SEPTEMBER 1993

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SEPTEMBER 1993

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

Secretary of Labor, MSHA v. Texas Gravel, Inc., Docket No. CENT 93-104-M. (Chief Judge Merlin, Default Decision of August 9, 1993 - unpublished).

Secretary of Labor on behalf of Cletis Wamsley and Robert Lewis v. Mutual Mining, Inc., Docket Nos. WEVA 93-375-D, WEVA 93-376-D. (Judge Amchan, Order of Temporary Reinstatement of August 16, 1993).

Secretary of Labor, MSHA v. Dolese Brothers Company, Docket No. CENT 92-110-M. (Judge Fauver, August 9, 1993).

Energy West Mining Company v. Secretary of Labor, MSHA, Docket Nos. WEST 92-819-R, WEST 93-168. (Judge Lasher, August 10, 1993)

Secretary of Labor, MSHA v. Dow Sand & Gravel, Docket Nos. YORK 93-14-M, etc. (Chief Judge Merlin, Default Decisions of August 9, 1993 - unpublished).

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. LAKE 93-23. (Judge Melick, August 12, 1993).

Secretary of Labor, MSHA v. Buffalo Crushed Stone, Inc., Docket Nos. YORK 92-117-M, YORK 92-128-M. (Judge Weisberger, August 11, 1993).

Secretary of Labor, MSHA v. Steele Branch Mining, Docket No. WEVA 92-953. (Judge Koutras, August 13, 1993).

Peabody Coal Company v. Secretary of Labor, MSHA, Docket No. KENT 91-179-R. (Judge Melick, August 16, 1993).s

Secretary of Labor, MSHA v. Cyprus Plateau Mining Corporation, Docket No. WEST 92-371-R, WEST 92-485. (Judge Morris, August 24, 1993).

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

Secretary of Labor, MSHA v. Brown Brothers Sand Company, Docket No. SE 92-246-M. (Judge Barbour, August 19, 1993).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 8, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 93-104-M
TEXAS GRAVEL, 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 August 9, 1993, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Texas Gravel, Inc. ("Texas Gravel") for failing to answer the proposal for assessment of civil penalties filed by the Secretary of Labor or the judge's May 19, 1993, Order to Show Cause.[1] The judge assessed civil penalties in the sum of $2,100. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

On August 30, 1993, the Commission received from Toribio Palacios, Texas Gravel's counsel, a motion to set aside the default order. Mr. Palacios explained that Texas Gravel had inadvertently failed to file an answer and, because negotiations with the Secretary's Office of the Solicitor had already begun, the Secretary was on notice that Texas Gravel wanted a hearing in this case.

The judge's jurisdiction over this case terminated when his decision was issued on August 9, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b) (1993). 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 Texas Gravel's motion to be a timely filed Petition for

[1] As noted by the judge in his Order of Default, the file contains a signed return receipt card for the Order to Show Cause.

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 Texas Gravel'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

September 13, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 92-142
PITTSBURG AND MIDWAY COAL MINING COMPANY	:	

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

ORDER

BY THE COMMISSION:

In 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"), the Secretary of Labor and Pittsburg and Midway Coal Mining Company ("P&M") have filed with the Commission a joint motion to approve settlement of this case. For the following reasons, the parties' settlement motion is granted, and this matter is dismissed.

On June 16, 1993, we granted P&M's petition for discretionary review of a decision of Administrative Law Judge Michael A. Lasher, Jr. In their motion, filed August 16, 1993, the parties explain that P&M stipulated, before the judge, that it violated 30 C.F.R. § 75.302-4 by allowing exhaust air to recirculate into the intake entry through a three-inch diameter ventilation tube, but that it had contested the S&S designation. The judge concluded that the violation was S&S. 15 FMSHRC 1039, 1041-46 (May 1993) (ALJ)(published June 1993). The only issue raised by P&M on review is whether substantial evidence supports the judge's S&S finding. After further evaluation by the Secretary, he now agrees with P&M that substantial evidence of record does not support the judge's finding that P&M's violation of section 75.302-4 was S&S. The parties ask the Commission to grant their motion, vacate the S&S finding, reduce the civil penalty to $50, and dismiss this proceeding.

Oversight of proposed settlements of contested cases is among the Commission's adjudicative responsibilities under the Mine Act (30 U.S.C. § 820(k)) and is, in general, committed to the Commission's sound discretion. See, e.g., Pontiki Coal Corp., 8 FMSHRC 668, 674-75 (May 1986); Medusa Cement Co., 10 FMSHRC 1913, 1914 (October 1990). We conclude that adequate reasons exist to approve the parties' settlement in this case. No reason appears on this record to warrant disapproval of the settlement.

Therefore, upon full consideration of the motion, the settlement is approved. Citation No. 3244895 is modified to delete the significant and substantial designation and P&M is ordered to pay a civil penalty of $50 within 30 days of the date of this decision. Our direction for review is also vacated and this proceeding is dismissed.

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
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September 13, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLETIS R. WAMSLEY and ROBERT A. LEWIS, APPLICANT	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	DOCKET NO. WEVA 93-375-D
MUTUAL MINING, INC., RESPONDENT	:	DOCKET NO. WEVA 93-376-D

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (1988)("Mine Act"), respondent Mutual Mining, Inc., has filed a petition for review of Administrative Law Judge Arthur Amchan's August 16, 1993, Order of Temporary Reinstatement issued pursuant to Commission Procedural Rule 45, 58 F.R. 12158 (March 3,1993), to be codified at 29 C.F.R. §2700.45 (1993). We grant respondent's petition for review and, for the reasons that follow, affirm the judge's order requiring the temporary reinstatement of Cletis Wamsley and Robert Lewis.

Complainants Wamsley and Lewis were miners employed by Mutual Mining, Inc. and active union safety committeemen until their layoff on December 21, 1992. On December 22, they filed discrimination complaints with the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). Following an investigation, the Secretary determined that the discrimination complaints filed by Wamsley and Lewis were not frivolous. On July 6, 1993, the Secretary filed an application for temporary reinstatement of the two miners. On August 5, an evidentiary hearing on the application was held. On August 16, the judge issued his decision in which he concluded that the complaints were not frivolous.

The Secretary alleges that Wamsley and Lewis were laid off because of their activities as union safety committeemen, including their participation in filing a complaint, pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 803(g), and their involvement in a "safety run." Subsequently, MSHA responded to the section 103(g) complaint and issued 20 citations and orders. On the day of the MSHA inspection, respondent laid off Wamsley and Lewis, along with ten other miners. Respondent contends that the miners were laid off for economic reasons and that the layoff had been planned long before the safety complaints and the MSHA inspection.

As the Commission has previously stated, "The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." Secretary of Labor o.b.o. Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305, 1306 (August 1987), aff'd, Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

The judge held an evidentiary hearing and considered the testimony of five witnesses in addition to the two complainants. He determined:

> The Secretary of Labor has the burden of proving that the complaints were not frivolous.... I ... find that the record as a whole establishes that the complaints were not frivolous.

Slip op. at 1-2.

The only issue before us is whether Wamsley's and Lewis' discrimination complaints were frivolously brought. After careful review of the evidence and pleadings, we conclude that the judge's determination that the complaints are not frivolous is supported by the record and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.

Respondent has also moved the Commission to stay the order of the judge. In support of its motion, respondent asserts that reinstatement of the complainants would contravene its collective bargaining agreement and that the complainants are currently employed. To the extent that respondent sought relief pending our consideration of the instant matter, such relief was considered and denied. To the extent that respondent seeks a stay of the temporary reinstatement order pending a final determination of whether a violation of section 105 (c)(1) of the Mine Act has occurred, its motion is denied.

Accordingly, the judge's order requiring the temporary reinstatement of Cletis Wamsley and Robert Lewis is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 17, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. YORK 93-14-M
v.	:	YORK 93-19-M
	:	YORK 93-20-M
DOW SAND & GRAVEL	:	YORK 93-28-M

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act"). On August 9, 1993, Chief Administrative Law Judge Paul Merlin issued four Orders of Default to Dow Sand & Gravel ("DS&G") for failing to answer the civil penalty proposals filed by the Secretary of Labor ("Secretary") and the judge's April 19, 1993 Orders to Show Cause. The judge assessed civil penalties of $1,490 as proposed by the Secretary. For the reasons that follow, we vacate the default orders and remand the cases for further proceedings.

On September 7, 1993, E. Milton Dow filed a letter with the Commission requesting that the default orders be set aside. Dow submits that DS&G responded to the show cause orders. Dow also attached a copy of an undated motion by the Secretary for approval of settlement in Dow Sand & Gravel, Docket No. [92]-161-M, in which the Secretary has apparently agreed to a substantial reduction of civil penalties because of DS&G's operating losses and improved attitude toward compliance.

The judge's jurisdiction over these cases terminated when his decision was issued on August 9, 1993. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b)(1993). 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 DS&G's request 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 DS&G's position. In the interest of justice, we remand these matters 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 orders and remand these matters for further proceedings.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 22, 1993

ALUMINUM COMPANY OF AMERICA	:	
	:	
v.	:	Docket No. CENT 92-362-RM
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether an accident control withdrawal order ("control order") was properly issued to Aluminum Company of America ("Alcoa") pursuant to section 103(k) of the Mine Act by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA").[1] The inspector issued the control order to Alcoa after he determined that an area in Alcoa's Point Comfort Alumina Plant had been contaminated by mercury. Administrative Law Judge Roy J. Maurer vacated the control order after determining that the Secretary failed to establish that an "accident," as that term is defined in the Mine Act, had occurred. 14 FMSHRC 1721, 1723 (October 1992)(ALJ). For the reasons set forth below, we affirm the judge's decision.

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[1] Section 103(k) of the Mine Act states:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

I.
Factual and Procedural Background

Alcoa operates an alumina hydrate production facility in Point Comfort, Texas. On August 5, 1992, MSHA Inspector Ralph Rodriguez inspected the plant in response to a miner's complaint filed under section 103(g) of the Mine Act,[2] which alleged that workers were being exposed to mercury and other hazardous substances. George Weems, an MSHA industrial hygienist, conducted a health survey of the plant on August 25-26, 1992. As part of his survey, Weems inspected and sampled an area known as R-300, where, according to Alcoa and miner representatives, mercury had previously been used, most probably in the production of chlorine between approximately 1965 and 1979. Tr. 94, 200, 206. Apparently, mercury has not been used at the site since that time.

Rodriguez and Weems observed beads of mercury, each measuring two to three millimeters in size, at several locations inside and outside the R-300 building, including in cracks in foundations that had served as pump mounts and along the exterior wall of the building. Tr. 148-49. MSHA also sampled for and detected mercury vapor in several places in the R-300 area including in the pump foundations. No mercury vapor was detected in the breathing zone or higher than knee level. Soil samples were also taken in the area adjacent to the R-300 building. Inspector Rodriguez cited Alcoa, alleging a violation of 30 C.F.R. § 56.20011 for failure to barricade or post signs at the R-300 building.[3]

Rodriguez returned on September 4, 1992, and determined that Alcoa had abated the previous citation by posting signs and barricades at the building. He also observed six people working in an area adjacent to the R-300 building. These workers, who were Alcoa's environmental consultants, were using a backhoe to remove a manhole cover from an underground pipe. They were not

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[2] Section 103(g) provides, in pertinent part:

> Whenever a representative of the miners ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists ... such ... representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation....

30 U.S.C. § 813(g).

[3] Section 56.20011 provides:

> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.

wearing protective equipment. Consequently, Rodriguez issued Alcoa a citation alleging a violation of 30 C.F.R. § 56.15006 for failure to wear protective equipment when encountering chemical hazards.[4]

MSHA issued a report on its health survey of Point Comfort on September 9. Gov. Ex. 7. The report concluded that mercury vapor and metallic (liquid) mercury were present at R-300, but that, according to MSHA's readings, mercury vapor was not present at breathing zone heights. The report also concluded that the ground west of the R-300 building was heavily contaminated with mercury. The report recommended that people entering the area wear protective clothing and equipment and that Environmental Protection Agency ("EPA") procedures be followed in disposing of or cleaning contaminated clothing or equipment.

On September 11, 1992, MSHA Supervisory Inspector Doyle Fink issued the subject control order, which stated:

> Mercury contamination has occurred at all the R-300 facility and area approximately 70 feet west extending to the paved roadway parallel to the R-300 facility to be covered by this 103(k) order. In order to protect the health and safety, all persons are prohibited from entering this area, except with the approval of the District Manager or his representative pending further investigation of the extent of the hazard.

Gov. Ex. 6.

Alcoa filed a notice of contest of the control order and an expedited hearing was held before Judge Maurer on October 6, 1992. At the conclusion of the Secretary's case, the judge entered a decision from the bench granting Alcoa's motion to dismiss. The judge subsequently issued a written decision confirming his bench decision. While the judge credited the testimony of the Secretary's witnesses, including expert testimony as to the hazardous nature of mercury (14 FMSHRC at 1721-22), he held that the Mine Act gives the Secretary the authority to issue a section 103(k) order only if there has been an "accident," as that term is defined by section 3(k) of the Mine Act.

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[4] Section 56.15006 provides:

> Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.

14 FMSHRC at 1722.[5] The judge concluded that the Secretary did not prove that the mercury contamination detected in the R-300 area was the result of an accident and, accordingly, he vacated the section 103(k) order. 14 FMSHRC at 1723. He noted that the Secretary could have protected the safety and health of miners through use of the enforcement mechanisms contained in section 104 of the Mine Act, 30 U.S.C. § 814. Id.

The Commission granted the Secretary's Petition for Discretionary Review of the judge's decision.

II.
Disposition of the Issues

The Secretary argues that the judge's interpretation of the definition of the term "accident" in section 3(k) of the Act is contrary to its plain language and the Act's protective purposes. The Secretary maintains that an unplanned and uncontrolled release of mercury, including a gradual release that creates a long-term hazard, is an accident under the Mine Act. The Secretary also maintains that the judge erred in vacating the order on the basis that MSHA could have corrected the hazard using the enforcement mechanisms of section 104 of the Act.

Alcoa argues that the judge correctly concluded that the order was defective because no accident had occurred. It contends that no one was injured as a result of the alleged mercury contamination and that the contamination was otherwise outside the scope of accident in section 3(k). In addition, the Secretary failed to present any evidence that there had been a sudden spill of mercury or an increase in the level of mercury before the issuance of the order. Alcoa argues that, in the absence of an accident, the Secretary is not authorized to issue orders to take control of an area to prevent future injuries.

We agree with the judge that an accident is "a necessary precondition to the issuance of a section 103(k) order." 14 FMSHRC at 1722. The judge dismissed the case because he found that the Secretary did not prove that an accident had occurred in the R-300 area. Thus, the primary issue in this case is evidentiary in nature: whether the Secretary established that the mercury contamination was the result of an accident.

The Secretary maintains that the mercury release qualifies as an accident as that term is defined in section 3(k) of the Mine Act. The Secretary correctly asserts that "a mercury release that involves 'injury to, or death of, any person' is an accident" under section 3(k) of the Act.

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[5] Section 3(k) provides:

> "accident" includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person....

30 U.S.C. § 802(k).

S. Br. 8. The Secretary further argues that the "fact that the extent of injury to miners cannot yet be determined does not mean that the kind of exposure that can produce injury has not already occurred." S. Reply Br. 5. He argues that it would be inconsistent with the protective purpose of section 103(k) to hold that "MSHA could not issue a Section 103(k) order protecting miners from continued exposure until exposure had manifested itself in diagnosable injury." Id. In the evidentiary context of this case, the Secretary's argument is misplaced.

The Secretary established that mercury vapor was present at ground level, but not in a miner's normal breathing zone. The Secretary also established that approximately 10 to 20 small beads of mercury were found in cracks around the foundations and motor mounts. Tr. 174-75, 206. The Secretary did not, however, offer any evidence that miners had been exposed to mercury vapor in violation of the applicable threshold limit value ("TLV")[6] or that miners had come in contact with the liquid mercury. The Secretary's position that an injury had occurred, but that the extent of the injury had not yet been determined, has no foundation in the record. The Secretary established neither overexposure to mercury vapor or harmful contact with liquid mercury, nor resulting illness or injury.[7]

The Secretary points out that the definition of accident in section 3(k) of the Mine Act "includes a mine explosion, mine ignition, mine fire or mine inundation" even if no injury results.[8] S. Br. 7-8. The Secretary does not contend that the events specified in the definition encompass this mercury contamination. Rather, the Secretary argues that the word "includes" in the definition is a term of enlargement. S. Br. 9, n.5. He maintains that an event not specifically listed in the definition falls within the definition of "accident" if it is "similar in nature or present[s] a similar potential for

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[6] 30 C.F.R. § 56.5001 provides that exposure to airborne contaminants (such as mercury vapor) shall not exceed the TLV's established by the American Conference of Governmental Industrial Hygienists.

[7] Supervisory Inspector Fink testified that the order was issued because of "perceived concern[s] about the mercury ... to make sure that the employees working there were first in priority...." Tr. 93. He stated that the section 103(k) order was issued to force Alcoa to sample the area, post and barricade it, and make sure that employees entering the area wore protective equipment. Tr. 127. He issued the order to keep "everybody out until we've got time to look at this thing and decide where we're going...." Tr. 134-35, 137. Margie Zalesak, a senior MSHA industrial hygienist, stated that the control order was issued because "the [environmental] contractor did not appear ... knowledgeable in the handling of mercury" to make sure that "anyone going into the area would be protected...." Tr. 204.

[8] "Inundation" is defined as an "inrush of water on a large scale which floods the entire mine or a large section of the workings." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 587 (1968). "Inundation," as used in section 3(k) of the Mine Act, may include the inrush of any liquid or gas. See 30 C.F.R. § 50.2(h)(4).

injury or death as a mine explosion, ignition, fire, or inundation." S. Reply Br. 3-4. In general, the Secretary is correct. Whether a specific event is similar in nature must, however, be determined on a case-by-case basis.[9]

The Secretary contends that the mercury contamination at Alcoa's facility was similar in nature to the events specifically listed in the definition. The Secretary presented no evidence, however, that the mercury contamination involved in this case was similar in nature or presented a potential for injury similar to that of a mine explosion, ignition, fire or inundation.[10] Mine explosions, ignitions, fires and inundations typically are sudden events that pose an immediate hazard to miners and require emergency action. If there is a sudden spill of mercury or other hazardous chemical in an active area of a mine, it may be reasonable for the Secretary to conclude that an accident has occurred. However, the Secretary did not establish such an occurrence at Point Comfort.

The Secretary has issued regulations at 30 C.F.R. Part 50, implementing the accident reporting provisions of section 103 of the Mine Act, 30 U.S.C. § 813. In Part 50, the Secretary sets forth the meaning of the term "accident" for reporting purposes. The Secretary has listed at 30 C.F.R. § 50.2(h) events that he considers to be similar in nature and severity to a mine explosion, ignition, fire or inundation. Although the list is not exhaustive, it is noteworthy that neither chemical spills nor chemical contamination are included. Moreover, the events listed require quick action. They include an entrapment of an individual for more than 30 minutes; an unplanned inundation of a mine by a liquid or a gas; certain unplanned roof falls; unstable impoundments, refuse piles and culm banks that require emergency action; and damage to hoisting equipment that endangers an individual.

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[9] The Secretary argues that the judge concluded that the release of mercury was not an accident because mercury contamination is not included in the list of events in the statutory definition. S. Br. 11-12; S. Reply Br. 6 n.1. We believe that the Secretary has misconstrued the judge's decision. The judge recognized that the events listed in the definition were "not meant to be exclusive or exhaustive." 14 FMSHRC at 1722. The critical determination by the judge, however, was his finding that, short of "torturing the terminology," no accident was shown. 14 FMSHRC at 1723.

[10] The Secretary's witnesses stated that they were not sure of the source of the mercury or quantity present in the R-300 area but that they assumed that the mercury had contaminated the area when chlorine was being produced there. See, e.g., Tr. 94. Industrial hygienist Zalesak described the situation as being very unusual because the contaminated area was not in active production. Tr. 200. She stated that it was unlikely that these beads had been "sitting [on the surface] for 13 years" because mercury "vaporizes off." Id. She assumed that the mercury had been deposited in the area when chlorine was produced and that the mercury was seeping up through cracks in the concrete and around the foundation. Tr. 200, 203, 206.

Finally, the Secretary argues that section 103(k) should not be limited to sudden occurrences that create immediate hazards but should equally apply to "gradual occurrences that create more long-term hazards" because they create a similar potential for injury. S. Br. 13-14. He contends that, because "gradual occurrences and long-standing conditions" can produce serious injuries, they are "no less amenable than sudden events to the remedial scheme authorized by section 103(k)." S. Br. 14. The Secretary maintains that, since there had been "an unplanned and uncontrolled release of a known toxic chemical," MSHA was authorized to issue the accident control order to prevent injury to any person and to insure that the operator has a plan to return the affected area to normal. Id.

The Secretary may be authorized to issue a control order in the event of a gradual unplanned release of a toxic chemical, but only if there has been an accident as that term is defined by the Mine Act. The Secretary's witnesses did not attempt to relate the hazards associated with the conditions in the area to an event similar to a mine explosion, fire or inundation. While we agree with the Secretary that an accident need not necessarily involve a sudden occurrence that creates an immediate hazard, the evidence in this case fails to support the Secretary's argument that this particular gradual release of a toxic chemical was similar in nature or presented the same potential for injury as the events set forth in the statutory definition of accident.[11]

We disagree with the Secretary's argument that the judge vacated the section 103(k) order because MSHA could have achieved the same results through the more usual remedial mechanisms in the Mine Act and that he thereby improperly intruded on the Secretary's enforcement discretion. S. Br. 15-16. The judge's reasoning is based on his determination that the occurrence of an accident had not been proven. 14 FMSHRC at 1722-23.

As the judge noted, however, the Secretary was not without a remedy in this case. As discussed above, the Secretary has standards requiring operators to post or barricade hazardous areas and requiring that protective clothing be worn in areas where chemical hazards are present. 30 C.F.R. §§ 56.20011 & 56.15006; see notes 3 & 4, supra. In addition, the Secretary has standards that limit the exposure of workers to airborne contaminants. See note 6, supra. If Alcoa failed to abate a citation alleging a violation of these standards, MSHA could issue a withdrawal order pursuant to section

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[11] Industrial hygienist Weems testified that the conditions at R-300 presented a potential mercury vapor problem because workers could get mercury on their work boots, track the mercury into confined spaces and expose workers to harmful concentrations of mercury vapor. Tr. 154, 164. Industrial hygienist Zalesak testified that mercury can be absorbed through inhalation and through the skin. Tr. 198. At the time the order was issued, however, warning signs and barricades had been posted in the R-300 area in accordance with 30 C.F.R. § 56.20011. In addition, it appears that workers did not regularly enter the area because, as Supervisory Inspector Fink testified, the R-300 area was only used "occasionally for storage." Tr. 106. Moreover, MSHA's investigation revealed that there was no detectable mercury vapor in the breathing zone of workers who might enter the area.

104(b) of the Mine Act, 30 U.S.C. § 814(b). If Alcoa continued to violate these standards, it would be subject to the sanctions set forth in sections 104(d) and (e) of the Act, 30 U.S.C. § 814(d) & (e).

Neither the judge's nor our decision in this case interferes with the Secretary's general authority under section 103 of the Act, 30 U.S.C. § 813, to continue his investigation of the mercury release at Point Comfort. We do not disagree with the Secretary's broad interpretation of section 103(k) of the Act. Our conclusion in this case is based solely on the record developed before the judge and we do not suggest that the gradual release of a toxic substance can never qualify as an accident subject to the provisions of section 103(k).[12]

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[12] On August 4, 1993, the Secretary asked the Commission to take official notice of a document published by the EPA in the Federal Register on June 23, 1993, which indicates that the Point Comfort facility has been included in a list of potential hazardous waste sites warranting further investigation by the EPA. In response, Alcoa asked the Commission to deny the Secretary's request as "improper, irrelevant and untimely." As a general matter, the record on review before the Commission is limited to the record developed before the judge. See e.g., Twentymile Coal Co., 15 FMSHRC 941, 946-47 (June 1993); Union Oil Co. of California, 11 FMSHRC 289, 300-01 (March 1989). The Secretary has not demonstrated the relevance of the EPA document to this proceeding or set forth a compelling reason why the Commission should take official notice of it. Accordingly, the Secretary's request is denied.

III.
Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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September 24, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 91-563 WEST 91-624
AMERICAN MINE SERVICES, INC.	:	

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"), presents the issue of whether a violation by American Mine Services, Inc. ("AMS") of 30 C.F.R. § 75.1400-3[1] was caused by AMS's unwarrantable failure to comply with the standard. Administrative Law Judge John J. Morris concluded that the violation was not a result of the operator's unwarrantable failure. 14 FMSHRC 2123 (December 1992)(ALJ). The Commission granted the

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[1] Section 75.1400-3, entitled "Daily examination of hoisting equipment," provides:

> Hoists and elevators shall be examined daily and such examinations shall include, but not be limited to, the following:
>
> * * *
>
> (b) Hoists and elevators. (1) An examination of the rope fastenings for defects;
> (2) An examination of the safety catches;
> (3) An examination of the cages, platforms, elevators, or other devices for loose, missing or defective parts;
> (4) An examination of the head sheaves to check for broken flanges, defective bearings, rope alignment, and proper lubrication; and
> (5) An observation of the lining and all other equipment and appurtenances installed in the shaft.

Secretary's petition for discretionary review, which challenges the judge's finding on unwarrantable failure. For the reasons that follow, we affirm.

I.
Factual and Procedural Background

AMS operates the West Elk Mine, otherwise known as the Mount Gunnison No. 1 Mine, an underground coal mine in Somerset, Colorado. On January 23, 1991, a hoist malfunctioned, trapping three miners in the ventilation shaft for two and a half hours. The malfunction was caused by a collar door jam.

The hoist operator had not examined and checked the hoisting equipment prior to transporting the three miners. Inspector Cosme Gutierrez of the Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the incident. Inspector Gutierrez issued a citation to AMS under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), for failure to make a daily inspection of the hoisting equipment as required under section 75.1400-3.

AMS contested the citation, and a hearing was held before Judge Morris. The operator argued that there had been no violation of section 75.1400-3 because AMS inspected the hoist on a daily basis, as required by the standard. The judge concluded that AMS violated section 75.1400-3 by failing to check the hoisting equipment "at the commencement of the shift or at least prior to [the] beginning of any hoist functions." 14 FMSHRC at 2128. The judge also concluded that the violation was significant and substantial ("S&S")[2] in nature. 14 FMSHRC 2128-29. He determined, however, that AMS's conduct did not constitute an unwarrantable failure to comply with the safety standard. 14 FMSHRC at 2129. With respect to assessment of a civil penalty, the judge concluded that AMS was moderately negligent. Id.

The Secretary appealed the judge's finding on unwarrantable failure. AMS did not seek review of the judge's determinations as to violation or S&S designation.

II.
Disposition

On review, the Secretary asserts that the judge failed to consider two evidentiary factors presented below, which, he asserts, establish unwarrantable failure. The Secretary had introduced evidence that the mine operator knew of recent malfunctions in the upper limit switch[3] of the hoist, which

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...."

[3] A "limit switch" is a "device fitted to an electrically driven hoist or winding engine which becomes effective at the end of a wind to prevent the cage overwinding or underwinding." Bureau of Mines, U.S. Department of Interior,

should have put him on notice of a need for heightened scrutiny of the hoist. In addition, the hoist operator's explanation to the inspector, that he was too busy to perform the test, showed that the operator knew the hoist should have been inspected before the miners were lowered. The Secretary argues that the judge's decision, which overlooks these factors, is not supported by substantial evidence. The Secretary seeks a remand for further consideration of the record.

In finding the Secretary's evidence inadequate to establish unwarrantable failure, the judge discussed and discounted the fact that AMS was cited for a violation of 30 C.F.R. § 75.1400-4 a few minutes before issuance of the contested citation. The judge did not discuss the evidence referenced by the Secretary on appeal. Nevertheless, we conclude, based on the record before us, that AMS's actions do not constitute unwarrantable failure.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("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 and careful person would use ... characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." Id. at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 193-94 (February 1991). The Commission's determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and on judicial precedent. Emery, 9 FMSHRC at 2002-03.

The Secretary and AMS stipulated that AMS inspected the hoist three times daily, once each shift. Tr. 164-65. The standard requires that hoists and elevators "shall be examined daily...." 30 C.F.R. § 75.1400-3. AMS had inspected the hoist on the night shift of January 21, which was the last working day and shift before the hoist malfunction. Tr. 177-79. The record also contains undisputed evidence that the hoist was generally maintained in good working order and that the hoisting apparatus exceeded MSHA's safety standards. Tr. 170; Tr. II 230.

In Emery, 9 FMSHRC at 2004-05, the Commission determined that the operator's failure to detect four popped roof bolts was not aggravated conduct where Emery had otherwise taken additional measures to provide support and was not indifferent to roof support. See also Rushton Mining Co., 10 FMSHRC 249, 253 (March 1988). Here, AMS had taken extra measures with respect to the hoist apparatus itself and the frequency of inspections and, in general, was not indifferent to hoisting safety measures.

Dictionary of Mining, Minerals and Related Terms 643 (1968). Inspector Gutierrez testified that "limit switches or safety valves would cause that cage to shut off before it hits the top of the chutes." Tr. 57.

The Secretary contends that the required daily inspection must be performed prior to use of the hoist. At the hearing, the MSHA witnesses testified as to that timing requirement but said they knew of no written document specifying such a requirement. Tr. 155-56. The regulation at issue does not expressly set forth when, during a day or during a shift, a hoist inspection is to be made. A potential for confusion arises from the difference between the language of the regulation and MSHA's unwritten enforcement policies. In King Knob Coal Co., Inc., 3 FMSHRC 1417, 1422 (June 1981), the Commission held that confusing or unclear MSHA policies are a factor mitigating operator negligence. We conclude that the absence of specific guidance by MSHA concerning its view of the meaning of "daily" examination under section 75.1400-3 mitigates against a finding of aggravated conduct on the part of AMS.

As to prior malfunction of the limit switch, the operator's master mechanic, Tony Bowac, testified that he had adjusted and checked the limit switch the day before the incident. The log book contained the notation of "check and adjust" on January 22. Tr. II 203-04. The Commission has explained that a defective condition may place an operator on notice of the need for heightened scrutiny to ensure compliance with Mine Act regulations. See Eastern Associated Coal Corp., 13 FMSHRC 178, 187 (February 1991) (continuing leakage problem placed the operator on notice of the need for heightened scrutiny of the leaks); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011 (December 1987)(history of roof falls at mine placed operator on notice that heightened scrutiny of roof conditions was vital). There is no evidence, however, to suggest that a limit switch malfunction should have alerted the operator to a possible problem with the collar door. AMS acted appropriately by inspecting and adjusting the limit switch prior to using the hoist.

The Secretary also relies on the inspector's testimony that the hoist operator told him that he had "neglected" to examine the hoist prior to its use due to a "hectic morning." Tr. 61. This statement, even taken at face value, neither constitutes a defense nor, under the circumstances, indicates the aggravated conduct of unwarrantable failure. Emery, 9 FMSHRC at 2003-04. Cf., e.g., Rochester & Pittsburgh, 13 FMSHRC at 193-94 (aggravated conduct shown where operator failed to make the required weekly examination, but certified that he had); Youghiogheny & Ohio, 9 FMSHRC at 2011 (aggravated conduct presented when foreman demonstrated serious lack of reasonable care by violating clear terms of roof control plan).

We conclude that substantial evidence[4] supports the judge's determination that the failure to check the hoist before lowering the miners did not amount to aggravated conduct. See 14 FMSHRC at 2129. Although the

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[4] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

judge failed to address some of the Secretary's evidence, the evidence presented on this record, including that on which the Secretary relies, supports no other conclusion than that the conduct of AMS was not unwarrantable failure. In such circumstances, a remand to the judge for reconsideration would serve no purpose. See Donovan v. Stafford Construction Co., 732 F.2d 954, 961 (D.C. Cir. 1984) (remand unnecessary because evidence could justify only one conclusion).

III.

Conclusion

For the foregoing reasons, we affirm in result the judge's determination that the conduct of AMS was not unwarrantable failure.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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September 27, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 91-251
ENERGY WEST MINING COMPANY	:	

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"), presents the issue of whether a violation by Energy West Mining Company ("Energy West") of 30 C.F.R. § 75.503 (1992)[1] was significant and substantial ("S&S") in nature.[2] Administrative Law Judge Michael Lasher concluded that the violation was S&S and assessed a $750 civil penalty. 14 FMSHRC 1595 (September 1992)(ALJ). For the reasons discussed below, we remand for further proceedings.

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[1] 30 C.F.R. § 75.503, entitled "Permissible electric face equipment; maintenance," provides in pertinent part:

> The operator of each coal mine shall maintain in permissible condition all electric face equipment ... which is taken into or used inby the last open crosscut of any such mine.

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

I.

Factual and Procedural Background

Energy West operates the Cottonwood Mine, an underground coal mine in Huntington, Utah. On October 24, 1990, Donald Gibson, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an examination of the electrical equipment at the longwall mining unit in the 16 West Section. At one longwall shield, the inspector discovered an impermissible opening between the ballast box[3] and its cover. The inspector inserted a measuring gauge into the plane flange joint and determined that the opening was .005 of an inch, exceeding the permissibility standard set forth at 30 C.F.R. § 18.31(a)(6).[4] The inspector, together with Energy West's foreman, Tom Kerns, removed the box's cover and discovered that rust had caused the opening. He issued a citation to Energy West alleging an S&S violation of section 75.503.

MSHA subsequently proposed a civil penalty of $350 for the alleged violation and Energy West contested it. At the hearing before Judge Lasher, Energy West conceded the violation but contested its S&S designation.

The judge concluded that the violation was S&S. 14 FMSHRC at 1623. Because of the gravity of the ignition hazard contributed to by the violation, the presence of miners, and Energy West's negligence, the judge assessed a civil penalty of $750. Id.

We granted Energy West's petition for discretionary review, which challenges the judge's S&S determination and his civil penalty assessment.

II.

Disposition of Issues

A violation is properly designated as being S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an 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:

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[3] Steel ballast boxes, located on the longwall shields, provide power for auxiliary lighting. Each box is approximately 8½-by-11 inches in size and 2 inches thick. A 120-volt cable enters one side of the box, passes through a power supply module encased in rubber, and is connected to the next ballast box. An aluminum cover about 3/8 of an inch thick is bolted onto each box. The "plane flange joint," formed where the cover meets the box, prevents sparks or explosions from escaping the box. Tr. II 117, 143-44, 150; Exs. G-4, G-5.

[4] The regulation requires that the opening for the cited ballast box not exceed .004 inch. 30 C.F.R. § 18.31(a)(6).

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The Commission has held 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)(emphasis in original). When examining whether an explosion or ignition is reasonably likely to occur, "it is appropriate to consider whether a 'confluence of factors' exists to create such a likelihood." Zeigler Coal Co., 15 FMSHRC 949, 953 (June 1993) citing Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988).

The judge noted that the first element of the Mathies test, violation of a safety standard, was conceded. 14 FMSHRC at 1621. The judge determined that the second element, a discrete safety hazard contributed to by the violation, was present because the permissibility violation posed the danger of a methane or coal dust explosion. 14 FMSHRC at 1621-22.

With respect to the third element, which is the subject of dispute on review, the judge concluded that a reasonable likelihood of an injury was also present. 14 FMSHRC at 1622. The judge analyzed the evidence from the standpoint of a "substantial possibility" of injury standard. See 14 FMSHRC at 1607-1609, 1622. As to the fourth element, a reasonable likelihood that any injury would be of a reasonably serious nature, the judge found that, because miners worked near the area of the violation, serious injuries would result if an explosion occurred. 14 FMSHRC at 1622.

