left in the eight-hour shift. Mr. Downard was filling in as the crew boss but normally he is a member of the crew.

**SELDON BARKER** has been a shuttle car operator for 19 years. On February 12, 1992, he was working in the 3rd South section developing a main panel for a longwall. There were seven members in the crew plus a supervisor. Mr. Downard was acting supervisor and Billy Burton was his supervisor.

Mr. Barker was operating an off-standard shuttle car. Off-standard means he would be driving on the opposite side that is normal for driving an automobile.

Mr. Barker was hauling coal from the continuous miner to dump it behind the feeder breaker, a distance of about 600- to 700 feet. The shuttle car weighs 33,000 pounds. There were holes in the road. It takes about a minute to load the shuttle car and a minute to go from the continuous miner to the feeder breaker, which is uphill. When the shuttle car is empty, you drive downhill. It takes about a minute to dump at the feeder breaker and a round trip takes about five minutes. When operating the shuttle car to the feeder breaker you do not travel in a straight line but you drive around corners.

On February 12, the brakes on the shuttle car became inoperable as there were no brakes at all with two hours remaining in the shift. Mr. Burton advised Mr. Downard that he had no foot brakes.

Mr. Downard suggested bleeding the brakes. This took from 15 to 20 minutes to do, but it did not restore braking power. They discussed the possibility that the master cylinder was not functioning.



In an eight-hour shift, they move about 100 shuttle cars. If they shut down this equipment, their goal could not be achieved. Messrs. Downard and Barker agreed to keep the shuttle car running. Mr. Barker couldn't tell Mr. Downard to take the shuttle car out of production. They made their 100 shuttle car quota for that day.

When operating the shuttle car without brakes and when unloading at the feeder breaker, the operator is going uphill. In this position, the shuttle car is held in position by taking your foot off of the pedal and changing seats. When Mr. Barker saw Mr. Anderson behind him, he back-trammed the shuttle car. Back-tramming or feather-tramming is when you put a toe under the tram pedal located on the reverse side. Mr. Barker was not in the proper seat to operate the tram pedal.

On February 12, Supervisor Burton was on the section for an hour and Mr. Barker believed Mr. Burton talked to Mr. Downard who said there was a problem with the brakes. It was Mr. Barker who first suggested that he could operate the shuttle car in a reasonably safe manner.

Mr. Barker did not use the emergency brakes except when he stopped on a hill. He has more shuttle car experience than anyone else at the mine. He did not refuse to operate the shuttle car with the bad brakes. He thought he had a choice in this matter, (i.e., to refuse to operate the shuttle car), but he didn't know how far he could go with it.

**SHELDON ANDERSON** was the mechanic on February 12 in the 3rd South section. The 3rd South floor bottom has a grade going downhill. The floor was slick and contained loose coal. In addition, the surface was uneven.

On February 12, Mr. Barker was on the feeder dumping a load of coal and Mr. Anderson was going through the crosscut behind him. Mr. Anderson flashed his light and as he stepped around the shuttle car it came back on him. If he hadn't jumped he would have been struck and either killed or hurt.

Mr. Anderson yelled at Mr. Barker. Mr. Barker did not say anything. Mr. Anderson did not know the brakes on the shuttle car were inoperative. The next day, Mr. Downard stated he had made a mistake and he should have told everyone the shuttle car had no brakes. In Mr. Anderson's opinion, it was not a safe practice to use emergency brakes.

**GEORGE W. MANSON** has been a Cyprus mechanic for 12 years and is experienced in mining. On February 12, he was involved with the brakes on the No. 8 shuttle car. Generally he serviced and maintained equipment in the section and on February 12 he repaired the brakes on shuttle car No. 8 in accordance with a maintenance request.

The brakes were slow in stopping the equipment so the disks were cleaned and the brakes bled. Thereafter, the equipment was tested for stopping ability. They found that the reservoir brake fluid might have been three-eighths of an inch to one-half inch below normal. [The shuttle car was equipped with a dry braking system.]

On the second day the maintenance department received the same complaint and the brakes were bled. They were also tested and Mr. Manson felt they were operable.

A third time they were instructed to recheck the equipment because something was causing the brakes not to function. In removing the master cylinder they discovered that there was no fluid coming out of the line. They then went to the upper reservoir and removed the line. At this point they found a small rock which stopped the flow of the brake fluid into the master cylinder.

In Mr. Manson's opinion, the problem that they found would not make the equipment unsafe to operate. The brakes would still stop the equipment but it would take longer to stop it.

**ART C. GORE** is an MSHA coal mine inspector and experienced in mining. He identified Exhibit M-8 and discussed the technical aspects of the braking system. He further indicated that MSHA records show 87 fatalities have occurred from bad brakes and 16 fatalities have been the result of shuttle car accidents.

**PAUL DOWNARD** is a person experienced in underground mining. He has been a member of the Robert Powell crew as an hourly employee and he occasionally fills in as spell boss. On February 12, 1992, he was spell boss on the afternoon 10-hour shift. Mr. Barker talked to him about the brakes on the shuttle car and he further indicated he was having problems with the brakes. Mr. Downard told him they should find some brake fluid. Mr. Downard was experienced with Joy shuttle cars and he felt he could handle the mechanics involved. Mr. Barker added the brake fluid and Mr. Downard was outside looking at the brake calipers. He did not touch the brakes. They found there was some air in the system and you could see air bubbles in the leaking fluid. Mr. Downard also looked in the brake fluid reservoir but couldn't see anything. The brake pedal felt spongy. There may have been some air but there was some braking power. The frame was wet from where the fluid was leaking. Mr. Downard told Mr. Barker that they would order a master cylinder. Mr. Barker said there was no way to get it changed before quitting time. Mr. Barker said he could run the shuttle car safely. Mr. Barker has 15 years experience running shuttle cars.

Mr. Downard has the authority to take the equipment out of service if it is unsafe. If Mr. Barker had not made the suggestion about safe running, Mr. Downard would have taken the equipment out of service.

Mr. Downard told some of the men on the crew that Mr. Barker was having problems with the brakes but he did not tell all of them. Mr. Downard was hoping to get the master cylinder installed within 15 to 20 minutes.

Mr. Downard observed Messrs. Burton and Barker talking and Mr. Burton said to shut it down if there was any problems. Mr. Downard did not have any discussion with Mr. Burton concerning the brakes.

During the rest of the shift, Mr. Downard saw Mr. Burton at the shuttle car. He did not see Barker almost run over Mr. Anderson but he felt that he had a fail-safe brake system and the emergency brake; in addition, back-tramming was also available. Back tramming or feathering a tram pedal will slow down the equipment.

Mr. Downard indicated his relationship with shuttle car operator Barker was not good. Mr. Barker does not like to take orders and he was previously suspended one day when Mr. Downard was the spell boss.

The company budgets 100 shuttle carloads per shift. Mr. Barker did not say to him that he wanted to help him make his quota.

The following shift, Mr. Downard and the crew discussed the Anderson incident. Mr. Downard was concerned that he had not made it around to everyone to tell them about the brakes on the shuttle car. Mr. Downard indicated to the crew that if it happened again, he'd shut it down and fix it. Mr. Downard should have done it differently and he doesn't feel he should have relied on Mr. Barker. But as spell boss, Mr. Downard thinks he is entitled to rely on statements by his equipment operator.

Mr. Downard felt that Mr. Barker's desire was for safety and he felt confident that Barker could safely operate the equipment. Mr. Barker was confident in this regard but he wanted the crew to know about it. He agreed that operating a shuttle car without service brakes would be unsafe. However, there are times when it depends upon how bad the brakes are. Mr. Downard assumed there were some brakes because Barker could still operate the equipment. Mr. Barker said he had other brakes, however the condition was unsafe if there were no brakes and the equipment was being operated by tramming and emergency brakes. [The purpose of the reverse tram is not to stop the shuttle car.]

After Mr. Downard agreed to let Mr. Barker operate the shuttle car he did not tell Anderson about the brakes. Mr. Downard's responsibility was greater than Mr. Barker's under the circumstances.

**ROBERT A. LINDSEY** has been employed by Cyprus for 11 years and has operated diesels, shuttle cars, and roof bolters.

It is company policy to remove any unsafe equipment from service. That authority is set forth on the task training sheet.

Messrs. Barker and Downard did not have a good relationship. It was, in fact, a "bad" relationship and there was animosity between the two men but Mr. Lindsey did not know why. It has been going on for a long time. Additional miners having a bad relationship are Mr. Barker, Ben Brady, and Benny Avhil.

Mr. Lindsey agrees he is not saying someone engineered accidents to make Mr. Downard look bad. He considers Mr. Downard to be a good supervisor but other individuals do not agree. In Mr. Lindsey's opinion, Mr. Barker is fairly vocal about safety issues and he wouldn't be shy in this respect with Mr. Downard.

**JERRY DOLINSKI** is the maintenance foreman for Cyprus. He has been employed by the company for 15 years and is experienced in maintenance and underground coal mining. In February 1992, he was superintendent for George Manson and on February 13, 1992, they worked on the No. 8 shuttle car. The complaint was that there were no brakes. The pedal went to the floor.

Messrs. Dolinski and Manson bled the brakes but they would not build up. This indicated to Mr. Dolinski that there was no brake fluid in the master cylinder.

Exhibit R-13 shows that there was no reference to work on the shuttle car on February 11 nor on February 12. On February 13 it was indicated the line was plugged and the brake fluid could have been going through and later plugged. On February 14 no work was done on the brakes. Even if the master cylinder is one-half or one-third full the brakes will still continue to operate.

Mr. Dolinski found no brakes at all on shuttle car 8. He explained in detail the nature of the dry (as distinguished from wet) brakes. He further explained the cause of the problem was a small rock that blocked the flow of the brake fluid.

**WILLIAM B. BURTON** is a shift foreman with 21 years experience. He has held various positions in the mine. On February 12, 1992, he was a shift foreman and was making his rounds. He came to Mr. Barker and talked to him while he was in the shuttle car. Mr. Barker stated the brakes were bad or screwed up but he was running it fine and the crew had been notified. He said he had no brakes.

Mr. Burton indicated that any operator can shut down equipment if it is unsafe and he is expected to notify the foreman when he does that. On February 12 Mr. Burton said the shuttle car should be taken out of service. He also checked with Sheldon Anderson and asked him if he had been almost run over by a shuttle car. He replied, "No, it wasn't a big deal."