On review, Energy West challenges only the judge's findings as to the third element of Mathies. It contends that the judge's conclusion is not supported by substantial evidence[5] in the record and that the judge relied on an improper legal standard. The judge found no "specific evidence" of prior high levels of methane in the mine, but he deemed "credible and convincing" the inspector's testimony that a methane explosion was always possible. 14 FMSHRC at 1622. He noted that the violation occurred within 150 feet of

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[5] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] a conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

pillar extraction and that the longwall shearing machine generates and suspends coal dust. Id. The judge credited the inspector's testimony that the opening in the plane flange joint was large enough either to permit electrical sparking to the outside or to admit methane or coal dust into the opening to cause an explosion. 14 FMSHRC at 1619, 1622. The judge concluded "that there existed a substantial possibility that the hazard contributed to by the violation would have resulted in an injury or fatality occurring," and that, therefore, the third Mathies element was established. 14 FMSHRC at 1622.

The Commission has uniformly applied the Mathies test to analyze S&S violations since 1984. The judge expressed his view that his finding of a substantial possibility of a resulting injury satisfied the Mathies reasonable likelihood element. 14 FMSHRC at 1622. We disagree with the judge that a substantial possibility formulation is the equivalent of reasonable likelihood. Such a formulation is at variance with the Commission's criteria for determining S&S. We acknowledge the judge's effort to amplify the Mathies test, but we decline to alter that test. Accordingly, we conclude that the judge erred in applying a substantial possibility concept in place of reasonable likelihood.

The judge's substantial possibility analysis does not lend itself to review under the third Mathies standard. Therefore, we remand this case to the judge for application of the third Mathies element, i.e., whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

We note two additional issues to be resolved. The judge made unclear findings as to ignitable levels of methane in the past and we request the judge to clarify his findings on that subject.[6] The judge referred to the mine as "gassy" (14 FMSHRC at 1622) and, on review, the parties have disagreed as to whether the mine is subject to spot inspections under section 103(i) of the Act, 30 U.S.C. § 813(i). The Mine Act does not explicitly employ "gassy" or "nongassy" classifications. We ask the judge on remand to clarify whether the Cottonwood Mine was subject to section 103(i) inspection.

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[6] The judge found that there was no evidence of prior detection of high levels of methane, although he noted testimony by Inspector Gibson that the mine had experienced ignitable levels of methane. 14 FMSHRC at 1620, 1622. The judge also found, in his analysis of another citation decided in this consolidated proceeding, that ignitable levels of methane have never been detected in this mine. 14 FMSHRC at 1606 n.9.

III.
Conclusion

For the foregoing reasons, we vacate the judge's S&S determinations and remand for analysis pursuant to the Mathies standard. We do not reach the civil penalty issues raised by Energy West.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

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SEP 3 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel., ON BEHALF OF DENNIS RAY BURRESS, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 93-52-D
	:	NORT CD 92-05
v.	:	V. P. No. 6
GARDEN CREEK POCAHONTAS COMPANY, WILLIAM FIX & CLIFTON HUCKLEBERRY, Respondents	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

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

The parties have moved for an order approving a proposed settlement and dismissing the case.

FOR GOOD CAUSE SHOWN, the motion is GRANTED.

ORDER

WHEREFORE IT IS ORDERED that:

1. The settlement is approved, and the parties are directed to comply with all of its terms.

2. Subject to compliance with the settlement, this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 7 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 92-493-M A.C. No. 01-02915-05505
v.	:	
	:	Baker Mann Mine
ABYSS SAND & GRAVEL, INC., Respondent	:	

DECISION

Appearances: Kathleen G. Henderson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Petitioner.

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 civil penalty assessments for two alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent contested the alleged violations and a hearing was convened in Montgomery, Alabama, pursuant to notice. The petitioner appeared, but the respondent did not, and the hearing proceeded as scheduled. For reasons discussed later in this decision, the respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

Applicable Statutory and Regulatory Provisions

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

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

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

Issues

The issues presented in this case are (1) whether the petitioner has established the violations as cited in the contested citations, and (2) the appropriate civil penalties that should be assessed for the violations.

Discussion

Section 104(a) non-"S&S" Citation No. 3426449, July 21, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14131(a), and the cited condition or practice states as follows (Exhibit P-4):

> A seat belt was not provided for the Euclid Model R-22 haul truck and was operating in the pit area. However, the ground was level and was not operating on elevated roads.

Section 104(a) "S&S" Citation No. 3426448, July 21, 1992, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.14132(a), and the cited condition or practice states as follows (Exhibit P-5):

> The back alarm was not working on the 980 Cat end loader and was operating in the plant and stock pile areas.

The respondent failed to appear at the hearing in this matter. The notices of hearing were mailed to the respondent's business address of record by regular mail and certified mail. The certified mailings were returned from the post office as "undeliverable", "unclaimed", and "no mail receptacle".

The applicable Commission default Rule 66, 29 C.F.R. § 2700.66, provides as follows:

> (b) Failure to attend hearing. If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.
>
> (c) Penalty Proceedings. When the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid.

William Wilkie, MSHA Inspector and field supervisor, confirmed that he sent an inspector to the respondent's mine site in an attempt to contact the respondent, but found the entrance gate closed, and he could not gain entry. Telephone calls were also placed to the mine phone number listed on MSHA's Legal

Identity form, as well as the respondent's home, but no one answered the phone (Tr. 54). Mr. Wilkie confirmed that MSHA permanently closed the mine on March 29, 1993, and he did not know the whereabouts of the respondent mine operator (Tr. 54).

The Birmingham, Alabama solicitor's office advised me that several prehearing attempts to contact the respondent by telephone at his last known business and residence telephone numbers were to no avail (Tr. 55-56).

In view of the foregoing, the petitioner's counsel moved that a default judgment be entered against the respondent pursuant to Commission Rule 66(b), 29 C.F.R. § 2700.66(b), and that both of the citations be affirmed (Tr. 5-6). The motion was granted from the bench (Tr. 6), and my ruling in this regard is herein reaffirmed, and I find the respondent to be in default.

Petitioner's Testimony and Evidence

The evidence presented by the petitioner in the course of the hearing establishes that the respondent is subject to the jurisdiction of the Act, and that the petitioner correctly exercised its enforcement jurisdiction in inspecting the mine and issuing the citations in this case (Tr. 8-12).

MSHA Inspector Jose O. Garcia testified that he inspected the mine in July, 1992, and issued the citations in question. He confirmed that a seat belt was not provided for the cited truck which he observed being operated. He stopped the truck and observed that it did not have a seat belt for the operator to use while driving the truck (Tr. 13-16). He also confirmed that he inspected the cited loader and asked the operator to back it up. When he did, the backup alarm did not work (Tr. 22).

Inspector Garcia testified to the hazards presented in operating the truck without a seat belt, and operating the loader with an inoperative backup alarm (Tr. 16-17; 22-26). He also explained the basis for his "S&S" finding with respect to the backup alarm violation, and he confirmed that he considered the seat belt violation to be non-"S&S" (Tr. 27-29; 41-47).

Mr. Garcia testified that the plant area in question was a rather confined area and that the stockpiles are close to the conveyor belts where the truck drivers come into in the area. He observed people on foot in the area, and he indicated that most loader accidents occur when the loader is backing up in the direction of someone walking nearby. He confirmed that the shift started at 7:00 a.m., and that he observed the loader shortly

after noon and concluded that it had been operating that morning moving materials around the plant area and loading trucks (Tr. 49-52).

Findings and Conclusions

Fact of Violations

As previously noted, the respondent failed to appear at the hearing and it has been defaulted. Based on the evidence and testimony presented by the petitioner, I conclude and find that the violations have been established, and the contested citations ARE AFFIRMED as issued.

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

Inspector Garcia confirmed that the respondent is no longer in business and that the mine has been closed. He characterized the respondent as a small operator employing six or seven people when it was in operation. The mine had an annual production of 1,600 tons or hours worked as a sand and gravel operation (Tr. 32-34).

I conclude and find that the respondent is a small mine operator, and in the absence of any evidence to the contrary, and notwithstanding the fact that the respondent has apparently closed its mining operation, I cannot conclude that payment of the penalty assessments for the violations which have been affirmed will adversely affect the respondent's ability to continue in business.

History of Prior Violations

The inspector confirmed that the respondent has a history of prior violations (Tr. 35). However, the petitioner did not produce a computer print-out detailing any prior violations or assessments, and the inspector had no knowledge of any prior backup alarm or seat belt violations (Tr. 39-40). The pleadings, which include certain information concerning the penalty criteria found in section 110(i) of the Act, reflect 16 prior assessed violations but no further information is provided (Tr. 39).

I take note of the fact that in a prior civil penalty proceeding involving these same parties, Docket No. SE 92-10-M, I issued a settlement decision on June 24, 1992, concerning fourteen (14) prior violations, including a violation of section 56.14131, issued on July 18, 1991, and a violation of section 56.14132(b)(1), issued that same date. The first citation was assessed at $20, and the respondent agreed to settle it by paying the full amount. The second citation was assessed at $68, and it was settled for $30.

Negligence

The inspector testified that the seat belt violation resulted from a moderate degree of negligence on the part of the respondent (Tr. 17-19). He confirmed that he discussed the citations with Mr. Mann, the mine operator, and that he offered no explanations for the violations other than to point out that the truck was an old truck which was not equipped with a seat belt (Tr. 48). The inspector also found a moderate degree of negligence associated with the backup alarm violation. I agree with the inspector's negligence findings and adopt them as my findings and conclusions.

Gravity

I conclude and find that the seat belt violation was nonserious, and that the violation for the inoperative backup was a serious violation.

Good Faith Abatement

The inspector confirmed that the seat belt violation was abated the day after the citation was issued (Tr. 17). He also confirmed that the backup alarm violation was abated and that the respondent acknowledged both of the violative conditions that were cited (Tr. 29). He confirmed that a new switch was installed to repair the backup alarm (Tr. 47-48). I conclude and find that the cited conditions were timely abated by the respondent in good faith.

Civil Penalty Assessments

Although the respondent failed to appear at the hearing and has been defaulted, I nonetheless take note of its answer in this case contesting the amount of the proposed civil penalty assessments. The respondent asserted that its sand and gravel operation has been closed due to the lack of operating funds and its "struggle to pay bills". The respondent characterized the proposed civil penalty assessment of $595 for the "S&S" inoperative backup alarm violation, and $204 for the non-"S&S" seat belt violation as "amazing." The petitioner's oral motion that I affirm the amounts of the proposed penalty assessments was taken under advisement (Tr. 52).

It is well settled that the presiding judge is not bound by the proposed civil penalty assessments and may make his own de novo penalty determinations based on the civil penalty criteria found in section 110(i) of the Act. Further, Commission Rule 66(c) authorizes the judge to enter an order assessing "appropriate penalties" in the case of a defaulting mine operator. Under the circumstances, and based on my consideration

of all of the facts in this case, I conclude and find that the following civil penalty assessments are reasonable and appropriate in this case:

Citation No.	Date	30 C.F.R. Section	Assessment
3426448	7/21/92	56.14132(a)	$125
3426449	7/21/92	56.14131(a)	$75

ORDER

The respondent IS ORDERED to pay the civil penalty assessments made by me for the enumerated violations which have been affirmed by me in this matter. Payment is to 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

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

SEP 8 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-421-M A. C. No. 33-00058-05502GTJ
v.	:	Diamond Stone Mine
DAVIS TRUCKING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

This case is before me upon a petition for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement. A reduction in the penalty from $2,000 to $1,000 is proposed. The one violation in this case was issued for failing to require the use of seat belts by the operator's truck drivers. The Solicitor represents that the reduction is warranted because the operator immediately instructed its drivers to wear seat belts after receiving the violation. In addition, the Solicitor advises that the operator is small in size, has a modest history of prior violations and is experiencing financial difficulties.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement amount which remains substantial is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED,** and it is **ORDERED** that the operator pay a penalty of $1,000 within 30 days of this order.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 9 1993

RICKY DARRELL EALY, Contestant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 93-662-D
v.	:	BARB CD 93-15
R B MINING COMPANY, INC., Respondent	:	RB #4 Mine

SUMMARY DECISION AND ORDER OF DISMISSAL

On March 9, 1993, Contestant, Ricky Darrell Ealy, filed a discrimination complainant with MSHA alleging that he had been fired on June 10, 1992, due to an injury to his knee and the need for surgery. On May 17, 1993, MSHA informed Contestant that it had determined that a violation of § 105(c) of the Act had not occurred. Thereupon, Mr. Ealy filed a complaint with the Commission.

Respondent, in its Answer, requested dismissal of the Complaint on the grounds that it was not timely filed and that it failed to state a cause of action upon which relief could be granted. On August 5, 1993, I issued an Order To Show Cause requiring Mr. Ealy to show why the Complaint should not be dismissed on the grounds raised in the Answer.

Contestant responded to this Order on August 20, 1993. With regard to the timeliness issue, he states that he filed his discrimination case nine months after he was fired because he was unaware of the requirement that discrimination complaints be filed within 60 days.[1] As to the issue of whether his complaint states a claim upon which relief can be granted, Contestant responded:

> I do feel I was discriminated against due to the injury to my knee and that I had to have surgery. I feel the only reason I was fired was so that the mines (sic) would not have to pay me compensation.

[1]In light of my disposition of the issue of whether Contestant has stated a claim upon which relief can be granted, I need not reach the question as to whether his response is sufficient to avoid dismissal on timeliness grounds.

Contestant also alleges that he was threatened with discharge if he filed for Black Lung Benefits.

Mr. Ealy, in responding to the Show Cause Order, attached a June 18, 1992, letter he filed with an agency of the State of Kentucky. On page 4 of that letter there is an account of conversation with one Steve Brock on June 13, 1992, in which Mr. Brock apparently told Contestant that Federal Mine Inspectors were on Respondent's property and that Respondent "was saying that [Contestant] had called them, which [Contestant] had not." Contestant does not allege, however, that Respondent was under the impression that he had contacted MSHA prior to discharging him on June 10, 1992.

The record in this matter contains no allegation that Contestant engaged in activity protected by section 105(c) of the Federal Mine Safety and Health Act. See Randy J. Collier v. Great Western Coal, Inc., 12 FMSHRC 35 (Judge Broderick, January 1990). Even if Mr. Ealy were to establish that Respondent discriminated against him due to his physical condition or his need of surgery, I would be unable to afford him any relief.

I construe Respondent's Answer as a motion for summary decision pursuant to the Commission's Rules of Procedure, 29 C. F. R. 2700.67. Missouri Gravel Company, 3 FMSHRC 2470 (November 1981). I find that there is no genuine issue as to any material fact; and that Respondent is entitled to summary decision as a matter of law. I, therefore, grant this motion and dismiss Contestant's discrimination complaint.

Arthur J. Amchan
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 10 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 92-455
	:	A. C. No. 40-02045-03577
v.	:	
	:	Docket No. SE 92-456
S & H MINING, INC., Respondent	:	A. C. No. 40-02045-03578
	:	
	:	S & H Mine No. 2

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Imogene A. King, Esq., Frantz, McConnell & Seymour, Knoxville, Tennessee, for Respondent.

Before: Judge Feldman

The above proceedings are before me as a result of petitions 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 heard on June 17, 1993, in Knoxville, Tennessee. The pertinent jurisdictional stipulations and stipulations concerning the civil penalty criteria contained in section 110(i) of the Act are of record.

The parties moved to settle the citation in issue in Docket No. SE 92-456 after presentation of the Secretary's direct case. The terms of the settlement agreement concerning this case were approved at the hearing and will be incorporated as part of this decision.

Remaining Docket No. SE 92-455 was tried in its entirety. This docket involves two 104(a) citations, designated as significant and substantial, associated with alleged operational violations of the respondent's No. 1 and No. 4 conveyor belt mantrips. Specifically, the respondent has been cited for violation of the mandatory safety standard specified in section 75.1403-5(a), 30 C.F.R. § 75.1403-5(a). This mandatory safety standard provides:

> Positive-acting stop controls should be installed along all belt conveyors used to transport men, and such controls should be readily accessible and maintained so that the belt can be stopped or started at any location. (Emphasis added).

The threshold issue for determination is whether the positive-acting stop controls (the stop cords) were "readily accessible" as contemplated by the applicable mandatory safety standard. Inspector M. J. Hughett and Supervisor Harrison R. Boston testified on behalf of the Secretary. The respondent called Paul G. Smith, President of S & H Mining, Inc., and Lonnie P. Carden, an employee of the corporate respondent. The parties' have also filed post hearing and reply briefs which I have considered in my disposition of this case.[1]

PRELIMINARY FINDINGS OF FACT

On the morning of April 16, 1992, MSHA Inspector M. J. Hughett arrived at the respondent's No. 2 Mine for the purpose of performing a routine inspection. Hughett was accompanied by Jacksboro Field Office Supervisor Harrison R. Boston. Boston was accompanying Hughett to evaluate Hughett's performance as a coal inspector. (Tr. 58). Hughett and Boston, accompanied by the respondent's Superintendent Charles White, proceeded to travel inby to inspect the mine's conveyor belt system.

The No. 2 Mine utilizes four conveyor belt mantrips for the purpose of transporting miners from the surface to the working face. These four belts are numbered consecutively starting with the belt originating at the surface. Each belt is approximately 28 inches wide and travels at speeds between 200 and 250 feet per minute. To ride the belts to the face, personnel must lie flat on their chests in a prone position. There is a shutoff switch at the head and tail end of each conveyor belt and at the middle of each belt. In between each of these switches is a positive-acting stop cord that is hung to enable miners to stop or start the belt at any location. The stop cord is installed along the belt line on the miner's left side as the miner is facing inby. Boston testified that the mandatory safety standard requires the stop cord to be readily accessible by positioning it where the

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[1] The respondent filed proposed findings on August 5, 1993. Due to a delay in obtaining the transcript of this proceeding, the Secretary was permitted to file his proposed findings, which also served as reply findings, on August 30, 1993. The respondent filed reply findings on September 7, 1993.

cord can be seen and reached by "just sticking [one's] arm straight out." (Tr. 66). As a result of his inspection, Hughett issued citations alleging violations concerning the condition of the stop cord for all four conveyor belts.[2]

Citation No. 3382643 - No. 1 Conveyor Belt

The No. 1 belt entry is a comparatively old entry with numerous timbers and cribs on each side of the belt to support the roof which has sloughed and fallen over the years. (Tr. 23, 88). This belt line is approximately 250 feet long. The height of the belt entry from floor to ceiling is between 28 and 34 inches. (Tr. 26, 52, 59, 104). Clearance from the level of the belt line to the roof, however, is only 24 inches. (Tr. 52, 104, 152). Approximately 25 feet inby from the portal is an area with diminished clearance which is approximately 45 feet long. (Tr. 148). In this area, the ceiling is approximately 6 inches lower than the remainder of the roof along the No. 1 belt entry due to additional collars that have been installed to support an area of draw rock. (Tr. 130). In this cross-timbered area, clearance from the belt line to the roof decreases from approximately 24 inches to 18 inches. (Tr. 152).

The weight of the miner causes the No. 1 belt to operate in a cupped or concave manner analogous to the shape of a hammock. (Tr. 120). Thus, the edges of the belt are higher than the middle of the belt. The bottom rollers that move the belt are set into holes dug in the floor. The top rollers which are 2 inches wider than the belt are slightly higher than the edge of the belt line. (Tr. 136-137).

Upon inspecting the No. 1 conveyor, Hughett concluded that the stop cord was not readily accessible along the entire length of the belt. His conclusion was based on excessive slack in the line which caused it to hang lower than the belt line so that it could not be reached. (Tr. 18). Hughett described the inaccessible slack areas as existing "all the way" along the belt line. (Tr. 23). He also testified that the cords "swagged" down below the belt line between each timber to which the cord was attached,

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[2] Citation Nos. 3382644 and 3382645 were issued for violations in connection with the stop cord controls along the No. 2 and No. 3 conveyor belts. (Gov. Ex. 5, 6). The violative conditions cited in these citations are different from those cited in the citations in issue concerning the No. 1 and No. 4 belt lines. (Tr. 34). The citations issued for the No. 2 and 3 belt lines were uncontested by the respondent and the proposed civil penalties for these citations were paid. (Tr. 26).

although he could not recall the distance between the timbers. (Tr. 35, 41). Boston testified that the cord was not clearly visible for approximately 50 percent of the distance along the belt. (Tr. 118).

In rebuttal, Smith testified that the stop cord was hung from 6 to 8 inches above the belt at all locations along the No. 1 belt line except for the 45 foot area that was cross-timbered. (Tr. 132, 149). Smith further testified that in this cross-timbered area, the stop cord was intentionally installed at a lower level than the timbers so that it would be easier to reach because the miners tend to duck under this low clearance area. (Tr. 130, 152). Smith described the location of the stop cord in this area as approximately 2 to 3 inches beneath the top level of the top roller. (Tr. 156).

Citation No. 3382643 was terminated by Hughett on April 22, 1992, wherein Hughett concluded that the ". . . stop control along the No. 1 belt line was installed to a properly [sic] working condition." Smith testified that the only action taken to abate this citation was to raise the stop cord 6 inches on the lateral timbers in the 45 foot cross-timbered area. (Tr. 139).

Citation No. 3382646 - No. 4 Conveyor Belt

The No. 4 conveyor belt, which advances as the working face advances, was approximately 1800 feet long from the belt drive to the tail piece when inspected by Hughett on April 16, 1992. Although the width of the No. 4 belt is the same as that of the No. 1 belt, the clearance from floor to roof is considerably greater along the No. 4 conveyor belt. (Tr. 146).

Hughett testified that the stop cord was inaccessible at a distance of "3 or 4 feet" from the belt line in three or four different places. (Tr. 28, 48). Other than these three or four places, Hughett testified that the placement of the stop cord complied with the regulations. (Tr. 48). Boston testified that the pull cord was inaccessible at distances from "3, 5 or 6 feet out from the belt" in six, possibly eight locations. (Tr. 117, 118). Hughett noted no problem with the installation height of the stop cord. (Tr. 46). Boston testified that the stop cord was unreachable for approximately 20 percent of length of the No. 4 conveyor belt. (Tr. 117). Boston further testified that "the [cord for the] No. 4 belt was definitely more accessible than the No. 1 [belt]." (Tr. 119). Finally, Boston testified that he determined the cord's accessibility by sticking his arm straight out to see if the cord could be reached. (Tr. 66, 67).

Lonnie Carden, an employee of the respondent, is a certified beltman with foreman's papers. (Tr. 190, 191). At the time of the inspection, Carden's responsibilities included performing the preshift examinations on the No. 1 through No. 4 conveyor belts.

(Tr. 179, 180). Carden was also responsible for the maintenance of the No. 4 belt, including operation of the pull cords and belt switches. (Tr. 191). Carden stated that on April 16, 1992, at approximately lunch time, he rode the No. 4 belt outby behind Hughett and Boston. (Tr. 195, 200). Carden observed Boston reach his hand out to evaluate the stop cord distance. (Tr. 192, 193). Carden admitted that Boston could not reach the cord at certain locations. However, Carden testified that, at these locations, Boston remained in the middle of the belt extending his arm directly from that point without making any effort to shift his body which would have brought him into contact with the cord. (Tr. 198). Carden, who was familiar with the No. 4 conveyor belt, stated that in order to reach the cord at those locations it was only necessary for Boston to slide or move his body slightly toward the cord. (Tr. 198).

On April 22, 1992, Hughett terminated Citation No. 3382646 on the basis of his conclusion that the positive-acting start and stop control along the No. 4 belt was installed "properly." (Gov. Ex. 3). However, both Smith and Carden testified that they took no action to abate this citation because they could not find an area where the stop cord was inaccessible. (Tr. 181, 182).

FURTHER FINDINGS AND CONCLUSIONS

Fact of Occurrence

As noted above, the question for resolution is whether the stop cords on the No. 1 and No. 4 belts were readily accessible as required by section 75.1403-5(a). Webster's Third New International Dictionary, (1986 Edition) ("Webster's") defines "readily" as "with fairly quick efficiency; without needless loss of time; reasonably fast; with a fair degree of ease; without much difficulty; with facility; easily."

No. 1 Conveyor Belt

With respect to the No. 1 belt line, it is uncontroverted that the stop cord was obscured for a significant distance (approximately 45 feet). Both Hughett and Boston testified that the stop cord was swagged and the cord was not visible because it was hanging below the belt.

Significantly, Smith's testimony tended to support the observations of Hughett and Boston. Smith conceded that the stop cord was "an inch at the most" below the belt line. (Tr. 131). Smith also described the swag in the cord as "maybe a half an inch below the rollers." (Tr. 131). Although Smith characterized the cord in this 45 foot area as "visible," he stated that you "couldn't see the cord if you were looking at the roller, but you could see between the rollers, and the belt is down between the rollers, and you can see between them and see the cord there

if it were swagging below that." (Tr. 132-133). In a further acknowledgement that the cord was obscured, Smith testified that "you can put your head up to the edge and see out over the belt . . .if you hang your head out over the belt you could stick it into a timber also. But you've got to know what you are doing, and you can come to the edge and you can look down." (Tr. 135).

Applying the operative term "readily" accessible, it is clear that an object that cannot be easily visualized cannot be construed to be readily accessible as contemplated by section 75.1403-5(a). Thus, I conclude that the Secretary has met his burden of establishing that a violation of the applicable mandatory safety standard did in fact occur at the No. 1 conveyor belt.

No. 4 Conveyor Belt

Turning to the No. 4 belt line, the issue is whether the stop cord was a lateral distance of 3 to 6 feet from the edge of the belt at several locations as the Secretary alleges, or, within reach by shifting the position of one's body on the belt as the respondent argues. The Secretary must bear the burden of establishing the fact of a violation. In this case, Hughett and Boston have provided contradictory and inconsistent testimony concerning the number of locations where the cord was allegedly unreachable and the distances at these locations from the cord to the edge of the belt. (See Tr. 28, 117, 118).

Moreover, the Secretary has failed to rebut Smith's claim that no remedial action was taken to abate Citation No. 3382646 because the stop cord was accessible along the entire length of the No. 4 belt. Significantly, Hughett's April 22, 1992, termination of Citation No. 3382646 fails to specify what action was taken to abate the alleged violation. Nor does Hughett's contemporaneous notes taken on April 22, 1992, which were described by the Secretary's counsel as "sketchy," specify what action, if any, was taken to abate the citation. (Tr. 219). Hughett's recollection concerning the respondent's abatement efforts was vague and faulty. (See Tr. 214-222). Finally, Hughett testified that he may have been over-zealous in the presence of Boston who was evaluating his performance as an inspector. (Tr. 44-45).

Boston's testimony also does not effectively rebut the respondent's assertion that no corrective action was taken. Boston testified that he does not have any reason to believe that the conditions were not corrected. However, he indicated that he does not have an independent recollection of what was done to terminate the citation. (Tr. 111). Later in Boston's testimony during cross-examination as a rebuttal witness, Boston testified that his recollection concerning the respondent's abatement had

been refreshed by reading Hughett's notes. (Tr. 235-236). However, these notes are silent concerning abatement at the No. 4 conveyor belt. (Tr. 220-222; Gov. Ex. 12).

In an effort to overcome the inconsistencies in the testimony of Hughett and Boston, the Secretary faults the respondent for its failure to call its Superintendent, Charles White, to corroborate Hughett's and Boston's account. (Petitioner's Brief, 13-14). However, the Secretary has the burden of proving the fact of a violation. The respondent is under no obligation to assist the Secretary in this endeavor. If the Secretary considered White's testimony to be crucial, he was free to subpoena him as an adverse witness. See Brown v. United States, 414 F.2d 1165, 1167 (D.C. Cir. 1969). Having failed to do so, the Secretary is not entitled to a beneficial inference that White, if called, would have buttressed the Secretary's case. Significantly, White does not possess the requisite unique or special knowledge with regard to Hughett's or Boston's observations that warrants an adverse inference against the respondent. Cf. NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. 1980); NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2d Cir. 1969) (cases permitting an adverse inference concerning missing witnesses' statements or motivations).

Thus, on balance, I credit the testimony of Carden and Smith that the cord was reachable in the areas in question by simply sliding or moving the body toward the edge of the belt and reaching for the cord. (Tr. 166, 181, 184-185, 198). Having concluded that the cord was reachable by leaning and reaching out over the edge of the belt, I find that the Secretary has failed to demonstrate that the stop cord was not readily accessible. Therefore, Citation No. 3382646 shall be vacated.

Significant and Substantial

The remaining issue is whether Citation No. 3382643 issued for the No. 1 conveyor belt was properly designated as significant and substantial. A violation is deemed to be "significant and substantial" if there "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U. S. Steel Mining Company, Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Company, 3 FMSHRC 822, 825 (1981); Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texas Gulf, Inc., 10 FMSHRC 498 (1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (1987).

Hughett testified that the function of the stop cord is to enable a miner to deenergize the belt in case of an emergency. (Tr. 12). Hughett and Boston testified that an ever present hazard is roof material falling on the belt. In such an event, given the concavity of the belt, it is possible that a miner could sustain serious injury by being carried on the belt underneath fallen roof material. In this regard, the testimony reflects that the No. 1 belt line is located in an area that is prone to roof fall. (Tr. 23, 87, 88). Moreover, in view of the number of timbers and cribs required to support the roof, Boston testified that it would be almost impossible to jump off the No. 1 belt because of the lack of lateral clearance along the belt line. (Tr. 122).

Boston characterized the hazard contributed to by this violation as twofold. The first hazard, as noted above, is that a miner could not stop the belt in case of an emergency because he could not locate the stop cord. The second hazard is the risk associated with injury to the hand or arm if a miner extended his upper extremities beneath the belt. In such an event, the rollers, which are spaced 8 to 10 feet apart, can cause a serious crushing injury to the hand. There are also wood supports installed against the belt itself which can cause serious injuries to the head or hand as the miner maneuvers for the cord. Thus, it is apparent that this violation exposes the miner to significant injuries by virtue of his inability to deenergize the belt as well as by the act of blindly reaching for the cord. As such, the Secretary has established that there is a reasonable likelihood that the hazards contributed to by this violation will result in a serious injury given continued mining operations. Consequently, Citation No. 3382643 was properly designated as significant and substantial.

Negligence

Citation No. 3382643 notes a moderate degree of negligence with regard to the violation associated with the No. 1 belt. Negligence is commonly referred to as a measure of one's carelessness. In this regard, Smith testified that the stop cord was intentionally hung lower in this 45 foot cross-timbered area because it was an area of lower clearance where miners tend to duck their heads down. (Tr. 153). Therefore, the respondent was of the opinion that hanging the cord in a lower position made it easier for miners to reach. (Tr. 130-140). While I find that this concern is outweighed by the risk of hand injury associated with placing the hand under the belt and rollers, the respondent's rationale for the placement of the cord is an

appropriate mitigating factor. Therefore, the underlying degree of negligence associated with Citation No. 3382643 shall be reduced to low. The gravity, however, in view of the risk of significant injury, remains serious. Consequently, I am assessing a civil penalty of $200 for this citation.

Docket No. SE 92-456

As previously noted, the parties moved to settle Citation No. 3382587 which is the subject of Docket No. SE 92-456. The respondent has agreed to pay a civil penalty of $75 in return for the Secretary's agreement to remove the significant and substantial designation. The motion to approve settlement was granted on the record and is incorporated herein.

ORDER

Based on the above findings of fact and conclusion of law, it **IS ORDERED** that:

1. Citation No. 3382646 **IS VACATED.**

2. Citation No. 3382643 **IS AFFIRMED** although the underlying negligence is reduced from moderate to low.

3. The settlement motion concerning Citation No. 3382587 **IS APPROVED** and the significant and substantial designation **IS DELETED.**

4. The respondent **SHALL PAY** a total civil penalty of $275 within 30 days of the date of this decision. Upon receipt of payment, these cases **ARE DISMISSED.**

Jerold Feldman
Administrative Law Judge

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SEP 10 1993

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. SE 93-335-R
	:	Citation No. 3007642; 6/2/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. SE 93-336-R
	:	Citation No. 3007641; 6/2/93
	:	Mine No. 3
	:	Mine ID 01-00758

DECISION

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

Before: Judge Feldman

These contest proceedings were initially heard on June 18, 1993, in Hoover, Alabama. On July 6, 1993, I issued a Partial Decision formalizing my bench decision in this proceeding. Partial Decision in Jim Walter Resources, Inc., 15 FMSHRC 1447. The Partial Decision identified the following two central issues: (1) whether a citation issued for a violative dust concentration condition, which is promptly corrected, in the absence of any recurrence, provides a basis for recision and modification of the dust control plan under section 303(o) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 863(o), or section 75.370(a)(1) of the regulations, 30 C.F.R. § 75.370(a)(1); and (2) in the absence of any evidence of repeated or continuing dust concentration violations, whether an operator's unilateral decision to increase the air velocity at the working face and the water pressure of the sprays in excess of the minimum requirements in the existing dust control plan, in view of increased production output, provides a basis for modifying the existing dust control plan to reflect higher minimum air velocity and water pressure standards.

The Partial Decision granted the contestant's contest with respect to the first issue and temporarily reinstated the existing dust control plans. In the Partial Decision, citing Peabody Coal Company, 15 FMSHRC 381, 386 (March 1993); Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); and Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 404-407 (D.C. Cir. 1976), I noted that it is well established that the statutory language in section 303(o) of the Mine Act requires mine ventilation or dust control plan provisions to address specific conditions at a particular mine. Partial Decision, 15 FMSHRC at 1449. Thus, the Secretary is precluded from imposing general rules applicable to all mines in the plan approval process. Id. I concluded, therefore, that the Secretary lacks the statutory authority to routinely rescind dust control plans whenever a violation of the respirable dust concentration standard in section 70.100(a), 30 C.F.R. § 70.100(a) is detected. Id. at 1450.

At the hearing, the parties expressed a willingness to pursue settlement of the remaining issue. Resolution of this issue depends upon whether the minimum air velocity and water pressure standards contained in the existing dust control plans are adequate dust suppression measures for the continuous mining or longwall operations at the individual mine in question. The Secretary bears the burden of proof concerning the suitability of minimum dust control plan provisions. Peabody, 15 FMSHRC at 388. However, it is incumbent on the operator to explain why these minimum provisions are sufficient if, as in the instant case, the operator operates with air velocity and/or water pressure levels that are considerably greater than the minimum standards. In attempting to resolve these issues, it is fundamental that the parties must engage in good faith negotiations. Id.

In a letter dated August 25, 1993, the Secretary now moves to vacate the two contested citations, thus, reinstating the rescinded dust control plans. Counsel for the contestant has informed me, albeit reluctantly, that he interposes no objection to the Secretary's motion to vacate.

I also note, parenthetically, that declaratory relief in this instance is inappropriate. The conditions noted at the respondent's No. 3 Mine during the March 10, 1993, inspection which provided the basis for this proceeding are not static and are subject to change. Therefore, there is no substantial likelihood of recurrence of this alleged enforcement harm as dust control plans are mine specific and relate to current mine operations and conditions. See Mid-Continent Resources, Inc., and UMWA, 12 FMSHRC 949, 956 (May 1990). Consequently, the Secretary's motion shall be granted.

ORDER

Accordingly, the Secretary's motion to vacate the subject Citation Nos. 3007641 and 3007642 **IS GRANTED** and **IT IS ORDERED** that these contest proceedings as they relate to these citations **ARE DISMISSED WITH PREJUDICE** against the Secretary.

Jerold Feldman
Administrative Law Judge

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SEP 10 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-1964 A.C. No. 46-01867-03904
v.	:	Docket No. WEVA 91-1965 A.C. No. 46-01867-03905
CONSOLIDATION COAL COMPANY, Respondent	:	Blacksville No. 1 Mine

DECISION ON REMAND

Before: Judge Weisberger

The Commission, in its decision in this case, (Consolidation Coal Company, 15 FMSHRC 1555 (August 21, 1993)), remanded this proceeding to me to determine whether the violation of 30 C.F.R. § 75.1707, set forth in Citation No. 3315803 was significant and substantial, and to assess a civil penalty.

I. Significant and Substantial

According to MSHA Inspector Richard Gene Jones, the violation herein is significant and substantial in that, in the event of a fire in the track entry, with no air-tight separation between the intake and track entries, smoke and carbon monoxide would enter the intake entry. Workers inby would thus be exposed to the hazard of smoke inhalation and carbon monoxide poisoning. He also indicated that a decrease in visibility caused by smoke could cause lack of orientation, which could result in contusions. Jones noted the existence of fire sources such as a high voltage cable, the liberation of methane which would accumulate in a roof cavity,[1] and the fact that the gauge of the trolley track is incorrect which causes the trolley pole to jump off the wire, and hit the trolley which causes arcing.

The Commission has set forth in Mathies Coal Company 6 FMSHRC 1 (1984) the elements that must be established to prove a violation is significant and substantial as follows:

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[1] The mine is classified by MSHA as one that liberates more than one million cubic feet of methane in a 24 hour period.

> 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. (6 FMSHRC, supra, at 3-4.)

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).

In analyzing whether it has been established that the violation was significant and substantial, I note the finding by the Commission of the violation by Respondent of Section 75.1707. Further, I find that the violation contributed to the hazard of miners in the intake entry being exposed to the dangers of smoke, should a fire occur in the track entry. Also, the hazards of smoke exposure could certainly result in serious injury as set forth in Jones' uncontradicted testimony.

The issue for resolution, is the likelihood of a fire causing smoke to course from the track entry, through the hole in the stopping at issue, to the intake entry. (See, BethEnergy Mines, Inc., 14 FMSHRC 1232, (August 4, 1992)). In other words, since the hole in the stopping contributed to a hazard only in the event of a fire, it must be established that the event of the fire was reasonably likely to have occurred. (See, BethEnergy, supra).

The mere existence of various potential fire sources cannot support a conclusion that the event of a fire was reasonably likely to have occurred in the normal course of mining operations. There is no evidence of the existence of any fault in the condition of the high voltage cable. Further, on cross-examination, Jones indicated that the portion of the track where the gauge is not correct is not within the P8 Panel, i.e., the

panel at issue.[2] He conceded that, accordingly, a fire started by arcing caused by the incorrect track gauge should not affect the P8 panel in issue, unless the fire gets out of control. There is no evidence that this would be reasonably likely to occur. Also, contrary to Petitioner's assertion in his brief that the mine in question has a history of mine fires, the only evidence on this point is the testimony of Jones that there was a fire causing fatalities in 1972. I thus conclude that, inasmuch as the record fails to establish the likelihood of a hazard producing event i.e., a fire, it must be concluded that the violation herein was not significant and substantial (See, Mathies Coal Co., supra).

II. Civil Penalty

In evaluating the negligence, if any, of the Respondent with regard to the specific violation cited herein, not much weight is placed on the fact that on various dates in January and February, 1991, Jones issued citations to Respondent alleging violations of Section 75.1707, supra, with regard to stoppings located at other longwall panels. The issuance of these citations is accorded little weight in evaluating whether Respondent knew or reasonably should have known of the existence of the specific hole in the stopping in question.

Jones indicated that the hole in the stopping was "very obvious" (Tr. 48) and the stopping was approximately 20 to 25 feet from where a person would get off the mantrip. However, there was no evidence as to how long the hole existed prior to the inspection, nor is there any evidence to indicate what caused the hole.

I find, for the above reasons, that there is insufficient evidence to base a conclusion that the Respondent's negligence herein was more than a slight degree. Taking into account the remaining factors in Section 110(i) as stipulated to by the parties, I conclude that a penalty of $100 is appropriate for the violation cited in Citation No. 3315803.

The parties stipulated that the decision regarding Citation No. 3315803 would apply to Citation No. 3315865 (Tr.7). Accordingly, consistent with my decision regarding Citation No. 3315803, I find that the violation cited in Citation No. 3315865 was not significant and substantial, and that a penalty of $100 is appropriate.

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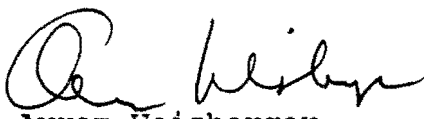
[2] The parties stipulated that the site of the incorrectly gauged trolley track is between the P7 and P8 Panels.

ORDER

It is ORDERED that, within 30 days of this decision, Respondent shall pay $200 as a civil penalty for the violations found herein.

It is further ORDERED that Citation Nos. 3315803 and 3315865 be amended to reflect the fact that the violations cited therein are not significant and substantial.



Avram Weisberger
Administrative Law Judge

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SEP 13 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-376
	:	A.C. No. 15-09568-03607
v.	:	
	:	Stone Mine No. 2
BELL COUNTY COAL CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Thomas A. Grooms, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Gary G. Thompson, Safety Coordinator, Bell County Coal Corporation, Middlesboro, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $1,400 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for a approval of settlement is **GRANTED** and it is **ORDERED** that Respondent pay a penalty of $1,400 within 30 days of this order.

Gary Melick
Administrative Law Judge

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SEP 15 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-227
	:	A.C. No. 15-06702-03554
v.	:	
	:	M-2 Mine
ASH TRUCKING COMPANY, INC., Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Rodney E. Buttermore, Jr., Esquire, Buttermore, Turner, Lawson and Boggs, Harlan, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing, Petitioner filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $16,800 to $12,200 was proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $12,200 in three equal installments -- the first installment due 90 days from the date of this order and the remaining installments 30 days and 60 days thereafter.

Gary Melick
Administrative Law Judge

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SEP 15 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-577
	:	A.C. No. 15-11986-03552 A
v.	:	
	:	Mine No. 211
BOBBY LEE PRICE, Employed by CROCKETT COAL COMPANY, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Bobby Lee Price, Elkhorn City, Kentucky, pro se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), charging the respondent with an alleged "knowing" violation of mandatory safety standard 30 C.F.R. § 75.220. At the time of the alleged violation, the respondent was employed by the Crockett Coal Company as a section foreman.

The respondent contested the alleged violation and filed an answer to the petitioner's proposal for assessment of a civil penalty in the amount of $600. A hearing was held in Pikeville, Kentucky, and the parties appeared and participated fully therein. The parties waived the filing of posthearing briefs, but I have considered their arguments made on the record in the course of the hearing in my adjudication of this matter.

Issues

The principal issue presented in this case is whether or not the respondent knowingly authorized, ordered, or carried out the alleged violation. If he did, the next question presented is the appropriate civil penalty which should be assessed against the respondent taking into account the civil penalty criteria found

in Section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164.

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

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

Discussion

Section 104(a) "S&S" Citation No. 3519163, issued on January 14, 1991, by MSHA Inspector Ronald Hayes, cites a violation of 30 C.F.R. § 75.220, and the cited condition or practice is described as follows:

> The approved roof control plan is not being complied with on the MMU 001-0, which is in the process of extracting pillars, because the pillar block which was located between the No's 6 and 7 entries was almost entirely extracted. The cuts taken from this coal block were approximately 30 feet wide and from (approximately) 25 to 30 feet deep. The block of coal was approximately 50 feet by 50 feet, and after the extraction only 5 small coal blocks were left ranging from approximately 2 to 4 feet wide and from (approximately) 6 to 8 feet long. All the cuts were intersected with one another, leaving nothing in the center of the block on the outby side of it.
>
> The approved roof control states that the extraction of pillars shall be a 3 cut plan. The cuts shall be 20 feet wide and 20 feet deep. Also, a butt off was driven to the right of the No. 8 entry approximately 60 feet outby the last open crosscuts, where advance mining was stopped for the extraction of pillars. This butt off was approximately 60 to 70 feet deep and the left side of the butt off was extracted beginning at the end of the but off and continuing back to within 10 feet of the No. 8 entry. This extraction was from 50 to 60 feet wide and the cuts were from 20 to 25 feet deep and only 8 wooden roof supports were installed in the center of the extraction. Also, the No.'s 3 thru 8 headings were advanced approximately 60 to 70 feet inby the last open crosscut. These entries also had coal extracted from the left and right side of the entries. The extraction began in the face of the entries and continued outby to within approximately 10 feet of the

last open crosscut. The cuts taken from them were approximately 25 to 30 feet deep and only a few wooden roof supports were installed.

The approved roof control plan does not have any kind of provisions included in it that shows this kind of extraction of coal. This citation is in conjunction with 107-a Order No. 3519162, and therefore no abate time is set and will not be abated until the provisions written in the 107-a Order No. 3519162 are met.

Petitioner's Testimony and Evidence

MSHA Inspector Ronald Hayes identified a copy of an MSHA Mine Legal Identify Form concerning the Crockett Coal Company, and he confirmed that this company was in fact a corporation (Exhibit P-1, Tr. 10). Mr. Hayes also identified a copy of the section 104(a) citation that he issued on January 14, 1991, as "a contributing factor" to a section 107(a) order that he issued on that same day (Exhibits P-2 and P-3; Tr. 1-18). He also identified copies of the approved mine roof control plan which was in effect at the time he issued the citation, and a copy of a map and sketch that he made documenting his observations of the pillar area that had been extracted (Exhibits P-4 and P-5; Tr. 20-22).

The respondent Bobby Lee Price agreed that the Crockett Coal Company was a corporation, but he stated that the company has been sold and that he was no longer in its employ. However, he confirmed that he was employed by Crockett Coal at the time the citation was issued by Mr. Hayes (Tr. 10). He also confirmed that he was familiar with the conditions or practices cited by Mr. Hayes as a violation, as well as the roof control plan relied on and cited by the inspector (Tr. 19, 22).

Inspector Hayes testified that MSHA Inspector James Osborne, who was regularly assigned to the mine in question, was not in the office at the time "a tip" was received from a Kentucky Department of Mines inspector that he had "observed a mining practice that wasn't right" and had withdrawn miners. Since Mr. Osborne was not available, the acting office supervisor asked Mr. Hayes to go to the mine for an inspection. After making a copy of the mine pillar plan, Mr. Hayes went to the mine and met with the state inspector. Mr. Hayes then informed mine manager Robert Jessee that he was going underground to conduct an inspection. He also met with Mr. Price, and proceeded underground in the company of Mr. Jessee, Mr. Price, and the state inspector (Tr. 23-26).

Mr. Hayes explained the observations he made during his inspection, and he stated that the coal pillar between the No. 6 and No. 7 entry had been extracted and that the remaining blocks

of coal were two to four feet wide and approximately six to seven feet long. He also observed that very few timbers had been set and that there were "hill seams" in the roof. Based on his observations, he informed Mr. Jessee and Mr. Price that he was issuing a section 107(a) order (Tr. 27). Mr. Hayes stated that he discussed the size of the remaining pillar stumps that were left after the coal was extracted, and that Mr. Jessee and Mr. Price agreed with his calculations. Mr. Hayes stated that he did not go into the stump areas to measure them because "all the coal was gone, it was dangerous up there", and that he was not going inby roof support (Tr. 28).

Mr. Hayes stated that the three-cut pillar roof control plan required that eight-foot corners be left when a pillar is mined, and that the blocks on the bottom part of the pillar are to be eight-foot square. He stated that Mr. Price was supervising the work when the pillar was cut and when he asked Mr. Price about it, "he said he had instructed those men to cut that pillar block that way". Mr. Hayes identified a copy of an MSHA "Possible Knowing and Willful Violation Review Form" that he filled out and submitted documenting the admission made to him by Mr. Price (Exhibit P-6; Tr. 30-31). Mr. Hayes stated that he also recorded in his notes Mr. Price's statement that "he instructed his miner man to extract the pillar between six and seven entries" (Tr. 31).

Mr. Hayes testified that Mr. Price had a copy of the roof control plan in his pocket and admitted that he was familiar with it and knew the roof control requirements (Tr. 32). Mr. Hayes explained how the pillar block should have been cut under the approved plan, and he stated that all of the cuts had intersected together, and there was no eight foot block left on the corner as required (Tr. 34). He also believed that the roof cracks and hill seams, standing alone, constituted adverse roof conditions, and that coupled with the smaller blocks that were left, he believed there was a possibility of "a major roof fall and multiple deaths" from these conditions (Tr. 35). He explained that the pillar blocks are designed to hold up the roof, and the more that is taken out, the more weight will likely cause a roof fall (Tr. 37).

Mr. Hayes stated that he could not prove that men went inby roof support, and he confirmed that a remote controlled miner was used and it could take a 35-foot cut without exposing anyone past the roof bolts. However, men were in the entry, and if the roof fails above the anchorage and falls out, it will crack all the way to the pillar. The potential for a roof fall, and the presence of the miner operator and shuttle cars in the area prompted him to issue the imminent danger order (Tr. 38-39). He also explained several additional conditions that contributed to that order (Tr. 39-40).

Mr. Hayes stated that Mr. Price gave him the following explanation as to why the pillars were mined the way he found them (Tr. 42):

> A. They stopped mining here and they had projections to go on. According to Mr. Price when I had -- that is why they stopped this and did this. And according to Mr. Price -- I asked him why they did cut this pillar this way and that was to get a good roof fall, because they needed to get quick coal, because they were getting out of this mine.
>
> They were pulling out of it to possibly sell or trade, or whatever to another company or corporation that was to come in. But they were shutting down.
>
> Q. They were trying to get out all of the coal they could?
>
> A. Trying to get all the coal the could at that time.

Mr. Hayes stated he based his "high negligence" finding on the fact that Mr. Price "told them to cut the pillar that way", and since he was the foreman, "he was responsible" (Tr. 45).

On cross-examination, Mr. Hayes confirmed that he did not measure the pillar cuts and just estimated them (Tr. 46). Mr. Price stated that "we set back and looked at the pillars where they had been cutting them and we agreed that the blocks were smaller than eight foot" (Tr. 46). Inspector Hayes agreed that this was true (Tr. 46). Mr. Price also stated that he told MSHA'S special investigator that the blocks "were approximately from three to six foot and maybe bigger in behind, where we couldn't see them" (Tr. 47). Mr. Hayes stated that "we had no idea what the backside looked like", and that "we were talking about these front two and this one in the center" (Tr. 47).

Mr. Hayes explained the timbering that he observed, and he confirmed that some of the timbers were properly in place, but that others that were required were missing and not set (Tr. 50-51).

Mr. Hayes explained the dangers in leaving only two to four foot pillar corners, instead of the required roof control plan eight square foot corners as follows at (Tr. 62-63):

> A. My opinion, the way this block was pulled with these stress cracks in the roof which is making adverse conditions, which makes a roof fall potential larger than what it would

normally be, it would have been an imminent danger to those people setting those timbers or mining the next block of coal right here.

Because if this had failed, with the stress cracks in that mine, there is a very great possibility it would have overrode these breaker timbers and come in on those people that was over here mining this area right here, this block which had to be mined next.

Q. So there was a potential there for rock falling on people.

A. Yes, there was. The potential was there.

Q. Inby unsupported roof.

A. Inby -- If they were under supported roof, it was a potential they would fall in on them. Yes, it was.

And, at (Tr. 68):

Q. These stress cracks were in the area that we're concerned with here.

A. Yes, they were all over the place.

Q. And what your point is, is that leaving these pillars this small with those added stress cracks there created --

A. And going by the minimum plan and not doing anything else to help that adverse condition of the stress cracks, yes, it caused an imminent danger.

Charlie D. Bryant, testified that on January 14, 1991, he was employed at the mine as a continuous miner helper. He identified a copy of a statement that he made to MSHA Special Investigator James Frazier when Mr. Frazier intreviewed him on April 9, 1991 (Exhibit P-7; Tr. 70-72). Mr. Bryant confirmed that he was present when Mr. Hayes inspected the mine on January 14, 1991, and he confirmed that he made the following statement to Mr. Frazier (Tr. 72-73):

Q. "We pulled one block before the inspector got to the section. We took the cuts two sumps wide (twenty-two feet). All of the cuts in the block cut together. Bobby Price told us to leave a three to four-foot stump on the corner." Is that correct?

A. Yes, Sir.

Q. Is that the correct statement of --

A. Yes.

Q. Did he give these instructions to you, and who else, sir?

A. Me and the continuous miner operator which was -- Darrell Caudill, I think, was the day that it was started. Darrell Caudill or Thomas Wright was there. But it was given specifically, yes.

Q. And is that how you all cut them?

A. Yes, Sir.

Q. You just left three or four-foot stumps?

A. Yes, Sir.

Q. And do you know, in fact, that it's supposed to be eight foot square?

A. I was told by Thomas Wright it was, yes, sir.

Q. So you knew this was supposed to be eight foot square, but you cut it the way you were told to by Mr. --

A. Yes, Sir.

Mr. Bryant explained how the pillar cuts were made, and he confirmed that he made no measurements of the cuts because "I wasn't going to go in there and measure it, but they told us to leave a three to four-foot stump on the end" (Tr. 74-76).

MSHA Inspector James E. Frazier, testified that he conducted a special investigation of Mr. Price's case. He stated that the coal produced at the mine in quesiton was transported to the company that leased the coal to the Crockett Coal Company, and it was then shipped out of state. At the time of his investigation, approximately 15 employees worked at the mine, and it produced 800 tons a shift, and Mr. Price worked as a section foreman (Tr. 77-79).

Mr. Frazier identified a copy of a statement made to him by Mr. Price when he interviewed him on April 3, 1991 (Exhibit P-8), and he confirmed that Mr. Price signed the statement, and that he gave him an opportunity to review the statement and to make any

corrections. Petitioner's counsel quoted the following relevant portions of Mr. Price's statement (Tr. 80-81):

> Q. I direct your attention to page two there. Near the top of the page there or somewhere near the top, it says, "I came back to work on January 9, 1991. I had been off since January 3, 1991. When I came back to work on January 9, 1991, the headings had been winged from right to left over to number two, I think. I worked on the left side developing x-cut..." I take it that means crosscuts. Is that right?
>
> A. Yes, Sir.
>
> Q. "...And entries and on the right side doing the same. The shift of January 3, 1991, our section had not started retreat work. On Monday, January 14, 1991, my crew started retreat mining the pillars.
>
> "I knew the pillar plan...this mine had for a continuous miner. They had a three-cut plan. We were supposed to cut twenty two wide. I followed the cut sequence according to the plan. All of the timbers were set, plus five more additional timbers than the plan required.
>
> "I stayed with the miner during the entire extraction of this pillar. This pillar block was supposed to be forty feet times forty feet. This area was developed on sixty-foot centers. The miner was operated with remote control.
>
> "We cut this block the same way we had for years. No emphasis had ever been placed on leaving eight-foot stumps on the bottom end of the blocks. It was always hard to turn a place and maintain the eight-foot stumps. This stump we had left was in a triangular slope. It was probably only two feet in some place, but I'm sure it was thicker in some of it."

Mr. Frazier confirmed the accuracy of the statements made by Mr. Price, and confirmed that Mr. Price admitted that the stumps were not eight foot, that he knew the roof control plan, and that the stumps were only two feet in some places (Tr. 82). Mr. Frazier was of the opinion that this was a violation of the roof control plan, that Mr. Price "virtually admitted" a violation of the plan, and was highly negligent because "he knew the plan and he knew the bottom stumps were less than eight feet" (Tr. 84). Based on all of his interviews and his mining

experience, Mr. Frazier was of the opinion that "the stress hill seams and the small blocks of coal being left, it was a dangerous situation" (Tr. 84).

Mr. Price acknowledged that he made the statement to Mr. Frazier (Tr. 84), but stated as follows at (Tr. 85):

> Mr. Price: On these blocks here, and stumps and things we were talking about here, and where it says I told the miner man, you know, to cut them this way, I told the miner operator to go to that area where we were going to start extracting pillars that morning. I did not tell him to cut them and leave two or three-foot stumps, which these stumps were bigger. But I did make this statement to Mr. Frazier.

Respondent's Testimony and Evidence

Respondent Bobby Lee Price, confirmed that a state mine inspector was at the mine prior to the inspection by Mr. Hayes and when the upper area of the section was extracted. Mr. Price stated that mine superintendent Jessee told him that after the state inspector left the mine, the remaining two blocks of coal would be mined. Mr. Price denied that he instructed Mr. Bryant to cut the blocks and leave two and three foot stumps. Mr. Price stated that he informed his crew that "we're going to start pillaring this morning. This is the block over here we cut" (Tr. 92).

Mr. Price stated that in the three-and-one-half years that he mined pillars in the mine, he always installed extra roof support around the pillars. He also stated that "I never left a pillar in that mine that my miner man was cutting on that I didn't stay right with him". He denied ever putting any of his men out from under roof support and stated that he has "threatened to fire people over it" (Tr. 92-94).

Mr. Price stated that the mine roof was composed of sandstone, and that "those little cracks" needed to be continually strapped. He conceded that the cracks "were from fingernails to some of them was a foot and a half, two feet wide". However, he indicated that each time a bolt was installed, a strap was also installed across the crack. He confirmed the presence of stress cracks in the roof at the pillar extraction locations in question, but stated that extra timbers were always installed and that "we always tried to protect my men" (Tr. 95). He stated that timbers were installed in the pillar extraction areas in question according to the roof plan (Tr. 96-97).

Mr. Price stated that in the three-and-one-half years he has pulled pillars in the mine, the citation issued by Mr. Hayes was

the first one he ever received (Tr. 98). He stated that after the citation was issued, he reviewed the roof control plan with his men to the satisfaction of the inspectors, and the men were allowed to return to work (Tr. 99). He explained that it was difficult not to cut through when the miner is cutting an angle and that the miner operator cannot tell when the miner head will cut through a place (Tr. 101). When the miner ripper head continued to cut through the blocks, Mr. Price said he quit the mine "because the superintendent, he just wanted so much stuff-crazy stuff done. I wouldn't do it" (Tr. 101). He confirmed that after the citation was issued and terminated, the remaining blocks of coal were cut in essentially the same manner as they were when Inspector Hayes was there, and although some blocks "were not cut through as bad", some of them fell through when they were penetrated by the miner head (Tr. 102).

Mr. Price disagreed with the sketch of the cited area prepared by Inspector Hayes and stated that timbers were placed in several areas where the sketch shows none installed, and several of the entries on the sketch "had not been pushed up" (Tr. 103-104).

On cross-examination, Mr. Price stated that he was currently employed by the Husky Coal Company as a foreman and electrician at a salary of $125 a day. He denied that he instructed Mr. Bryant and the miner operator to cut the corner of the block so there was only three or four feet left. He stated that "It's like I told Mr. Frazier. I told them to go cut the block. You know, I didn't tell them to steal every bit of coal that was in the block" (Tr. 104-105). Mr. Price further stated that Mr. Bryant "lied about me telling him to go over there and cut and leave two to three-foot blocks" (Tr. 105). He further stated that Mr. Bryant was an unsafe worker and that "I had to ride him from daylight to dark" and "rode charlie pretty hard on safety" for not setting timbers or exposing his feet and legs while operating the miner machine (Tr. 106).

Mr. Price denied telling Mr. Hayes that he told his men to cut the block the way it was cut. He stated that "I told them to go and cut the pillars". I said "Boys, we're going to start pillar extraction this morning. Take the miner over there and start on that pillar. That is what I told them" (Tr. 106).

Mr. Price confirmed that he was present when the pillars cited by Mr. Hayes were cut. He admitted that the pillars were cut together "not only this time, but other times. But maybe it was, just like I said, maybe not, as bad as this one" (Tr. 113). He further stated that "when the miner went in those pillars, you could not keep it from cutting one way or the other into the other blocks. And this is the first time that I was ever wrote anything on those pillars like that" (Tr. 113).

Mr. Price conceded that he told Mr. Frazier that some of the blocks could have been cut only two feet wide "where you was looking into the end of them" (Tr. 114). Inspector Hayes did not disagree that cutting the block at an angle would leave the corner less than eight feet, but he did not believe that it would result in a five foot corner or a corner from two to four feet (Tr. 116).

Findings and Conclusions

Fact of Violation

The respondent Bobby Lee Price is charged with a "knowing" violation of mandatory safety standard 30 C.F.R. § 75.220, for failing to follow the approved mine roof control plan with respect to the extraction of certain pillar areas described in detail in the citation issued by Inspector Hayes. The inspector cited the conditions after going to the mine and conducting an inspection in response to information given to MSHA by a state mine inspector with respect to certain pillar extraction that was taking place at the upper end of the section. Although the petitioner does not dispute Mr. Price's assertion that he was not at the mine when the state inspector stopped this activity and withdrew miners from the mine, the petitioner pointed out that the Crockett Coal Company and three of its "agents" (two foremen and the mine manager) were charged with violations of section 75.220, for mining the entries cited by the state inspectors in violation of the roof control plan, and that the corporate respondent (Crockett Coal Company), and its cited agents did not contest the violations and paid the proposed penalty assessments. Counsel further pointed out that in this case Mr. Price is only charged with a violation in connection with the mining of the pillar blocks cited by Inspector Hayes (Tr. 45, 58-59, 86-87).

The petitioner's counsel stated that the essence of the violation in this case is the fact that the cited coal pillar blocks were cut too small, leaving corners that were less than eight foot for roof support as required by the approved mine roof control plan (Tr. 52). Mr. Price has not rebutted the credible testimony of Inspector Hayes with respect to the existence of the cited violative conditions. Indeed, Mr. Price did not deny that the pillar blocks which were extracted during his supervisory work shift left corners less than the eight feet required by the roof control plan (Tr. 52). Further, Mr. Price acknowledged that he told Inspector Frazier that the pillar blocks had been cut in such a manner leaving stumps or corners less than eight feet as required by the plan, and only two feet in some places (Tr. 84-85). Under all of these circumstances, I conclude and find that the petitioner has established a violation of section 77.220, by a clear preponderance of all of the credible evidence and testimony adduced in this matter, and the citation IS AFFIRMED.

The next question presented is whether or not the petitioner has proved that Mr. Price "knowingly" authorized, ordered or carried out the violation. Section 110(c) of the Act, 30 U.S.C. § 820(c), provides in relevant part as follows:

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

The Commission has defined the term "knowingly" as used in the statutory predecessor to section 110(c), in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (January 1981), aff'd 669 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983), as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

In Secretary of Labor (MSHA) v. Bethenergy Mines, Inc., et al., 14 FMSHRC 1232 (August 1992), the Commission reaffirmed its prior holding in Kenny Richardson, supra, and stated that "the proper legal inquiry for purposes of determining liability under section 110(c) of the Act is whether the corporate agent "knew or had reason to know" of a violative condition, and that the Secretary must prove only that the cited individual knowingly acted and not that he knowingly violated the law, 14 FMSHRC 1245.

Inspector Hayes testified that when he spoke with Mr. Price on the day of his inspection after issuing the citation, Mr. Price admitted that he had instructed his men to cut the pillar the way Mr. Hayes found it, and that he (Price) was aware of the roof control plan when this work was done. Inspector Hayes confirmed that he noted Mr. Price's admissions in an MSHA form that is used by an inspector to recommend a "possible

knowing/willful violation" investigation (Exhibit P-6), and that he also noted in his notes that Mr. Price instructed his miner man to extract the pillar between the No. 6 and 7 entries (Tr. 30-31).

Continuous Miner Helper Charlie Bryant who was present during Mr. Hayes' inspection of January 14, 1991, confirmed a prior statement that he had made to special investigator Frazier that Mr. Price instructed him and the continuous miner helper to cut the pillar blocks and to leave a three to four-foot stump on the corner. Mr. Bryant testified that he was told that an eight-foot square corner was required but that the stump in question was cut the way he was instructed.

Special Investigator Frazier produced a copy of a signed statement by Mr. Price in which he admits that he was aware of the roof control plan and that the block that was cut on January 14, 1991, was cut "the way we had for years", that no emphasis had ever been placed on leaving eight-foot stumps, and that the cited stump "was probably only two feet in some place" (Exhibit P-7).

Mr. Price vehemently denied that he ever instructed Mr. Bryant and the miner operator to specifically leave two or three-foot blocks when mining the pillars in question. Mr. Price also denied telling Inspector Hayes that he instructed his men "to cut the block the way it was cut". However, Mr. Price acknowledged the accuracy of the statements that he made to Special Investigator Frazier. Mr. Price also confirmed that he assigned his crew the task of cutting the pillars in question on January 14, 1991, and that he was present when they were cut the way that Inspector Hayes found them. Mr. Price also admitted that he told Mr. Frazier that some of the blocks could have been cut only two feet wide, and he admitted that the cited coal pillars were cut together on January 14, 1991, as well as on previous occasions.

Mr. Price's principal defense in this case is his concern over the gravity findings made by MSHA's office of assessments that "the violation could have contributed to the cause of a roof fall accident" (Tr. 52). Mr. Price denied that he ever knowingly, on January 14, 1991, or at any other time in his mining career, exposed members of his crew to any hazardous roof falls. Mr. Price also denied that any of the miners on his crew worked inby roof support on January 14, 1991, as stated in MSHA's gravity findings (Tr. 54). Inspector Hayes confirmed that he made no such findings, and that his citation does not include any allegations of miners working inby roof support (Tr. 54-55).

I conclude and find that Mr. Price's concerns about MSHA's gravity findings in connection with the proposed penalty assessment are irrelevant to the issue of whether he "knowingly"

violated the cited standard section 75.220. Further, after careful consideration of all of the testimony and evidence in this case, including the aforementioned admissions by Mr. Price, and the unrebutted testimony of the credible witnesses presented by the petitioner in support of its case, I conclude and find that Mr. Price knew that the pillars cited by Inspector Hayes were being cut in such a manner on January 14, 1991, as to leave less than the eight-foot corners required by the approved roof control plan. I further conclude and find that Mr. Price had knowledge of the roof control plan requirements for leaving eight-foot wide corners as the pillar blocks were being extracted, and that notwithstanding this knowledge on his part, Mr. Price permitted the cited pillars to be cut and extracted in a manner contrary to the approved plan. Under all of these circumstances, I conclude and find that the petitioner has established a "knowing" violation on the part of Mr. Price within the meaning of section 110(c) of the Act, and the Commission's precedent decisions.

Gravity

Inspector Hayes testified that the roof cracks and "hill seams" that were present in the cited area where Mr. Price and his crew were working constituted adverse roof conditions, and that coupled with the small corner blocks that were left during the extraction of the pillars, Mr. Hayes believed that there was a possibility of a major roof fall exposing the miners to fatal injuries as a result of the cited conditions. Mr. Hayes determined that serious and permanently disabling injuries were highly likely as a result of the cited conditions, and he concluded that the violation was "significant and substantial". Further, given the presence of miners and equipment in the cited area, and his concern about a potential roof fall, Mr. Hayes issued a section 107(a) imminent danger order in conjunction with the citation. The petitioner's counsel stated that the imminent danger order is not at issue in this case, but that it was relevant to any gravity determination (Tr. 33). I conclude and find that the violation was serious. I also conclude and find that the inspector's "S&S" finding was justified, and it is affirmed.

Negligence

I conclude and find that Mr. Price's knowing violation supports the inspector's determination that the violation resulted from a high degree of negligence.

History of Prior Violations

The petitioner's counsel confirmed that Mr. Price has not previously been charged with any other section 110(c) violations (Tr. 87).

Good Faith Abatement

The record reflects that the violation was abated on January 15, 1991, a day after the citation was issued, and that all underground employees were retrained on the approved roof control plan before resuming work underground. Petitioner's counsel confirmed that the mine was subsequently abandoned in 1991.

Civil Penalty Assessment

Mr. Price confirmed that he is gainfully employed, and in the absence of any evidence to the contrary, I cannot conclude that the payment of the civil penalty that I have assessed for the violation will adversely jeopardize Mr. Price's financial situation.

The petitioner's counsel requested that the initial proposed civil penalty assessment of $600 against Mr. Price be increased to $1,000, because "this evidence shows that this was an extremely reckless thing on his part that could have endangered a lot of men" (Tr. 86). After further consideration of this request, IT IS DENIED.

On the basis of the aforementioned findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the initial proposed civil penalty assessment of $600 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent Bobby Lee Price IS ORDERED to pay a civil penalty assessment of six-hundred dollars ($600) for the violation which has been affirmed in this matter. Payment is to be lade to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 15 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 93-295 A.C. No. 15-14074-03630
v.	:	
PEABODY COAL COMPANY, Respondent	:	Docket No. KENT 93-296 A.C. No. 15-14074-03631 MARTWICK UNDERGROUND

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for Respondent.

Before: Judge Amchan

These cases are before me upon petitions for the assessment of civil penalties pursuant to § 105 and 110 of the Federal Mine Safety and Health Act of 1977. Docket Kent 93-295 concerns one citation, number 3417307, which alleges a violation of 30 C.F.R. 75.316 for Respondent's failure to comply with its approved ventilation plan. More specifically, the citation alleges that when the continuous miner and its scrubber were not operating, air circulation at the inby end of the line brattice near the continuous miner was significantly less than what was required by Respondent's approved ventilation plan. A $267 civil penalty was proposed. As discussed herein, I affirm the citation as a "non-significant and substantial" violation of the Act and assess a $267 penalty.

Docket Kent 93-296 concerns citation 3546915 alleging a violation of 30 C.F.R. 75.1105[1] in that air ventilating a battery charging station was vented to the surface of the mine rather than to the return air shaft. An order, numbered 3546916, was issued pursuant to § 104(b) of the Act for Respondent's alleged failure to timely abate citation 3546915. A $1,855 penalty was proposed for these alleged violations. I affirm citation number

[1]The requirements of this standard have been modified by the provisions of 30 C.F.R. 75.340(a)(1) since the inspection.

3546915 as a "non-significant and substantial" violation and assess a $10 penalty. I vacate order number 3546916 on the grounds that it was unreasonable for MSHA to require abatement before the effective date of its new ventilation standards given the unique circumstances of this case.

Docket Kent 93-296

On October 22, 1992, Louis W. Stanley, an MSHA supervisory ventilation specialist inspected the Martwick mine as part of a review of Respondent's ventilation plan. During this inspection he determined that the air ventilating a battery charging station located 300 feet inby from the bottom of the slope of the mine was vented to the surface rather than to the return air shaft, as required by 30 C.F.R. 75.1105 (Tr. 11 - 18).[2] That standard provided:

> Underground transformer stations, **battery-charging stations**, substations, compressor stations, shops, and permanent pumps shall be housed in fire-proof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return...(emphasis added)

Mr. Stanley issued Respondent citation 3546915, which required that the violation be terminated by 8:00 a.m. on October 24, 1992 (Tr. 15). The danger presented by this violation in Mr. Stanley's view is that, if a fire were to break out at the battery charging station, the smoke would travel up the slope to the entry of the mine. Miners going in and out of the mine, particularly during a shift change, could be exposed to a hazard (Tr. 46, 57 - 58).

Upon receiving the citation, Respondent installed curtains and a 4-inch diameter pipe to direct the air current into the return (Tr. 65 - 71). After this proved unsuccessful, Respondent installed a four inch exhaust fan to draw the air from the battery charging station into the pipe (Tr. 73 - 79). However, when Mr. Stanley returned on October 26, 1992, he tested the air flow with smoke and it still vented up the slope towards the surface of the mine (Tr. 16 - 18). As a result of this test, Mr. Stanley issued order number 3546916 pursuant to § 104(b) of the Act, alleging a failure to timely abate his original citation. Afterwards, Respondent abated the alleged violation by moving the battery charging station (Tr. 18).

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[2]There were 5 battery chargers at this station, which was one of approximately 15 battery charging stations in the mine. The chargers are electrically powered and are used to charge the batteries on equipment such as man trips (Tr. 25 - 26).

On November 16, 1992, less than a month after the inspection in this case, new MSHA ventilation standards for underground coal mines went into effect. Among these standards was one at 30 C.F.R. 75.340(a)(1), which provides that battery charging stations shall be "[v]entilated by intake air that is coursed into a return air course **or to the surface** and that is not used to ventilate working places . . . (emphasis added)." Petitioner concedes that Respondent would not have been in violation of the Act with regard to the instant citation and order after November 16, 1992 (Tr. 38 - 39).

The new standard was promulgated as a final rule on May 15, 1992, with an effective date of August 16, 1992. On August 6, 1992, MSHA delayed the effective date of the new ventilation standards until November 16, 1992, due primarily to difficulties some mine operators were having coming into compliance with some of the new regulations by August 16. No specific reference to 30 C.F.R. 75.340(a)(1) was made in regard to the delay. 57 FR 34683-4 (August 6, 1992).

When promulgating the final rule in May 1992, MSHA provided the following explanation for revising the requirements of § 75.1105:

> Unlike the existing rule, however, the final rule does not require that the intake air be coursed "directly" to the return. This existing requirement has caused much confusion under the existing rule. The final rule clarifies that the intake air installation may not also be used to ventilate active working places. Thus, the air may be coursed into other entries before being coursed into a return, if the air is never used to ventilate a working place. Since this air will not be used to ventilate face areas, the final rule provides the same level of protection as the existing rule. 57 FR 20888-9 (May 15, 1992).