On this particular day there were two or three shuttle cars on 3rd South. If Barker went out of service they could still continue to run coal. The shuttle car should be taken out of service if it is unsafe to operate and Mr. Burton believed they were all partly responsible.

Mr. Barker received a disciplinary for the matters between him and Downard; this occurred a couple of weeks ago. This event was because Mr. Barker was "harassing" Mr. Downard.

#### **DISCUSSION, EVALUATION AND FURTHER FINDINGS**

Credibility issues involve the condition of the shuttle car brakes and the operator's knowledge as to these unsafe conditions on February 12, 1992. On these issues I essentially credit the testimony of Sheldon Barker. As the shuttle car operator, he would be the most knowledgeable person concerning the condition of the shuttle car. The credible evidence established the following:

#### **FINDINGS OF FACT**

1. Sheldon Barker was the shuttle car operator on February 12, 1992. (Tr. 432).
2. On that day, the brakes slowly deteriorated until there were about two hours left in the shift. At that point the foot brakes would not stop the shuttle car. (Tr. 442, 443).
3. Mr. Barker advised Supervisor Paul Downard that he had no brakes. (Tr. 443). Downard said, "We'll bleed them." After bleeding them Mr. Downard could not get any brakes. (Tr. 443, 453).
4. The two men believed it could be a master cylinder problem. (Tr. 444).
5. If Barker could operate the shuttle car, they could reach their goal of 100 car production quota. (Tr. 445).
6. Barker had never operated a shuttle car with complete loss of service (foot) brakes. (Tr. 447). He wasn't too sure he had the option to shut down the shuttle car. (Tr. 446).
7. He held the shuttle car (while unloading it) by feathering the tram pedal. Feathering means you engage the pedal and then let off. (Tr. 447, 448).
8. While he was dumping one load, Mr. Anderson walked in front of the shuttle car but jumped out of the way. (Tr. 448, 449).

9. On February 12, Supervisor Barker was in the section. Mr. Barker heard Mr. Downard tell Mr. Burton there was trouble with the brakes. (Tr. 450).

10. Mr. Barker suggested to Mr. Downard that he could operate the shuttle car rather than wait for the master cylinder. (Tr. 456).

11. It was agreed by Barker that Downard would advise all persons in the section that the buggy was in an unsafe condition. (Tr. 458). Barker did not tell Burton that the shuttle car was unsafe. (Tr. 458).

12. Mr. Barker was operating the shuttle car more cautiously than usual. (Tr. 462).

13. Mr. Barker was assured everyone in the section knew the brakes were not operating. (Tr. 466).

14. There was no refusal to operate the equipment. Barker felt he was doing a service to Downard to keep the buggy operating. (Tr. 466).

15. William Burton, shift foreman, encountered Barker late in the shift. He stated he was having problems with the brakes. They were "bad" or "screwed up." However, he (Barker) was running it fine and the crew had been notified. (Tr. 721-722).

16. Mr. Burton didn't hear about the Barker/Anderson near collision until about a month later. (Tr. 728).

#### FURTHER FINDINGS

It may well be that Mr. Barker could run this equipment by using reverse tramming. However, the use of a shuttle car without service brakes is "unsafe" within 75.1725(a) and the equipment must be removed from service immediately.

Mr. Dolinski confirmed Mr. Barker's view that there were no brakes, which was the condition Mr. Dolinski found when he examined the equipment. Mr. Manson's contrary testimony is rejected. Mr. Dolinski, Manson's supervisor, would be more knowledgeable than Manson.

The statements by Superintendent Burton, the shift foreman, further confirm the lack of brakes on the equipment. Mr. Burton stated the shuttle car should have been taken out of service because it was unsafe to operate.

As a defense, Cyprus asserts that the animosity between shuttle car operator Barker and spell foreman Downard, as noted in the record, establish a situation where Barker was interested in "getting" the foreman.

Mr. Lindsey testified along these lines. In addition, Superintendent Burton indicated that Messrs. Downard and Barker did not like each other. He cites the incident where Barker was suspended by Downard as a possible motive for their feelings (i.e., Downard and Barker).

I am not persuaded by Mr. Lindsey's testimony. The two men may not have gotten along, but the testimony about a "bad" relationship is somewhat ambiguous and vague. Further, the Downard/ Barker incident where Barker was suspended and lost five hours' pay only happened two weeks before the hearing. In point of time, this would not be too relevant here. Mr. Barker was suspended by Mr. Downard for heckling him; Burton did not recall any other incidents involving the two men.

From having observed the witnesses, it is apparent that Mr. Barker would not hesitate to complain about safety matters and he made such a complaint here; however, the equipment was not removed from service.

#### SIGNIFICANT AND SUBSTANTIAL

The case law as to S&S citations are set forth in connection with the previous citation.

The record establishes criteria as to paragraphs (1), (2) and (4) of the Mathies formulation.

Paragraph (3) is also established since Barker almost collided with Anderson.

Cyprus argues S&S was not established because the Secretary failed to prove there was a reasonable likelihood that an injury would occur.

I conclude a reasonable likelihood existed. In connection with the "near miss" between the shuttle car and Anderson, if the miner helper had not jumped, he would have been struck by the shuttle car.

Inspector Taylor further confirmed that it was reasonably likely that a serious injury or a fatality could occur. His opinion was based in part on the shuttle car operator's limited visibility, the area in which it was operating, the size of the equipment, the slope and undulating floor. (Tr. 382-385).

### UNWARRANTABLE FAILURE

I consider Paul Downard, the spell boss, to have been negligent. Mr. Downard had an opportunity to more thoroughly investigate the shuttle car problem. Further, an upper level supervisor also failed to follow up on the problem. I consider such conduct constitutes high negligence which establishes a statutory unwarrantable failure.

Cyprus argues unwarrantable failure does not apply here because there are no specific guidelines or tests that can be performed under the cited standard to determine the adequacy of the brakes. Compare 30 C.F.R. §§ 56.14101 and 75.523-3.

I am not persuaded. "No brakes" as matter of law are "unsafe" within the meaning of § 75.1725(a). The unwarrantable failure arises here in the continued use of the shuttle car without brakes and the failure of two supervisors to investigate and remedy the situation.

Cyprus argues Mr. Barker found some braking power because he bled the brakes and observed pressure on the brake calipers. Mr. Downard also found some braking power.

I am not persuaded. Mr. Barker said he had "no brakes." His testimony was confirmed by the maintenance foreman Mr. Dolinski. On February 13, he "pushed on the brake pedal and the pedal went all the way to the floor" (Tr. 665) and in his investigation he "didn't have any brakes at all." (Tr. 685).

For the above reasons, Citation No. 3850267 should be affirmed.

### CIVIL PENALTIES

The size of the operator, the appropriateness of the penalty and the company's prior history have been previously discussed.

The operator was negligent in that it failed to thoroughly investigate and remedy this situation.

Gravity is high since miners could have been struck by the shuttle car.

Abatement was not involved in this situation.

For the foregoing reasons, I enter the following:



**ORDER**

1. In Docket No. WEST 92-485, Order No. 3588140, is modified to a 104(a) citation and the citation, as modified, is **AFFIRMED** and a penalty of \$200.00 is **ASSESSED**.

2. In Docket No. WEST 92-485, Citation No. 3850267 is **AFFIRMED** and a penalty of \$600.00 is **ASSESSED**.

3. The contest cases in WEST 92-370-R and WEST 92-371-R, pending herein, are **DISMISSED**.

  
John J. Morris  
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 27 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-83
Petitioner	:	A.C. No. 44-05772-03557-A
	:	
v.	:	Docket No. VA 92-84
	:	A.C. No. 44-05772-03558-A
HENRY B. SALYERS	:	
DARRYL KEENE	:	Docket No. VA 92-89
STEVE VINSON	:	A.C. No. 44-05772-03559-A
JIMMY D. WYATT Employed by	:	
MIDDLE CREEK ENERGY	:	Docket No. VA 92-93
INCORPORATED,	:	A.C. No. 44-05772-03555-A
Respondents	:	No. 1 Mine

## DECISION

Appearances: Stephen Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;  
Henry B. Salyers, Pounding Mill, Virginia, for himself;  
Darryl Keene, Cedar Bluff, Virginia, for himself;  
Steve Vinson, Richlands, Virginia, for himself;  
Jimmy D. Wyatt, Cedar Bluff, Virginia, for himself.

Before: Judge Barbour

## STATEMENT OF THE PROCEEDINGS

These are civil penalty proceedings initiated by Petitioner, the Secretary of Labor ("Secretary"), against the Respondents, Henry B. Salyers, Darryl Keene, Steve Vinson and Jimmy D. Wyatt, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq.<sup>1</sup> The

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<sup>1</sup>Section 110(c) of the Act states in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act] except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered or

(continued...)

Secretary asserts that Wyatt, as superintendent of the No. 1 Mine, a mine owned and operated by Middle Creek Energy, Inc. ("Middle Creek"), knowingly authorized ordered or carried out violations of mandatory safety standards 30 C.F.R. § 75.400 and 30 C.F.R. § 75.517. He further asserts that Salyers, Keene and Vinson, as section foremen at the No. 1 Mine, each knowingly ordered, authorized or carried out the same violation of section 75.400 as Wyatt. The Secretary seeks the assessment of civil penalties against the individual Respondents for the alleged violations.

An evidentiary hearing was conducted in Tazewell, Virginia, at which the Secretary was represented by Steven Turow and the individual Respondents represented themselves.<sup>2</sup>

#### STIPULATIONS

The parties stipulated as follows:

1. On February 14, 1991, Steven May, an inspector of the Secretary's Mine Safety and Health Administration ("MSHA") conducted an inspection of the No. 1 Mine, a mine owned and operated by Middle Creek.

2. As a result of the inspection May issued three citations: Citation No. 3507924, a citation issued pursuant to section 104(a) of the Act and alleging a violation of section 75.517; Citation No. 3507925, a citation issued pursuant to section 104(a) of the Act and alleging a violation of section 75.400; and Citation No. 3507926.<sup>3</sup>

3. On February 13 and 14, 1991, Wyatt was the mine superintendent at the No. 1 Mine and Salyers, Keene and Vinson were section foremen.

4. Middle Creek is a corporation.

Tr. 8.