Inspector Stanley believes the revision allowing the venting of battery charging stations to the surface to be ill-advised (Tr. 40). However, MSHA has made a finding that this practice poses no threat to employee safety and health. MSHA and Inspector Stanley are bound by this determination, which was made prior to the issuance of the citations in this case.

Respondent clearly violated the requirements of the Mine Act as they existed on October 22 and 26, 1992. However, this violation was of a purely technical nature--given the agency's formal determination that the venting of battery charging stations to the surface is an acceptable practice. In assessing a civil penalty, the Commission is required to consider the operator's history of previous violations, the size of its business, its negligence, the effect on its ability to stay in

business, the gravity of the violation and the operator's good faith in achieving rapid compliance after being notified of the violation.

In view of MSHA's prior determination that the violation was of no consequence to employee safety, I find a minimal penalty of $10 is appropriate for this violation.[3] I also find that Respondent's negligence was extremely low in view of the fact that MSHA had already determined that venting to the surface was a safe practice when this violation occurred.

Section 104 (a) of the Act provides that a citation shall fix a reasonable time for the abatement of a violation. I hereby vacate order 3546916 because I do not think it was reasonable to require abatement of citation 3546915 prior to the effective date of the new MSHA ventilation regulations. It is important to note that the new regulations were final rules, not proposed rules at the time of the inspection in this case, and MSHA had published its rationale for the change in the specific regulation under which Respondent had been cited.

Although, the effective date of the new regulations had been postponed, MSHA's rationale for the delay had nothing to do with the propriety of § 75.340(a)(1). Moreover, there was no indication, as of October 22, 1992, that § 75.340 was the subject of any legal challenge or that it was being reconsidered by the Agency. Given the unique circumstances of this case, the reasonable course for MSHA would have been to allow Respondent three weeks to abate the original violation in order to determine whether it still was under a legal obligation to do so.

Docket KENT 93-295

On November 19, 1992, MSHA Inspector Darold Gamblin conducted a regular quarterly inspection of the Martwick mine. During this inspection he encountered a employee working with a continuous mining machine in the number 2 entry of the number 1 working section. Inspector Gamblin sampled the air flow at a point 25 feet behind the cutting edge of the machine, at the end of the line curtain, near where the employee was working. When the continuous miner was not operating the air flow was 2,340 cubic feet per minute (cfm) (Tr. 86 - 87). Respondent's approved ventilation plan (Exh. G-4) required an air flow of 5,000 cfm, before the continuous miner was turned on, at the inby end of the line brattice.(Exh. G-4, page 4, paragraph # 2).

As a result of this air flow reading, Inspector Gamblin issued Respondent citation 3417307, alleging a significant and

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[3]The statute requires that a penalty be assessed for each violation. Tazco, Inc., 3 FMSHRC 1895 (August 1981).

substantial violation of 30 C.F.R. 75.316. This regulation, which requires operator compliance with approved ventilation plans[4],was superseded by 30 C.F.R. 75.370, just three days before the inspection in this matter. Since the requirements of § 75.370 are essentially the same as the former 75.316, I will sua sponte amend the pleadings to conform to the evidence. See Cyprus Empire Corporation, 12 FMSHRC 911,916 (May 1990); Rule 15(b) of the Federal Rules of Civil Procedure. Section 75.370 (a)(1) requires that "[t]he operator shall develop and follow a ventilation plan approved by the district manager..."

Respondent has conceded that it was in violation of the Act but takes issue with the characterization of the violation as "significant and substantial" (Respondent's Answer, paragraph 5, Respondent's Response to the Prehearing Order, paragraph 2). The elements of a "significant and substantial" violation have been set forth by the Commission as follows:

> (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. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

There is no question that the evidence in this case satisfies the first and fourth elements of the Mathies test. Respondent has conceded the violation and there is no question that injuries, to which the violated requirement is directed, inhalation of excessive amounts of respirable coal dust and fires and explosions due to excessive concentrations of methane, are of a serious nature (Tr. 93).

What is at issue are the second and third elements of the Mathies test. Respondent's evidence suggests that, due to the air flow capacity of the scrubber on the continuous miner, the inadequate ventilation prior to the scrubber's operation either presents no hazard, or that injury or illness is sufficiently unlikely that the violation cannot be properly considered "significant and substantial" See Cement Division , National Gypsum Co., 3 FMSHRC 822 (April 1981).

The Commission in National Gypsum has held that a "significant and substantial" violation is not established by merely showing that the chance of an injury or illness resulting

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[4]Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir., 1976); Secretary v. Mid-Continent Coal and Coke Co., 3 FMSHRC 2502 (1981).

from the violation is more than remote or speculative. In this case the Secretary has simply not established how likely an accident would be when the inby end of the line brattice is ventilated by 2,340 cfm of air prior to operation of the scrubber, rather than 5,000 cfm.

Assuming that the provision for 5,000 cfm is important, the Secretary's evidence leaves unanswered the question of what degree of noncompliance makes an accident or injury "reasonably likely". To rule in favor of the Secretary, I would have to infer that any amount of ventilation less than 5,000 cfm creates a substantial likelihood of injury or illness. I find no basis for such an inference. It would seem likely that a small deviation from the 5,000 cfm requirement would not create a reasonable likelihood of injury or illness. If I were to credit the Secretary's witnesses, I might infer that at some point inadequate ventilation prior to operation of the scrubber would create such a reasonable likelihood. However, there is simply no evidence in this record tying the 2,340 cfm measured by Inspector Gamblin to the likelihood of injury or illness.

Inspector Gamblin testified that he believed injury or illness "reasonably likely" (Tr. 93 - 98). However, this testimony is purely conclusory and I have no idea what underlies Gamblin's opinion. There is also testimony by MSHA ventilation supervisor Louis Stanley that he would not approve a ventilation plan in a deep cut mine such as Martwick unless it contained a requirement for 5,000 cfm of air before the scrubber is activated (Tr. 191). From this testimony, it appears that Mr. Stanley believes that without that quantity of air flow, injury from a fire or explosion, or inhalation of excessive respirable dust is possible. However, there is an insufficient rationale in this record for me to conclude from his testimony that there is a reasonable likelihood of injury or illness when the ventilation at the end of the line curtain is 2,340 cfm, rather than 5,000 cfm.

The Secretary, at pages 9 and 10 of its Post-Trial Brief, relies on U. S. Steel Mining Co., 7 FMSHRC 1125 (August 1985), a case in which the Commission reversed an ALJ decision that 2,400 cfm of air at a working face was not a "significant and substantial" violation. In that case the operator's ventilation plan also required 5,000 cfm. I find the U. S. Steel decision easily distinguishable from the instant case and not particularly helpful in meeting the Secretary's evidentiary burden. The requirement of U.S. Steel's ventilation plan was for 5,000 cfm once mining commenced and the Commission decision relies heavily on its conclusion that ignition of methane was reasonably likely given the ignition source provided by the arcing and sparking of the continuous miner. In the instant case where the requirement of 5,000 cfm applied before the operation of the continuous miner and the evidence indicates that ventilation of the working face

would have been much greater than 2,340 cfm when cutting operations began, I find no basis for relying on the U. S. Steel decision to conclude that an accident was reasonably likely on the record before me.

Controverting the Secretary's evidence is the testimony of Respondent's witness, Randy Wolfe. Mr. Wolfe, a supervisory safety engineer employed by Respondent, testified that the scrubber on the continuous miner will adequately eliminate any hazard from dust or methane without any other source of ventilation. He concluded that there is no reasonable likelihood of injury or illness resulting the fact that the air flow prior to operation of the scrubber was less than 5,000 cfm--assuming that conditions remained the same as they were on the November 19, 1992 (Tr. 171 - 172). Mr. Wolfe also testified that 2,340 cfm airflow to the inby end of the line brattice was adequate to eliminate any hazard of methane ignition prior to the activation of the continuous miner (Tr. 161 - 162).

The preponderance of the evidence suggests that the lack of 5,000 cfm of air prior to operation of the scrubber increased the likelihood of serious injury or illness to some extent. In this regard, I consider it significant that Mr. Wolfe's opinion with regard to the absence of a reasonable likelihood of injury and illness was qualified by the proviso that conditions remain the same. The Martwick mine is a one that is subject to spot inspections by MSHA due to its propensity for methane release. I infer from this fact, and the requirements of Respondent's plan, that maintaining 5,000 cfm prior to operation of the scrubber is necessary to insure employee safety.[5] However, these facts alone do not warrant the conclusion that when the airflow is 2,340 cfm, prior to the operation of the scrubber, injury or illness is reasonably likely.

I assess the $267 penalty proposed by the Secretary. I note first that this penalty is very low--particularly considering the Respondent's size. Peabody has stipulated that it is a large operator and a reasonable penalty will not affect its ability to

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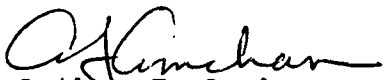
[5]I do not accord great weight to Mr. Wolfe's testimony regarding the adequacy of the 2,340 cfm. Mr. Wolfe's highest level of education is an Associates degree in Applied Science from Madisonville, Kentucky Community College. His testimony was largely based on a paper prepared by Dr. John Campbell. Little information was provided regarding Dr. Campbell's qualifications other than that he had worked for Respondent in the past. Indeed, it is not even clear in what field Dr. Campbell holds his doctorate. There is also no indication as to whether Dr. Campbell's conclusions are widely held in the scientific community or whether his paper was ever subjected to an impartial peer review.

remain in business. I believe that the gravity of the violation, particularly the seriousness of an injury if one occurred, warrants a $267 penalty. On the other hand, I find that no higher penalty is warranted given the low to moderate negligence that caused the violation and Respondent's prompt abatement of the violation by extending and tightening its line curtains to increase the air flow (Tr. 98 - 99). I see no reason to either raise or lower the penalty on the basis of Respondent's history of previous violations.

ORDER

Citation No. 3417307 (Docket Kent 93-295) is affirmed as a "non-significant and substantial" violation and a $267 civil penalty is assessed. Citation No. 3546915 is affirmed as a "non-significant and substantial" violation and a ten ($10) penalty is assessed. Order No. 3546916 is vacated. Within thirty (30) days of the date of this decision, Respondent is ordered to pay a civil penalty of $277 for the violations found herein.



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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 16 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 92-1012 A.C. No. 46-01455-03895
v.	:	Osage No. 3 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Barbour

STATEMENT OF THE CASE

This case is before me upon the petition for assessment of civil penalties filed by the Secretary of Labor ("Secretary") against Consolidation Coal Company ("Consol") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act" or "Act"). 30 U.S.C. 815 and 820. The petition alleges two violations of certain mandatory safety standards for underground coal mines found in Part 75 of Volume 30 of the Code of Federal Regulations ("C.F.R."). The alleged violations are set forth in orders of withdrawal issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. § 814(d)(2). In addition to the allegations of violation, the orders assert the violations each constituted significant and substantial contributions to mine safety hazards ("S&S" violations) resulting from Consol's unwarrantable failure to comply with the cited standards. Consol answered, denying the Secretary's allegations, and hearings were held in Morgantown, West Virginia.[1]

The issues for decision are whether the violations existed as charged and, if so, whether they were S&S in nature and the result of Consol's unwarrantable failure to comply. In addition,

[1]Because the case could not be heard in full during the time available, the initial hearing was adjourned short of completion. It was reconvened about one month later. Citations to the transcript of the first hearing are signaled "Tr. I". Citations to the transcript of the second are signaled "Tr. II".

if violations are found, appropriate civil penalties must be assessed.

At the close of the hearing counsels presented oral summaries of their positions.

STIPULATIONS

Pertinent to this decision, the parties agreed as follows:

1. Consol is the owner and operator of the Osage No. 3 Mine.

2. Operations of Consol are subject to the jurisdiction of Act.

3. This proceeding is under the jurisdiction of the Federal Mine Safety and Health Review Commission ("Commission") and its designated Administrative Law Judge.

4. Mine Safety and Health Administration ("MSHA") Inspector Lynn Workley was acting in his official capacity and as an authorized representative of the Secretary when the orders at issue were served.

5. True copies of each of the orders were served on Consol or its agent as required by the Act.

6. The total proposed penalty for the orders contested by Consol in this proceeding will not affect Consol's ability to continue in business.

See Tr. I 8.

ORDER NO.	DATE	30 C.F.R. §
3718491	2/10/92	75.323

The order states:

> The 7 butt intake escapeway was examined by Ron Wyatt (certified foreman) on 1/23/92 and he entered in the approved book that added roof support is needed at 55 block from the intake door to the return door. The report was countersigned by Joe Statler[,] mine foreman[,] and by Aaron Cage[,] assistant super[intendent]; however no action has been taken to correct this hazard.

Gov. Exh. 4.

THE EVIDENCE

THE SECRETARY'S WITNESS

LYNN WORKLEY

MSHA Inspector Workley testified that on January 23, 1992, during the course of an inspection of the Osage No. 3 Mine, he traveled the 7 butt intake escapeway with Consol inspection escort, Norman Hill, and UMWA representative, Ronald Schriver. At No. 55 break (a crosscut) Workley saw that the roof was sagging. In the crosscut Workley observed a diagonal crack from the outby right hand rib of the escapeway to the inby left hand rib. (In other words, the crack extended across the entire intersection of the escapeway entry and the crosscut. See Exh. Gov. 7.) The crack was opened about a 1/2 inch. According to Workley, the mine roof was deteriorating in the right and left crosscut and coal had fallen from the roof at the corner where the rib and roof met. Tr. I 22. Workley testified that he believed the roof could have fallen at any time. Tr. I 45.

There were stoppings in the right and left crosscut and the distance between the stoppings was approximately 100 feet. Id.; Gov. Exh. 7. The intake entry and crosscut were each 15 feet wide. Tr. I 52.[2] Workley believed that the condition of the roof at the intersection was such that the miner who weekly examined for hazardous conditions should have observed and reported it. Workley stated that at the time he saw the condition he was not aware if the condition had been reported and, at the suggestion of Hill, he decided to wait until he got to the surface in order to check the weekly examination book (the book wherein hazardous conditions noted during the weekly examination are recorded). Tr. I 23.

Upon checking, Workley found an entry in the book regarding the condition had been made that day by Ronald Wyatt, the midnight shift foreman who had examined the escapeway. Wyatt had indicated that additional roof support was needed between the stoppings in the No. 55 break. Tr. I 24.

Workley identified a copy of a page from the book. The page is titled Emergency Escape Facilities and Escapeways Examined (Weekly) and it states in pertinent part "1-23-93[,] 7 Butt Face to 6 Butt Split[,] 55 Block From Track Door to Return Door Needs

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[2]Although Workley's sketch of the area shows the crosscut as intersecting the entry at a 90 degree angle, Workley acknowledged that the crosscut actually intersects at a 60 degree angle. When asked whether cutting crosscuts on a 60 degree angle can reduce the danger of roof fall, he replied, "It can." Tr. I 56; see also Gov. Exh. 7.

Additional Support[,] R. Wyatt [signature]" Gov. Exh. 6 at 2. The page was countersigned by Joseph Statler, the mine foreman, and by Aaron Gage, the assistant mine superintendent.

Workley testified that when he viewed the intersection he noticed that two posts had been set at its outby right corner, one on either side of the crack. Tr. I 25, 52. (The posts are depicted by small circles on Gov. Exh. 7.) Workley believed the posts were insufficient to properly support the roof. However, he did not issue a citation at that time because Consol was following the "correct procedure" in that Wyatt had traveled the area as required, had noted the hazardous condition and had recorded the condition in the book. Tr. I 24-25. Further, Workley stated that when additional roof support is needed it normally takes at least one shift to transport roof support materials such as cribs and posts to an area and to arrange for miners to come to the area and do the work. Tr. I 26. Workley testified that after he reviewed the "Weekly Examination" book he explained to Hill and Schriver his reasons for not writing a citation and he left the mine.

Workley returned to the mine during the afternoon shift of February 10 to conduct another inspection. This time Workley was accompanied during his inspection by Consol representative Art Jordan and miners' representative Eddie Cheslik. Workley returned to the No. 55 break of the No. 7 butt intake escapeway. Workley stated that he found conditions to be "almost exactly the same" as they had been on January 23. Tr. I 27. Workley told Jordan and Cheslik that he was issuing a section 104(a) citation requiring installation of additional roof support and a section 104(d)(2) order of withdrawal for an unwarrantable failure to correct the hazardous condition that had been recorded in the weekly examination book on January 23. Id.

After issuing the order, Workley checked the weekly examination book and found an entry for January 30, 1991, indicating that additional roof support was needed in the area of the intersection. Workley identified a copy of the page bearing the entry. Gov. Exh. 6 at 4. (Workley read it into the record, "1/30/92, seven butt face to Moorsville, 55 block, track door to return, needs added support." Tr. I 29.) Workley believed the entry indicated that between January 23 and 30 Consol had done essentially nothing to correct the condition, even though Statler had told him that a miner had been assigned to take corrective action and that a couple of posts had been set at No. 55 block. Tr. I 29, 43.

Workley acknowledged there were still two posts present on February 10, one set on each side of the crack at the outby right corner. In addition, he acknowledged that there may have been some posts in the crosscut on both January 23 and February 10. Tr.I 30, 54. He indicated, however, that even if some posts had

been set between January 23 and February 10, they did not correct the hazardous condition, for he noted that to abate the condition Consol had to install six cribs and twenty seven additional posts in addition to whatever posts may have been there. Tr. I 31; Gov. Exh. 6 at 5. In Workley's opinion the failure to correct the condition of the roof in the intersection between January 23 and February 10 violated section 75. 323 because that standard required reported hazardous conditions be corrected promptly. Tr. I 32.

Workley believed failure to install the required roof support had subjected persons traveling through the intersection to the danger of injuries from roof fall and that such injuries could range from quite serious to fatal. Tr. I 33. He also believed it reasonably likely that a reasonably serious injury would have occurred had mining continued. He noted some blocks of head coal adjacent to the crack and measuring approximately 6 to 8 inches wide had fallen from the roof and that he had asked Jordan and Cheslik not to go under the area. Workley stated, "I felt extremely uncomfortable getting under far enough to see the crack and what more deterioration had taken place . . . " Tr. I 41. Because of the sag in the roof, the amount of loose rock and coal adjacent to the crack and the sloughage from the top part of the ribs in the crosscuts, Workley believed parts of the roof could have fallen at any time. Tr. I 42.

According to Workley, those miners likely to have been injured were the miner who was required to travel the entry weekly to examine the escapeway, the one or more section workers who usually accompanied the examiner and persons using the crosscut to travel from the return entry to the track entry. Tr. I 43. Moreover, if a section crew had to use the escapeway to evacuate the mine, the entire crew of up to six or seven miners would have been subject to injury because they would have had to pass under the defective roof on their way out of the mine. Tr. I 35.

With regard to Consol's negligence in failing to correct the condition, Workley believed that because the mine foreman, Statler, and the assistant superintendent, Gage, had countersigned the page containing the report of the condition, they were aware of it. Tr. I 35. Moreover, because the condition was the same or worse on February 10 than it had been on January 23, Workley believed that mine management had taken no apparent action to correct the condition. This belief was confirmed by the fact that there were no entries in the book to show that any action had been taken, only an entry on January 30, to indicate that the same condition still existed. Tr. I 37. Mining had been taking place while the condition existed and Workley concluded Consol had given priority to production, not to maintenance of the roof in the escapeway. Tr. I 37-38.

When asked whether he would have considered it a violation if eight posts had been set in the area of the crack, Workley replied that Consol would still have been in violation because it took more than eight posts to eliminate the hazard. (He specifically noted six cribs had been build for abatement purposes and stated that the roof support given by one crib is equal to that of a dozen posts. Tr. I 39.)

The condition was abated by the midnight crew on February 11. Workley described the abatement as timely. Tr.I 40.

CONSOL'S WITNESS

JOSEPH STATLER

Statler is the general mine foreman at the Osage No. 3 Mine and he held that position during Workley's inspections of January and February 1992. Statler was asked what was done in response to Wyatt's entry of January 23, 1992, in the preshift examination book -- the entry that indicated the subject area needed roof support? He responded that immediately after the inspection on January 23, Hill had told him that posts would have to be set in the area. Statler stated that he then told the foreman of the next shift, the afternoon shift, to send people into the area, to see what needed to be done and to do it. Tr. I 59-60. Statler also stated that "as a backup" he left a note for the foreman of the midnight shift -- the shift following the afternoon shift -- to "make sure that . . . area was taken care of." Tr. I 60. According to Statler, the midnight shift foreman found that no work had been done in the area during the afternoon shift, and he therefore took two men into the area and the crew set eight posts. Tr. I 60-61.

Statler identified a copy of a page from the mine work book -- a book that is kept at the mine and referred to by Statler to determine what work has been done. Op. Exh. 1, Tr. I 61-62. Statler identified an entry for the midnight shift on January 24, 1992. The entry states that miners Nabors and Coburn had "picked up empty flat put in 6 Butt spur. Went to 8 west tailpiece replaced skirts. Changed rollers on 8 west belt. Set 8 posts 7 Butt intake 55 block." Op. Exh. 1 (emphasis added); see Tr. I 62. Statler also stated that he never went to the 55 block to see the posts the work book indicated had been set. Tr. I 63.

Statler was then referred to the entry of January 30, 1992, in the book used to record the results of the weekly examination of escapeways. Gov. Exh. 6 at 4. The entry contains two illegible, marked through words. Statler was of the opinion that the weekly examiner, Parker, had written the words "none found" in the column titled "Hazards Noted" and that these words had

been scratched out subsequently. Statler noted that above the scratched out words examiner William Varner had written the phrase "55 block track door to Ret needs add support," which Statler deciphered as "55 block track door to return needs additional support." Gov. Exh 6 at 4; Tr. I 67. In Statler's opinion, Varner had walked the entry with Parker, they had not noticed the area as having been in need of any support but when they came out of the mine and reviewed the book and saw that a week earlier the area had been indicate as being in need of support, they could not recall if roof supports had been installed or not. Therefore, they erred on the side of safety and marked out "none found" in the hazards column and added the entry indicating additional support was needed. Statler was candid that this was only speculation on his part. He had not discussed the situation with either man. Tr. I 68-69.

Continuing his testimony regarding the weekly examination book, Statler noted that on February 6, 1992, Lee Wolf had examined the 7 Butt face to the 6 Butt split -- an examination that would have required him to walk through the subject intersection -- and that he had indicated no hazards had been found. Tr. I 70; Gov. Exh 6 at 3.

THE VIOLATION

Section 75.323 stated in part:

> The mine foreman shall read and countersign promptly . . . the weekly report covering the examinations for hazardous conditions. Where such reports disclose hazardous conditions, they shall be corrected promptly.[3]

Counsel for the Secretary argues the evidence establishes the condition of the crosscut was hazardous, that it was observed by Wyatt on January 23 and was recorded as a hazardous condition, that it was not corrected until February 10, 1992, and that the fifteen day delay in correcting the condition violated the standard's mandate that reported hazardous conditions be corrected "promptly." Counsel further asserts that even if eight posts were placed in the crosscut, as Consol alleges, the eight posts did not abate the condition and constitute prompt correction. Tr. I 76-79.

Counsel for Consol argues that within a day after the crack in the roof was noted additional roof support (i.e., the eight

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[3]Section 75.323 was one of the ventilation regulations revised effective August 15, 1992. 57 FR 20914 (March 15,1992). The requirements of section 75.323 now are subsumed in section 75.364.

posts) had been set and that this roof support was sufficient to take care of the situation as it existed at the time, even though it may have deteriorated subsequently and have required additional work at a later date. Tr. I 84.

I conclude the violation existed as charged. I am persuaded of this by the testimony as well as the fact that Consol chose not to call witnesses whose testimony would have presumably supported -- and strongly supported -- its argument.

There is no dispute about the condition found by Workley on January 23. The roof in the intersection of the escapeway and the crosscut was sagging and a 1/2 inch wide crack in the roof ran diagonally across the intersection. In addition, the roof in the crosscuts had deteriorated and coal had fallen at corners of the intersection. There were two posts set at the outby corner of the intersection of the escapeway and the crosscut, but they were totally inadequate to support the roof. I credit Workley's opinion that the condition of the roof was such that it could it presented a danger of falling, and I conclude therefore that the condition in the escapeway was hazardous.

There is likewise no dispute that the condition was observed and recorded and that the weekly report was read and countersigned by mine foreman Statler, as was then required by section 75.323. Statler 's signature appears on the page bearing Wyatt's January 23, 1992 report of the condition. Gov. Exh 6 at 2. Up to this point, Consol complied with section 75.323.

The problem, of course, is that the section also required the hazardous condition to be "correctly promptly." I agree with the Secretary that this was not done. In my view, prompt correction means that the hazardous condition must be corrected as quickly as is reasonably possible under all of the relevant circumstances. Here, as Statler recognized, that would have required the foreman on the shift after the hazardous condition was reported on January 23 -- the afternoon shift -- to make certain the roof was adequately supported. I credit Statler's testimony that he told the afternoon shift foreman to take care of the situation. I also credit his testimony that the foreman did nothing, and I conclude from this that the hazardous condition was not corrected promptly and that the standard was violated.

In addition, I conclude the violation was ongoing. Even if, as Consol maintains, eight posts were set on the midnight shift, the preponderance of the evidence is that they did not adequately correct the condition. I am persuaded the entry in the weekly examination book for January 30 that additional roof support was needed accurately reflects that fact, and I do not believe that the roof was deteriorating fast enough that whatever support was installed on the midnight shift of January 23-24 was made

obsolete. Rather, it seems clear to me that the condition of the roof as it existed on January 23 was never fully corrected until the violation was abated on February 11. I especially note that Consol did not call either Parker or Varner as witnesses, although both had observed the condition of the roof on January 30. Rather Consol relied solely upon the testimony of Statler, a witness who never saw the condition at issue.

In reaching the conclusion the violation was continuing, I discount the February 6 entry of mine examiner Wolf to the effect that no hazards were found in the subject intersection. Without actual testimony from Wolf, I cannot find that his written comment outweighs the opinion of Workley, that Consol never corrected the ongoing problem with the roof. Afterall, Workley twice viewed the area. Moreover, the significant amount of roof support that was necessary to eliminate the hazard adds credence to Workley's opinion that the hazardous roof existed from January 23 until February 11. I believe it extremely unlikely that the roof would have been adequately supported and then rapidly deteriorated to the point where such massive additional roof support was needed.

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 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.[4]

Here, I have found a violation of the cited safety standard. Further, the violation posed a discrete safety hazard in that failure to promptly correct the condition of the roof subjected miners passing beneath it to the danger of injuries due to a roof

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[4]In Mathies Coal Co. 6 FMSHRC 1, 3-4 (January 1984), the Commission stated:

> [T]o establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary . . . 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.

fall. If such an accident had happened, the resulting injuries were reasonably likely to be serious or even fatal. Roof fall is, afterall, a leading cause of serious injury and death in the nation's underground coal mines.

As is frequently the case when the alleged S&S nature of a violation is challenged, the question is whether the Secretary 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 1984). The relevant time frame for determining whether a reasonable likelihood of injury existed 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, 8 FMSHRC at 12; U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985).

Counsel for the Secretary maintains the testimony establishes the area in which the violation existed was traveled regularly by the weekly examiner and by other miners as well. He argues that the area was not adequately supported from January 23 through February 10 and that the condition was not focused upon and corrected and thus would have been a continuing, ongoing hazard had Workley not forced the issue. Therefore, he views it as highly likely that the roof would have fallen and injured someone had normal mining operations continued. Tr. I 79-80.

Counsel for Consol argues that miners "very, very rare[ly]" passed under the affected roof and therefore that it was not reasonably likely that someone would have been injured. Tr. I 85. Moreover, he observes that between January 23 and February 10 nothing serious happened and that this speaks for itself in establishing that the probability of something occurring was "nill." Tr. I 86.

I reject Consol's arguments and conclude that Workley properly found the violation was S&S. The Secretary is right in asserting the area in which the bad roof occurred was regularly traveled and it was traveled not only by the weekly examiner and whomever accompanied him but by other miners as well. The examiner, passed under the roof on a regular basis in compliance with the requirement that the area be examined for hazardous conditions. He was accompanied usually by at least one other miner. Moreover, as Workley noted, miners used the area to travel between the track and return entries, as attested by the man doors in the stoppings at both ends of the crosscut. Further, if the escapeway ever had to be used for its intended

purpose, an entire section crew would have had to pass under the area.

I have already found that the inadequately supported roof existed between January 23 and February 10. Workley was uncertain whether, as Statler maintained, up to eight posts had been installed to support the roof, but I have agreed with Workley that whether or not they were installed the hazard was not alleviated. I further conclude that the unsupported roof would have continued to exist had normal mining operations continued. I accept counsel for the Secretary's argument that the testimony fully supports the conclusion the condition was only corrected because Workley cited the violation. Workley, the only witness to testify who had first hand knowledge of the condition, stated that on February 10 the cited area was about the same as it had been on January 23. It was clear to Workley, and it is clear to me, that Consol's correctional efforts were at most woefully inadequate. In this regard, Statler's testimony and Consol's own records afford a compelling basis from which to infer its indifference to the situation. The first foreman sent by Statler to correct the condition did nothing, and Consol's record of the weekly examination for hazardous conditions that was conducted after the January 23 examination (the January 30 examination) indicates that additional support was still needed. The implication Consol was indifferent to the condition is inescapable. Given these factors, I fully agree with counsel for the Secretary it was reasonably likely that "someone would have gotten struck by rock from a roof fall." Tr. I 80. The violation was S&S.

In determining the gravity of the violation I must consider both the potential hazard to the safety of the miners and the likelihood of the hazard occurring. As has been noted, the violation subjected miners to serious injury or death from a fall of the roof. In addition, given the extensive roof support that had to be installed to correct the condition and the fact that miners unquestionable traveled under the inadequately supported roof, it was likely that a miner would have been involved in a roof fall accident. 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 Corp., 9 FMSRHC 2007, 2010 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of "unwarrantable " ("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 and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, 9 FMSHRC at 2001.

Counsel for the Secretary argues that Statler's failure to go to the affected area and make certain the condition of the roof was corrected was aggravated conduct on Consol's part. Tr. I 81. Counsel for Consol counters that within a day after the condition was first noted by Workley, the eight posts were set and that this was sufficient to take care of the situation as it existed at the time, even though it may have deteriorated later. By promptly attending to the situation, Consol did not exhibit the kind of aggravated conduct that constitutes unwarrantable failure. Tr. I 84-85.

In my view, Counsel for Consol is wrong. As I have found, even if the eight posts were set, they did not correct the hazard. The roof in the area continued to be inadequately supported until the violation was corrected, and Consol was well aware of this in that the report of the January 30 examination for hazardous conditions specifically called for more roof support. Still, nothing was done and ten days later, when Workley again viewed the area it was in no better condition than it had been on January 23. In knowing that the area had poor roof and that its examiner had called for additional support, not once but twice within a period of slightly more than two weeks, and in failing to ensure the support was present even after it had received a second "wakeup call," Consol exhibited the type of heightened and inexcusable neglect that constitutes unwarrantable failure.

It is likewise clear to me that Consol's failure to adequately support the roof by February 10 was the result of its failure to meet the standard of care required of it under the circumstances and that its failure represented a high degree of negligence.

ORDER NO.	**DATE**	**30 C.F.R. §**
3717961	2/20/92	75.301-4(a)

The order states:

> The mean entry air velocity was calculated to be 41.6 feet per minute in the crosscut 3 to 2 where the 7 butt continuous mining machine was operated. A mean entry air velocity of 60 feet per minute is the minimum required to dilute -- render harmless --and carry away methane and respirable dust.

Gov. Exh. 9.

THE EVIDENCE

THE SECRETARY'S WITNESSES

LYNN WORKLEY

Workley stated that he conducted another inspection at the mine on February 20, 1992. During this inspection he was accompanied by Bill Kun, a Consol safety escort and head of the mine's safety department and by miners' representative, Larry Numeric. Tr. II 9-10. Workley arrived at the mine at approximately 7:45 a.m. Before proceeding underground he met a roof bolting machine operator who asked Workley to go the 7 butt section and check the ventilation tubes because there was no ventilation on the section. The miner's face was black with coal dust. Tr. II 10.

Workley went to the 7 butt section, a section where mining was performed by a continuous mining machine ("continuous miner"). Tr. II 11. Workley arrived on the section at approximately 9:00 a.m. Tr. II 42. Mining was not taking place when Workley arrived and none took place while he was there. Tr. II 11, 39, 42. Some miners were moving supplies and some were in the process of completing a belt move that had been started the previous shift. Tr. II 11, 51. Workley stated he walked to the face of the section and had a conversation with the section foreman, Louis Parker, and the continuous miner operator, Joseph Jimmy. Workley asked Parker if he was ready to being mining coal, and, according to Workley, Parker said, "yes." Tr. II 11.[5] Workley stated that he then took an air reading in the last ventilation tube in place in the face area. Workley described the type of air reading he conducted as one as one in which he used a magnehelic and Pitot tube. Id. [6]

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[5]Later, Workley changed and supplemented his testimony regarding the place where the conversation occurred. He stated that he and Parker spoke in the intersection of the crosscut and the entry leading to the face ("E" on Gov. Exh. 10). Because this area was near the auxiliary fan, most in the area, himself included, were wearing ear protection at the time. Nonetheless, Workley maintained that he and Parker were near enough easily to hear one another. Tr. II 129-130.

[6]A "Pitot tube" is defined as a device that:

> [C]onsists of two concentric tubes bent in an L shape. In operation, the instrument is pointed in the direction of air flow: the inner tube, open at the end directed upstream, measures total head, and the outer tube, perforated with small openings transverse to the air flow, records static head. Each tube is connected to a leg of a manometer, when reading velocity head.

(continued...)

As a result of the air reading Workley determined the velocity of air in the last tube was far less than required. Workley testified his test established a velocity of 3,574 cubic feet per minute ("cfm"). Since the area of the entry was 86 square feet, Workley calculated the mean entry air velocity of the entry to be 41.6 feet per minute.[7] According to Workley, section 75.301-4(a) of the regulations, which was in effect at that time, required a mean entry air velocity of at least 60 feet per minute. Tr. II 12, 14.

Workley decided to issue an order of withdrawal after Parker told him he was ready to mine coal. Had Parker stated that he was not ready to mine, Workley would have issued a citation for a violation of section 75.301-4(a) on the previous shift, the midnight shift, because in his opinion the mean entry air velocity was no more than 41 feet per minute toward the end of the midnight shift. Tr. II 145. Workley issued the subject section 104(d)(2) order of withdrawal to Kun at approximately 9:40 a.m.. Tr. II 13, 42; Gov. Exh. 9.

Workley identified a drawing he had made depicting the subject area as it had existed on February 20, 1992. Gov. Exh. 10. Workley explained that the section was ventilated by an exhaust system, in that air ventilating the face was sucked by an auxiliary fan through tubing and away from the face. In other words, air coursed up the entry into the face area, crossed the face and was exhausted out of the face area and through the tubing. Tr. II 16. Workley testified that the tubing was extensively damaged and Workley was of the opinion that the damage caused the insufficient ventilation. Tr. II 15.

The tubing, which was hung from the miner roof with steel wire and spads, was made of fiberglass and was assembled in a total of nine regular sections. Each section was 10 feet long. Tr. II 17, 70. The regular sections of tubing were approximately 22 inches high by 11 inches wide. The section nearest the face

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[6](...continued)
U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 828. Workley explained that because there was low air velocity on the section a magnehelic and Pitot tube reading was the only way he alone could determine the quantity of air drawn to the working face and using that figure could calculate the mean entry air velocity coming up into the working place. Tr. II 12. If the velocity of air on the working face had been higher he could have used an anemometer. Tr. II 40. Or, if another person had been present to help conduct the inspection, he could have used a smoke cloud. Id.

[7]Workley described the "mean entry air velocity" as "[t]he average velocity across the entire cross-sectional area of the entry." Workley took only one reading with the Pitot tubes and he maintained that it was not necessary to take more than one reading to calculate the mean entry air velocity. Tr. II 40-41.

was called the "peewee section" because it's height and width were smaller than the regular tubing. The peewee section was 17 1/2 inches high by 9 inches wide. It slid into and out of the larger tubing, making its length easily adjustable. Tr. II 17.

An auxiliary fan was located in a crosscut outby the face. Tubing extended from the fan up the entry leading to the face and into the face area. At the corner of the crosscut in which the fan was located and at the corner of the entry leading to the face area the tubing made approximately 90 degree turns.

Workley measured the air volume by inserting the Pitot tube into the peewee tube about five feet back from the end of the peewee tube and about 14 feet outby the face. Tr. II 19, 65; "B" on Gov. Exh. 10. Workley stated that he measured at this point rather than at the end of the peewee tube because it was as close as he could get to the end of the tube and still get an accurate air reading. Tr. II 63-65.

In Workley's opinion, because the peewee tube slid into the angle tube it was not possible for the peewee tube to be adjusted as it normally would have been. Tr. II 18. Consequently, there was a gap between the peewee tube and the regular size angle tube and Workley maintained that there was loss of air where the peewee tube slid into the angle tube and the loss diminished the velocity of air that he measured, as did every other damaged place in the tubing were air leaked into the tubing. As Workley stated, "Each leak between the fan and [the] point [where he measured the air] reduces the amount of air that's shown in the reading that's being provided at the end of the ventilation tube." Tr. II 19. In Workley's opinion, he obtained an accurate reading of the air at the end of the tube because there were no leak between where he took the reading and the end of the peewee tube. Tr. II 19-20.

Workley was asked about notations he had made on Gov. Exh. 10, notations that indicated places where the tubing was "mashed" or had "holes." He stated that they depicted places where his notes indicated the tubing had been "busted" during frequent use and also where it had small, multiple holes. At the joint between the peewee tube and the angle tube Workley found a gap at the top of the peewee tube that measured approximately 6 inches high by 2 inches wide. Workley believed air that was being sucked into the gap would have gotten no further than the gap. In other words, that air would not first have swept the face as it was supposed to do. Tr. II 134-138, 140. At other places Workley found a hole 3 inches high by 9 inches wide, as well as two other holes large enough to stick a hand into. Tr. II 21-22.

Workley stated that Parker told him mining had been done during the midnight shift. Tr. II 68. Because, as the tubing

was extended the velocity of air at the end of the tubing dropped, Workley concluded that on some part of the midnight shift, possibly the last hour and a half, the mean entry air velocity dropped to the level he found it. Tr. II 22. However, given the amount of coal dust he had seen on the miner's face, the velocity may have been below 60 cfm for a longer period because "short duration exposition would not cause that quantity of float coal dust to stick to you." Tr. II 26.[8]

Workley believed that due to the lack of a sufficient mean entry air velocity excessive quantities of float coal dust were likely to be generated in the face area, especially in the working environment of the roof bolting machine and continuous miner operators. Workley stated that breathing excessive quantities of such dust can lead to pneumoconiosis, a potentially fatal disease. Tr. II 26. (Workley checked the continuous miner and found the spray system was operational. He could not think of any other cause for excessive coal dust in the face area beside inadequate ventilation. Tr. II 80.) Moreover, if mining continued with an insufficient velocity of air, the contraction of pneumoconiosis by such miners was reasonably likely. Tr. II 27.

Further, Parker had told Workley he had been trying to get mine management to furnish better tubing for two weeks. Workley therefore believed it reasonably likely the condition would have continued and that repeated shifts would have had to mine without adequate ventilation. Tr. II 59-60.

In addition to the health hazard created by the violation Workley feared the lack of adequate ventilation could result in a fire or explosion. Because excessive quantities of float coal dust were likely in the face area and because such dust could be ignited, it was Workley's opinion that miners in the face area were exposed to the danger of burns and possible concussions, especially miners roof bolting or operating the continuous miner. Tr. II 27. An ignition source could have been the bits of the continuous miner striking stone or hard rock at the face and producing sparks. Tr. II 60. If such ignitions occurred, injuries could have ranged from minor (burned eyebrows and facial hair) to fatal, but under the conditions he observed, Workley believed the ignitions would have caused sever burns. Tr. II 27-28.

He based his opinion on the fact that the auxiliary fan and tubing had been left exactly as it been on the midnight shift,

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[8]On cross examination Workley admitted he did not know how the miner had gotten so dirty. He stated the miner might have been elsewhere on the section than the face area. Tr. II 43.

and the roof bolting machine operator's face indicated the operator had been working in excessive quantities of float coal dust for most of the midnight shift, and mining was about to continue with no change in the ventilation system. Tr. II 29. Moreover, Workley was of the view that an ignition was reasonably likely because he had investigated such ignitions in face areas at other mines in the area. Id. Further, although Workley only found .4 percent methane at the end of the tubing, if mining had continued at some point it would have been reasonably likely for methane to have reached the minimum explosive level of 5 percent. Tr. II 60, 73-74.

Turning to his belief the lack of adequate air velocity was the result of unwarrantable failure on Consol's part, Workley again noted that after the violation was cited Parker stated he had been trying to get better tubing for two weeks. Tr. II 30-31, 78-79. (Workley maintained that Jimmy was present when Parker told him this. Tr. II 52, 78. Workley could not recall if Kun or Numeric were also present. Tr. II 52.) Further, the miner with the black face told Workley he had complained to people in mine management that the crew could not maintain adequate ventilation. Tr. II 31. Moreover, Workley thought that a person actually could feel the difference between a mean entry air velocity of 60 cfm and one of 41 cfm. Finally, Workley maintained that when mining was in process the foreman would have seen "dust rolling back over the roof bolters and to the [continuous] miner operator," and this should have alerted the foreman to the inadequate air velocity. Tr. II 32.

Workley was also of the opinion that Parker was negligent in that he was going to begin mining and he was going to do so in a situation where he clearly knew or should have known that the ventilation was inadequate. Tr. II 61.

In order to abate the cited violation the foreman and continuous miner operator cut up brattice cloth and wrapped the cloth around the tubing to cover the leaks. Tr. II 33-35. Workley could not recall where they had obtained the cloth, and Workley did not see the cloth in the vicinity of the face prior to citing the violation. Tr. II 33. This indicated to Workley that the tubing would not have been wrapped before mining started and that the tubing had not been wrapped on the midnight shift. Tr. II 34.

Section 75.301-4(a) provided an exception from the 60 cfm requirement for working places where a blowing system was the primary means of face ventilation or where a lower mean entry air velocity had been determined by the MSHA district manager to have been adequate. Workley stated that neither exception applied in this instance. Tr. II 36.

The question of whether a check curtain had been hung in the crosscut immediately inby the auxiliary fan was raised on cross

examination by Consol's counsel. Workley maintained that although he was not certain, he did not believe that such a curtain was in place. However, if it had been so hung, it would not have increased ventilation at the face. This was because the air in the crosscut where the fan was located was 26,500 cfm, which would have blown out the bottom of any curtain. Tr. II 54-55.

CONSOL'S WITNESSES

DANNY SERGE

Consol inspection escort Danny Serge was Consol's initial witness. He was not with Workley during the inspection of February 20.

Serge testified that he is in charge of control of respirable dust at the mine. Tr. II 83. According to Serge, when mining is in progress a check curtain normally is in place immediately inby the auxiliary fan. With the curtain in place all air in the crosscut where the fan is located is directed up the entry to the face. Tr. II 85-56.

Serge, who testified he regularly took Pitot tube readings to determine air velocity, stated that he normally took them not in the peewee tube but in the tube next to it. Serge maintained that until the reading taken by Workley he had never heard of any person from either MSHA or Consol taking a Pitot tube reading in the peewee tube. Tr. II 97. Readings taken in the peewee tube could result in significantly different results than those taken in regular tubing further away from the face. A reading taken in the tube next to the peewee tube would have been higher than the peewee tube result because of the gain of air through the joint where the peewee tube fit into the next tube. Tr. II 89-91. Serge speculated that the air reading would have been increased by as much as 50 percent if it had been taken further back from where Workley took it. Tr. II 93.

Serge believed that the air going up the entry swept the face before being sucked into the gap between the peewee tube and the regular tube and thus that a reading taken in the regular tube would represent the air present at the face. Tr. II 101-104.

WILLIAM KUN

William Kun, safety supervisor at the Osage No. 3 mine, was Consol's last witness. Kun accompanied Workley and was served Order No. 3717961. Kun stated that at the commencement of the inspection he and Workley went directly to the 7 butt section.

(Kun was unaware at the time of any prior conversation Workley may have had with a miner.) They arrived on the section around 8:40 a.m. They observed three or four miners at the tailpiece who were installing rollers on the tailpiece. Coal was not being mined and it could not be mined until the tailpiece was completed. Kun had "no knowledge" of how long it would have been before work at the tail piece was finished. Tr. II 107-108.

The inspection party proceeded up the entry toward the face area. Along the way Kun recalled Workley looking "at a couple of tubes." Tr. II 125. At the face area, the continuous miner was located adjacent to the peewee tube. Tr. II 109. Kun was not certain whether or not Jimmy was present at the continuous miner. Tr. II 122.

With regard to the condition of the tubing, Kun agreed that there were some holes in it. Tr. II 112. Kun also believed that Serge was correct to believe that taking a reading in the next tube back from the peewee tube would have given a true representation of the air passing the face. He stated, "[Y]ou're finally getting all the air that swept the face because the air that goes through the end of the slider tube, which is closest to the face, plus what goes in at that joint is now giving you a true representation of what is being passed by the face." Tr. II 112-113.

After the face area had been inspected the inspection party moved down the entry and met Parker at the intersection of the crosscut and the entry. Prior to that, Parker had been working with the miners who were moving the belt and he had completed checking for methane at three idle faces on the section. Tr. II 115. It was at this point that Parker and Workley had a conversation, but Kun maintained that he did not hear Parker mention anything about the tubing to Workley. Tr. II 110, 114.[9] However, Kun did hear Workley ask Parker if Parker was ready to start mining and, according to Kun, Parker replied, "I'm about ready." Tr. II 116. Kun believed that Parker could not have meant mining was going to start immediately because only the continuous miner operator was at the face and various checks would have had to be made by other miners before mining could commence. Tr. II 117. In addition, the roof bolter operator and the loader operator were at the tailpiece and they would have had to be in the face area for mining to begin. Tr. II 119.

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[9]In fact, Kun was standing several feet away from the two men. Tr. II 116. In addition, as previously mentioned, the auxiliary fan was running and Kun believed the inspection party was wearing ear protection. Tr. II 127.

THE VIOLATION

Section 75.301-4(a) stated in pertinent part:

> [E]xcept in working places using a blowing system as a primary means of face ventilation or in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and carry away methane and to reduce the level of respirable dust to the lowest attainable level by the . . . [MSHA] District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined or loaded from the working face with mechanical mining equipment . . . [10]

Counsel for the Secretary argues that Workley's air measurement, by which he determined the air quantity (volume), was validly taken and produced a true result. Consequently, Workley's calculation of the mean entry air velocity was likewise accurate. Counsel terms as "irrelevant" the fact that no mining was taking place because Parker told Workley he was going to start. Moreover, Consol was mining on the midnight shift and by inference the violation occurred on that shift as well. Tr. II 150-152.

Counsel for Consol notes the regulation applies where coal is being "cut, mined or loaded" and argues that coal was not being cut, mined or loaded when the alleged violation occurred. Tr. II 157-158. In the alternative, Counsel argues that if the standard is applicable despite the lack of actual mining, Workley's air reading cannot establish the violation because by taking the reading as he did, Workley missed a "significant quantity of air." Tr. II 158.

I conclude that on the morning of February 20, 1993, the violation existed as charged.[11] Consol's argument that the standard should be interpreted to mean what it saids -- that is,

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[10]Like section 75.323, section 75.301-4(a) was revised effective August 15, 1992. 57 F.R. 20914 (May 15, 1992). Its requirements now are included in section 75.326.

[11]Because I conclude a violation of section 75.301-4(a) existed when cited by Workley, I need not decide whether such a violation also existed on the midnight shift. I note, however, that although Workley stated he believed a violation of section 75.301-4(a) had taken place on the midnight shift, it is clear that he chose not to cite Consol for such a violation and the Secretary's attempt to belatedly bring that "violation" within the parameters of Order No. 3717961 is dubious at best.

it should be applied in all working places where coal is being cut mined or loaded -- usually would carry the day, for regulatory interpretation would normally stop where the wording is clear. However, a reading of the entire standard convinces me it presented one of the rare instances where seemingly unambiguous language must be subjected to further interpretation. I reach this conclusion because of the directive of section 75.301-4(c) that "[t]he determination of mean entry air velocity may be made either immediately before mining equipment enters a working place or during its presence in such working place." Obviously, if the determination upon which a violation of the standard hinges could have been made "immediately before mining equipment enters a working place," then an operator could have been in violation of the standard even before coal actually was cut, mined or loaded. In my view, the standard thus contemplated the presence of the required mean entry air velocity beginning at a point "immediately prior" to actual cutting, mining or loading.

Moreover, it is perhaps obvious, but nonetheless worth observing, that when regulatory interpretation is undertaken the law prefers reasonable consequences. Given the purpose of the standard to have protected miners from the hazards of methane and respirable dust, it was reasonable and furthered that purpose to have allowed an inspector to take preemptive action when the catalyst for such hazards -- the actual mining of coal -- was immediately at hand. In sum, I agree with counsel for the Secretary that the inspector "should not [have] be[en] required to permit [an unsafe condition] . . . to go on . . . when he had been given every . . . indication from the operator . . . that such activity [was] imminent." Tr. 152.

Here, I fully credit Workley's testimony that Parker stated coal was ready to be mined. Kun testified that Parker said he was "about ready", but Kun was not standing with Workley and given the noise from the auxiliary fan, Kun agreed he, Kun, might have been wearing ear muffs. On the other hand, Workley, was certain he and Parker could hear one another and certain about what had been said. More telling yet, is the fact that Consol did not call Parker as a witness. This speaks almost as loudly as Workley and Parker must have been.

Workley knew the continuous miner was in the face area. Having been told by the foreman that the foreman was ready to mine, I believe Workley was justified in taking Parker at his word. In my view it would be unreasonable to hold that Workley should have questioned Parker further about the "readiness" of the roof bolters or loader operator. An inspector may assume a foreman knows whereof he speaks.

Further, it was reasonable for Workley to conclude that mining would have been conducted under the circumstances he had observed on the section. There was, as Workley testified, no

visual indicated that efforts had been made to patch or repair the tubing nor any evidence that such repair work was planned.

I realize that Workley took the air reading upon which the violation is based prior to his discussion with Parker. Nonetheless, nothing had occurred between the taking of the reading and the discussion to change the result Workley obtained, and I therefore hold that Workley properly understood the mining of coal was immediately at hand in a working place with a mean entry air velocity of less than 60 cfm.

This conclusion is also based upon the fact that I reject Consol's challenge to the manner in which Workley measured the mean entry air velocity. In particular, I am not persuaded by Consol's contention that the air entering the gap between the peewee tube and the main tube (the angle tube) would of necessity have ventilated the face area and thus that Workley failed to measure a "significant" amount of air. Rather, I credit the essence of Workley's testimony in this regard -- that much of the air entering the gap would have been sucked directly into it rather than going to the face first. This represents an elementary principle of physics and thus, while it is true that had he taken a reading outby the gap Workley would probably have obtained a higher reading, it would not have been a reading relevant to determine the quantity of air necessary for calculation of the mean entry air velocity.[12] I therefore conclude the Secretary has established a violation on section 75.301-4(a).

S&S AND GRAVITY

Counsel for the Secretary argues that the S&S nature of the violation is fully established by Workley's testimony. He states that if normal mining operations had continued, excessive accumulations of methane and respirable coal dust could have been expected in the face area. He further argues that Workley persuasively testified the cutter heads on the continuous miner presented an ignition source and that if mining had continued the deterioration of the ventilation would have been reasonably likely to result in an ignition. Further, according to counsel,

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[12] I further find on the face of this record that Workley correctly determined the mean entry air velocity based on one measurement of the quantity of air. Although Consol challenged the point at which Workley made his measurement, it did not offered any testimony to refute Workley's assertion that he had calculated the mean entry air velocity properly based upon the result of his single measurement. Nor did Consol point to any regulations or MSHA guidelines that prohibited such a practice. Nevertheless, it seems incongruous indeed to find the "mean" on the basis of one measurement, and the issue might well have been decided differently had other evidence been offered.

Workley credibly testified pneumoconiosis was reasonably likely given the coal dust. Tr. II 153-154.

Counsel for Consol argues that at the time Workley inspected the section no respirable coal dust was present, methane was low and there was no ignition source. Further, if mining had continued there was no reasonable likelihood of injury because adequate air was moving up the entry to remove the methane and coal dust, and the fact that Workley saw one miner with a dirty face was no indication pneumoconiosis was reasonably likely. Tr. II 159-161.

I conclude the testimony supports Workley's S&S finding. A violation of the cited standard existed. In the context of continued normal mining operations the violation posed the safety hazard of an explosion and fire due to methane or coal dust and the health hazard of pneumoconiosis due to excessive concentrations of respirable dust. These hazards could have resulted in serious, even fatal, consequences to miners.

Moreover, I conclude there was a reasonable likelihood the hazards would have resulted in injury or illness. There is no indication Consol was going to repair the tubing, thus there is no indication the inadequate ventilation would have improved. Methane is liberated at the mine and it is common knowledge that methane liberation increases during mining. Without the required mean entry air velocity liberated methane was less likely to have been swept from the face area. Further, Consol does not dispute Workley's testimony that the bits of the continuous miner could cause sparks, thus providing an ignition source for accumulated methane. Given these factors and in the context of ongoing mining operations an ignition was reasonably likely.

In addition, I conclude the contraction of pneumoconiosis in the context of normal continued mining operations was reasonably likely given the fact that the continuous miner creates respirable dust when mining is taking place and the violation made adequate removal of that dust unlikely. While I agree with Consol that the miner with the dirty face does not prove reasonable likelihood (afterall, Workley admitted he did not know for certain where the miner had been working or what he had been doing on the midnight shift), I do not believe a physical indicia of the presence of coal dust is necessary to uphold an S&S finding. Pneumoconiosis is a cumulative disease. Illness results from repeated exposure. It is not possible to state that any one exposure is more "likely" to bring on the disease than any other and I therefore believe all to be equally hazardous. Thus, in my view, a condition such as this violation, that is reasonably likely to lead to exposure to excessive respirable coal dust is reasonably likely to result in an illness.

As I have noted, the violation subjected miners in the face area to serious or even fatal injury and illness. Further, as mining continued it was likely miners would have been injured or been made ill by the conditions created by the violation. Therefore, I also conclude the violation was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The issue of unwarrantable failure can be decided by answering the question of whether the violation of section 75.301-4(a) was due to Consol's aggravated conduct constituting more than ordinary negligence? The Secretary's counsel emphasizes Workley's testimony that the problem with the tubing was ongoing, that Parker told him he had been unable to secure replacement tubing and that there was nothing noticeably present on the section with which to make on-the-site repairs of the tubing (e.g., materials to wrap the tubing). Further, counsel points to the miner with the black face and asserts the inadequate ventilation had to be apparent to management. Tr. II 154-155.

Counsel for Consol counters that although the tubing was in "rather dilapidated condition" this does not establish unwarrantable failure to comply with the cited ventilation standard. Tr. II 162. Section 75.301-4(a) requires a specified amount of ventilation, not maintenance of the ventilation system. Tr. II 160-161.

I find for the Secretary. The condition of the tubing was visually obvious. As even Consol's counsel admits, the tubing was badly damaged. The damage was so extensive I conclude it must have occurred over several shifts, and this conclusion is supported by Workley's entirely credible account of the conversation in which Parker told Workley he had been trying for two weeks to get mine management to provide better tubing. (As I have previously noted, Consol did not call Parker as a witness.) The unexplained, long term failure of mine management to have provided its foreman with the means to comply with something so elementary to safety as the cited ventilation standard was indeed inexcusable.

Nor does the inexcusable fault rest solely with nameless management officials. Parker also must share in the blame. He knew the tubing was damaged and he must have known the consequences of that damage upon the ability of the tubing to maintain adequate ventilation at the face. Yet, on February 20, he was ready to begin mining without making repairs to the tubing -- repairs that would have permitted compliance with the standard, as the abatement of the order shows. While he may not have been able to obtain better tubing, it is not too much to expect he could have obtained brattice cloth or other materials

to wrap the tubing, and I conclude that his failure to do so was inexcusable.

Finally, Consol's failure to adequately maintain the mean entry air velocity of February 20 was the result of management's and the foreman's failure to meet the standard of care required of them under the circumstances and their failure represents a high degree of negligence.

OTHER CIVIL PENALTY CRITERIA

Gov. Exh. 1 is a computer print-out listing assessed and paid violations at the Osage No. 3 Mine in the twenty four months preceding the first violation alleged in this case. The print-out lists a total of 1,180 paid violations. Of these, there was one violation of section 75.323 and no violations of section 75.301-4(a). Counsel for the Secretary argues that this is an "average history" of previous violations. I find the history is large and while there is no evidence of a pattern of noncompliance with the standards at issue, the total history warrants commensurately large civil penalties.

In addition, I find the mine is large in size and Consol is a large company. The parties have agreed that any penalties assessed will not affect Consol's ability to continue in business.

Finally, I find that once the violations were cited, Consol exhibited good faith in rapidly abating them.

CIVIL PENALTY ASSESSMENTS

The Secretary has proposed a civil penalty of $900 for the violation of section 75.323 and a civil penalty of $1300 for the violation of section 75.301-4(a). With regard to the violation of section 75.323, given its S&S nature, the unwarrantable failure of Consol in allowing it to exist, the mine's large history of previous violations and Consol's status as a large operator, I find an increase in the proposed amount to be appropriate, and I assess a civil penalty of $1200.

With regard to the violation of section 75.301-4(a), considering the same factors, and noting especially what I believe to have been the particularly egregious lack of care of Consol in allowing the violation to exist, I find an increase in the proposed amount to $1800 to be appropriate.

ORDER

Section 104(d)(2) Order No. 3718491 is AFFIRMED and Consol IS ORDERED to pay a civil penalty in the amount of twelve hundred dollars ($1200) for the violation of section 75.323 alleged therein.

Section 104(d)(2) ORDER No. 3717961 is AFFIRMED and Consol is ORDERED to pay a civil penalty in the amount of eighteen hundred dollars ($1800) for the violation of section 75.301-4(a) alleged therein.

Payment 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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JERRY LEE DOTSON,	:	DISCRIMINATION PROCEEDING Docket No. SE 92-181-D Mine No. 50
v.	:	
LAD MINING INC., LARRY FLYNN, AND RONALD CALHOUN, Respondent	:	

FINAL DECISION

APPROVING SETTLEMENT

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Michael W. Boehm, Esq., and Thomas S. Kale, Esq., Spears, Moore, Rebman and Williams, Chattanooga, Tennessee, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case is before me upon the complaint of the Secretary of Labor ("Secretary") on behalf of Jerry Lee Dotson, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(c)(2)("Act"). The Respondents are Lad Mining, Incorporated ("Lad"), Larry Flynn and Ronald Calhoun. The essence of the Secretary's complaint is as follows: (1) that Dotson was working at Mine No. 50; (2) that the operator for whom Dotson was working went out of business and closed the mine; (3) that shortly, thereafter, the mine reopened under a new operator, Lad, and that Larry Flynn, the owner of Lad, and Ronald Calhoun, the president of the company that leased coal rights to Lad, refused to hire Dotson to continue working at the mine because of Dotson's protected activity and in violation of Section 105(c)(1) of the Act.

A hearing on the merits of the complaint was held in Chattanooga, Tennessee. Following the submission of post-hearing briefs by counsels for the Secretary and the Respondents, I issued a Partial Decision Pending Final Order in which I found the Secretary had proved that Dotson engaged in protected activity, that Respondent Calhoun knew of his activities and was motivated by them to take adverse action against Dotson and that

Respondent's Flynn and Calhoun likewise were motivated by the protected activity to take adverse action against Dotson. I further found that the Respondent's failed to rebut the Secretary's case or to establish an affirmative defense to his allegations. Therefore, I concluded the Respondent's had violated Section 105(c)(1) of the Act. Secretary of Labor on behalf of Dotson v. Lad Mining Incorporated, 15 FMSHRC 634, 659 (April 1993).

Having found the Respondent's in violation of the Act, I ordered the parties to confer with respect to the remedies due Dotson and to advise me regarding the results of their discussions. I stated that if the parties were not able to agree regarding the remedial aspects of the matter, a further hearing would be convened. 15 FMSHRC at 660.

DISCUSSION

Subsequently, the parties engaged in extensive discussions and negotiation; and the parties efforts have resulted in a settlement agreement (the "Agreement") between the Complainant and the Respondents. Counsel for the Respondents has submitted a copy of the Agreement for my review. The Agreement is signed by counsel for the Respondents and counsel for the Secretary. The Complainant also has signed it. The Agreement sets forth the terms of the settlement with respect to the remedial aspects of this matter.

In addition to the Agreement the parties have filed a Joint Motion to Dismiss this matter on the basis that the Agreement resolves all outstanding issues to the parties' mutual satisfaction.

CONCLUSION

I have reviewed the Agreement and considered the motion. I conclude and find the settlement disposition is reasonable and in the public interest. Accordingly, the settlement is APPROVED. The parties' joint motion to dismiss with full prejudice is GRANTED.

ORDER

The parties are ORDERED to comply with all provisions of the Agreement. In view of the settlement disposition of this case, this matter 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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SEP 17 1993

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, LOCAL 5922, Complainants	:	COMPENSATION PROCEEDING
	:	Docket No. WEVA 93-358-C
v.	:	No. 21 Mine
BEAR RUN COAL COMPANY, AND W. P. COAL COMPANY, Respondents	:	

ORDER OF DISMISSAL

Before: Judge Hodgdon

This case is before me on a complaint for compensation under Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821. The parties have filed a motion to approve withdrawal of the complaint and to dismiss the case. The motion states that the Complainants have been paid by respondent the compensation claimed and that the issue in this case is, therefore, moot.

Accordingly, the joint motion to withdraw the complaint is **GRANTED** and the case is **DISMISSED** with prejudice.

T. Todd Hodgdon
Administrative Law Judge
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SEP 20 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 92-128-M A.C. No. 14-00159-05528
v.	:	Inland Quarries
AMERICOLD CORPORATION, Respondent	:	

DECISION

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

Bohn A. Frazer, Quarry Manager, Kansas City, Kansas, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Americold Corporation ("Americold") with violating two safety regulations promulgated under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801, et seq. (the "Act").

A hearing on the merits was held in Kansas City, Missouri, on May 11, 1993. The parties waived post-trial briefs and submitted the case on oral argument.

STIPULATION

The parties stipulated as follows:

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

2. Americold Corporation is the owner and operator of the Inland Quarries, MSHA I.D. No. 14-00159.

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

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

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent 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 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 in business.

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

9. Americold Corporation is a small mine operator with 45,327 annual hours worked in 1990.

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

Citation No. 3907226

The above citation describes the following violative condition:

Ventilation control measures were not provided for the underground shop area to confine or prevent the spread of toxic gases originating from a shop fire. Smoke from a shop fire would most likely travel directly to the active mine face areas.

The shop was located approximately 2,500 feet in the main mine portal entry. The present primary and secondary escape routes, as indicated on the escape and evacuation plan, were located just north of the shop area.

The citation further alleges that the described condition violates 30 C.F.R. § 57.4761. The cited regulation provides as follows:

> **Section 57.4761 Underground shops.**
>
> To confine or prevent the spread of toxic gases from a fire originating in an underground shop where maintenance work is routinely done on mobile equipment, one of the following measures shall be taken: use of control doors or bulkheads, routing of the mine shop air directly to an exhaust system, reversal of mechanical ventilation, or use of an automatic fire suppression system in conjunction with an alternate escape route. The alternative used shall at all times provide at least the same degree of safety as control doors or bulkheads.
>
> **(a) Control doors or bulkheads**
>
> If used as an alternative, control doors or bulkheads shall meet the following requirements:
>
> (1) Each control door or bulkhead shall be constructed to serve as a barrier to fire, the effects of fire, and air leakage at each opening to the shop.
>
> (2) Each control door shall be--
>
> (i) Constructed so that, once closed, it will not reopen as a result of a differential in air pressure;
>
> (ii) Constructed so that it can be opened from either side by one person or can be provided with a personnel door that can be opened from either side;
>
> (iii) Clear of obstructions; and
>
> (iv) Provided with a means of remote or automatic closure unless a person specifically designated to close the door in the event of a fire can reach the door within three minutes.
>
> (3) If located 20 feet or more from exposed timber or other combustible material, the control doors or bulkheads shall provide protection at least equivalent to a door constructed of no less than one-quarter inch of plate steel with channel or angle-iron reinforcement to minimize warpage. The framework assembly of the door and the surrounding bulkhead, if any, shall be at least equivalent to the door in fire and air-leakage resistance, and in physical strength.
>
> (4) If located less than 30 feet from exposed timber or other combustibles, the control door or bulkhead shall provide protection at least equivalent to a door constructed of two layers of wood, each a minimum of three-quarters of an inch in thickness. The wood-grain of one layer shall be of the other layer. The wood construction shall be covered on all sides and edges with no less than 24 gauge sheet steel. The framework assembly of the door and the surrounding bulkhead, if any, shall be at least equivalent to

than 24 gauge sheet steel. The framework assembly of the door and the surrounding bulkhead, if any, shall be at least equivalent to the door in fire and air-leakage resistance, and in physical strength. Roll-down steel doors with a fire-resistance rating of 1.5 hours or greater, but without an insulation core, are acceptable provided that an automatic sprinkler or deluge system is installed that provides even coverage of the door on both sides.

(b) Routing air to exhaust system. If used as an alternative, routing the mine shop exhaust air directly to an exhaust system shall be done so that no person would be exposed to toxic gases in the event of a fire.

(c) Mechanical ventilation reversal.

If used as an alternative, reversal of mechanical ventilation shall--

(1) Be accomplished by a main fan. If the main fan is located underground:

(i) The cable or conductors supplying power to the fan shall be routed through areas free of fire hazards; or

(ii) The main fan shall be equipped with a second, independent power cable or set of conductors from the surface. The power cable or conductors shall be located so that an underground fire disrupting power in one cable or set of conductors will not affect the other; or

(iii) A second fan capable of accomplishing ventilation reversal shall be available for use in the event of failure of the main fan;

(2) Provide rapid air reversal that allows persons underground time to exit in fresh air by the second escapeway or find a place of refuge; and

(3) Be done according to predetermined conditions and procedures.

(d) Automatic fire suppression system and escape route. If used as an alternative, the automatic fire suppression system and alternate escape route shall meet the following requirements:

(1) The suppression system shall be--

(i) Located in the shop area;

(ii) The appropriate size and type for the particular fire hazards involved; and;

(iii) Inspected at weekly intervals and properly maintained.

(2) The escape route shall bypass the shop area so that the route will not be affected by a fire in the shop area.

EVIDENCE

The evidence in connection with Citation No. 3907226 is essentially uncontroverted.

RICHARD LAUFENBERG is a federal mine inspector as well as a mining engineer.

He is familiar with Inland Quarries Mine, which is an underground limestone mine. It is mined by room and pillar method.

On April 2, 1991, Mr. Laufenberg inspected the Inland Quarries to assist Jerry Fuller of MSHA's Denver Technical Support. A ventilation survey was being conducted because in February 1991 a trash fire occurred in the vicinity of the underground shop and MSHA's district manager was concerned. Mr. Gomez, then district manager, instructed Technical Support to do the ventilation survey. This was a Code 36, or "miscellaneous inspection."

Messrs. Fuller and Laufenberg met with Bohn Frazer and they went underground.

Exhibit P-4 is an underground map that shows the main air flow of the ventilation system.

The map is marked in green to indicate the main haulway system in the escapeways. Red arrows show the evacuation route and pink arrows show the primary flow of fresh air.

The shop itself is marked with an"A" in the L-shaped darkened area. Limestone is mined in the places marked "B-1" and "B-2".

The storage area, which is under OSHA's jurisdiction, has been marked with a "C".

The mine portal is marked with a "D". The mine itself and the storage area are not completely separated.

Mr. Laufenberg issued Citation No. 3907226 because this underground facility with an underground shop. Routine and typical shop work was being done and this included work with tools, torches, grinders, and compressors. They were also working on equipment in the shop.

The shop did not control the spread of toxic gases. The area is well lit and about seven to eight times the size of the courtroom. (The courtroom is approximately 120 to 150 feet by 80 feet. Tr. 37).

The shop is enclosed by pillars, with one opening on the east side and one large opening on the south side. The two openings are 15 to 20 foot wide.

A fire could occur in the shop from the use of torches, as well as grinding and electrical equipment. There was also grease and oil stored in the area. MSHA's regulation required adequate control measures to prevent the spread of toxic gases. The toxic gas most likely to occur was carbon monoxide. In the event the oils and greases caught fire, they would produce carbon monoxide which would flow through the mine.

The shop, which was 5,000 to 7,000 feet from the face area, was also adjacent to the primary and secondary escape routes.

Mr. Laufenberg did not see any control measures. Specifically, there were no control doors or bulkheads nor had the company tried to route the air. In addition, there was no reversal mechanical ventilation possible nor was there any automatic fire suppression system.

Sixteen workers were affected by this condition. It was the inspector's opinion that the violation was significant and substantial. If a fire occurred, the miners would be exposed to carbon monoxide gas and the existing ventilation would carry the gas into the face area. Carbon monoxide can overcome miners. It would be easy for someone to be injured.

Mr. Laufenberg considered the company's negligence to be moderate, as MSHA has regulated underground shops and the company should have recognized the violative condition. The company abated the violation by installing fire control doors.

Mr. Laufenberg identified the operator's ventilation, escape and evacuation plan submitted to MSHA by date of December 2, 1985.

JERRY LEE FULLER serves as a senior mining engineer for MSHA with Denver Technical Support. He is a mining engineer with special training in ventilation. Mr. Fuller provides support for the Metal and Non-Metal Division in MSHA.

After a trash fire occurred at the quarry, he was asked to do a ventilation inspection. The inspection took place April 2 and April 3, 1991.

Attached to Mr. Fuller's report (Exhibit P-5) is a clear overlay map. Exhibit P-5 differs from Exhibit P-4 as it shows the warehouse area more clearly. The map is basically an overlay of P-4.

The inspection group traveled the ventilation circuit and measured the air quantity. They took measurements throughout the underground operation. The air quantity was calculated per minute and then converted into the total air volume. His partner in the inspection ran the anometer. All of the measurements that were taken are noted on Exhibit P-5.

In this mine most of the air comes in the portal and up past the shop. The air then goes through the openings in the wall and is exhausted out of the mine as shown by the pink arrows on Exhibit P-4.

As a result of his survey, Mr. Fuller concluded the mine was well ventilated.

Mr. Fuller further agrees with Mr. Laufenberg that the violation was S&S. There is an S&S problem if the smoke was not controlled. The basic problem would be toxic gas (carbon monoxide) which would go directly to the face.

Mr. Fuller did not know how long it would take the gas to get to the face. It was entirely likely that the carbon monoxide could get there before any smoke. In his opinion, it was not likely that a miner at the face could see any fire in the shop.

Inland Quarries' Evidence

EARL HUFFMAN is a mechanic at Inland Quarries and he has performed various jobs for the company.

Mr. Huffman indicated that MSHA has never made an issue about a barrier between the pillars or the fire doors for the shop. Mr. Bohn Frazer, the quarry manager, said MSHA wanted to check the warehouse. In addition, he told the employees that MSHA would not issue a citation. Nevertheless, the company received a citation.

The company has always had good ventilation.

WALT KNIGHT is the general manager for the Americold Kansas City operation. The warehouse system was developed in 1988. In 1989 the Occupational Safety and Health Administration (OSHA) changed the carbon monoxide exposure threshold limit value from 50 PPM to 35 PPM. The company knew they could not meet the new requirements and they secured the services of a ventilation engineer who made recommendations. Eventually fans were installed at all of the places on Exhibit P-4. The ventilation changes cost approximately $300,000.00.