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<sup>1</sup> (...continued)

such corporation who knowingly authorized, ordered or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

<sup>2</sup> At the commencement of the second day of the proceeding, counsel for the Secretary moved to withdraw the petitions against Keene and Vinson and to dismiss the cases in which they were named as parties. Tr. 315. I granted the motion. Id. However, since the allegations against the two remaining Respondents are intertwined with those previously pending against Keene and Vinson, I will reference all of the allegations in discussing and ruling on the remaining cases.

<sup>3</sup> Citation No. 3507926 is not at issue in these proceedings.

## CONTENTIONS OF THE PARTIES

Counsel for the Secretary stated the evidence would show that on February 14, 1991, May found conditions at the mine that cumulatively resulted in an imminent danger and in the issuance of an order of withdrawal pursuant to section 107(a) of the Act. In addition, and pertinent to these proceedings, the conditions individually constituted violations of the alleged mandatory safety standards. The violation of section 75.400 concerned accumulations of loose coal and coal dust and the violation of section 75.517 concerned tears in the jacket of a trailing cable for a continuous mining machine ("continuous miner"). As a result, in conjunction with the imminent danger order of withdrawal, citations alleging the violations were issued by May.

According to counsel, all of the Respondents were aware of the existence of the coal and coal dust, all were in a position to correct the violation and all failed to do so. Tr. 8-9. Moreover, Wyatt was aware of the condition of the trailing cable and was in a position to have the cable repaired and/or replaced and failed to do so. Tr. 9.

Wyatt, responding on behalf of the Respondents, maintained the government could not substantiate that an imminent danger had existed and that the order and alleged violations did not convey "the true picture of the conditions." Tr. 10. In Wyatt's view, none of the Respondents "willfully violate[d] any standards of the Act." Id.

## THE SECRETARY'S WITNESSES

### STEVEN MAY

May was the Secretary's first witness. Prior to being employed by MSHA, May had a total of eight years experience as a mine electrician. In addition, May was certified as an electrical repairman, a maintenance foreman and a chief electrician. Tr. 15.

May described Middle Creek's No. 1 Mine as an underground mine where coal was mined by continuous miners, hauled to underground transfer points by ram cars and transferred to the surface by conveyor belts. Tr. 16. May stated that the mine produced approximately 3,000 tons of coal per day and that there were two production shifts.<sup>4</sup> Tr. 17, 170. With a labor force of

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<sup>4</sup>It was stipulated during the course of May's testimony, that there were three shifts at the mine: 11:00 p.m. to 7:00 a.m., a maintenance shift of which Vinson was the foreman; 7:00 a.m. to 2:30 p.m., a production shift of which Salyers was the foreman; and 2:30 p.m. to 10:30 p.m., a production shift  
(continued...)

approximately 35 miners, May described the mine as of a medium size. Tr. 170-171.

May identified a drawing of part of the section of the mine where the violations were alleged to have occurred (the 001 section) and stated that the drawing represented the area as it had existed on February 14. P. Exh. 3; Tr. 18. The drawing depicts five advancing faces. (They are numbered 1 through 5 from left to right.) Directly outby the No. 5 face is a crosscut and May stated that a continuous miner was located in the crosscut, to the right of the face when looking inby. The No. 4 face was further advanced than the No. 5 face and a roof bolting machine was parked outby the face.

A trailing cable ran from the continuous miner to the power center located in the third crosscut outby the No. 4 face. The transfer point was in the No. 4 entry between the third and fourth crosscut outby the No. 4 face. Tr. 20.

May stated that he arrived at the mine at approximately 2:00 p.m. on February 14. It was the first day of a regular quarterly inspection of the entire mine. May and Wyatt proceeded to the 001 section. Tr. 24. May and Wyatt passed the power center, the electrical installation where a transformer lowered incoming electrical current to 480 volts. Tr. 26. May and Wyatt walked past the power center and up the No. 5 entry. Tr. 54.

The trailing cable for the continuous miner was lying on the floor of the entry. Id. May believed he could hear machines running on the section and he assumed that mining was in progress. Tr. 50, 94-95. May began to examine the cable and the noise stopped. Tr. 50. May believed the cable was energized. Tr. 51. May stated he could see the light on the continuous miner. Tr. 150.

May described the cable. It was approximately 2 inches thick. Inside there were three power conductors and a ground monitor and ground wire. Electricity ran through the conductors. The monitor and ground wire were safety devices and if either were broken or came in contact with a conductor, the continuous miner was supposed to de-energize. Tr. 29.

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<sup>4</sup>(...continued)  
of which Keene was the foreman. Tr. 179-180.

The entire trailing cable for the continuous miner measured approximately 500 feet in length. The continuous miner was located about 150 feet from the power center. The excess cable was lying in loops in the No. 5 entry, one side of each loop being approximately 30 feet long. Tr. 30. The loops were lying along the rib. Tr. 54. The loops extended inby the No. 5 entry to the corner of the entry in which the continuous miner was located (crosscut B on P. Exh 3).

May inspected the looped cable and initially observed 17 places where it was torn and ripped. May stated that after the cable was totally unlooped, he counted 18 such places. Tr. 31. May did not recall if the tears were at places in the cable that had been taped previously, but he described the cable as being "as bad as I've seen." Tr. 37. In each of the 18 places May maintained that he could see through the tears to the interior of the cable. Tr. 55.

The longest tear was approximately 25 inches long. (May measured the tear with a folding ruler. Tr. 31-32.) At another tear where the cable's outer insulation was missing for approximately 8 to 10 inches, May found that the three conductors had been rolled together and the ground monitor had been rolled around the conductors. Tr. 32. In addition, one of the conductors was bare and a wooden wedge was driven between the bare conductor and the ground wire. Tr. 33. May believed the conductor and the ground wire had burned together and had been separated subsequently by the wedge. Tr. 79-80. May speculated the wedge had been driven between the conductor and the ground wire so the wires would not touch and de-energize the continuous miner. Tr. 34. (On cross-examination May stated that he could not recall pointing out the bare wires and wedge to Wyatt, and he confirmed that he did not mention the condition in his notes. Tr. 81-82.)

May explained that a ground wire does not have to be insulated but that a conductor requires insulation. Tr. 60-61, 76. The insulation keeps the current from traveling from one conductor to another. According to May, when he first saw the cable he could not believe it was being used. Rather, he thought it was "some old cable that was discarded." Tr. 161.

May concluded the condition of the cable constituted a violation of section 75.517. The violation was based upon the torn and exposed areas in the cable. Tr. 148-149. May stated that in his opinion any unrepaired break or tear in the cable cover was a violation of the standard and it did not matter how many of the interior wires were exposed. Tr. 149. May described what he regarded as the essence of the violation: the cable "had 18 places that were not properly insulated that were open, and even one with a bare phase wire." Tr. 89.

May was especially concerned about the tear that exposed the bare conductor. He believed it posed a dual hazard in that miners who touched the conductor could be shocked and if the conductor touched the ground wire, the resulting arc could ignite a fire. Tr. 33. Although the average miner wore rubber boots, some miners wore leather boots and if they stepped on the bare conductor they could be shocked. Tr. 35. They also could be shocked if they crawled and put their hands on the bare conductor. Tr. 35. However, crawling by the miners was not likely since the entry was approximately 48 inches high. Tr. 83. Because the cable carried 480 volts of electricity any miner contacting it could be critically injured or killed. Id.

May also believed the tears exposing insulated conductors created a shock hazard because without the protection of the cable's out jacket a miner who touched an insulated conductor could be shocked. In short, the potential for injury was increased by the fact that the outer jacket of the cable was not providing the protection it was designed to ensure. Tr. 63, 73.

Moreover, if the conductor and ground wire contacted one another and arced, coal dust or loose coal in the vicinity of the arc could ignite, and May stated that he had observed coal and coal dust and loose coal measuring about 2 inches deep lying on and around the cable. Tr. 36, 38, 42. May believed it was "highly likely" such an ignition could happen. Tr. 50.

After examining the cable, May walked to the continuous miner. Wyatt did not accompany him. While walking from the power center to the coiled cable and from the cable to the miner May had observed coal and coal dust on the mine floor. Later, when May had an opportunity to inspect the entries and face areas, he also noted the presence of coal and coal dust in all 5 entries from the transfer point inby, although the accumulations were located mainly in entries No. 3 and No. 4. Tr. 43, 46. The coal and coal dust had accumulated in even greater amounts in the face areas than it had between the power center and the miner. Tr. 41. As May explained, loose coal and coal dust will occur naturally where mining has taken place. Therefore, May did not believe that the coal and coal dust that was present in each entry from the face to 40 feet outby the face was in violation of section 75.400. Tr. 43-44. Nonetheless, the accumulations that existed from 40 feet outby the faces to the transfer point did violate the standard, and May estimated that the distance the violative accumulations existed in each entry was 200 feet or more. Tr. 44.

In describing the accumulations in the crosscuts, May stated that the accumulation in the crosscut furthest outby (crosscut E on Exh. P. 3) gradually built up to a depth of 51 inches at the feeder. Tr. 136. Crosscut D was not "too awful bad" although there was some accumulation. Id. In crosscuts E, D and C there

was some rock dust, but in crosscuts A and B there was none. May also stated that where the coal in the entries had been run over by mining equipment, coal dust in depths of approximately 2 inches existed. Id., 51. The coal and coal dust in the entries was dry and black and May described the section in general as being "very dry". Tr. 46, 83. May did not see any evidence that a clean up was in progress on the section. Tr. 96.

May admitted, however, that rock dusting would have been done after the section had been cleaned and that the accumulations he observed could have been from the production shifts that followed Vinson's maintenance shift. He stated he had "no idea" how much cleaning Vinson had done on the 11:00 p.m. to 7:00 a.m. shift. Tr. 132, 134, 138. He agreed it was possible Vinson might have made certain that everything was cleaned, but May added, "Wyatt told me the reason the section was dirty was that . . . [Vinson's crew had] worked maintenance on the . . . [other production section] and had not got down . . . [to the section where the accumulations existed] to clean it up." Tr. 132. May further agreed that before he reached the section where the accumulations existed, Keene, foreman of the 2:30 p.m. to 10:30 p.m. shift, could have been in the process of getting ready to clean the entries. Tr. 145.

In addition to the entries and crosscuts, May found that at the feeder coal dust had accumulated from the floor to the roof, a distance of 51 inches. Tr. 47, 119. The hazard from coal dust adjacent to the feeder was that there were potential ignition sources present at the feeder -- bearings, electric motors, gears and pulleys, all of which created heat through friction. Tr. 48. May agreed, however, that he had not tested the dust to determine its combustible content, and he further agreed that it could have contained incombustible material. However, he did not believe the incombustible content could have been as much as 50 percent because "[the dust] would not have been black if it had been 50 percent incombustible." Tr. 102.

May stated that after viewing the condition of the cable he had intended to issue an imminent danger order of withdrawal. However, by the time he next saw Wyatt, May had an opportunity also to view the accumulations. Therefore, he based the imminent danger order on both the cable and the accumulations. May stated, "[w]ith the bare phase lead and with the coal . . . as it was I felt that if they continued to run [coal] then you would have had a disaster on the section." Tr. 157. In conjunction with the withdrawal order May issued citations for violations of sections 75.517 and 75.400. The citations were abated by 9:30 a.m., the following morning. Tr. 126-127.

With regard to the allegations that Wyatt, Vinson, Keene and Salyers knowingly violated the cited standards, May testified he



recommend that MSHA conduct an investigation to determine if they had acted contrary to section 110(c). He made the recommendation because of the seriousness of the cited conditions. Tr. 176.

#### RICKEY LAWSON

Lawson, who on February 14, 1991, was a mechanic/electrician for Middle Creek at the No. 1 Mine, was the Secretary's next witness. (At the time he testified he no longer worked for Middle Creek.) Lawson worked on the 11:00 p.m. to 7:00 a.m. shift and he was supervised by Vinson. He described the nature of his job as servicing equipment and repairing anything that broke down during the day shifts. Tr. 183.

On February 14, 1991, Lawson had worked for approximately three to five months at the mine, and Lawson stated that the trailing cable May cited as being in violation of section 75.517 was in use when he started work. Tr. 184-185. Lawson's job included repairing the cable, which usually involved applying rubber tape to the outer jacket and covering the rubber tape with wide, plastic masking tape. Tr. 185. He testified that prior to February 14, he had repaired the cable "quite a few times." Tr. 191. However, he had worked with many cables that were in worse condition than the cited cable. Tr. 186. He acknowledged that the cited cable had to be taped daily because as the continuous miner moved, the cable rubbed against the ribs and the tape from previous repairs wore off. Tr. 187.

Lawson stated that Wyatt told him and all other electricians "to seek an eye on the cable." Tr. 187. At one point Wyatt had also directed the cable be turned around -- that is, reversed -- so that worn parts would get less wear. Tr. 188-189. (Lawson described the turning of cables as a common mining practice. Tr. 194.) He further stated that he had told Wyatt the cable had a lot of "busted" places in it and he suggested it be replaced. Wyatt's response was to tell Lawson to continue taping it and to "keep an eye on it." Tr. 189.

Lawson described a "game plan" for the cable -- to keep watching it, to keep it taped and to retape it every night if necessary. Tr. 191-192. The continuing problem necessitating the "game plan" was the cable's outer jacket burst as it was pulled around corners. Tr. 192. Lawson recalled Middle Creek contacting the manufacturer of the cable and requesting that the company send a representative to determine why Middle Creek was having so much difficulty with the cable. Tr. 195.

#### BERNARD SALYERS

Bernard Salyers, cousin of the Respondent, Henry Salyers, had worked at the mine as an electrician since 1987.

In February 1991, he was the chief electrician and he worked part time above ground and part time underground. Tr. 202.

In his opinion the trailing cable had a manufacturing defect in that "for no apparent reason its outer jacket would just burst open." Tr. 201. The jacket would separate along a straight line and the insulated inner wires would be revealed. Tr. 203-204. The splits were so straight that initially he suspected the cable had been cut. Tr. 207. Upon observing the cable closely, he found that at first a small groove would appear on the cable jacket and the cable would start to separate along the groove. Tr. 209. He believed the problem with the cable began two or three months before it was cited. Tr. 205.

According to Bernard Salyers, Middle Creek contacted the company from whom it had purchased the cable (not, as Lawson testified, the manufacturer) and the company advised Middle Creek to cut a piece from the cable and the company would send it to the manufacturer for analysis. Tr. 204. This was done, a few days before May's inspection. Tr. 205. Thus, on February 14, Middle Creek was waiting for advice from the company whether to purchase a new cable. Tr. 208. Middle Creek purchased a new cable from a different manufacturer a month or two after the citation was issued. Tr. 214.

#### STEVE VINSON

Vinson began working for Middle Creek in July 1989. On February 14, 1991, he was a shift foreman at the mine. Vinson explained that the purpose of his shift, the 11:00 p.m. to 7:00 a.m. shift, was to make it possible for the day shifts to function as production shifts. Tr. 221. The only type of maintenance the production shifts would do was to clean up and to rock dust. Tr. 222. In Vinson's opinion, there was no way a production shift could clean up all of the coal that had accumulated during a shift and the maintenance shift therefore cleaned up what was left. Tr. 222-223, 243.

Wyatt, as superintendent, always listed for Vinson the jobs to be done on the maintenance shift. At the end of the list, cleaning and rock dusting were invariably included and this was true for the 11:00 p.m. to 7:00 a.m. shift of February 13-14. Tr. 243, 253.

On that shift Vinson was told to move the belt on the 002 section (the section that was "down") and to clean and rock dust both sections. Tr. 225. The belt move took about 4 hours and involved all of the crew. Tr. 226. After the move was completed, Vinson directed a miner to go to the 001 section (the production section) to clean, rock dust and work on ventilation. Cleaning was done with a scoop. Tr. 227. Vinson and three members of the crew remained at work on the 002 section. Id.

Ron Joyce was the miner Vinson sent to the 001 section. Vinson stated that he went to the 001 section around 6:40 a.m. on February 14. As best Vinson could recall, he met Joyce at the feeder. Joyce was cleaning and because the shift was ending, Vinson stopped Joyce, and Joyce and Vinson left the mine. Tr. 230, 231.

Although Vinson believed the area in front of the feeder had been cleaned, he did not think procedures that were required to move the feeder had been instituted, and it was necessary to move the feeder to clean immediately adjacent to it. Tr. 230-231. In any event, the sides of the feeder were not cleaned because the only way that could have been done was to pull the feeder out of position, which would have taken 3 hours. Therefore, accumulations directly in front of the feeder were cleaned but those at its sides were not. Tr. 246-247. Vinson agreed that the area around the feeder including the sides of the feeder could have been cleaned by shovel, but he estimated it would have taken one man four or five hours. Tr. 252.

At about 3:30 a.m., prior to sending Joyce to clean in 001 section, Vinson had inspected the section (including the area involved in the citations) and he again inspected it at 6:30 a.m., shortly before meeting Joyce. Tr. 232-234. Vinson stated that although the section was a little dirty in the face of No. 4 and No. 5 entries, it was "nothing that wouldn't pass inspection that morning," and, indeed, Vinson believed that Joyce's clean up efforts had been adequate. Tr. 234-235, 256.

Vinson stated that he disagreed with May regarding the existence of the alleged accumulations. In Vinson's opinion a lot of the areas that May regarded as containing float coal dust and as being black in color (the entries and cross cuts outby the continuous miner) really were old rock dusted areas and were "whitish" in color, not black. Tr. 238, 246, 249. In Vinson's opinion "the only places that were really dirty was in the face" and he added "I done my best to get them cleaned up that night." Tr. 238.

Vinson added that the fact that May testified he saw rock dust showed that some cleaning had been done because rock dust is applied after cleaning. Tr. 240. Vinson believed that the Nos. 1, 2 and 3 entries had been rock dusted -- although he had not seen Joyce rock dusting and he could not recall if he asked Joyce if he had done any rock dusting. Tr. 241. He also believed that rock dusting had been done by hand because, as he stated, "We just didn't have the manpower there that night with all the work we had to do." Tr. 251. Vinson explained that one man was sent to clean up because in his experience one man, working for three hours, could accomplish all the clean up that was usually needed. Tr. 252. Vinson stated that Wyatt would

have had no prior knowledge of the condition of the section before Vinson had his crew begin cleaning it. Tr. 248.

With regard to the cited trailing cable, Vinson testified that two days before the inspection he had helped Lawson tape 2 tears in the cable. Tr. 239.

#### DARRYL KEENE

Darryl Keene testified next. At the time of the hearing he was working as a ram car operator for another coal company. However, on February 14, 1991, he was shift foreman for Middle Creek on the 2:30 p.m. to 10:30 p.m. production shift. Tr. 251. He had been the foreman for only two or three days and he had worked for Middle Creek for only three or four months.

Keene stated that as shift foreman he was responsible for making sure the face areas were cleaned and that cleaning was usually done with a scoop. Tr. 261. Keene was also responsible for seeing to it that the face areas were rock dusted. In fact, Keene, himself did the cleaning and rock dusting. Areas that he was not able to clean before the shift ended would be reported to the oncoming shift foreman, Vinson. Tr. 262.

On February 14, Keene entered the mine at 2:10 p.m. Contrary to his usual practice, he did not get an oral preshift report from Henry Salyers, the foreman on the 7:00 a.m. to 2:30 p.m. shift.<sup>5</sup> Rather, the preshift report was brought out of the mine in written form and Keene did not see it before going on the section and thus had no prior knowledge of whether or not accumulations were present on the section. Tr. 264-265.

Once on the section, Keene inspected all of the headings. He believed that he walked from the power center up the No. 4 entry toward the face. Keene did not believe the No. 4 entry had an excessive amount of accumulated coal dust, although he stated that probably there was some present. Tr. 266. Keene described the entire section as being in need of "some cleaning," except

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<sup>5</sup>Keene explained:

The preshift is called out to me. The way we done that is . . . Salyers . . . would call his preshift report out to me and I would write in a book what he called out to me what was [done] and what was left. And then I would come on and do my shift, do my production. Then two or three hours before Steve [Vinson] came on I would do the same thing for him.

Tr. 264.

for crosscuts A and B between entries No. 1 and No. 2, areas which had just been cut and had not yet been roof bolted. Tr. 269, 290. Regarding the feeder, Keene recalled an area of perhaps 12 feet where coal had accumulated. Tr. 267.

Keene testified that during his shift there was very little, if any, production because the continuous miner had been rendered inoperative by a problem with its methane monitor. Tr. 270, 279, 283. Keene did not check the continuous miner's cable and he was unaware if it was in need of taping, but he agreed it was general knowledge at the mine that the cable had a problem that caused it to split. Tr. 271, 259-260. He also did not know if the cable was energized but it could have been. Tr. 284.