During Mr. Knight's tenure, MSHA did not inspect the warehouse nor the ventilation system. Mr. Knight permitted entry by MSHA into the warehouse area to inspect the fans. Before the inspection Mr. Laufenberg said MSHA would not issue any citations if the company granted MSHA permission to enter the warehouse area.

It is not possible to physically inspect the fans shown as No. 2, 3, and 4 in Exhibit P-5 because the area is locked and quarry personnel could not enter the area. MSHA previously had never requested permission to enter.

The trash fire that resulted in the inspection occurred on a Sunday morning. However, there was no one working and there was no damage or injuries. The fire was extinguished about noon on Sunday. MSHA had never expressed concern about lack of fire doors.

BOHN FRAZER has been the quarry manager since December 1987.

He received a call from MSHA's representative Laufenberg who indicated MSHA desired to inspect the ventilation in the mine. He further stated that, if they would grant permission, no citations would be issued. Permission was then granted. When Mr. Laufenberg came back to the office with the citation, Mr. Frazer was aghast.

The company takes particular pride in safety and they try and cooperate with the authorities.

When they were told to install a one and a half hour fire door, they obtained a three hour rated door and MSHA said they had to apply for a variance. It took six months to install the door.

These things are a mystery to the company and Mr. Frazer felt the company was not being treated fairly.

Mr. Frazer personally heard Mr. Laufenberg state that, if the company allowed the inspections, they would not write any citations in the mine area. This was agreed during a telephone conversation.

DISCUSSION and FURTHER FINDINGS

The uncontroverted evidence establishes a violation of 30 C.F.R. § 57.4761. The underground shop was not equipped with any of the control measures deemed necessary by MSHA's regulation to confine or prevent the spread of toxic gases from a fire originating in the underground shop.

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 of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-104 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The question of whether any specific violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-501 (April 1988); Youghiogheny and Ohio Coal Co., 9 FMSHRC 2007, 20011-1012 (December 1987).

Following the Mathies formulation, I conclude there was an underlying violation of a 30 C.F.R. § 57.4761. A clear measure of danger to safety was contributed to by the violation. Further, I credit the testimony of Inspectors Laufenberg and mining engineer Fuller that the violation was S&S. A reasonable likelihood that the hazard contributed to will result in an injury was established by MSHA's expert witnesses. (Tr. 58, 112-114). Specifically, Mr. Laufenberg testified the violation was S&S because the electrical circuits, oil and greases present made a fire reasonably likely. (Tr. 39-47). The lack of controls would carry carbon monoxide to the active face. Such toxic gases are likely to cause a fatality. (Tr. 46).

Mr. Fuller agreed the violation was S&S. He stated "4761" [30 C.F.R. § 57.4761] presupposes that a fire would originate in the shop and at that point, addressing the standard correctly, means that you have to be able to control that smoke. So the presumption of a fire already existing in the shop, to me, indicates that it's a significant and substantial problem if you are not controlling it." Compare Bethenergy Mines, Inc., 14 FMSHRC 1232, 1243.

Citation No. 3907227

The above citation describes the following violative condition:

> The underground limestone mine did not have two or more totally separate escapeways to the surface. The primary escape route was designated in the escape and evacuation plan as the main haulage road from the mine portal to the active mine faces. The secondary escape route, indicated as the paved underground roadway, was located in the warehouse area and did not extend to the face. From a ventilation stand point, the escape routes were not separated. There were no stoppings constructed between the two escape routes for ventilation control.

It was further alleged the described condition violated 30 C.F.R. § 57.11050(a). The cited regulation provides as follows:

> **Section 57.11050 Escapeways and refuges.**
>
> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

Evidence

Mr. Laufenberg issued this citation.

The area marked in green on Exhibit P-4 is the primary escape route and the escapeways are nothing more than the haul roads.

The two roads are separated by a pillar line. There is a 40-foot open space between the pillars. If there was a toxic gas, it would migrate into both of the escapeways.

Sixteen miners were exposed to the violation and the exposure was continuous. There were always ignition sources present, such as trucks.

It was likely that someone would be injured or killed in an underground fire.

MSHA requires two separate escapeways.

It was a distance 3,200 feet in which the pillars were separated by the 40-foot openings.

To abate this condition the company constructed ventilation stoppings between the pillars and curtains were hung.

The effectiveness of the abatement was established when a December 1991 fire occurred and the entire mine remained clear of carbon monoxide. This was after the curtains had been installed.

Mr. Laufenberg identified Exhibit R-1 as the company's ventilation plan dated December 2, 1985.

Mr. Laufenberg agreed that it would be obvious to anyone entering the mine that there was no ventilation barrier between the pillars and he did not know why he had not previously cited the company. He did not see it.

Mr. Laufenberg agreed MSHA has no jurisdiction to inspect in the area where the fans are located inside the warehouse. This particular area is under OSHA's jurisdiction.

Jerry Fuller agreed with Mr. Laufenberg that a violation of the regulation occurred.

He indicated the regulation requires that damage to one escapeway does not affect the other. In this case, if a fire occurred, you could not use the escapeways to get out and it would be like driving through a black cloud.

Mr. Fuller believed this violation was S&S. The object of the regulation is to provide two separate escapeways and, in effect, the openings between the pillars resulted in only one escapeway.

In order to complete the ventilation survey, it would be necessary for Mr. Fuller to look at the fans. If permission was required, he would get it; however, he did not know who had granted permission to inspect the warehouse, which is under OSHA jurisdiction.

Mr. Fuller acknowledged that, after four inspections a year (for a total of 56 inspections), he was unable to explain why MSHA had not detected the lack of proper ventilation and the lack of fire doors in the shop area.

DISCUSSION AND FURTHER FINDINGS

The uncontroverted evidence establishes that the "escapeways" were simply two paved haul-roads separated by a pillar line. Since a 40-foot open space separate each pillars any toxic gas would migrate into both the "escapeways." (See Ex. P-4). As

a result there were not "two or more escapeways" as required by 57.11050.

SIGNIFICANT AND SUBSTANTIAL

The case law framework for S&S allegations are set forth in connection with the previous citation. However, in connection with this citation, no expert testimony supports paragraph 3 of the Mathies formulation. Specifically, Mr. Laufenberg did not testify as to any S&S allegations concerning the escapeways. Mr. Fuller, a ventilation expert, hedged his opinion that the escapeway violation was S&S, based "on his ventilation survey." (Tr. 118; Ex. P-5). The ventilation survey and the testimony does not support paragraph 3 of the Mathies formulation.

The S&S allegations should be stricken as to Citation No. 3907227.

AMERICOLD'S CONTENTIONS

Americold's arguments address a number of issues: the operator urges the Commission to consider MSHA's failure to detect that no ventilation barriers existed between the primary and secondary escape routes for many years.

Further, the company was assured no citations would be issued as a result of MSHA's inspecting the warehouse area. (Mr. Laufenberg denies he entered into such an agreement.)

Americold's arguments basically embody the legal doctrine of estoppel.

It is clear that the mine is subject to inspection as required by the Mine Act, and likewise a penalty is required to be assessed for any violation. There is no support from a purely equitable standpoint for Americold's arguments that the Inspector's "no citation" promise, even if true, would bind the Secretary of Labor, and excuse Americold from the requirements of the Act.

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission refused to invoke the doctrine of equitable estoppel. It also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

> The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332

> U.S. 380, 383-386 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/UtAh Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighted in determining the appropriate penalty.

The Supreme Court of the United States in a recent decision again refused to invoke estoppel against the government and the Court has reversed every lower court decision granting estoppel that it has reviewed. (Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990), decided June 11, 1990). Insofar as it may be pertinent to this case, the Court held that erroneous oral and written information given by a Government employee to a benefit claimant who relied, to his detriment, on the misinformation cannot estop the Government from denying benefits not otherwise permitted by law.

The Court also stated:

> It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." Hansen v. Harris, 619 F.2d 942, 954 (CA2 1980) (Friendly, J., dissenting), rev'd sub nom., Schweitker v. Hansen, 450 U.S. 785, 101 S. Ct. 1468, 67 L.Ed.2d 685 (1981). To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

For the foregoing reasons, Americold's defense is **REJECTED** and the citations herein, as modified, are **AFFIRMED.**

CIVIL PENALTIES

In determining the amount of penalty to be assessed, Section 110(i) of the Act requires consideration of certain criteria.

In the instant case, Americold's favorable history shows it was assessed 14 violations for the two year-period ending April 1, 1991. (Ex. P-1).

Americold is a small operator with 45,327 annual hours worked in 1990. (Stipulation).

Americold was negligent. It should have known of the MSHA requirements.

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

The gravity of each violation should be considered as high. A possible fire, the spread of toxic gases, and the lack of two separate escapeways present hazardous conditions to underground miners.

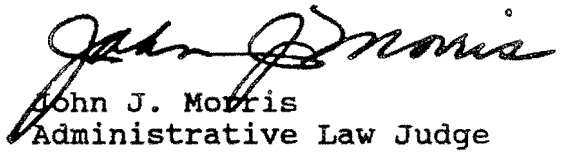
Americold rapidly abated the violations, so it is entitled to statutory good faith. Further, the company, in abating those two citations, demonstrated extreme good faith.

The Judge believes the penalties set for in the order of this decision are appropriate.

For the foregoing reasons, I enter the following:

1. Citation No. 3907226 is **AFFIRMED** and a civil penalty of $150 is **ASSESSED**.

2. Citation No. 3907227 is **AFFIRMED** and a civil penalty of $100 is **ASSESSED.**



John J. Morris
Administrative Law Judge

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SEP 20 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-527-M A.C. No. 04-04963-05521
v.	:	
A-1 GRIT COMPANY, Respondent	:	A-1 Grit Irwindale

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This case is before me upon a petition for assessment of the civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

The Secretary filed a motion seeking to settle the four citations, originally assessed for $942.00 for the sum of $754.00.

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

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

Accordingly, I enter the following:

ORDER

1. The settlement is **APPROVED.**

2. The citations and the amended penalties are **AFFIRMED.**

3. Respondent is **ORDERED TO PAY** to the Secretary of Labor the sum of $754.00 within 30 days of the date of this decision.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 92-130-M A.C. No. 54-00340-05501
v.	:	Proyecto Montehiedra
DRILLEX INCORPORATED, Respondent	:	

DECISION

Appearances: Jane Snell Brunner, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York for the Petitioner;
Doris Quiñones-Tridas, Esq. and Miquel E. Bonilla-Sierra, Esq., for Respondent.

Before: Judge Barbour:

STATEMENT OF THE CASE

In this civil penalty proceeding, brought by the Secretary of Labor ("Secretary") against Drillex Incorporated ("Drillex") pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 815(d) 820(a), the Secretary charges Drillex with 13 violations of mandatory safety standards for surface metal and nonmetal mines found in Part 56, Title 30, Code of Federal Regulations ("C.F.R."), and with one violation of the legal identity reporting requirements found at Part 41, 30 C.F.R. In addition, the Secretary asserts that several of the alleged violations were significant and substantial contributions to mine safety hazards. ("S&S" violations).

The alleged violations were cited on August 17, 1992, by inspectors of the Secretary's Mining Enforcement and Safety Administration ("MSHA") during an inspection of Drillex's Montehiedra Project (the "Project"). In answer to the Secretary's subsequent proposal for the assessment of civil penalties, Drillex did not deny the existence of the violations or that they were S&S, but rather raised a more fundamental issue by asserting the Project was not a "mine" within the meaning of the Act and therefore that MSHA was without jurisdiction to issue the citations in question.

The matter was one of a series of cases involving different operators that was called for hearing in San Juan, Puerto Rico.

At the commencement of the hearing, counsels for the parties stated that they had reached stipulations regarding all factual issues, thus obviating the need for the taking of testimony. Tr. 4-5. They further agreed the controlling issue of law was "whether Respondent's operation was a mine, conducting activities covered by the Act." Tr. 4.

The stipulations were read into the record by counsel for the Secretary and in written form were entered into the record as a joint exhibit. Tr. 5-8; Jt. Exh. 1. In addition, I questioned counsels in order to clarify my understanding of the stipulations, and I requested the submission of briefs, which were duly submitted.

STIPULATIONS

The parties stipulated in pertinent part as follows:

1. That on February 1, 1993, the U.S. Department of Labor filed a proposed Assessment of Civil Penalty with the Federal Mine Safety and Health Review Commission against Drillex . . . for alleged violations of the [Mine Act] at the . . . Project.

2. That [Drillex] contested the proposed assessment of civil penalties on the grounds that the operation conducted by Drillex . . . at the . . . Project does not fall within the jurisdictional scope of the foregoing statute, arguing that . . . [Drillex] is not a mine performing operations covered by the Act. Whether . . . [Drillex] has engaged in [i]nterstate commerce is not a contested issue in the instant case.

3. That the following stipulation of facts is submitted by the parties in order to resolve the jurisdictional issue presented by . . . [Drillex]:

> a. That on or about July 10, 1992 . . . Drillex . . . entered into an agreement with A.H. Development Corporation under which Drillex was to preform drilling, blasting, rock excavation and crushing of a minimum of 20,000 cubic meters of stone to be used as fill for embankment and road base at the . . . Project.[1] The specified work was

[1]In response to my question why the Project should not be considered as coming within Mine Act jurisdiction if drilling, blasting, rock excavation and crushing was conducted at the site, co-counsel for Drillex emphasized that the crushing of stone was undertaken only for the building of roads at the construction site. Tr. 12.

the only work preformed by Drillex at the . . . Project and the material was processed an average of three . . . times a week.

b. The [Project] . . . is a privately owned construction project wherein over two-hundred . . . residential units are being built.

c. The material processed by Drillex . . . was extracted from the project site and hauled to the crusher area located within the project.

d. The extracted material was to be reduced to gabion size by one . . . employee using a hydraulic hammer.[2] The remaining stone was reduced to three . . . inches down in size with the use of a portable jaw crusher plant.[3] Two . . . employees were retained for this purpose including the project supervisor.

e. Drillex . . . removed six trucks of contaminated material (stone mixed with clay) from the project site. Said material was deposited in a property adjacent to Canteras de Puerto Rico in Guaynabo, which is in the process to be acquired by Drillex.[4] Said material will be used to provide temporary access road for trucks and equipment in the property.

f. None of the referred material was marketed or sold.

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[2]I inquired regarding the meaning of "gabion size"? Counsel for Drillex replied, "Gabion size is stones of about one-foot big, 12 inches in size." Tr. 8. She further explained, "Those were broken down with a hydraulic hammer and not with a crusher." Id.

[3]Counsel for Drillex further explained, "We have two sizes, we have the gabion size, which is done with a hammer, and not with the crusher, and then we have the three inches down in size, which is processed with a crusher." Tr. 8.

[4]Counsel for Drillex stated Canteras de Puerto Rico is a quarry located in Guanynabo. According to counsel, the stone mixed with clay that was removed from the Project was not deposited at the quarry but rather was put in the ground at property adjacent to the quarry, property that is being acquired by Drillex. It takes about ten to fifteen minutes to drive from the Project to the property where the material was deposited. Tr. 9-11.

4. The parties further stipulate that the only legal matter to be determined will be limited to whether [Drillex's] operations at the . . . Project constitute a mine under the provisions of the . . . [Mine Act.] [Drillex] is not contesting the existence of the violations underlying the citations issued by MSHA.

Jt. Exh. 1.

THE ISSUE

Was the Montehiedra Project subject to the jurisdiction of the Mine Act on August 17, 1992.

PARTIES' ARGUMENTS

THE SECRETARY

The Secretary's counsel argues that the stipulations compel the conclusion the Project was subject to Mine Act jurisdiction. She bases her argument on both Commission precedent and the 1979 agreement between MSHA and the Secretary's Occupational Safety and Health Administration ("OSHA") (the "Agreement").[5] Counsel focuses initially upon the nature of the activities undertaken at the Project -- the drilling, blasting, excavation and crushing of rock to be used as fill for embankment and road base and the separation of waste from the rock and the removal of waste from the site. Counsel states that two Commission cases, Mineral Coal Sales, Inc., 7 FMSHRC 615 (May 1985), and Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), have held that the process of excavation and separation of minerals for a particular use causes Mine Act jurisdiction to vest. Since these processes were undertaken by Drillex, the Project came within the jurisdiction of the Act. Sec. Br. 4-7. Further, under the Agreement the specific activities which Drillex carried out at the Project are allotted to MSHA's authority and thus were covered by the Act. Sec. Br. 7-9.

DRILLEX

Counsel for Drillex counters that there is no precedent for finding MSHA jurisdiction at construction sites in which the extraction of minerals is not performed for their intrinsic qualities as minerals, but rather is an incidental operation needed for the construction of roads in the construction project. Drx. Br. 3. Counsel notes the Act's definition of "mine"

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[5]The Agreement was published in the Federal Register, 44 F.R. 2287 (April 17, 1979) and was subsequently amended, 48 F.R. 7521 (February 22, 1983). The Agreement is reprinted in the BNA Mine Safety and Health Reporter and notations herein referencing the Agreement are cited to the Reporter.

includes the milling of minerals and that milling may consist of crushing. She asserts, however, that for the Mine Act to apply, the crushing of minerals must be associated with a process in which, as the Agreement states, "one or more valuable desired constituents of the crude is separated from the undesirable contaminants with which it is associated," something counsel argues Drillex did not do. Id. 3-4. At the Project the stone was reduced in size but it was not separated from any valuable desired constituent. Id. 5. Rather, the activities at the Project were similar to a "borrow pit," an operation the Agreement reserves for OSHA jurisdiction.

Counsel asserts that:

> [A] jurisdictional line should be drawn between crushing as part of a milling process and crushing as an incidental operation to extraction. Classification as the former will undoubtedly carry with it Mine Act coverage; classification as the latter results in [OSHAct] regulation.

Drx. Br. 5.

JURISDICTION

I conclude the Secretary's exercise of Mine Act jurisdiction at the Project was permissible. I reach this conclusion despite the fact the Project is far from what is viewed traditionally as a "mine." More than fifteen years have passed since the effective date of the Act, yet it has been clear, almost from the inception of enforcement, that the Act's pervasive regulation is intended to apply not only to conventional mines, but also to entities that are not engaged in "mining" in the classic sense. Thus, while it may be true, as Drillex maintains, that there is no precedent for the imposition of Mine Act jurisdiction at a construction project where minerals are extracted solely for road construction at the project -- a purpose incidental to the main objective of the project -- that does not signal a prohibition of the exercise of Mine Act jurisdiction.

The Act states that "[e]ach coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act. 30 U.S.C. § 803. Section 3(h)(1) of the Act defines the facilities and processes that constitute a "coal or other mine." 30 U.S.C. § 802(h)(1). If what was done at the Project came within this definition, Mine Act jurisdiction applied.

The statutory definition of "coal or other mine" states in part:

> (A)an area of land from which minerals are extracted in nonliquid form . . . and (C) lands, excavations . . . workings, structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or to be used in the milling of such minerals, or the work of preparing . . . minerals.

30 U.S.C. §802(h)(1). Thus, the Act classifies as mining and subjects to its coverage, the extraction, milling and preparation of minerals. The Act does not further define the terms "milling of minerals" or "work of preparing . . . minerals." However, the Commission has expressed its opinion that use of the terms "signals an expansive reading is to be given to mineral processes covered by the Mine Act," Carolina Stalite Company, 4 FMSHRC 423, 424 (March 1982) n.3, rev'd sub nom. Donovan v. Caroline Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984), a view consistent with the Commission's recognition that a "broad interpretation is to be applied to the Act's expansive definition of a mine." Oliver M. Elam, Jr., Co., 4 FMSHRC 5, 6 (January 1982); see also Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1117 (9th Cir. 1981); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592. (3rd Cir. 1979).

The dispositive question here is whether mineral extraction, preparation or milling was engaged in at the Project? In mining, the word "extraction" connotes the process of removing a mineral from its natural deposit in the earth. See U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 404. Mineral preparation and milling while not specifically defined in the Act, are terms whose meanings involve the processes by which a mineral is made ready for use. As the parties have emphasized, MSHA and OSHA have entered into the Agreement in order to delineate their respective areas of authority with regard to mineral milling. Under the Agreement, "milling" is defined as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." MSHA - OSHA Interagency Agreement, Mine Safety & Health Reporter (BNA) ¶ 21:1101 (1983).

The Agreement gives examples of milling processes that MSHA has authority to regulate. It states that milling consists of one or more of various processes, including crushing and sizing, and it defines "crushing" as "the process used to reduce the size of mined materials into smaller, relatively coarse particles" and "sizing" as consisting of "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which parties range between maximum and minimum size." Id. ¶ 21.1103.

Given the meaning of the terms extraction and milling, I find these activities were carried out at the Project and, consequently, that the Project was a mine subject to Mine Act jurisdiction. The parties have stipulated that Drillex, pursuant to its agreement with A.H. Development Corporation performed drilling, blasting and rock excavation at the Project. Rock is a mineral or a composite of minerals and drilling, blasting and excavation were conducted to remove the rock from the earth. They were a part of the extraction process.

The parties have stipulated further that once the rock was extracted it was reduced to gabion size by an employee using a jack hammer and that what remained was further reduced to 3 inch size or less by a crusher. The stipulations also reflect that the rock was separated from the "contaminated material," stone mixed with clay. Despite Drillex counsel's argument to the contrary, I conclude these activities constituted milling. In this instance the rock itself was the "valuable desired constituent of the crude" and it was separated from the waste material, the stone mixed with clay. It was then reduced into "smaller relatively coarse particles" in two stages and was separated into groups according to size. In other words, the rock was crushed and sized.

Moreover, because the Secretary's decision to exercise MSHA authority at the Project was based on the statutory definition of "mine," I must accord it deference. Carolina Stalite Co., 734 F.2d at 1552. In doing so, I am mindful of the admonition from the Act's legislative history that "what is considered to be a mine and to be regulated under [the] Act be given the broadest possible interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. 95-181, 95th Cong., 1st Sess., 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 602.

It is true, as Counsel for Drillex points out, that the Secretary has allotted jurisdiction over barrow pits to OSHA.

The Agreement states:

> "Barrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining . . . "Barrow pit" means an area of land where the overburden consisting of unconsolidated rock, glacial debris, or other earth material overlaying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic quantities on land which is relatively near the borrow pit.

Mine Safety & Health Reporter, (BNA) ¶ 21:1102 (1983). While the stipulated operations at the Project were in some respects similar to a barrow pit as defined in the Agreement, there are crucial differences. At the Project extraction was not on a one-time only basis or intermittent but was undertaken pursuant to an agreement to produce a total of 20,000 cubic meters of stone and was carried out approximately three times a week. More important, milling, in the form of separation, crushing and sizing, was carried out following extraction. Further, it was the particularly sized stone that was used primarily for a specific purpose -- for road base and embankment fill -- and not the bulk material originally extracted. When these factors are added to the fact that the Secretary, who drafted and administers the Agreement, has concluded MSHA jurisdiction is appropriate under the Agreement, I am compelled to reject the barrow pit analogy. See New York State Department of Transportation, 2 FMSHRC 1749 (July 1980) (ALJ Laurenson).

For the foregoing reasons I hold the Secretary properly exercised Mine Act jurisdiction when inspecting the Project.

THE VIOLATIONS AND CIVIL PENALTIES

Drillex does not contest the existence of the alleged violations, and I find they occurred. I further find that in proposing civil penalties for the violations the Secretary properly considered all applicable civil penalty criteria and that the proposed penalties are appropriate. Therefore, I assess the penalties as proposed.

CITATION/ORDER NO.	DATE	30 C.F.R. §	PENALTY
3611057	8/17/92	56.1000	$ 50
3611058	8/17/92	41.20	$ 50
3611059	8/17/92	56.15001	$ 50
3611060	8/17/92	56.12028	$108
3611221	8/17/92	56.18012	$ 50
3611222	8/17/92	56.15002	$189
3611223	8/17/92	56.15003	$157
3611224	8/17/92	56.11002	$119
3611225	8/19/92	56.14132(a)	$119
3611227	8/17/92	56.14130(g)	$119
3611228	8/17/92	56.11001	$119
3611229	8/17/92	56.14200	$337
3611230	8/17/92	56.4203	$ 50
3611231	8/17/92	56.18002(b)	$ 50

ORDER

The citations/orders referenced above are AFFIRMED. Drillex is ORDERED to pay the civil penalties for the violations as assessed totalling one thousand five hundred and sixty-seven dollars ($1,567) within thirty (30) days of the date of this decision.

This proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

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SEP 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 93-184 A.C. No. 15-11620-03533
v.	:	No. 2 Hall
PYRAMID MINING INCORPORATED, Respondent	:	

DECISION

Appearances: Darren L. Courtney, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee for Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Petition for Assessment of a Civil Penalty filed by the Secretary (Petitioner) alleging a violation by the Operator (Respondent) of 30 C.F.R. § 77.1505. Pursuant to Notice, the case was heard in Evansville, Indiana, on July 8, 1993. At the hearing, Darold Gamblin testified for Petitioner. Joe Clark, and James Michael Hollis, testified for Respondent. The parties filed Briefs on August 23, 1993.

Findings of Fact and Discussion

Respondent operates a coal mine known as Hall No. 2. Respondent arranged for a contractor to extract coal from an above ground seam by use of a continuous miner, or auger. The seam was developed in sections commencing November 1991.[1] In normal operations the miner excavated a hole 10 to 11 feet wide, approximately 4 feet, high and 420 feet in length. Once a hole was excavated the miner was moved 3 to 4 feet, and another hole was excavated. This cycle continued as the section was

[1]The sequence in which the sections were developed, the month and year in which they were developed, and their relative locations, are depicted on Respondent's Exhibit No. 2.

developed. In November 1992, 4 Sections had been excavated, and one was being mined.

On March 20, 1992, the subject site was inspected by MSHA Inspector Darold Gamblin. Approximately 35 to 40 holes were not blocked. These were located in an area 2,000 feet from the area that was being mined. In the normal course of mining, no one enters unblocked auger holes. However, according to Gamblin, children from a nearby residential area might enter these unblocked holes. A person entering an auger hole would be exposed to the hazards of unsupported roof, methane, or insufficient oxygen. Exposure to these hazards could result in a serious injury or fatality.

Gamblin issued a citation alleging a violation of 30 C.F.R. § 77.1505, which provides as follows: "Auger holes shall be blocked with highwall spoil or other suitable material before they are abandoned."

Respondent did not impeach or contradict Gamblin's testimony regarding the existence of auger holes that were not blocked. The issue for resolution is whether the holes were abandoned.

Gamblin determined that the holes were abandoned because no mining was taking place in the sections at issue. The only area being mined was located 2,000 feet away from the cited holes. In this connection, Gamblin opined that it would take the miner 2 to 3 days to travel from the area where it was mining on March 20, to return to the holes that had not been blocked. He indicated that he had seen the same holes in January 1992[2], during a previous examination.[3] Gamblin noted that he does not know of any reason why an operator would leave an area where they were drilling auger holes, and go to a different section of the mine, and then return later to the original area.

According to Joe Clark, Respondent's ground manager, in the normal course of mining, auger holes are developed to a length of

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[2] There is no clear convincing evidence to establish when the open holes cited in March 1992, had been augered. Joe Clark, Respondent's ground manager, when asked when they were originally drilled answered as follows: "They would have been drilled between November and March." (Tr. 58) (Emphasis added).

[3] In response to questions from counsel, Gamblin indicated that, to his "knowledge" Respondent did not ever go back and "redrill" those holes (Tr. 35) (sic). The record does not establish the basis for Gambin's "knowledge". Also, there is no evidence in the record from anyone who had personal knowledge as to whether Respondent returned to further excavate the holes in issue after they had been initially augered.

420 feet. However, according to Clark, at times, either due to geological conditions, or more commonly due to mechanical problems with the miner, an auger hole was not drilled to the full length of 420 feet. He indicated that the miner at issue had lots of mechanical problems. He indicated "we" (Tr.49) were not satisfied with the performance of the contractor, who did not want to re-enter holes that had not been completed. He said that "we were going to insist that they go back and get full penetration" (Tr. 55). He said that Respondent did not consider the holes to be abandoned.

James Michael Hollis, Respondent's safety and reclamation supervisor testified that as far as Respondent was concerned the holes were not abandoned, and it was the "intent" of Respondent to get full penetration (Tr.70). He said that "...we were going to go back and try to go back to those holes to get full penetration". (Tr. 75-76) (sic)

There is no definition in Part 77 of volume 30 of the Code of Federal Regulations, of the word "abandoned."[4] Hence, reference is made to the common meaning of the word "abandoned." In Webster's Third New International Dictionary, (1986 ed.) ("Webster's"), "abandon" and the transitive verb "abandoned", are defined as "1: to cease to assert or exercise an interest, right or title to esp. with intent of never again resuming or asserting it; 2: to give up (as a position, a ship) by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments ... ." "abanadoned", when used as an adjective, is defined in Webster's, supra as "1: given up: DESERTED, FORSAKEN... ."

The record does not convencingly establish the exact dates when the contractor stopped the initial drilling of the holes in issue. Hence, I cannot make a finding as to the specific length of time Respondent had ceased working on these holes when cited by Gamblin on March 20, 1992. On the other hand, I find the testimony of Gamblin insufficient to rebut the testimony of Respondent's witnesses, whom I found credible, regarding Respondent's intent to go back and get full penetration of the holes in question. In this connection I note that on March 20, 1992, when the unblocked holes were cited, the mine site at issue was still being minded.

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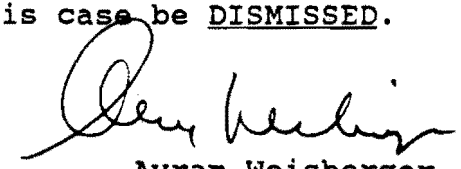
[4] Petitioner cited the definition of "abandoned areas" as set forth in 30 C.F.R. § 75.2(h). This definition is not relevant to the case at bar. Part 75 of 30 C.F.R. supra, pertains to underground mines only. In contrast Part 77, which governs this proceeding, pertains to surface mines, and surface areas of underground mines. There is no evidence of any regulatory intent that definitions set forth in Part 75 supra, are to be applied to Part 77 supra.

Within the above framework, I conclude that Respondent, on March 20, 1992, had not "abandoned" the cited holes as that term is commonly defined. Accordingly, Respondent was not in violation of Section 77.1505, supra, and the Citation issued by Gamblin is ordered to be VACATED.

ORDER

It is ORDERED that this case be DISMISSED.



Avram Weisberger
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

SEP 23 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 92-368-M A. C. No. 11-00134-05512
v.	:	
	:	Midway Stone
MOLINE CONSUMERS COMPANY, Respondent	:	

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, IL, for the Petitioner;
Robert P. Boeye, Esq., Califf & Harper, P.C., Moline, Illinois, for Respondent.

Before: Judge Feldman

This case is before me as a result of a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., (the Act). This matter was heard on July 13, 1993, in Peoria, Illinois. Mine Safety and Health Administration Inspector (MSHA) John E. Guthrie and Assistant District Manager John Waxvik testified for the Secretary. The respondent called Oscar Ellis, the respondent's President, James Cheville, a union steward at the Midway Stone Quarry, James Papenhausen, the Safety Director, and Scott Hanson, a mine consultant. The parties' post-hearing briefs are of record.

STATEMENT OF THE CASE

This single citation proceeding concerns Citation No. 4099296 issued on May 6, 1992, by Inspector John E. Guthrie for an alleged violation of the mandatory safety standard contained in section 56.14107(a), 30 C.F.R. § 56.14107(a) with respect to the respondent's primary jaw crusher at its Midway Stone Mine (Midway). Section 56.14107(a) provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury (emphasis added).[1]

The citation was designated as nonsignificant and substantial in apparent recognition of the perimeter fencing of the subject primary crusher. However, the Secretary seeks to impose a civil penalty of $700.00 under the special penalty assessment provisions in section 100.5, 30 C.F.R. § 100.5.

The issues for determination are whether the respondent's perimeter fencing of the moving parts in issue satisfies the guarding requirements of Section 56.14107(a), and, if not, the propriety of the Secretary's imposition of a special assessment in this case. As noted below and at the hearing, the question of whether the respondent's perimeter fencing provides an equal or greater level of protection than that afforded by the safety standard in Section 56.14107(a) is not in issue and is beyond the scope of this proceeding. This question must be resolved in accordance with the petition for modification procedures promulgated in section 101(c) of the Act, 30 U.S.C. § 811(c).

STIPULATIONS

At the hearing, the parties entered the following stipulations in the record (tr. 9-13):

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

2. Respondent, Moline Consumers Company, owns and operates the Midway Stone Mine.

3. The Midway Stone Mine extracts dolomite which is crushed and broken.

4. The Midway Stone Mine is located in Rock Island County, Illinois.

5. Respondent's operations affect interstate commerce.

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[1] Subsection (b) of section 56.14107 specifies that guarding of exposed moving parts is not required where the parts are at least seven feet away from walking or working surfaces. The parties have stipulated that the primary crusher parts in question are less than the requisite distance of seven feet. (Stipulation No. 19). Therefore the guarding requirements of section 56.14107(a) are applicable in this matter.

6. The Midway Stone Mine worked 25,008 production hours from January 1, 1991 through December 31, 1991.

7. Respondent, worked less than 700,000 production hours at all of its mines from January 1, 1991 through December 31, 1991.

8. Respondent had 12 violations during the preceding 24 months ending on July 15, 1992.

9. The payment of the $700 special penalty assessment will not affect Respondent's ability to continue in business.

10. On May 6, 1992, John E. Guthrie,(the "inspector") an authorized representative of the Secretary of Labor, issued Citation No. 4099296 at Respondent's, Moline Consumers Company's, Midway Stone Mine, in Rock Island County, Illinois, alleging a violation of 30 C.F.R. § 56.14107 in that Respondent had failed to provide guarding for its primary jaw crusher drive sheaves and belts and flywheel.

11. A complete and accurate copy of Citation No. 4099296 is attached hereto as Exhibit A.

12. The correct Mine Identification Number for the Midway Stone Mine is 11-00134.

13. On May 6, 1992, Respondent did not have pending a Petition for Modification for this mine identification number.

14. Respondent has not, to date, filed a Petition for Modification for this mine identification number.

15. Respondent was aware that MSHA required the primary crusher to be guarded.

16. On May 6, 1992, the primary jaw crusher, which is the subject of Citation Number 4099296, was guarded by a fence and a gate which was locked, bolted, and had a starter wire connection at the gate.

17. Respondent's workers leave the gate unlocked at night so that greasing can be performed prior to start up.

18. On may 6, 1992, the electric motor, drive sheave and belts and the flywheel on the primary jaw crusher, which are the subject of Citation No. 4099296, did not have individual guarding inside the fenced enclosure.

19. The exposed moving parts on the primary jaw crusher, which are the subject of Citation No. 4099296, are less than seven feet above walking or working surfaces.

20. Contact with the moving parts on the primary jaw crusher, which are the subject of Citation No. 4099296, could result in entanglement, crushing and/or death.

PRELIMINARY FINDINGS

The essential facts are not in dispute and can be briefly stated. The respondent operates the Midway Stone Quarry in Rock Island County, Illinois. The primary crusher machine at this facility has drive assemblies which include drive belts which run between sheaves and/or flywheels. Pinch points occur when the belts pass over the flywheels. The respondent has erected a chain link fence approximately 12 feet wide by 17 feet long by 6 1/2 feet high around the perimeter of the crusher blocking access to the area where the belts and drives are located. The only entrance into the area is through a gate. The gate is secured by a strap and bolt locking system and, in addition, the gate is locked with a padlock. The key to the padlock is located in a separate structure approximately 250 feet from the crusher. As a further measure of protection, the respondent has installed an interlock electrical system at the gate. This system requires the unplugging of an electrical cord whenever the gate is opened which automatically shuts down the crusher.

Finally, the respondent has established a "lock-out" procedure which requires all employees to first shut off the main power source to the primary crusher before entering the fenced in area. In order to shut off the main power source, it is necessary to go to a separate structure located approximately 250 feet from the machinery. This procedure prevents exposure of personnel to parts that continue to move for a short period of time even though power has been turned off. (Tr. 210, 211, 216, 219-221).

The respondent utilizes a similar method of area fencing of its primary crusher at its Valley Plant No. 7 (Valley) facility. (Tr. 34). On October 17, 1990, Administrative Law Judge George A. Koutras issued a decision wherein he concluded that the respondent's perimeter fencing of its primary crusher at Valley did not satisfy the guarding requirements of Section 56.14107. Moline Consumers Company, 12 FMSHRC 1953 (October 1990). Judge Koutras' decision was based on the fact that the crusher ". . . belt drive was not individually physically guarded at the time of the inspection, and the gate which served as guard was unlocked and opened, thereby allowing free access to the crusher belt drive area immediately inside the gate." Id. at 1965. MSHA Supervisory Inspector Ralph D. Christensen permitted the respondent to abate the citation in Judge Koutras' case by replacing the padlock with the installation of a nut and bolt to secure the gate. Judge Koutras questioned the effectiveness of

this solution. Id. at 1967. Consequently, Judge Koutras, noting that "[t]he belt drive itself continues to be unguarded," urged the respondent to initiate modification proceedings under section 101(c) of the Act.

On November 30, 1990, in response to Judge Koutras' decision and the nut and bolt use allowed by Christensen, MSHA specifically addressed the issue of remote barriers and issued a memorandum to North Central District enforcement personnel informing them that perimeter guarding, regardless of how gates are secured, does not comply with the guarding requirements of section 56.14107. (P's Ex. C). The memorandum noted that affected operators should be given an opportunity to comply before being cited. Christensen is a Field Office Supervisor in Peru, Illinois and does not have the authority to establish MSHA policy. (Tr. 132-134, 169, 170-173).

By petition dated July 12, 1991 (amended July 26, 1991), the respondent sought to be relieved of it obligations under section 56.14107 for its crushers at its Valley and Allied Stone (Allied) plants. The respondent requested a variance from the standard in order to use perimeter or area guarding by fence, gate and padlock. The respondent's petition was initially denied by MSHA's district manager on October 2, 1991 and was denied on reconsideration on November 20, 1991. Thereafter, on December 17, 1991, the respondent filed a notice of appeal. The hearing on the respondent's petition for modification was ultimately scheduled for June 3, 1992, before Department of Labor Administrative Law Judge Robert S. Amery.[2]

In the interim, on or about April 30, 1992, Inspector Guthrie inspected the respondent's Midway facility. At that time, the primary crusher was not in operation. Guthrie noted that the pinch points of the primary crusher were not individually guarded. (Tr. 50-51). Guthrie advised Spud Reiling, the plant supervisor, that the respondent must ". . . guard the moving parts at the point of contact rather than area guarding," once production resumed. (Tr. 60).

Guthrie returned to Midway on May 6, 1992, and determined that individual guarding had not been installed at the crusher's moving parts despite his earlier warning that point of contact guarding was required. Consequently, Guthrie issued Citation No. 4099296 and concluded that the respondent's underlying negligence associated with the violation was high. (Tr. 56-57).

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[2] A hearing on a petition for modification is held before a Department of Labor Administrative Law Judge. 30 C.F.R. §§ 44.20-44.35 (hearings).

The modification hearing for the Valley and Allied crushers was held on June 3, 1992, before Judge Amery. On September 28, 1992, Judge Amery decided that the respondent's alternative method of guarding, which consists of a fence with a gate equipped with a padlock, plus a bolt and nut to form a barrier, as well as an electrical interlock system, warning signs and the respondent's lockout procedure, assures at least the same measure of protection as that afforded under the provisions of section 56.14107. Judge Amery imposed the additional requirement that the respondent place a box or cage over the rotating motor shaft during annual vibration tests to check the bearings when the drive belts are removed. Petition for Modification Hearing, Moline Consumer's Company v. MSHA, (Amery Decision) DOL No. 92-MSA-10 (September 28, 1992); Joint Ex. No. 3.

FURTHER FINDINGS AND CONCLUSIONS

Fact of Occurrence of violation

As noted above, the only dispositive issue is whether the respondent's system of area guarding satisfies, not equals, the mandatory safety standard in section 56.14107. In this regard, the respondent has acknowledged, in its petition for modification proceeding before Judge Amery, that its system of area guarding is an alternative to the MSHA approved point of contact guards of the primary crusher's moving parts. Amery Decision, Joint Ex. 3, pp. 4-5, 7. Having argued that its area guarding affords equal, if not better, protection than the mandatory standard at Valley and Allied, the respondent is estopped from asserting that its area guarding at Midway meets the mandatory standard. (Tr. 107-108).[3]

However, the respondent asserts that it reluctantly participated in the modification proceeding to avoid further enforcement action although it firmly believes that its area guarding meets the mandatory standard. (Tr. 99-103). Therefore, estoppel notwithstanding, I shall address this issue on the merits.

In resolving this question, it is fundamental that we look to the language and purpose of the standard. Where the terms of a statutory or regulatory provision are clear, such terms must be given effect unless the legislative or regulatory body clearly

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[3] Although I noted that I was inclined to conclude that the respondent was estopped from asserting that its area guarding meets the mandatory safety standard contained in section 56.14107, I withheld final judgment on this issue and permitted the respondent to present its entire case concerning whether area guarding satisfies the mandatory standard. (Tr. 107-108, 114-115).

intended the words to have a different meaning. See Utah Power and Light Company, 11 FMSHRC 1926, 1930 (October 1989) citing Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842-843 (1984); United States v. Baldridge, 677 F.2d 940, 944 (D.C. Cir. 1982); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192-1193 (9th Cir. 1982). Turning to the language of section 56.14107, it is noteworthy that this section is entitled "Moving Machine Parts". This mandatory standard is obviously intended to protect individuals from moving component parts rather than the machine itself. This standard protects individuals who perform maintenance. It also protects against injury from parts that continue to move even after equipment is de-energized. Significantly, Judge Amery recognized this distinction by imposing the requirement to shield (guard) the motor shaft as a component part during annual vibration testing in addition to the respondent's system of area guarding the entire piece of equipment.

Moreover, Scott Hanson, the respondent's consultant witness, recognized that section 56.14107 is intended as a safety standard to be applied to moving parts rather than an entire machine. (Tr. 286-287). Therefore, the plain and unambiguous language of section 56.14107 fails to support the respondent's contention that its area guarding meets the standard.

Consistent with the plain meaning of this mandatory safety standard, Commission Administrative Law Judge Morris has also concluded that a gate 4 to 5 feet from an unguarded chain drive assembly on a hopper feeder conveyor belt does not satisfy the standard in 56.14107. See Yaple Creek Sand & Gravel, 11 FMSHRC 1471 (August 1989). Similarly, Department of Labor modification proceedings have recognized that area guarding is an alternative to the required guarding of moving parts contained in section 56.14107. See Petition for Modification Hearing, Richem Construction Co., Inc. v. MSHA, DOL No. 92-MSA-18, (March 10, 1993) (ALJ Vittone); Amery Decision, Joint Ex. 3.

While I am cognizant of the respondent's sincere and apparently effective efforts to protect its employees from exposure to the crusher's moving parts, it is the respondent's responsibility to pursue alternative safety measures through the petition for modification procedure contained in section 101(c) of the Act. If an operator fails to do so it must be subject to civil penalty sanctions. Any other approach would permit the operator, rather than the Secretary, to unilaterally determine whether alternatives to mandatory safety standards are effective. Otis Elevator Company, 11 FMSHRC 1918, 1923 (October 1989). Thus, the respondent's area guarding of its primary crusher at its Midway facility, for which it has not filed a petition for

modification, constitutes a violation of the mandatory standard contained in section 56.14107. Accordingly, Citation No. 4099296 shall be affirmed.

Special Assessment

Having determined the fact of the violation, the remaining issue is whether a waiver of the regular assessment formula and the imposition of a special assessment is appropriate in this case. The Secretary proposes a civil penalty of $700.00 for this non-significant and substantial violation under the special assessment criteria in section 100.5(h) which permits special assessments for "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances."

A special assessment was imposed by MSHA on May 22, 1992, because "[t]he company continues to use a fence and gate system of guarding on primary crushers. A petition for variance was denied on November 21, 1991. Therefore, Citation 4099296 should be special assessed." (Tr. 138-139; Petitioner's Ex. D). However, the respondent's hearing before Judge Amery was not heard until June 3, 1992. The respondent is entitled to exhaust its administrative remedies in an effort to prevail on the merits of its modification petition. The respondent's failure to comply with MSHA's directive to install pinch point guarding during the pendency of its modification petition under circumstances where there is no likelihood of serious injury is not indicative of high negligence.

However, the respondent acts at its own peril with respect to the imposition of civil penalties if it fails to seek modification authority for a particular mine.[4] Had the respondent included Midway in its Valley and Allied modification petition prior to the issuance of Citation No. 4099296, section 44.4(c) would provide a basis for vacating the citation in issue.[5] The respondent's failure to a seek a pertinent modification in this case does not constitute the requisite gross

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[4] Although the respondent filed a petition for modification for its area guarding at Valley and Allied, section 44.11, 30 C.F.R. § 44.11, requires that all mines affected must be identified in the petition. For reasons best known to the respondent, it failed to include the Midway primary crusher in its petition for modification.

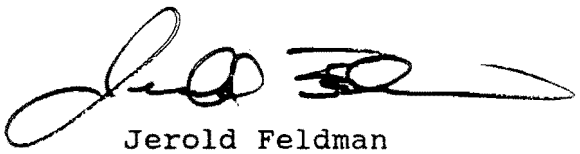
[5] Section 44.4(c), 30 C.F.R. § 44.4(c), provides that the granting of a modification shall be considered as a factor in the resolution of any enforcement action previously initiated for claimed violation of the subsequently modified mandatory safety standard.

negligence or other aggravating conduct necessary for a special assessment. Significantly, the Secretary has conceded that the respondent's failure to install site-specific guarding at pinch points, in view of the respondent's alternative measures, did not expose personnel to any significant risk of injury. (Tr. 180). Consequently, Waxvik's characterization of high negligence as "[t]he mine operator's flagrant disregard for the mandatory safety standard by substituting area guarding for point of contact guarding" is not supported by the evidence. (Tr. 149). The respondent cannot be charged with a "flagrant disregard" of a mandatory standard when it has acted to provide its employees with equivalent protection. Therefore, the Secretary has failed to demonstrate that the facts of this case warrant the imposition of a special assessment. Accordingly, considering the criteria of section 110(i) of the Act, including the low degrees of gravity and negligence associated with the subject violation, I am assessing a civil penalty of $20.00 in this matter.

Finally, the respondent must file a pertinent petition for modification for its Midway primary crusher within 45 days from the date of this decision. If a petition for modification is timely filed, MSHA should defer enforcement of the provisions of section 56.14107 pending the outcome of the petition.

ORDER

Accordingly, Citation No. 4099296 **IS AFFIRMED. IT IS ORDERED** that the respondent pay a civil penalty of $20.00 within 30 days of the date of this decision and, upon receipt of payment, this proceeding **IS DISMISSED. IT IS FURTHER ORDERED** that the respondent shall file, within 45 days of the date of this decision, a petition for modification of the provisions of section 56.14107 as they apply to its primary crusher at its Midway Stone Quarry.



Jerold Feldman
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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SEP 24 1993

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 93-362-M
Petitioner	:	A. C. No. 04-01711-05522
	:	
v.	:	River Rock Plant
CALMAT OF CENTRAL	:	
CALIFORNIA,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. On June 18, 1993, the Solicitor filed a motion to approve settlement of the one violation involved in this case. The Solicitor sought approval of a 50% reduction in the penalty amount. On August 3, 1993, an order was issued disapproving the settlement because the Solicitor gave no reasons to support the proposed reduction. The Solicitor was ordered to file additional information to support his motion.

On August 24, 1993, the Solicitor filed an amended motion to approve settlement and on September 17, 1993, a second amended settlement motion.

In the second amended settlement motion the Solicitor furnishes reasons for the suggested reduction from $1019 to $509. The citation was issued for an inoperative back-up alarm on a crane. According to the Solicitor, gravity and negligence were less than originally thought because the crane was out of service when the citation was issued and the faulty alarm would have been discovered during the mandatory pre-operation inspection. As a result, the Solicitor has agreed to delete the significant and substantial designation. I accept the Solicitor's representations and I conclude that the settlement is appropriate under the six criteria set forth in section 110(i) of the Act. The file contains a memorandum from the Civil Penalty Compliance Office for MSHA indicating that the operator has paid $451.50[1] for this case.

[1] $451.50 was the amount specified in the original settlement motion but the Solicitor has advised my law clerk that the figure was erroneous.

In light of the foregoing, it is **ORDERED** that the settlement motion filed September 17, 1993, is **ACCEPTED** as a response to the August 3 order.

It is further **ORDERED** that the recommended settlement be **APPROVED** and the operator having paid $451.50, is **ORDERED TO PAY** $57.50 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 24 1993

BOBBY L. JOHNSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 93-105-D
v.	:	
BOHICA, INCORPORATED, and/or SHILOH MINING, Respondent	:	MORG CD 92-09
	:	Cove Run Deep Mine No. 1

ORDER OF DISMISSAL

Before: Judge Weisberger

On August 31, 1993 an Order was issued wherein Complainant was ORDERED as follows, "...within 10 days of this Order, Complainant Johnson shall file either a statement withdrawing this complaint or a statement setting forth good cause why such a statement was not filed. It is further ordered, that if Complainant fails to comply with this order, this case will be DISMISSED."

To date, Complainant has not compiled with the Order. Accordingly, it is ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 27 1993

LONNIE DARRELL ROSS, Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No. KENT 91-76-D
	:	MSHA No. BARB-CD-90-40
SHAMROCK COAL COMPANY, INC. Respondent	:	
	:	
CHARLES EDWARD GILBERT, Complainant	:	Docket No. KENT 91-77-D
	:	MSHA No. BARB-CD-90-41
v.	:	
	:	
SHAMROCK COAL COMPANY, INC., Respondent	:	Mine No. 10

DECISION ON REMAND

Appearances: Phyllis L. Robinson, Esq., Hyden, KY, for Complainants;
Tony Oppegard, Esq., Lexington, KY, for Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc.; and
Timothy Wells, Esq., Manchester, KY, for the Respondent.

Before: Judge Fauver

On June 24, 1993, the Commission remanded these consolidated cases for clarification of interest awards and recalculation of the back pay awards by deducting unemployment compensation received during the backpay periods.

After extensive conferences and negotiations, the parties have moved for approval of a settlement agreement proposing the terms of an order on remand. I have reviewed the proposal and accompanying documents, and conclude that the proposed order is appropriate.

The parties have submitted to the judge the determination of an appropriate attorney fee. Having considered the documentation submitted regarding an attorney fee, I conclude that Attorney Phyllis L. Robinson is entitled to an attorney fee of $150.00 per hour for 69.50 hours ($10,425.00) plus reimbursable expenses of $95.34, for a total attorney fee of $10,520.34.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties' settlement agreement is APPROVED as a full and final settlement of all claims and issues raised in these proceedings.

2. Within 30 days of the date of this Decision, the parties shall comply fully with paragraphs 1 and 2 of the agreed proposed order on remand.

3. Within 30 days of the date of this Decision. Respondent shall pay Complainants' Attorney, Phyllis L. Robinson, an attorney fee of $10,520.34.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

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/efw

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DENVER, CO 80204-3582
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SEP 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-340 A.C. No. 05-02820-03621
v.	:	Docket No. WEST 92-384 A.C. No. 05-02820-03627
WYOMING FUEL COMPANY, Respondent	:	Golden Eagle Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-186 A.C. No. 05-02820-03657A
v.	:	Golden Eagle Mine
EARL WHITE, employed by BASIN RESOURCES, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Charles W. Newcom, Esq., Denver, Colorado, for Respondents.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent Wyoming Fuel Company with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. section 801 et seq. (the "Act"). The Secretary further charges Respondent White with violating section 110(c) of the Act.

A hearing was held on the merits in Denver, Colorado on May 26, 1993, and concluded on June 21, 1993. The parties filed post-trial briefs.

The orders/citations in Docket Nos. WEST 92-340 and

WEST 92-384 were issued to Wyoming Fuel Company as the mine operator for events that occurred on Sunday, June 23, 1991.

However, it is uncontroverted that the Golden Eagle Mine was purchased by the owner of Basin Resources, Inc. from the owner of Wyoming Fuel Company on June 1, 1991. (Tr. 205-206). No issue was raised as to this facet of the case.

In Docket No. WEST 93-186 the Secretary seeks a civil penalty, under section 110(c) of the Act, against Earl White employed by Basin Resources, Inc.

In view of the above, references in this decision may be to Wyoming Fuel Company ("WFC") or Basin Resources, Inc. ("Basin") or Earl White ("White").

DOCKET NO. WEST 92-384
CITATION NO. 3905711

This citation, issued under Section 104(d)(2) of the Act, alleges a violation of 30 C.F.R. § 75.316. [1] The citation reads as follows:

> The methane, ventilation and dust control plan, approved April 16, 1991, was not in compliance in the northwest #1 longwall, MMU 009-0, in that page 3 of this addendum shows #3 headgate entry as a return air course. The air was redirected on 6-23-91 in this entry and it is now on intake and, in turn, the air is coursed through #1 and #2 bleeder entries toward the new proposed exhaust shaft. At the shaft, the air is coursed to #58 crosscut of the tailgate return.

The regulation, Section 75.316, provides as follows:

> Section 75.316 Ventilation System and Methane and Dust Control Plan.
>
> (Statutory Provisions)
>
> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

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[1] This section is now recodified at 30 C.F.R. § 75.370-372.

DOCKET NO. WEST 93-340
CITATION NO. 3244408

This citation, issued under Section 104(a) of the Act, alleges a violation of 30 C.F.R. § 75.316 (cited above). The citation reads as follows:

> Methane in excess of 4.0% and 5.0% was present out by the Kennedy stoppings in crosscuts #62 and #63 between #3 and #4 entries on the #3 side of the northwest longwall tailgate area. Also, oxygen in amounts of 17.1% was measured with hand-held detectors at least four feet out by the stopping in #62 crosscut. Bottle samples were collected to substantiate this citation and order.
>
> This was the main contributing factor to the issuance of imminent danger order #3244407. Therefore, an abatement date was not set.

Imminent Danger Order No. 3244407

This imminent danger order was issued immediately before citation No. 3244408. The order, issued under Section 107(a) of the Act, was not contested and it has become a final order of the Commission.

The order itself reads as follows:

> An imminent danger existed in the tailgate area of the northwest longwall section in that methane (CH4) in amounts exceeding 4.0% and 5.0% were detected with a permissible methane detector out by the Kennedy stoppings in crosscuts #62 and #63 between #3 and #4 entries of the tailgate. A violation of 75.329 C.F.R. 30.

DOCKET NO. WEST 93-196
Secretary v. Earl White
Employed by Basin Resources, Inc.

In this case the Secretary, pursuant to Section 110(c) of the Act, seeks civil penalties against Earl White, Respondent, for knowingly authorizing, ordering, or carrying out, as an agent of the corporate mine operator, the violations alleged herein.

CITATION NO. 3905711
DISCUSSION AND FINDINGS

The critical issue in this citation is whether Basin and its manager, Earl White, were required to obtain approval from MSHA before implementing any ventilation changes. It is uncontroverted that no prior approval was obtained.

On its face 30 C.F.R. § 75.316 does not require an operator to comply with a ventilation plan nor does it require prior approval before ventilation changes are made. However, the Commission has determined that "once the plan is approved and adopted, its provisions are enforceable as mandatory standards." Jim Walter Resources, Inc. 9 FMSHRC 903, 907 (May 1987); see also Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Carbon County Coal Co., 7 FMSHRC 1367, 1371 (September 1985); Penn Allegh Coal Co., 3 FMSHRC 2767, 2771 (December 1981). In an enforcement action before the Commission, the Secretary must establish that the provision allegedly violated is part of the approved and adopted plan and that the cited condition violated the provision. Jim Walter, 9 FMSHRC at 907.

The pertinent portion of the ventilation plan is a letter dated November 15, 1990 addressed to Charles W. McGlothlin then Vice-President and General Manager of Wyoming Fuel Company. The letter reads, in part, as follows:

> RE: Golden Eagle Mine
> ID No. 05-02820
> Ventilation System and Methane
> and Dust Control Plan
>
> Dear Mr. McGlothlin:
>
> The ventilation system and methane and dust control plan, dated September 10, 1990, October 3, 1990 and November 7, 1990, consisting of three cover letters, a 48-page plan, and mine map, is approved in accordance with 30 CFR 75.316. The plan is subject to revision at any time and shall be reviewed by the operator and MSHA at least once every six months. Before any changes are made in the approved ventilation system, they shall be submitted to and approved by the District Manager prior to implementation. (Emphasis added).
>
> The following amendment to the previously approved plan is also included in the approval:
>
> > The Slope and Shaft Sinking Plan Amendment dated September 21, 1990.
>
> The map approval applies specifically to the provisions of 30 CFR Sections 75.316-1(a), 75.316-2(f)(1), 75.330, 75.1200 and 75.1200-1. Evaluation of escapeways will be accomplished by an on-site inspection of the mine by an authorized representative of the Secretary. The escapeways shall be the most direct and practical route out of the mine and shall comply with the criteria in 30 CFR 75.1704.1.
>
> This plan supersedes the previously approved plan with an approval date of May 10, 1989 and all incorporated amendments, except as noted above. This approval, also, supersedes the conditional approval dated November 8, 1990.

It is apparent that the underlined portion requires prior approval from MSHA before implementing any changes in the ventilation system.

It is further uncontroverted that White made changes in the ventilation system without seeking prior approval.

These changes were substantiated and best illustrated by two drawings made by witness Denning, prepared as "before and after" illustrations (see Exhibits M-7 and M-8). Basically White changed a return aircourse in the No. 1 headgate to an intake aircourse. As a result of the change there was no return aircourse in the headgate.

The Judge recognizes that White stated he was accustomed in his previous work to making ventilation changes and then submitting such changes to MSHA for approval. However, although he was only at the Golden Eagle Mine a short time he should have been familiar with the ventilation plan requirements.

If the Commission accepts White's theory then the ventilation regulations would be meaningless.

The Secretary established a prima facie violation of the ventilation plan because the prior notice requirement was a part of the plan and White, Basin's Vice-President and General Manager, failed to obtain approval from MSHA before implementing such changes.

WFC argues the plan approval "cover letter" cannot be considered part of the plan for a number of reasons.

WFC initially contends the letter addressed to Mr. McGlothlin is merely a "cover letter" and not part of the actual plan.

I disagree. The letter itself identified the document as the Golden Eagle Mine ventilation plan. An amendment is specifically included in the "cover letter", "Escapeways" are also incorporated: "they shall comply with the criteria in 30 C.F.R. 75.1704.1." There appears to be no reason to conclude that "page 2 of 46" is not part of the ventilation plan for the Golden Eagle Mine. However, I recognize that MSHA's use of a cover letter to impose ventilation amendments on an operator has been criticized.

Basin further asserts that MSHA witnesses testified as to three alternatives to trigger the prior approval requirement. Some MSHA witnesses draw a distinction between "major" and "minor" changes. (Tr. 176-178, 189-190). Inspector Jordan contended that prior approval was required for "all changes." (Tr. 28, 45).

I decline to support any argument that requires prior MSHA approval only for "major", but not for minor changes.

Commission Judges have routinely ruled that any deviation from the ventilation plan, even temporary or inadvertent, is a violation of 75.316.

In Consolidation Coal Company, 3 FMSHRC 2207 (September 1981), Judge Melick affirmed a violation of § 75.316, for the failure by the operator to ventilate an entry with a line curtain. Although the evidence established that the curtain had been in place 2 1/2 hours prior to the issuance of the citation, but had been taken down for some unexplained reason, the judge found that the absence of the curtain at the time the citation was issued was a violation. See also: Windsor Power House Coal Company, 2 FMSHRC 671 (March 1980), Commission review denied April 21, 1980 (Judge Melick affirmed a violation of § 75.316 because of the operator's failure to maintain adequate ventilation at a working face as required by its ventilation plan); Coop Mining Company, 5 FMSHRC 2004 (November 1993) (affirmed a violation of § 75.316, because of an operator's failure to install a line curtain as required by its ventilation plan. Although the judge considered the fact that the curtain may have been down for only a short time due to possible rib sloughage, he found that such an unusual occurrence was no defense); Mid-Continent Coke and Coal, 3 FMSHRC 2502 (November 1981) (a temporary halt in mining to permit other activities does not interrupt ventilation requirements) and U.S. Steel Mining Company, 12 FMSHRC 1390 (July 1990) (violation found where curtain was not required distance from face).

Basin further claims that MSHA cannot unilaterally establish plan provisions by adding requirements to transmittal letters because plans are the subject of negotiation between MSHA and the operator.

I agree that the approval and adoption process is bilateral involving consultation, discussion and negotiation between the parties mutually agreeing to ventilation plans suitable to specific conditions at particular mines. Jim Walter Resources Inc. 9 FMSHRC at 907. However, in the instant cases there is no evidence the parties ever engaged in any such negotiations. In short, evidence is necessary to support these bare allegations by Basin.

Basin also contends it had no notice of the plan requirements because it could not locate the cover letter in its file and it was not produced in discovery. (Tr. 362-363, 405-406).

The prior notice requirement was contained in MSHA's letter of November 15, 1990, addressed to Charles W. McGlothlin (Ex.

M-1, page "2 of 46"). A subsequent letter dated April 3, 1991, states in part "This amendment will be incorporated into the current ventilation plan originally approved on November 15, 1990 ... ". The subsequent letter indicates that the letter of November 15, 1990, was sent to WFC. Approvals of this type are transmitted in the regular course of business to the operator and various MSHA offices. (Tr. 130). In this situation Basin adopted the previous owner's plans. (Tr. 131).

Basin further observes that the new ventilation regulations, which were adopted after the events in this case, expressly require prior approval. [2] As a result Basin argues the elementary rules of statutory construction compel a conclusion that the regulation as it existed did not require prior approval by MSHA.

I agree that the regulation itself, 30 C.F.R. § 75.316, does not require prior approval by MSHA. However, the plan itself requires such prior approval. As a result the rules of statutory construction are not controlling.

Finally, Basin argues that MSHA's position is undercut when its other regulations provide for immediate changes especially when methane reaches certain levels e.g., see 30 C.F.R. § 75.308; 309(a); 316-2(d).

Basin's arguments are rejected. MSHA may properly address particular hazards (such as methane) with specific detailed regulations. Such particularized regulations do not prevent the enforcement of ventilation plans.

SIGNIFICANT AND SUBSTANTIAL

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there

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[2] The new regulation, 30 C.F.R. § 75.370, provides as follows:

> (c) No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.

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).

MSHA's principal and most knowledgeable witnesses were Messrs. Jordan and Denning.

Mr. Jordan testified this citation was an "S&S" violation. He did so because "anything that has the potential for serious injury or bodily harm is automatically significant and substantial." (Tr. 40). Mr. Jordan further stated it had the potential . . . ." and it is only a "guesstimate" of what can occur when it [air reversal] is done in this manner." (Tr. 40). It is apparent that Mr. Jordan's definition of "S&S" conflicts with the Commission's view.

Mr. Denning, MSHA's ventilation expert, testified that reversing the air without approval could cause "unknown changes" in the ventilation and cause methane to accumulate "in unknown areas." (Tr. 141).

However, Mr. Denning elaborated on this condition as follows:

> A. It's apparent that the change caused the ventilation pressures to be redistributed so that the methane accumulates at the tailgate entries and not only the change of the direction of air in the air course, but the removal of the stoppings that were cited in the imminent danger order at crosscuts 62 and 63. (Tr. 142).

As noted above the Secretary's experts failed to testify there was "a reasonable likelihood that the hazard contributed to will result in an injury." In short, the third facet of the Mathies formulation was not established.

However, it is necessary to consider imminent danger Order No. 3244407. 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). In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989)("R&P"), the Commission reviewed the precedent analyzing this definition and 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." 11 FMSHRC at 2163 (citations omitted). It 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). See also Wyoming Fuel Company, 14 FMSHRC 1296 (August 1992); Utah Power & Light Co., 13 FMSHRC 1617 (October 1991).

Imminent danger Order No. 3244407 was issued immediately before Citation No. 3244408 and that became a final order of the Commission. The order establishes the reasonable likelihood that the methane concentration will result in an injury.

The S&S allegations as to Citation No. 3905711 should be affirmed.

UNWARRANTABLE FAILURE

In Emery Mining Corp., 9 FMSHRC 1997, 2000-2004 (December 1987), and Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987), the Commission held that "unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." This conclusion was based on the ordinary meaning of the term

"unwarrantable failure," the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. The Commission stated that while negligence is conduct that is "inadvertent", "thoughtless," or "inattentive," conduct constituting an unwarrantable failure is conduct that is "not justifiable" or "inexcusable." Emery, supra, 9 FMSHRC at 2001.

The Commission has held that there cannot be an unwarrantable failure resulting from a good faith, although mistaken belief that its actions were in compliance with regulations. Utah Power & Light Company 12 FMSHRC 965, 972 (May 1990), aff'd 951 F.2d 292 (10th Cir, 1991), Cyprus Tonopah Mining Corporation 15 FMSHRC 367, 375-377 (March 1993).

Mr. White did not believe that 30 C.F.R. § 75.316 required that he obtain prior approval from MSHA before implementing changes in the ventilation system. This belief, shared by Thompson, was based on the language in the regulations and his previous experience. (Tr. 416-417).

I conclude this evidence is credible. Mr. White and his crew changed the ventilation system on Sunday, June 23, 1991. He called Mr. Jordan the next day to advise him of the change.

Further, White felt he could have been cited for failing to correct the problems in the ventilation system. (For apparent problems in the system, see Exhibit BR-1). Several recent decisions find that insufficient air velocity violated the operator's ventilation plan support White's concerns in this regard. Bethenergy Mines, Inc., 15 FMSHRC 1200 June 23, 1993, (Weisberger, ALJ); Energy West Mining Company, 15 FMSHRC 1185 June 21, 1993 (Lasher, ALJ).

The Secretary asserts the unwarrantable failure allegations should be sustained because White ignored statements by his two deputies (Salazar and Huey) that MSHA should be notified. Further, witness Gossard advised company representatives of the necessity of prior notification as it related to an explosion in the Golden Eagle Mine in 1991.

It is true that Salazar and Huey told White prior notification was necessary. But at this point White sent Perko (Safety Department) for a copy of Part 75. White read Part 75 and stated (according to both Salazar and Huey) "Show me in the book where it says I have to notify MSHA of this change" (Salazar at 64; Huey at 81). Huey also confirmed that White read Part 316 [30 C.F.R. § 75.316]. He indicated there wasn't anything there saying he couldn't make the ventilation changes (Huey at 81).

The evidence also shows that Ronald J. Gossard was assigned to head up an MSHA team to investigate the MSHA Golden Eagle mine

explosion that occurred in February 1991. At the close out conference, ventilation changes were discussed.

I give Mr. Gossard's testimony zero weight because Basin had not yet acquired the Golden Eagle Mine. Mr. Gossard's last trip to the mine was in March 1991 and he had no knowledge of the practices followed by Basin (Tr. 203). White took over his current position on June 1, 1991 when Entech (Basin) acquired the Golden Eagle Mine. (Tr. 206).

There was no unwarrantable failure because the operator through its manager had a good faith honest belief that he was complying with the regulations.

The allegations of unwarrantable failure should be stricken.

CITATION NO. 3244408
DISCUSSION AND FURTHER FINDINGS

At issue here, separate from the dispute involving Mr. White's changes in the ventilation system, is whether the methane levels that were detected by Inspectors Jordan and Phelps, when they went underground on the afternoon of Tuesday, June 25 constitute a violation.

It is uncontroverted that Inspector Jordan took his readings four feet outby the stoppings at Crosscut 62 and 63. (Tr. 47). The methane averaged 4 to 5 percent and above. (Tr. 35). The measurement location was supported by the test results which also reflect that they were taken four feet from the stoppings. (Ex. M-5). Although Jordan could not tell how far he was from the entry, White testified the stoppings are 60 feet from the entries. (Tr. 350).

Basin asserts that the mixing point where the measurement should take place is at the intersection of the bleeder taps and the return air entries, not the stoppings in the bleeder taps. As White explained, methane levels in the bleeder taps are naturally going to be higher as the methane coming off the gob is diluted on its way to the return air entries in the bleeder system. (Tr. 350). Air is traveling up the entry and the bleeder taps are at 90 degrees. As the methane comes off the gob, the air mixes with it and dilutes it below 2 percent. (Tr. 350, 351). There is no hazard in the reduction at that point and all the coal mines in the world work in that fashion. (Tr. 351).

The ventilation plan provides as follows:

> The methane content in the air in active workings (except those active work areas specifically addressed elsewhere in the plan or in 30 CFR 75) shall be less than 1.0 volume per centum. If at any time the air in any of these active workings contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that air shall contain less than 1.0 volume per centum of methane. (Ex. M-1, page "14 of 46").
>
> The methane content in any return aircourse, other than an aircourse returning the split of air from a working section, shall not exceed 2.0 volume per centum. (Ex. M-1, page "15 of 46").

The Secretary's regulations 30 C.F.R. § 75.309-2 Location of Methane Test provides as follows:

> The methane content in a split of air returning from any working section shall be measured at such point or points where methane may be present in the air current in such split between the last working place of the working section ventilated by the split and the junction of such split with another air split or the location at which such split is used to ventilate seals or abandoned areas. Tests to determine the methane content of such split shall be made at a point not less than 12 inches from the roof or ribs."
>
> Similarly, 30 C.F.R. § 75.316-2, Criteria for approval of ventilation system and methane and dust control plan, states in subpart (i), "When the return aircourses from all or part of the bleeder entries of a gob area and air other than that used to ventilate the gob area is passing through the return aircourses, the bleeder connectors between the return aircourses and the gob shall be considered as bleeder entries and the concentration of methane should not exceed 2.0 volume per centum at the intersection of the bleeder connectors and the return aircourses.

The Secretary has several regulations dealing with location of methane tests.

However, the Judge believes the above provisions should be read in conjunction with 30 C.F.R. § 75.310-3 which provides as follows:

§ 75.310-3 Location of methane tests.

The methane content in a split of air returning from any active workings of a mine shall be measured at such point or points where methane may be present in the air current in such split between the last working place ventilated by the split and the junction of such split with another air split or at a point where such split is used to ventilate seals or abandoned areas. Tests to determine the methane content of such split shall be made at a point not less than 12 inches from the roof or ribs.

Stripped of its surplusage, 30 C.F.R. § 75.310-3 reads: "The methane content shall be measured ... at a point where such split is used to ventilate seals."

The cited section indicates Inspector Jordan measured the methane at the proper location and manner.

Basin's reliance on Island Creek Coal Company 15 FMSHRC 339 (March 1993) is misplaced. In Island Creek Coal Company the Commission affirmed the Judge's order vacating the citation because there was no evidence that an explosive concentration of methane was entering the mine. In the instant case a 4 to 5 percent concentration of methane existed outby the stoppings.

Citation No. 3244408 should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The S&S factors as established by the case law are set forth above.

The evidence shows that the methane was found while the mine was deenergized, no workers were present and it occurred in a non-working area of the mine. There was no evidence of any ignition sources.

In view of these facts the S&S allegations should be stricken.

UNWARRANTABLE FAILURE

The case law as to unwarrantable failure is set forth in connection with the prior citation.

The evidence does not support unwarrantable failure and said allegations are stricken.

DOCKET NO. WEST 93-186
SECRETARY V. EARL WHITE

In this case the Secretary seeks a civil penalty against Earl White, Basin Manager and Vice-President, under Section 110(c) of the Act.

Section 110(c) provides:

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

In Bethenergy Mines, Inc. et al., 14 FMSHRC 1232 the Commission restated its views that a corporate agent "who knowingly authorized, ordered, or carried out ... [a] violation" committed by a corporate operator may be subject to individual liability under section 110(c) of the Mine Act. The proper legal inquiry for purposes of determining liability under section 110(c) of the Act is whether the corporate agent "knew or had reason to know" of a violative condition. Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984), citing Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). In Kenny Richardson, the Commission stated:

> 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.