#### JIMMY WYATT

Jimmy Wyatt last worked for Middle Creek at the No. 1 Mine in August or September 1991. At that time he had been working at the mine for approximately two years as the superintendent. He described his job as being in charge of day-to-day operations at the mine. Tr. 293. Wyatt stated that prior to February 14, 1991, no orders of withdrawal of any kind had been issued at the mine while he was the superintendent. Tr. 294. He estimated that as the superintendent he was required to spend between 25 percent and 35 percent of his time underground. Tr. 296.

On February 14, Wyatt arrived at the mine at approximately 6:15 a.m. By the time May arrived at 2:00 p.m., Wyatt estimated that he had spent at least two hours underground. Tr. 298. Wyatt first went to the 001 section because the continuous miner was not operable. A ripper jack had broken and needed to be repaired. Tr. 298. The jack was fixed around 11:00 a.m., and Wyatt believed that some mining had been done after it was repaired. Tr. 299.

Wyatt stated that he could not recall when first he had become aware of the condition of the cable. He described its propensity to split as a slowly progressive condition, and he speculated that the first few times it split miners were not overly concerned about it. Tr. 299. Wyatt also did not recall when the piece was cut from the cable and sent to the manufacturer's representative. He believed that Bernard Salyers had been responsible primarily for doing it. Tr. 300. Wyatt did recall, however, that the cable was not a constant source of discussion during the daily morning safety discussions at the mine. While it was true that it was at times discussed, a week to ten days might pass between such discussions. Id. Middle Creek purchased the cable in approximately September 1990, and it was put into use upon purchase. Because it required continual taping the cable was replaced approximately a month or two after February 14, 1991. In Wyatt's opinion the cable had a manufacturing defect. Tr. 303.

### DEWEY RIFE

Dewey Rife, a MSHA special investigator, was the Secretary's last witness. He was apparently called to refute Wyatt's contention that while he was superintendent no order of withdrawal had been issued prior to the imminent danger withdrawal order of February 14, 1991. Rife stated that MSHA's records indicated a section 107(a) imminent danger order of withdrawal had been issued at the mine on September 29, 1990. Rife, whose knowledge of the existence of the order was limited to a MSHA computer printout of violations issued at the mine, did not know upon whom the order had been served. Tr. 308.

### RESPONDENTS' EVIDENCE

At the close of the Secretary's case the hearing recessed until the following morning. When it resumed the Respondents indicated they felt they had been able to present adequately their cases through their testimony as the Secretary's witnesses and through cross examination. The Respondents stated that they had no testimony or documentary evidence to present but would rely on what had already been stated and on any closing arguments they might choose to make.

### DISMISSAL OF PROCEEDINGS AGAINST VINSON AND KEENE

Prior to closing arguments, the Secretary's counsel moved to dismiss the Secretary's petitions alleging knowing violations by Vinson and Keene. Counsel stated: "The purpose of the [Mine Act], particularly section 110(c) [of the Act], would not be further served by continuing a prosecution against either." Tr. 315. I agreed and granted the motion. Id. I will affirm the dismissals at the close of this decision.

### CLOSING ARGUMENTS

#### THE SECRETARY

Counsel began by noting the official positions of the two remaining Respondents -- that Wyatt was the superintendent of the mine and that Salyers was the foreman of the shift immediately preceding the inspection. Counsel maintained the testimony established the presence of significant accumulations of coal and coal dust in the 001 section in violation of section 75.400. The Secretary had proven coal dust was present at the feeder to a depth of 51 inches and that coal and coal dust existed in several places along the entries for a distance of 200 feet. He also asserted the evidence established the presence of coal dust on the ribs. According to counsel, the testimony of the Respondents established that at the No. 1 Mine, production and equipment maintenance came before the cleaning up of

accumulations, and that Wyatt and Salyers knew of the accumulations and failed to take steps to eliminate them.

In view of the fact that the mine was fairly small, it was reasonable to expect the superintendent to know of the conditions at the mine. Wyatt was in the mine prior to May's inspection and he should have observed the accumulations. Equally important, Wyatt managed the mine in such a way that violative accumulations were almost inevitable in that clean up duties had a low priority, for example, one person had been given three hours to clean up the 001 section.

Turning to Salyers, counsel argued that while his shift may have "inherited" some coal dust from Vinson's shift, the testimony made clear Salyers was responsible for leaving major accumulations of combustible materials at the end of his shift. That the cited accumulations had been left by Salyer's shift was established by the fact that Salyers' shift ended shortly before May's inspection.

Counsel further argued May's testimony that the cable contained 18 tears, some of which revealed the cables interior wires and at least one of which revealed a fully exposed conductor, established a violation of section 75.517. The testimony confirmed the condition of the cable had been an ongoing problem given the regularity with which it had split. In addition, Lawson's testimony indicated that Lawson had raised with Wyatt the problem created by the defective cable 2 or 3 times prior to February 14. Bernard Salyers also testified that he had raised the problem of the defective cable with Wyatt prior to February 14. Counsel stated that given the condition of the cable, the cable should have been removed from the mine and replaced rather than have been kept in use.

In counsel's opinion, the coal and coal dust was dry and the exposed cable wires and potential friction from the feeder provided possible ignition sources in the vicinity of the accumulations. Thus, the accumulations posed a serious fire hazard. In addition, the condition of the cable subjected miners on the 001 section to a serious and possibly fatal shock hazard.

#### THE RESPONDENTS

##### JIMMY WYATT

Wyatt argued the company had a clean up plan and that it was trying to do the best it could to keep the mine clean. He cited to Vinson's testimony that one man had been sent to clean the section and had been given three hours to do so and argued that within this time frame the section could have been cleaned. Referring to Keene's testimony that he did the clean up duties on his shift, Wyatt stated it was not unusual at times for a section

foreman to clean. Wyatt also argued that May's description of the alleged accumulations was suspect and he stated that May had not measured the accumulations at any particular point.

Wyatt maintained that May's testimony that the cable had 18 places where the inner leads were visible also was inaccurate. In fact, Wyatt believed that May had probably found only one place that needed taping. The 18 places to which May referred were places that Wyatt and May retaped, and they were counted after the cable had been retaped. According to Wyatt, every tear in the cable had been retaped as discovered. Wyatt also argued that May's notes and the citation form contained no reference to a stick being used to separate the exposed conductor and ground wire in the cable. The bottom line for Wyatt was that the cable was not in poor condition, as shown by the fact that it was used during the remainder of May's inspection and, Wyatt asserted, for a month or two thereafter, until it was replaced.

Moreover, the cable did not pose the hazard May contended. For one thing, the continuous miner was shut down due to a malfunctioning methane monitor which de-energized power to the machine. Further, even if the ground wire had been energized the circuit breaker would have tripped and power would have been cut off.

The cable itself was lying in an entry that had been the immediate return and as a result all dust in the entry had to be maintained at 80 percent incombustible content. The reason May conveniently failed to take any samples was because he knew the dust consisted mostly of rock dust.

#### HENRY SALYERS

Salyers maintained that he was no more to blame than anyone else for the existence of the accumulations on the 001 section. His responsibility was to run coal and to clean when he could. His shift always cleaned in the face, but if there were any accumulations in the back areas, they were cleaned up by the 11:00 p.m. to 7:00 a.m. shift.

Salyers was candid:

That day I cleaned what I could clean in the face. By the time the boss man makes a section all the time, watches about all the other men, keeps his centers up, keeps his curtains up and everything, there ain't no way -- with what people you've got there ain't no way you can go back three or four breaks back down the hallways and clean the hallways and keep them scraped up and ke[ep] the dust scraped up back there.



Tr. 357. In addition, Salyers claimed that May had seen the feeder before with similar amounts of coal around it and had never previously written a citation for a violation of section 75.400.

### THE VIOLATIONS

#### 30 C.F.R. § 75.400

Citation No. 3507925 states in part:

Beginning at the 001-0 section transfer point and extending inby in all entries and crosscuts to within 40 feet of the face areas of the 001-0 section loose[,] dry coal up to 48 (inches) at the transfer point and from 0 to 12 (inches) elsewhere with up to 2" (inches) of float dust present in the haulways was present. The entire section was very dry with up to 0.3 % methane in the No. 2 entry.

P. Exh. 2. The cited standard, section 75.400, provides that "[c]oal 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."

Wyatt, as superintendent of the No. 1 Mine, and Salyers, as foreman at the mine, do not deny they were agents of the cited corporate operator, Middle Creek. Rather, they maintain there was no violation of section 75.400 and even if there was that they did not knowingly authorize order or carry out such violation.

With regard to the existence of the alleged violation, I find it existed as charged. May was specific, and to my mind credible, in his testimony describing the accumulations, and if he was less specific in articulating their parameters in the body of the citation than in his testimony it is understandable, for it is clear that the accumulations were extensive in size and varied in consistency. Nor was May the only witness who noted the presence of the accumulations. Keene, who was the foreman on the shift during which the accumulations were cited, agreed the section was in need of "some cleaning." Tr. 269.

May's testimony that the accumulations existed from the face areas outby to the transfer points for approximately 200 feet was persuasive. It is true that May for the most part judged the existence and consistency of the accumulations by "eyeballing" them. But, there was at least one instance (in the vicinity of

the coiled cable) where he sat in the accumulated coal dust and found it to be about 2 inches thick and dry.

The credibility of May's testimony is further enhanced by the fact that he recalled the accumulations as varying in their characteristics -- testimony that is generally reflective of actual mining conditions. For example, May noticed that in some places in the entries the coal had been pushed up against the ribs while in other places machines had run through it, helping to reduce it to dust and leveling it out.

In addition, May's description of the coal dust that had accumulated at the feeder also was persuasive. He knew the height of the entry at the feeder was approximately 51 inches and he observed that coal dust had accumulated to the roof. I am persuaded that he accurately described the accumulations at the feeder not only by his specific testimony of their extent, but also by Vinson's statement that when he viewed the feeder around 6:40 a.m. on February 14, he did not believe procedures had been undertaken to move the feeder so that areas adjacent to it could be cleaned. I am further persuaded by Vinson's acknowledgement that the sides of the feeder could have been cleaned by shovel but that it would have taken a miner up to five hours to do it, and by the fact that the testimony does not indicate such a clean up, or indeed any other kind of clean up, was undertaken at the feeder between the time Vinson observed the feeder and the time May arrived on the section. Further, Keene too noted accumulations at the feeder.

May believed that there had been some attempt to rock dust and to clean up the entries and crosscuts before he observed the section, and the evidence establishes that May was correct in this regard. However, the clean up effort was inadequate. Vinson stated that in general the clean up program at the mine required the 11:00 p.m. to 7:00 a.m. shift to clean up what was left from the two production shifts and I believe this to have been true.

Because there was no testimony to the contrary, I also credit Vinson's testimony that Wyatt listed the jobs Vinson was to assign his crew to do, that the cleaning up of accumulations and rock dusting were always on the list, and that this was so for the 11:00 p.m. to 7:00 a.m. shift on February 13 and 14. According to Vinson, the program followed by the 11:00 p.m. to 7:00 a.m. shift generally was to send only one person to work for approximately three hours to clean up the section. Vinson stated that usually this was adequate. However, it seems certain that the usual program was not adequate on February 14, especially with regard to the accumulations at the feeder, which existed when Vinson left the section and which I believe were essentially the same accumulations found by May.

I conclude, therefore, that May properly found a violation of section 75.400. The testimony of May, who eyeballed the accumulations, and who was able to describe their consistency and extent was persuasive and, in my opinion, the Respondents did not present any testimony to overcome it. Moreover, and as I have stated, the fact that May was unable to describe with precise specificity the depths of the accumulations in each entry and crosscut does not, in my opinion, detract from his overall credibility, for it is clear to me that the accumulations were extensive.

#### **KNOWING VIOLATION**

The violation having been established the question is whether Wyatt and Salyers "knowingly authorized, ordered or carried [it] out?" The Commission has defined the term "knowingly," as used in section 110(c) as having the meaning:

that [is] used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . [T]his interpretation is consistent with both the statutory language and the remedial intent of the . . . Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8, 16 (January 1981), aff'd, 669 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).

May testified that Wyatt told him that Vinson's crew had not gotten the section cleaned. Tr. 176. May believed that a conscious decision was made by Wyatt to produce coal in any event and to put production ahead of safety. Tr. 176-177. However, even if Wyatt stated to May that Vinson's crew had not cleaned the section, it does not follow that Wyatt necessarily knew this before the conditions were pointed out to Wyatt by May. Rather, it could be that Wyatt assumed after he and May observed the accumulations that they were the result of inadequate clean up by Vinson's crew. Thus, the Secretary's case for a "knowing violation" must be established, if it is established at all, on another, less ambiguous basis.

In my view, the chronology of events provides such a rationale. May arrived at the mine at approximately 2:00 p.m. At that point Wyatt had been underground for approximately two hours and by Wyatt's own testimony he had been on the 001 section where he had inspected the continuous miner. Salyers, who was the foreman of the shift during which Wyatt was underground, did not testify. But Keene, the foreman immediately after Salyers' shift, stated that when he arrived on the section, the entire section was in need of some cleaning, and there was no testimony that Keene had the section cleaned prior to May's arrival. Indeed, common sense dictates that there was not time to have had this done.

May testified, and I have accepted, that accumulations existed in each entry for a distance of approximately 200 feet or more. These accumulations were visually obvious. I believe it permissible to infer from the presence of accumulations at the beginning of Keene's shift that during Salyer's shift the same or substantially similar accumulations existed and that they existed when Wyatt was underground before May arrived. It is not clear where the continuous miner was positioned when Wyatt was underground and it may be that it was not where May observed it because the Secretary and Wyatt agree that at least some mining may have been done after Wyatt viewed the machine. Nonetheless, if the presence in the entries of the same or substantially similar accumulations can be inferred while Wyatt was underground, it can also be inferred that to reach the continuous miner Wyatt would have had to pass through areas containing the accumulations. Since the accumulations were obvious, I find that Wyatt knew of the existence of the accumulations prior to May observing them.

It having been established that Wyatt knew of the violation, the question becomes whether Wyatt acted to try to eliminate the condition? There is no evidence that he did, and the lack of any such evidence leads me to conclude that Wyatt knowingly violated section 75.400 and accordingly is liable for a civil penalty pursuant to section 110(c) of the Act.

I also conclude that Salyers knowingly violated the standard. As I have found, the violative accumulations found by May on the 001 section were extensive, and I have concluded that the same or essentially similar accumulations existed during Salyers shift. As foreman, Salyers was responsible for the conditions on the section. The accumulations were visually obvious and I conclude Salyers knew of their existence.

As with Wyatt, the question becomes whether Salyers acted to try to eliminate the condition? I have noted that Salyers did not testify on his own behalf. I note as well that there is nothing in the record from which to infer that he tried to clean up the accumulations before Keene's shift took over. Indeed,

because Keene did not get the usual oral preshift report from Salyers and thus was not alerted to the presence of the accumulations prior to coming on the section, the implication is that Salyers did not give elimination of the accumulations the priority it deserved.

Salyers' argument that his job was to run coal and clean what he could and that he could not keep the section clean with the number of people he had on hand, is no excuse for failing to take steps to try to remove the accumulations. The law may not in all instances require the agent of a corporation, such as a foreman, totally to correct an existing violation but it does require him or her to try. A foreman cannot simply neglect the problem because there is "no way" to correct it.

I conclude therefore that Salyers also knowingly violated section 75.400 and accordingly is liable for a civil penalty pursuant to section 110(c) of the Act.

30 C.F.R. § 75.517

Citation No. 3507924 states in part:

The 480 three phase continuous mining machine's trailing cable in use on the 001-0 section has 18 damaged places where the outer jacket was removed with inner leads visible. 1 place was 25" (inches) long [.] Another place had outer and inner insulation removed with bare phase and ground wires present. This was located on dry, float coal dust down the No. 5 entry to the section transformer.

P. Exh. 1. The cited standard, section 75.517, provides, "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

As previously mentioned, Wyatt does not deny that he is an agent of Middle Creek. Wyatt's attack on the violation essentially consists of challenging the credibility of May's testimony regarding the number of places where the outer jacket of the cable was torn and presence of a piece of wood being used as a wedge to separate the exposed conductor and the ground wire.

I am persuaded, however, that May's testimony regarding the condition of the cable is accurate to the extent that there were 18 places requiring taping or retaping due to tears in the cable's jacket. May counted the places. May helped to tape the cable. In addition, Lawson, Bernard Salyers, Keene and Wyatt agreed the cable was defective and subject to repeated splitting,

and I accept that this was true. The propensity of the cable to split lends further credence to May's version of what he found.

I also conclude that at one of the tears the bare wire of one of the conductors inside the cable was exposed through the tear. While I agree with Wyatt that May's failure contemporaneously to record the existence of the alleged piece of wood that supposedly separated the conductor and the ground wire casts doubt upon its existence, I conclude that the question of whether or not the wood was present is beside the point when considering the existence of the violation. Section 75.517 requires the cable to be insulated adequately and fully protected. When the outer jacket is torn, as it was in 18 instances, the cable is not adequately insulated and the standard has been violated. Artificial separation of a naked conductor from a ground wire would simply augment the overall gravity of the violation.

#### **KNOWING VIOLATION**

The violation having been established, the question is whether Wyatt knowingly violated it. There is no doubt that the generally defective nature of the cable was known to Wyatt. However, this does not establish a knowing violation, unless in some fashion Wyatt did nothing to protect against the cable splitting and his failure to act lead directly to the 18 tears in the cable. It must be recognized that use of the cable was acceptable to MSHA, provided it was adequately taped. Afterall, and as Wyatt points out, once the violation was abated by taping the tears the cable was left in use for one or two months more.

In my view, the Secretary has not established that Wyatt failed to act to prevent the cited tears. Rather, the testimony leads me to conclude that Wyatt took some pains to make certain the cable was properly taped. Lawson's testimony that prior to the violation being cited Wyatt directed Lawson and all other electricians to "keep an eye on the cable" was not refuted. Similarly, his testimony that Wyatt ordered the cable turned to reduce the tears was not contradicted. While Lawson also testified he suggested to Wyatt that the cable be replaced, I do not draw an inference adverse to Wyatt from the fact that it was not taken out of service. As I have noted, use of the cable apparently was acceptable to MSHA provided it was adequately repaired. I further recognize that when the violation was cited, Middle Creek was awaiting an opinion from the company from whom it had purchased the cable regarding why the cable was prone to split and what could be done about it. The advice was sought while Wyatt was superintendent and is additional evidence that action was being taken in response to the problem.

Given the fact the cable could be used provided it was properly taped, I do not find persuasive counsel's argument that

Wyatt knew the cable was defective and should have had it replaced prior to being cited for the violation of section 75.517. Nor do I find that the Secretary has established that on February 14, Wyatt knew or should have known of the existence of the tears in the cable.

I have found that on February 14, Wyatt was on the 001 section prior to May's arrival and it is true that Wyatt directed his attention to the condition of the continuous miner. However, it is not certain where the continuous miner was located and thus it is not certain Wyatt had to walk past the area of the cable where the tears existed in order to reach the miner. Moreover, even if he did pass the defective area of the cable while he was on the 001 section, there is no basis from which to infer the tears (unlike the accumulations) were so visually obvious he would or should have observed them while passing by. May found them because he was specifically inspecting the cable and the evidence does not suggest to me that Wyatt should have made a special point of examining the cable. While the splitting of the cable was admittedly an ongoing problem, from Wyatt's viewpoint it seems reasonable to have believed that his directives to "keep and eye on the cable" and to keep it taped were being followed. He had instructed all of the electricians in this regard, and his testimony that the cable was not a frequent topic of discussion at daily safety meetings was not contradicted or challenged.

Therefore, I conclude that Wyatt did not knowingly authorize or order the violation of section 75.517, and I will dismiss this portion of the Secretary's penalty petition at the close of this decision.

**GRAVITY OF VIOLATION**  
**AND OTHER**  
**APPLICABLE CIVIL PENALTY CRITERIA**

Having found that Wyatt and Salyers knowingly violated section 75.400, I now turn to the gravity of the violation and to the other applicable civil penalty criteria. The accumulations of loose coal and coal dust were extensive, they were dry and they existed in the immediate vicinity of potential ignition sources. I credit May's testimony that the feeder mechanism contained many such sources -- bearings, electric motors, gears and pulleys -- the malfunction of any one of which could have ignited the accumulated coal and coal dust. I also note that the defective cable was lying in coal dust and that had the conductors contacted one another the circuit breaker, which was supposed to de-energize the cable, could have failed and the an ignition could have resulted. Indeed, even if the circuit breaker functioned properly an arc or spark would have occurred first and the coal dust could have ignited. The fact that the continuous miner may have been "down" at the time the violation was cited is beside the point, because Middle Creek expected to

repair it and resume mining presently. Given the extent and nature of the accumulations and the presence of numerous potential ignition sources, I conclude the violation was very serious.

Because I have found that Wyatt and Salyers actually knew of the existence of the accumulations and failed to take steps to eliminate them, I find that both exhibited more than ordinary negligence in allowing the violation to exist.

I also find that Wyatt exhibited good faith in attempting to achieve rapid compliance with section 75.400 after the violation was cited.

There is no evidence that Wyatt and Salyers, acting on behalf of Middle Creek, had any history of being cited previously for knowingly violating the Act or the mandatory health and safety standards promulgated pursuant thereto.

#### CIVIL PENALTY

The Secretary has proposed that a civil penalty of \$700 be assessed against Wyatt for the violation of section 75.400 and that a civil penalty of \$400 be assessed against Salyers. I find both these proposals somewhat excessive in view of the fact that Wyatt and Salyers, especially Salyers, appeared to me to be persons of limited means. Still, if section 110(c) is to have a deterrent effect, penalties assessed pursuant to it must be more than a slap on the wrist. Those penalized must realize that the authority of their positions carries a heightened responsibility to act to eliminate violative unsafe conditions once they are known. Accepting the continuing existence of violations by doing nothing to eliminate them after discovery is to fail to act in accord with the responsibility the Mine Act places upon those who function on the corporate operator's behalf.

I therefore assess a civil penalty of \$400 against Wyatt for his knowing violation of section 75.400 and a civil penalty of \$200 against Salyers for his knowing violation of section 75.400.

#### ORDER

#### DOCKET NO. VA 92-83

The Secretary's petition to assess a civil penalty against Henry Salyers for the violation of Section 75.400 is GRANTED. Henry Salyers is ORDERED to pay a civil penalty of two hundred dollars (\$200) within thirty (30) days of the date of this decision for the violation of section 75.400 as cited in Citation No. 3507925 on February 14, 1991, at Middle Creek's No. 1 Mine.



**DOCKET NO. VA 92-84**

The Secretary's petition for assessment of civil penalty against Darryl Keene is DISMISSED.

**DOCKET NO. VA 92-89**

The Secretary's petition for assessment of civil penalty against Steve Vinson is DISMISSED.

**DOCKET NO. VA 92-93**

The portion of the Secretary's petition for assessment of civil penalty assessment against Jimmy Wyatt for the violation of section 75.517 as cited in Citation No. 3507924 is DENIED. The portion of the Secretary's petition for assessment of civil penalty against Jimmy Wyatt for the violation of section 75.400 is GRANTED. Jimmy Wyatt is ORDERED to pay a civil penalty of four hundred dollars (\$400) within thirty (30) days of the date of this decision, for the violation of section 75.400 as cited in Citation No. 3507924 on February 14, 1991, at Middle Creek's No. 1 Mine.

*David F. Barbour*

David F. Barbour  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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AUG 27 1993

PEABODY COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 91-1370-R
	:	Citation No. 3417022; 8/27/91
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 91-1371-R
ADMINISTRATION (MSHA),	:	Citation No. 3551055; 8/13/91
Respondent	:	
	:	Martwick Underground Mine
	:	Mine I.D. No. 15-14074
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-99
Petitioner	:	A.C. No. 15-14074-03599
v.	:	
	:	Docket No. KENT 92-185
PEABODY COAL COMPANY,	:	A.C. No. 15-14074-03600
Respondent	:	
	:	Martwick Underground Mine

**DECISION**

Appearances: David R. Joest, Esq., Henderson, Kentucky,  
for Peabody Coal Company;  
MaryBeth Bernui, Esq., Office of the Solicitor;  
U.S. Department of Labor, Nashville, Tennessee,  
for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," to contest citations issued by the Secretary of Labor to the Peabody Coal Company (Peabody) and for review of civil penalties proposed by the Secretary for violations of mandatory standards alleged therein.

The Secretary moved to vacate Citation No. 3551060 (Docket No. KENT 92-185) on the grounds that there had been insufficient time to effectively negotiate the disputed provisions of the operator's ventilation plan. The undisputed motion was granted at hearing and Citation No. 3551060 was accordingly vacated. In addition, the Secretary moved at hearing for a settlement of Citation Nos. 3417027 and 3417031 (Docket No. KENT 92-185) proposing a reduction in penalties

from \$419 to \$275. I have considered the representations, documentation, and testimony at hearing in support of the motion and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The order following this decision will incorporate that settlement.

The two citations remaining at issue, Citation No. 3551055 (Docket No. KENT 92-99) and Citation No. 3417022 (Docket Nos. KENT 91-1370-R and KENT 92-185) allege violations of the mandatory safety standard at 30 C.F.R. § 75.507 and, more specifically, as modified charge respectively as follows:

Citation No. 3551055

Power connection points are in return air outby the last open x-cut on the No. 4 unit (ID 004-4), 1st E. Panel off S.W. submains. Return air was being coursed over the non-permissible power connection points of the conveyor belt motor, starting box and the belt power center located outby the 004-0 section at the mouth of the panel. The intake air reading between No. 1 and No. 2 room was 23,560 cfm and the return air reading at the block stopping across from the working section was 14,150 cfm.

Citation No. 3417022

Power connection points are in return air outby the last pen crosscut on No. 1 unit (ID 001-1) Second East Panel. Return air was being coursed down the belt and track entries over the pump station, belt drive, and other power boxes along the track entry. The intake air between No. 1 and No. 2 room was 20,400 cfm and 13,299 cfm immediate return. Split return 15,162.

The cited standard, 30 C.F.R. § 75.507, provides that "[e]xcept where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air."

The issuing inspector for Citation No. 3551055, Cheryl McMackin McGill, a coal mine safety and health specialist for the Mine Safety and Health Administration (MSHA) with 16 years experience in the mining industry, testified that she measured the intake air of the cited section (see Joint Exhibit No. 2) at 23,560 cubic feet per minute (cfm) and the return air at the combined returns at 14,150 cfm leaving a difference of about 10,000 cfm. According to Ms. McGill, this amount of air was accordingly passing through the neutral areas, i.e.,

the belt and track entries, after having ventilated at least one working face. She explained that the violation existed because this air then passed over a non-permissible power connection point. Ms. McGill took bottle samples on the No. 4 unit on the date the citation was issued and upon testing showed .12 percent methane. Methane readings on that date with a hand held detector showed .2 percent methane in the return closer to the section.

According to Ms. McGill the violation was "significant and substantial" and hazardous because of the existence of non-permissible power connectors in what she believed to be return air and the presence of methane from the working face which could result in fire and/or explosions thereby causing burns and fatalities from asphyxiation.

MSHA Inspector Lendell Noffsinger issued Citation No. 3417022 on August 27, 1991. He testified that the difference between the intake and return air in the neutral entries was about 6,000 cfm on that date. He measured the intake air between the No. 1 and No. 2 rooms at 20,400 cfm and on the return at 13,299 cfm (See Joint Exhibit No. 3). As a result he felt that return air was passing over non-permissible power connection points on the belt drives and pumps. He concluded that the violation was "significant and substantial" because he believed return air from a working face, possibly containing explosive levels of methane, was passing over non-permissible power connecting points. He concluded that it was reasonably likely to cause injuries such as burns from an explosion. He also detected .1 percent methane in the return air and noted that the section belt was running at the time the citation was issued.

MSHA Ventilation Specialist Lewis Stanley agreed that ventilating air containing methane gas passing over non-permissible power connection points could be dangerous. Inspector Stanley has been a ventilation specialist for 12 years, has had additional experience as a regular mine inspector, and 14 years experience as a coal miner. In his opinion, the condition could result in explosions resulting from sparks or an arc emanating from the power connection points.

Subsequent to hearings and briefing in these cases, the Commission, in Secretary v. Zeigler Coal Co., 15 FMSHRC 949 (June, 1993), upheld the Secretary's definition of the term "return air" for the purposes of 30 C.F.R. § 75.507, as air that has ventilated any working face or place in a coal producing section. Peabody's argument that under that standard air does not become "return air" until it has passed the last working place is accordingly rejected.

Peabody continues to argue, however, that at the time the instant citations were issued mine operators were not provided adequate notice of the requirements of the cited standard to enable them to defend against charges under that standard. In particular, Peabody argues that the cited standard does not give adequate notice of its requirements since the standard does not set forth any definition of intake or return air and the Secretary's Program Policy Manual definition of return air as air which has ventilated any one working face is contrary to what MSHA had previously recognized to be the accepted meaning of the term in the industry. Peabody further argues, but without any supporting evidence, that "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard" would have no way of knowing that "return air" is air that has ventilated any working face or place in a coal producing section.

I note preliminarily that Peabody's claim of inadequate notice appears to have been presented only in the abstract and that Peabody did not raise this claim either in its Answer, in its response to the Prehearing Order, or in opening statement at trial. Indeed, Peabody did not raise the claim that it did not have adequate notice until it filed its Posthearing Brief. Even at hearing Peabody failed to present any testimony that it did not receive adequate notice and produced no affirmative evidence that a "reasonably prudent person familiar with the mining industry and the protective purposes of the standard" would not have recognized the specific requirements of the standard. See Alabama By-Products Corp., 4 FMSHRC 2128 (December 1982); Lanham Coal Co., Inc., 13 FMSHRC 1341 (September, 1991). Under the circumstances, I find that Peabody has waived any claim to inadequate notice.

In any event, as each of the Secretary's expert witnesses did, when considering the purpose of the cited standard, i.e., preventing air contaminated with methane from passing over potential ignition sources from non-permissible power connection points, it is clear that ventilating air that has ventilated any working face or place in a coal producing section may be air contaminated with methane and therefore must be considered "return air" within the meaning of the cited standard. The Secretary's expert witnesses, Inspectors Lewis Stanley, Lendell Noffsinger and Cheryl McMacken McGill may be considered to be "reasonably prudent persons familiar with the mining industry and the protective purposes of the standard." Their recognition of the requirements of the standard within the framework of the mining industry and the protective purposes of the standard confirms the Secretary's interpretation applied herein. See Lanham Coal, Inc., supra; Alabama By-Products, supra. For this additional reason I reject Peabody's contention.

Peabody next argues that the Secretary has failed to prove that return air in fact passed over non-permissible power points as alleged. Peabody maintains that in this case the inspectors simply took intake and return air flow readings and assumed that the difference between the readings represented air which coursed down the neutral entries. Peabody argues that this assumption suffers from two major defects. First, it argues that the intake and exhaust air readings were not taken simultaneously and that no effort was made to verify that no change in air flow occurred in the interim. According to Peabody's argument, Inspector McGill simply assumed that the air flow remained constant based on nothing occurring in her presence to change air flow even though changes to mine ventilation could have effected air flow to the No. 4 Unit. Peabody argues, secondly, that the inspectors assumed that any air from the face areas which entered the neutral entries passed over non-permissible power points, even though the equipment containing such points is located some distance down the neutral entries and even though there are return side regulators and vents (for example, for battery charging stations) through which the "return" air could re-enter the return entries.

While Peabody speculates, in essence, that the Secretary's testing methods utilized in this case may have been less than perfect I find that the tests performed by the Secretary's agents were clearly sufficient to establish facts from which it may reasonably be inferred that return air passed over non-permissible power points and that the violations therefore were proven as charged. If indeed Peabody wished to establish affirmative defenses such as it suggests in its argument, it was incumbent upon Peabody to present that evidence at hearing.

I agree, however, with Peabody's argument that the Secretary has failed to prove that the violations were "significant and substantial."

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

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove:  
(1) the underlying violation of a mandatory safety

standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

Southern Ohio Coal Co., 13 FMSHRC 912, 916-917 (1991).

As Peabody notes in its Posthearing Brief the Secretary's witnesses testified that they believed the violations at issue were "significant and substantial" because of the danger of a methane ignition caused by methane in the "return air" coming into contact with non-permissible power points. However, no methane readings were taken in the vicinity of the power points and the levels of methane actually monitored were indeed low -- ranging from .03 percent to .2 percent. There is no evidence that methane levels in the return entries have ever been anywhere near explosive levels and no evidence of any prior ignitions. Testimony that there was a mere "possibility of explosion" is not sufficient. Without essential evidence as to the likelihood of an ignition the third element of the Mathies test is not proven. See U.S. Steel Mining, 6 FMSHRC at 1834 (August, 1984) and Secretary v. Zeigler Coal Co., supra at page 953.

In determining an appropriate civil penalty for the instant citations I find, in the absence of evidence, that Peabody is chargeable with but little negligence. Moreover, the violation was not proven to be of high gravity. Considering the available evidence under the criteria in Section 110(i) of the Act I find a civil penalty of \$150 for each violation to be appropriate.

ORDER

Citation No. 3551060 is hereby **VACATED** and Contest Docket No. KENT 92-30-R is **DISMISSED**. Citation Nos. 3417027, 3417031 are **AFFIRMED** as modified to delete the "significant and substantial" designations and Peabody Coal Company is hereby directed to pay a civil penalty of \$275 for both violations therein within 30 days of the date of this decision. Citation Nos. 3417022 and 3551055 are **AFFIRMED**, as modified to delete the "significant and substantial" designations and Peabody Coal Company is hereby directed to pay civil penalties of \$150 each for the violations therein within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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AUG 31 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 92-878  
Petitioner : A.C. No. 15-17162-03506  
v. :  
 : No. 4 Mine  
COUGAR COAL COMPANY, :  
INCORPORATED, :  
Respondent :

## DECISION APPROVING SETTLEMENT

Before: Judge Barbour

### Statement of the Proceeding

This proceeding concerns proposals for assessment of civil penalties filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for six alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The Respondent filed a timely answer denying the alleged violations.

The parties now have decided to settle the matter, and they have filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
4020311	04/14/92	75.1100-3	\$168	\$ 50
4030313	04/14/92	75.400	\$168	\$168
4030314	04/14/93	75.1100-3	\$168	\$ 50
4030316	04/14/93	75.1105	\$168	\$ 50
4030317	04/14/92	75.400	\$168	\$168
4030318	04/14/92	75.1100-3	\$168	\$ 50

In support of the proposed settlement disposition of this case, the parties have submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size, ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 4030311, which was issued because the water had been turned off a deluge-type

spray on a conveyor belt drive, the parties note the Respondent was working on the system when the violation was cited and that four other systems offering fire protection were operative. In addition, the mine was wet and no methane was present. The parties therefore assert the citation should be modified to reflect the condition was unlikely to result in an accident.

With regard to Citation No. 4030313, which was issued for accumulations of loose coal and coal dust at the head drive and outby, the parties state the Respondent has agreed to pay in full the proposed civil penalty.

With regard to Citation No. 4030314, which was issued because water would not flow through the deluge-type spray system for a belt drive, the parties note the water had been turned off while Respondent worked on the system and that it had been off for only a short time. In addition, the mine was wet and no methane was present. The parties, therefore, assert the citation should be modified to reflect the condition was unlikely to result in an accident.

With regard to Citation 4030316, which was issued because a power center was not being ventilated directly into a return aircourse, the parties note the condition had existed, but one shift and, more important, under current regulations the condition would not constitute a violation. The parties therefore assert the citation should be modified to reflect the condition was unlikely to cause an accident.

With regard to Citation No. 4030317, which was issued for an accumulation of float coal dust on a belt conveyor line, the parties note the Respondent has agreed to pay in full the proposed civil penalty.

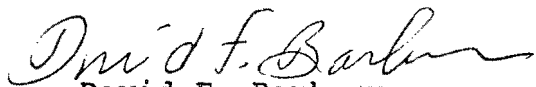
Finally, with regard to Citation No. 4030318, which was issued because water would not flow through a deluge-type fire fighting system or a belt drive, the parties note the Respondent was working on the system at the time the violation was cited and that four other fire fighting systems were available at the belt drive. In addition, the mine was wet and no methane was present. Therefore, the parties assert the citation should be modified to reflect the condition was unlikely to cause an accident.

#### CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that approval of the proposed settlement is warranted in that the proposed settlement disposition is reasonable and in the public interest. Pursuant to 30 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is **APPROVED**.

**ORDER**

Respondent IS ORDERED to pay civil penalties in the settlement amounts shown above in satisfaction of the violations in question. Petitioner is ORDERED to modify Citation Nos. 4030311, 4030314, 4030316, and 4030318 to reflect injury or illness is unlikely due to the violations. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is **DISMISSED**.

  
David F. Barbour  
Administrative Law Judge  
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## ADMINISTRATIVE LAW JUDGE ORDERS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 2, 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-713
Petitioner	:	A. C. No. 15-16779-03528
	:	
v.	:	Mine No. 3
HUSKY COAL COMPANY, INC.,	:	
Respondent	:	

## ORDER TO SUBMIT INFORMATION

In response to the second show cause order the Solicitor has filed a one line motion to dismiss on the ground that the operator has paid the "revised" penalty assessment in full. The Solicitor does not explain what the revised assessment is.

The Solicitor is reminded that under section 110(k) of the Act Commission judges have the responsibility to approve all settlements and that this jurisdiction is not defeated merely because an operator chooses to pay an amount the Solicitor finds agreeable. The legislative history of the 1977 Mine Safety and Health Act demonstrates that Congress intended that the Commission be an active participant in all such matters. The Solicitor is further reminded that the Commission is not bound by the Secretary's original assessments because all penalty matters are before the Commission de novo.

In light of the foregoing, it is Ordered that within 30 days of the date of this order the Solicitor file a motion explaining what amount the operator paid and why these amounts satisfy the requirements of section 110(i) of the Act.

  
Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 8 1993

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

DECISION

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

Before: Judge Weisberger

Statement of the Case

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

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



## Findings Facts and Discussion

### I. Background

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup>Prior to the issuance of these orders, a citation pursuant to Section 104(d)(1) of the Act, supra, had been issued to Respondent on October 22, 1991.

<sup>2</sup>4 or 5 of the cylinders contain oxygen, and the rest contained acetylene.

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

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

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

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

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

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

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

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

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

A. Violation of 30 C.F.R. § 56.11012

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

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

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

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

impractical to install such protective devices, adequate warning signals shall be installed." 30 C.F.R. § 56.2 defines a travelway as "...a passage, walk or way regularly used and designated for persons to go from one place to another." Within the framework of the above evidence, I find, as cited by Gadway, that on October 22, 1991, there existed an opening into which a person might fall that was near a travelway used by truckers going from the scale to the office. Hence I find that Respondent herein did violate Section 56.11012, supra.

#### B. Unwarrantable Failure

In essence, according to Gadway, he concluded that the violation herein was as a result of Respondent's unwarrantable failure, because "...by the looks of the board deterioration, it looked as if it was there for quite a while,... ." (Tr. 214) (sic). He also said that the hole was "very obvious" (Tr. 217). Mace indicated that the hole had been in existence for at least a week prior to October 22, 1991, when it was cited. Respondent has not offered any evidence to establish why it had not fixed, protected, or warned of this violative condition. Considering these factors, and taking into account the size of the hole, I conclude that the violation herein was as a result of more than ordinary negligence, and constituted an unwarrantable failure. (See, Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987) (construing unwarrantable failure to mean aggravated conduct constituting more than ordinary negligence)).

#### C. Significant and Substantial

According to Gadway, a truck driver could fall in the hole by mistake, and suffer a permanently disabling injury such as a broken leg or hip. Gadway concluded that the violation was significant and substantial. In this connection, he said that a violation is significant and substantial if an injury is reasonably likely to occur, and the injury is of a type that will result in, at the least, a loss of workdays.

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

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious

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

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

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

Southern Ohio, supra at 916-917.

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

#### D. Penalty

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

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

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

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

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

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

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

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

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

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

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

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

#### VII. Order No. 3594754

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

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



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

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

VIII. Citation No. 3594758

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

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

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

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

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

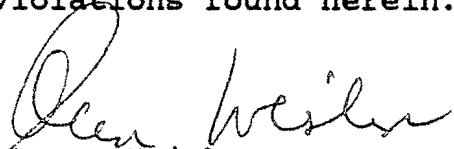
has been abated.

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

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

#### ORDER

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



Avram Weisberger  
Administrative Law Judge

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