3 FMSHRC at 16. In order to establish section 110(c) liability, the Secretary must prove only that the individuals knowingly acted not that the individuals knowingly violated the law. Cf., e.g., United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563 (1971).

Further, the Commission reaffirmed its previous holding that a "knowing" violation under section 110(c) involves aggravated conduct, not ordinary negligence, Bethenergy, 14 FMSHRC at 1245.

The evidence as to White has been previously reviewed. His conduct was not "aggravated."

Accordingly the 110(c) is **DISMISSED.**

CIVIL PENALTIES

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

The proposed assessment indicates the Golden Eagle Mine produced 591,944 tons.

Further, the penalties assessed should not affect the operator's ability to continue in business.

As to its history, the operator, Basin Resources, was assessed eight violations for the period from June 1, 1991 to June 24, 1991. (Ex. M-6).

The operator was negligent as to both citations. The company should have known prior MSHA approval was required to change ventilation. It should also have anticipated the methane concentrations would accumulate in the mine.

The gravity of the violations should be considered as high. The change in the ventilation caused the methane to locate in a different location.

The operator demonstrated good faith in promptly abating the violative condition.

The penalties set forth in this order are appropriate.

For the reasons herein I enter the following:

ORDER

1. WEST 92-384:

   Citation No. 3905711, as modified, is affirmed and a civil penalty of $300 is assessed.

2. WEST 93-340:

   Citation No. 3244408, as modified, is affirmed and a civil penalty of $400 is assessed.

3. WEST 93-196:

   The 110(c) case is dismissed.

John J. Morris
Administrative Law Judge

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SEP 27 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-607-M A.C. No. 24-01813-05508
v.	:	Portable Crusher #2
KONITZ CONTRACTING, INC., Respondent	:	

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
William E. Berger, Esq., Lewistown, Montana, for Respondent.

Before: Judge Cetti

The Secretary of Labor (Secretary) in this civil penalty proceeding charges the Respondent, Konitz Contracting Inc. (Konitz), the owner and operator of two portable crushers, with the violation of ten (10) mandatory safety regulations promulgated under the Federal Mine Safety Act of 1977, 30 U.S.C. § 801 et seq. (the Act).

Respondent filed a timely answer contesting the existence of eight (8) of the alleged violations. Pursuant to notice a hearing was held before this Judge at Livingston, Montana on July 20, 1993. Oral and documentary evidence was introduced by the parties, oral closing arguments were presented and filing of briefs were waived by both parties. This matter was submitted for decision with the filing of the transcript of the hearing on July 28, 1993.

STIPULATIONS

At the hearing the parties entered into the record stipulations as follows:

1. Konitz Contracting, Inc. is engaged in mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.

2. Konitz Contracting, Inc. is the owner and operator of the Portable Crusher #2, MSHA I.D. No. 24-01813.

3. Konitz Contracting, Inc. 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 were properly served by a duly authorized representative of the Secretary upon an agent of Respondent 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 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 in business.

8. The operator demonstrated good faith in timely abating the violations.

9. Konitz Contracting, Inc. is a small mine operator with 5657 hours worked in 1991.

10. Respondent's history of previous violations is average for an operator of its size.

11. 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 citations.

Citation No. 3631657

This citation charges Konitz with the violation of 30 C.F.R. § 56.18014 which is a mandatory safety standard requiring the operator to make advance arrangements for emergency medical assistance and emergency transportation for injured persons. The cited safety regulation reads as follows:

> 30 C.F.R. § 56.18014
>
> Arrangements shall be made in advance for obtaining emergency medical assistance and transportation for injured persons. (Emphasis added).

The narrative allegation of Citation No. 3631657 reads as follows:

> Advance arrangements were not made to assure that emergency medical assistance and transportation would be provided at the mine site in the event of an injury of an employee.

Ronald S. Goldade, a federal Mine Safety and Health Inspector, working out of the Helena, Montana MSHA field office testified substantially as follows:

The field office in Helena makes inspections throughout the entire state of Montana. Approximately 70 to 80 percent of his inspection duties consist of inspecting portable rock crushers operating in Montana. Portable crushers are very mobile. Parts of the conveyor systems are on wheels or can be picked up and put on flatbed semi-trailers and transported to different locations in a minimal amount of time. Often people in the area are unaware of the presence of a portable crusher operating in their area. Typically most portable crushing units stay in one place in remote areas for only a week or two.

Under the provision of the cited safety standard it is expected that an operator of a portable crusher located in a remote area will have his foreman or whoever's in charge, prior to start up, contact the nearest town with ambulance service to make sure that the sheriff's department or whoever's responsible for the emergency medical assistance in the area knows the location of the site of the crusher operation.

The inspector stated that a lot of these small towns in Montana don't have full staff ambulance service and many are dispatched through the sheriff's department. By advance contact the operator is assured of learning the procedure and the method of communication needed to obtain emergency medical service and transportation when it is needed.

Turning from the general to the specifics in this case, Inspector Goldade testified he was instructed by his field office supervisor in April of 1992 to travel to Red Lodge, Montana area and make a regular inspection of the Crushing Plant Number 2 which has a mine I.D. No. 24-01813.

The inspector drove to Red Lodge, a small town with a population of 2,000 located in the southwest corner of Montana, approximately 50 miles south of Billings which is the largest nearby city.

The inspector located Portable Crusher No. 2 about 7 miles from Red Lodge. The crusher was set up in the middle of a field

on a private ranch about 1/2 to one mile off a county road. On arriving at the site the inspector made a regular inspection. He found a number of violations and based on his inspection issued the 10 citations involved in this docket.

Inspector Goldade talked to the foreman, Ken Bowser, who was present and in charge of the operation at the site. It is undisputed that Ken Bowser had been the operator's foreman in charge of crusher operations for the past 14 years. Foreman Bowser told the inspector that no advance arrangements had been made for obtaining emergency medical assistance and transportation at the mine site in the event of an injury requiring such assistance.

Mr. Tom Konitz, called by Respondent's counsel, testified that he was the owner and president of Konitz Contracting, Inc. He has been in the business of operating portable rock crushers since he bought Portable Rock Crushers No. 1 and No. 2 in 1979. Mr. Konitz stated that he is aware of the cited regulation 30 C.F.R. § 56.18014 and believed he had complied with it by posting on the bulletin board inside the crusher van the phone number of the sheriff's department and all other emergency phone numbers required by 30 C.F.R. § 56. 18012. (It is undisputed that Konitz was not cited for this latter safety standard.)

Konitz stated that the portable crusher is moved frequently over long distances in Montana, most of the time in rural, sparsely populated areas. At the time of the inspection the crusher was set up in a field on a private ranch. The crusher was set up and operating about half a mile off Highway 99 and could be seen from the highway. In the event a need for emergency medical service arose, it was Konitz's policy to have the foreman go to the closest farmhouse with a phone and dial the sheriff's office or 911. Konitz stated he has never done more than this the past 14 years before this citation was issued and had never been previously cited for violation of the safety standard in question. Evidence was presented that the closest phone to the crusher site was at a farmhouse across the road "approximately a mile or two at the most" from the crusher site. Konitz stated he assumed the farmhouse was not locked but did not know whether it was locked or not or whether anyone would be at the farmhouse in the event emergency use of the phone was needed.

Konitz stated that since the issuance of the citation he has contacted ambulance service and hospitals with unimpressive results. He stated sometimes they'll listen and "take the information down" and "sometimes they'll not show much interest." He stated "they advertise throughout the state (Montana) that the 911 and the sheriff's office" is the correct way to obtain emergency assistance in the rural areas of Montana.

Inspector Goldade stated he has no problem with Mr. Konitz calling the sheriff's office as his "first avenue of contact"

before operating the crusher in a remote area, giving the location of the crusher site and determining in advance of starting operations at the new site the procedures needed to obtain the emergency medical services specified in the cited safety standard.

DISCUSSION AND CONCLUSION

It is Respondent's position that he was complying with the cited safety standard by posting on the bulletin board that is kept in the crusher van the appropriate sheriff's department and other emergency phone numbers. This may well have satisfied the requirements of C.F.R. § 56.18012 but not the clear mandate of the cited standard 30 C.F.R. § 56.18014 that arrangements must be "made in advance" for obtaining emergency medical assistance and transportation for an injured person. A crusher operator must comply with both safety standards. Compliance with one safety standard is not a defense to the violation of the other safety standard. A reasonably prudent person would have recognized this in view of the clear, plain language of both of these safety standards. The safety standard cited clearly requires that the arrangements for emergency medical assistance and transportation for an injured person must be "made in advance" of starting operations at a new mine site.

The evidence presented establishes a violation of the clear mandate of the 30 C.F.R. § 56.18014. The citation is affirmed.

PENALTY

Respondent is a small mine operator. I concur in the inspector's evaluation of the operator's negligence as moderate since the operator should have been aware of the requirements of the cited safety standard. On consideration of all the statutory criteria in section 110(i) of the Act I conclude that the appropriate penalty in this case for Respondent's failure to make the required arrangements in advance, is the $50 penalty proposed by MSHA.

DISPOSITION OF THE REMAINING CITATIONS

On the record the parties at the hearing advised that they had reached an amicable settlement of the remaining nine citations in this docket and jointly offered for approval an agreement covering these citations.

Under the proposal offered for approval the Respondent agrees to pay in full the MSHA proposed penalties of $50 for each of the violations alleged in Citation Nos. 3631649, 3631652, 3631654, 3631655 and 3631656 totaling $250. At least two of the $50 penalties in the sum of $100 have already been paid.

In addition, the Petitioner moves for leave to vacate four of the citations on the grounds of insufficient evidence. These citations are Citation Nos. 3631648, 3631650, 3631651 and 3631653.

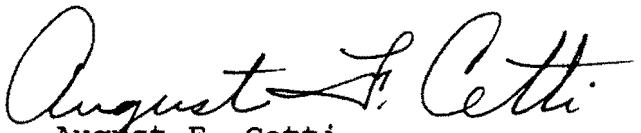
I have considered the evidence, the representations and the stipulations received at the hearing and I conclude that the proffered settlement of the remaining nine citations referenced above is appropriate under the criteria set forth in section 110(i) of the Act and it is approved.

ORDER

1. Citation Nos. 3631648, 3631650, 3631651 and 3631653 are **VACATED.**

2. Citation Nos. 3631649, 3631652, 3631654, 3631655, 3631656 and 3631657 are **AFFIRMED** and a civil penalty of $50 is assessed for each of these violations.

3. **RESPONDENT SHALL PAY** a civil penalty in the sum of $300 to the Secretary of Labor within 40 days of this decision and order with full credit for all payments that have been previously made.



August F. Cetti
Administrative Law Judge

Distribution:

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sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 29 1993

MELVIN FULTZ, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 93-198-D
	:	MSHA Case No. WILK CD 93-03
HARRIMAN COAL CORPORATION, Respondent	:	

DECISION

Appearances: Melvin Fultz, 30 Spring Street, Tremont, Pennsylvania, pro se;
Mark Semanchik, Esq., Lipkin, Marshall, Boharad and Thornburg, Pottsville, Pennsylvania, for Harriman Coal Corporation

Before: Judge Melick

At hearings, the Complainant herein, Melvin Fultz, failed to present any evidence that he had any employment or other relationship to the Respondent, Harriman Coal Corporation, or that such corporation caused any damages cognizable under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, the "Act."[1] In addition, while Mr. Fultz testified

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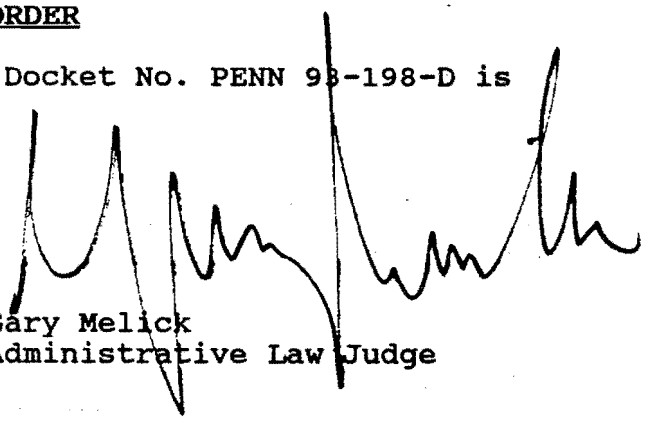
[1] Section 105(c)(1) of the Act provides as follows:
"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act."

at hearing that the Rausche Creek Contracting Company (though not served as a party to this proceeding) failed to compensate him for time lost due to injuries sustained while working for said company he has not alleged any precipitating activity protected under Section 105(c)(1) of the Act. Accordingly, for the above reasons, this case is **DISMISSED**.

ORDER

Discrimination Proceeding Docket No. PENN 93-198-D is hereby **DISMISSED**.



Gary Melick
Administrative Law Judge

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SEP 29 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD B. CARSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 93-109-D
	:	BARB CD 92-38
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Secretary;
R. Stanley Morrow, Jim Walter Resources, Inc., Brookwood, Alabama, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

The Secretary brings this case on behalf of Donald B. Carson and claims that Carson was unlawfully discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), in that he was at least impliedly threatened with the loss of his job for engaging in protected safety-related activity.

Pursuant to notice, a hearing was held on the merits of this case on May 25, 1993, in Hoover, Alabama. Subsequently, the parties have both filed posthearing arguments which I have considered in the course of my adjudication of this matter. I make the following decision.

FINDINGS OF FACT

1. At all times relevant to this complaint, Carson was employed by respondent at their No. 4 Mine; he has been employed at the respondent's No. 4 Mine for approximately 17 years and has served on both the safety committee and grievance committee during that period of time, although he no longer does so.

2. On June 3, 1992, Carson was assigned to work in a relatively remote section of the mine (Southwest bleeders) repairing seals. He spent the entire shift in that area rebuilding a seal, and at times experienced some lightheadedness and nausea of unknown etiology. Prior to leaving this area at the end of his shift, he walked down to where the next sealed area was to be built, thinking that the next shift would probably finish-up the seal he had been working on and start on the next one. In that area, he observed adverse roof conditions in that there were roof channels or mats broken and the roof was sagging. Upon leaving the mine, Carson went to the safety office and informed David Millwood and Ronnie Smith, who are UMWA Safety Committeemen, of the unsafe roof conditions he had found in the mine.

3. At the same time as Carson was relating his tale about the adverse roof conditions to the safety committeemen, MSHA Coal Mine Inspector Bill Deason was also in the mine's safety office. He overheard the conversation and became concerned about miners being in the area, not only because of the roof conditions he was hearing about, but because he knew that he had previously issued a citation in that area for low oxygen.[1] Deason queried Carson about who, if anyone, had preshifted the area and about whether he had had a CO monitor or a methane detector with him while he was working in that area. As far as Carson knew, no one had preshifted the area and he had none of the aforementioned equipment with him. After inspecting the area himself and discussing the situation with management, Inspector Deason issued two section 104(d)(2) orders; one for failure to conduct a preshift examination and a second for failure to comply with the mine's ventilation plan.

4. Carson returned to work the next night and found out that the two aforementioned orders had been issued by Inspector Deason after he left the previous morning. Towards the end of his shift, he was approached by Bob O'Malley, the owlshift mine foreman, who purportedly told him that what he did was "low-down and dirty" and that he no longer respected him. Carson then asked O'Malley what he was talking about and O'Malley replied "you know what I'm talking about, its about the seals." Carson

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[1] Inspector Deason issued section 104(a) Citation No. 3016975 on May 7, 1992, for a purported violation of 30 C.F.R. § 75.301. Subsequently, it was determined that no violation existed and the citation was vacated by MSHA.

then attempted, without success, to explain to O'Malley that he hadn't had anything to do with the inspector issuing the (d)(2) orders.[2]

5. Upon returning to the surface after finishing his shift, Carson went straight away to the safety office to see the UMWA Safety Committeemen and Inspector Deason about what he perceived to be intimidation and/or harassment concerning the (d)(2) orders Inspector Deason had issued. It was about this time that Mr. Oliver, the general mine foreman, told Carson that Mr. Cooley, the mine manager, wanted to talk to him. Carson in turn asked his UMWA Safety Committeeman, Millwood, to accompany him into the meeting. Carson testified that because of his earlier confrontation with O'Malley, he was concerned about being threatened and wanted a union representative with him when he met with the mine manager.

6. Carson and Millwood met with General Mine Foreman Oliver, Mine Manager Cooley, and Fred Kozel, the deputy mine manager, in Mr. Oliver's office. There is a dispute about precisely what was said at that meeting, but the clear preponderance of the evidence made the impression on me that the mine management was upset over receiving the two (d)(2) orders from Deason and they were operating under the assumption that Carson was somehow responsible for their issuance. The meeting was described by Millwood as a "tongue lashing, at the least." Millwood further opined that it was a "heated conversation" in a "threatening" atmosphere. Carson also credibly testified in my opinion, that he personally felt threatened. I find as a fact that there was an implied threat made by Cooley against Carson's future employment, or at the least, a reasonable basis for Carson to believe there had been.

7. In April of 1992, 2 months before the incident at bar took place, there was a reduction in the work force at this mine. At that time, Carson was "rolled back" from a more desirable

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[2] It is important to note that the only evidence of this entire conversation comes from the testimony of Mr. Carson. It is nowhere refuted in the record and is therefore uncontroverted. That does not mean, however, that it is undisputed. Respondent does dispute it, but unfortunately, Mr. O'Malley, the foreman who is credited with making these remarks, was killed in a boating accident and was therefore unavailable to testify in this proceeding.

outside position to a less desirable one inside the mine. At the same time, his wife was laid off. Both were unhappy with the company as a result.

DISCUSSION, FURTHER FINDINGS AND CONCLUSIONS

Respondent ascribes "revenge" as Carson's motive for filing this discrimination complaint. This because of the alleged mistreatment that he and his wife feel they suffered at the hands of the company as more fully set out in Finding of Fact No. 7, supra.

Be that as it may, the general principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It is undisputed that Carson did engage in protected activity when he made the safety-related complaint or report of unsafe conditions to his safety committeemen and unwittingly, to the MSHA Inspector who overheard the conversation. See Findings of Fact Nos. 2 and 3, supra.

Therefore, the only remaining issue in complainant's prima facie submission is adverse action. That is, did mine management threaten and/or intimidate Carson as a result of his engaging in the aforesaid protected activity. And if they did, does a verbal

threat, or what in this case is more properly denominated an implied threat, constitute "adverse action" within the meaning of the Act.

I find generally credible that testimony of Carson and Millwood that the meeting described in Finding of Fact No. 6, supra, emphasized management's distress over the issuance of the two (d)(2) orders, the cost that would be attributable to them and the assignment of blame for their issuance squarely onto Carson. It was also clearly intimated at that meeting, if not stated outright, that it was just exactly this type of activity that could result in further layoffs or even a shutdown of the mine. In my mind, this is an implied threat to his job, designed to have a chilling effect on not only Carson, but on anyone else who knew of the situation, and management's quick response.

Respondent's attempt to explain this meeting away by their concern over Carson not coming to mine management first to report the unsafe conditions he found or their hunger for more knowledge about those conditions is not well taken and is rejected. There is plenty of testimony in this record that Carson's chosen procedure to notify his UMWA Safety Committeeman of the unsafe conditions he found is normal and routine in this mine. Furthermore, by the time of the meeting, management knew a lot more about the "safety violations" described in the two orders than Carson did. It must be remembered that Carson did not write the (d)(2) orders; Inspector Deason did. Carson was not even on the premises by the time Deason got around to inspecting the area and issuing the two orders. Also, Carson did not intentionally report the condition to the inspector prior to first notifying the company. As I have stated earlier, the usual procedure for notifying the company is to inform the safety committeeman who in turn notifies the appropriate company management and/or safety personnel.

Accordingly, to the extent that respondent argues that the adverse action complained of herein was not motivated in any part by the complainant's protected activity; that argument is rejected.

I also believe that the implied threat to his job is "adverse action" within the meaning of the Act in this instance. The threat itself is adverse action. There is no need to wait until the threat is carried out.

The Commission has previously stated in Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982) that: "[C]oercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act." Section 105(c)(1) states that "no person shall discharge or in any manner discriminate against. . . or otherwise interfere with the exercise of the statutory right of any miner." (Emphasis added).

In making these broad statements, the Commission was guided by the legislative history of the Mine Act which referred to "the more subtle forms of interference, such as promises of benefit or threats of reprisal. Moses, supra, at 1478, citing Legislative History at 624. (Emphasis added). The Commission observed that a "natural result" of such subtle forms of interference "may be to instill in the minds of employees fear of reprisal or discrimination." Moses, supra, at 1478.

An illustrative ALJ decision which is clearly on point is Denu v. Amax Coal Company, 11 FMSHRC 317 (March 1989) (ALJ). In that case, a supervisor repeatedly asked a miner if he knew the consequences of his actions and told him that those consequences included discharge. Although the miner was later told at that same meeting that he would receive no disciplinary action, Judge Melick nonetheless concluded that the questioning itself constituted unlawful interference. The Judge stated in the conclusion to his decision that:

> I find however that threats of disciplinary action and discharge directed to a miner exercising a protected right clearly constitute unlawful interference under section 105(c)(1), whether or not those threats are later carried out. Such threats place the miner under a cloud of fear of losing his job. In addition, while under such threats, a miner would be even less likely to exercise his protected rights when future situations might clearly warrant such an exercise.

Denu v. Amax Coal Company, 11 FMSHRC 317, 322 (March 1989) (ALJ).

I concur that this type of behavior engaged in by high-ranking management personnel in a coercive, hostile atmosphere is a violation of the Mine Act whose primary purpose can only be to cause miners to refrain from asserting their rights under the Mine Act. It unquestionably has a chilling effect on the miners.

Even though Carson was not discharged, suspended, or demoted, nor did he suffer any pecuniary loss as a result of engaging in protected activity in this instance, he nevertheless

did undergo discrimination, within the meaning of the Mine Act. Accordingly, I find and conclude that the evidence supports a finding that respondent unlawfully retaliated against Carson for engaging in protected safety-related activity in violation of section 105(c) of the Mine Act.

I further conclude and find that mine management knew or should have known that they were in serious violation of the Mine Act at the time they engaged in the June 5, 1992, meeting with Carson. And considering all the circumstances in this case, I find a penalty of $1000 to be appropriate for the violation of the Mine Act found herein.

ORDER

THEREFORE, IT IS ORDERED:

1. Respondent shall post a copy of this Decision on a bulletin board at the subject mine which is available to all employees, and it shall remain there for a period of at least 60 days.

2. Respondent shall pay to the Department of Labor a civil penalty of $1000 within 30 days of the date of this Decision.

This Decision constitutes my final disposition of this proceeding.

Roy J. Maurer
Administrative Law Judge

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 29 1993

BARRETT PAVING MATERIALS, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. YORK 92-10-RM
	:	Citation No. 3866158; 9/17/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. YORK 92-11-RM
	:	Citation No. 3866159; 9/17/91
	:	Docket No. YORK 92-12-RM
	:	Citation No. 3866160; 9/17/91
	:	Docket No. YORK 92-13-RM
	:	Citation No. 3866161; 9/17/91
	:	Docket No. YORK 92-14-RM
	:	Citation No. 3866162; 9/17/91
	:	Docket No. YORK 92-15-RM
	:	Citation No. 3866163; 9/17/91
	:	Docket No. YORK 92-16-RM
	:	Citation No. 3866164; 9/17/91
	:	Docket No. YORK 92-17-RM
	:	Citation No. 3866165; 9/17/91
	:	Docket No. YORK 92-18-RM
	:	Citation No. 3866166; 9/17/91
	:	Docket No. YORK 92-19-RM
	:	Citation No. 3866167; 9/17/91
	:	Docket No. YORK 92-20-RM
	:	Citation No. 3866168; 9/17/91
	:	Docket No. YORK 92-21-RM
	:	Citation No. 3866169; 9/17/91
	:	Docket No. YORK 92-22-RM
	:	Citation No. 3866170; 9/17/91
	:	Docket No. YORK 92-23-RM
	:	Citation No. 3866171; 9/17/91

: Docket No. YORK 92-24-RM
: Citation No. 3866172; 9/17/91
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: Docket No. YORK 92-25-RM
: Citation No. 3866173; 9/17/91
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: Docket No. YORK 92-26-RM
: Citation No. 3866174; 9/17/91
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: Docket No. YORK 92-27-RM
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: Docket No. YORK 92-28-RM
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: Docket No. YORK 92-29-RM
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: Docket No. YORK 92-31-RM
: Citation No. 3866179; 9/18/91
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: Docket No. YORK 92-32-RM
: Citation No. 3866180; 9/18/91
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: Docket No. YORK 92-33-RM
: Citation No. 3867541; 9/19/91
:
: Docket No. YORK 92-34-RM
: Citation No. 3867542; 9/19/91

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

v.

BARRETT PAVING MATERIALS,
Respondent

: CIVIL PENALTY PROCEEDING
:
: Docket No. YORK 92-119-M
: A.C. No. 30-02869-05509
:
: Jamesville Quarry
:
: Docket No. YORK 92-71-M
: A.C. No. 30-00009-05509
:
: Docket No. YORK 92-72-M
: A.C. No. 30-00009-05510
:
: Docket No. YORK 92-96-M
: A.C. No. 30-00009-05511
:
: Norwood Quarry

DECISION

Appearances: Anthony J. Colucci III, Esq., Block and Colucci, P.C., Buffalo, New York for Barrett Paving Materials;
William Staton, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York for U.S. Department of Labor.

Before: Judge Weisberger

These consolidated cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by the Operator (Respondent) of various mandatory safety standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to notice, the cases were heard in Syracuse, New York on June 8, 9 and 10, 1993. Stephen W. Field, testified for Petitioner, and Phillip A. Royce and Kurt F. Fleury testified for Respondent. Respondent filed a Closing Statement on September 9, 1993. On September 13, 1993, a statement was received from Petitioner indicating that he elected not to file a post-hearing memorandum.

Docket Nos. YORK 92-119-M, YORK 92-71-M, and YORK 92-72-M

At the hearing, Petitioner indicated that Citation No. 3866158, one of the citations contained in Docket No. YORK 92-71-M and Citation No. 3869498 the subject of Docket No. YORK 92-119-M, would be vacated on the ground that Petitioner is unable to sustain its burden of proof of establishing the violations alleged therein. Based on the representations of counsel, I conclude that the vacation of these citations is appropriate, and hence order that Docket No. YORK 92-119-M be DISMISSED, and Citation No. 3866158 be DISMISSED.

At the hearing, the parties represented that Respondent is no longer contesting the following Citations in Docket No. YORK 92-71-M: Citation Nos. 3866166, 3866168, 3866169, 3866176, 3866177, 3866178, and 3866179. Also it was represented, with regard to Docket No. YORK 92-72-M, that Respondent was no longer contesting Citation No. 3867542. It was further represented that Respondent has agreed to pay the assessed amounts in all these citations. I have considered the representations of counsel, as well as all the documentation in the record, and I conclude that the settlement the parties have arrived at is proper under the Federal Mine Safety and Health Act of 1977, ("the Act,"). Accordingly it is ORDERED that Respondent pay the full assessed amount of $471.

Findings of Fact and Discussion

I. Docket No. YORK 92-96

A. Citation No. 3866162

1. Violation of 30 C.F.R. § 56.15004

(a) Testimony

On September 17, 1991, Stephen W. Field, an MSHA Inspector, inspected Respondent's Norwood Quarry operation. According to Field, he drove up to the area of the crusher in the company of the quarry superintendent, Kurt F. Fleury. According to Field, he and Fleury exited the vehicle. Field indicated that he walked towards the north side of the crusher, and Fleury followed him. According to Field, when he passed between the crusher and the conveyor, he observed dust and rock chips in the air and on the ground. According to Field, when he was approximately within 10 feet of the portable crusher he began to "constantly" feel rock chips hitting his face and arms (Tr. 19,24). He did not feel the chips until he was under the conveyor. When Field felt the rock chips hitting his face and arms, he turned around, and noticed that Fleury was not wearing safety glasses. According to Field, he asked Fleury to put on safety glasses, and Fleury indicated that he (Fleury) did not have them with him, and Fleury left the area. Field indicated that he did not recall Fleury asking permission to leave. Field testified that when Fleury returned with his glasses he told him that he was going to issue a citation. That evening, Field wrote and subsequently issued to Respondent a citation under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 56.15004, which, as pertinent requires that persons wear safety glasses "...when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." In this connection, Field explained that because of the amount of dust and rock chips that were in the air, there was a hazard of an injury to a person's eyes.

Fleury testified, in essence, that he exited the pick up truck with Field in the vicinity of the primary portable crusher. He said that he stood approximately 2 to 3 feet in front of the truck, and asked Field if he could be excused to get his safety glasses from the truck. Fleury testified that Field agreed to this request. According to Fleury, he checked the glove compartment of the truck for his glasses, and when he did not find them, he got into the truck and drove to the office to obtain his glasses. Fleury testified that when he had been in front of the vehicle with Field, there was no discussion regarding glasses. According to Fleury, upon his return to the area of the crusher, Field told him that he was going issue a citation because an "employee" was not wearing safety glasses in a hazardous area. (Tr.168) Fleury testified that earlier that morning, he had seen an employee without glasses near the portable crusher. Field testified that he had not seen this employee. On rebuttal, Field testified that subsequent to the

testimony that he gave under direct and cross-examination, he recalled that Fleury had requested him not to put in the citation that the supervisor was without glasses, as it would have embarrassed him, and therefore he (Field) used the word "employee" in the citation.

(b) Analysis

Although there are differences in the versions testified to by Field and Fleury, the record tends to establish the following set of facts: (1) On September 17, 1991, Field and Fleury were on their way to inspect the area of the crusher and the conveyor; (2) in the area under the conveyor, and in the area between the crusher and the conveyor, there was a definite hazard of an eye injury; (3) Fleury did not have any safety glasses in his possession when he and Field exited the vehicle on the way to the conveyor and crusher; and (4) the vehicle was parked 60 or 80 feet from the primary portable crusher. Within the context of these facts, I find that it has been established that Respondent did violate Section 56.15004 supra, because Fleury was not wearing safety glasses "around an area of a mine... where a hazard can exist which could cause injury to unprotected eyes." (Emphasis added).

2. Significant and Substantial

According to Field, he concluded that the violation was "significant and substantial" because he "felt the violation was more serious." (Tr. 25)

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

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying

violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

Southern Ohio, supra at 916-917.

I have found that, as cited, there was a violation of a mandatory safety standard herein which contributed to a hazard of an eye injury. It thus becomes incumbent upon the Secretary to establish that there was a reasonable likelihood of an injury-producing event i.e., an eye injury, contributed to by the fact that Respondent's employee was not wearing safety glasses. Field indicated that there was a large amount of dust and rock chips that were airborne. He said that he "constantly" felt these items on his face and arms. He was asked: "What were the size of the chips?" and he responded as follows: "Small chips, sixteenth by an eighth inch, eighth inch by an eighth inch" (Tr.24).

The evidence does not establish that an employee of Respondent was in the immediate area where these hazardous conditions existed i.e., between the crusher and the conveyor, and under the conveyor.[1] There is no evidence that Fleury entered this immediate area. According to the version testified to by Field, Fleury was behind him. It is conjecture that Fleury would have entered the immediate area where rock chips and dust were airborne, without having obtained his safety glasses. Also Fleury indicated that he reviewed accident records for a five year period, and found that none of Respondent's employees had

[1] Fleury testified that he had seen an employee the morning of the 17th without glasses near the portable crusher, but there was no evidence as to whether this employee was in the immediate area of the hazard.

been injured as a consequence of having had a foreign object enter their eyes, although three truck drivers had been so injured. Further, employee records going back to 1953 did not indicate any lost time as a consequence of an eye injury.

Within the framework of this record, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event. Accordingly I find that it has not been established that the violation herein was significant and substantial.

3. Unwarrantable Failure

According to Field, he asked Fleury if there was any company policy concerning the wearing safety glasses, and Field indicated that there was not. He said that Fleury said that glasses were available, but that there is no company policy for employees to wear them. Also, according to Field, Fleury told him that he does not tell employees the locations on the site where glasses should be worn. According to Field, at the close out conference on September 18, Fleury told him that he would make a poor example for employees, as he seldom wears safety glasses. Fleury denied making this statement, and indicated that when Field asked him if he was aware of any company policy concerning the wearing of safety glasses, he indicated yes, but that no specific areas were posted. According to the uncontradicted testimony of Fleury, the following Notice is provided to all employees, and is also posted in the scale room, which is where employees punch in:

> * * *
> (4) Eye protection must be worn when welding, grinding, cutting, chipping, or any other operation causing hazard to the eyes.
> * * *
> Any violation of the above rules will result in disciplinary action, including discharge. (Exhibit R-1)
> * * *

I observed the demeanor of the witnesses during their testimony, and found Fleury more credible on these points.

In order to establish that a violation results from an operator's unwarrantable failure it must be established that an operator has engaged in aggravated conduct which is more than ordinary negligence (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)). Within the framework of the above evidence I conclude that Petitioner has not met its burden in this regard.

I find that as a consequence of the violation herein an eye injury could have resulted. Hence, the violation is of a high level of gravity. Considering the remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $150 is

appropriate for this violation.

B. Order No. 3866175

1. Violation of Section 56.15004, supra

On September 17, approximately three hours after Field orally issued Citation No. 3866162, he observed an employee[2] who was not wearing safety glasses. According to Field, at some point he noticed the employee (Jack Price) was approximately two feet from the 4 1/4 inch screen. Field said he also observed dust in the air, and small rock chips "in the area alongside the screen" (Tr. 29). He said that the walkway had a "buildup" of rock chips that was 4 to 6 inches deep (Tr. 29), and extended for about 5 feet on the east side of the walkway facing north. According to Field, Price was not wearing safety glasses. Field said he asked Price where his glasses were, and the latter said they were in the pick-up truck, and that he had just taken them off.

Fleury indicated that when he went to speak to Price when he and Field had first observed him, he told him to leave the area, and to go to where it was safe. Fleury also observed dust and rock chips airborne when he spoke to Price, but indicated that they were coming from the crusher below the walkway, and were not falling on the walkway.

After Field spoke to Price, he informed Fleury that he was going to issued an Order alleging a violation of 30 C.F.R. § 56.15004, supra.

Based upon the above, I conclude that inasmuch as an employee (Price) was observed around an area where there were airborne particles that could cause injuries to unprotected eyes, and the employee was not wearing safety glasses, Respondent did violate Section 56.15004 supra.

2. Unwarrantable Failure

According to Field, he asked Price if Fleury had told him to get his glasses and he answered "no" (Tr. 102). Fleury did not contradict this statement.

As discussed above, I(A)(3) infra, there is no evidence that Respondent had any policy not to advise employees to wear safety glasses. Nor is there any evidence that Fleury was aware that Price was not wearing glasses until he approached him, as Fleury had been with Field for the entire time between when he issued

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[2] The employee was subsequently identified by Fleury as Jack Price.

Citation No. 3866162 and Order No. 3866175. When Fleury noted that Price was not wearing glasses, although he did not order him to get safety glasses, he asked him to leave the area to get to a safe area. Within this framework, I find that it has not been established that the violation herein resulted from any aggravated conduct on the part of Respondent. Hence, it has not been established that the violation was a result of Respondent's unwarrantable failure. (See Emery, supra).

3. Significant and Substantial

The record establishes that Price was, at the time he was cited by Field, within a few feet of airborne rock chips, and was not wearing safety glasses. However, then is no evidence as to the duties he had to perform which would have required him to remain in the immediate area of exposure to airborne particles. There is no evidence regarding the amount of time Price would have been exposed to airborne particles in the subject area, in the normal course of his duties. For these reasons, and for the reasons set forth above, I(A)(2) infra, I find that it has not been established that there was a reasonable likelihood of an injury producing event i.e., an eye injury. Hence it has not been established that the violation was significant and substantial. I find that a penalty of $150 is appropriate.

II. Docket No. YORK 92-71-M

A. Citation No. 3866159

On September 17, at about 10:30 a.m., Field required an operator of a 35 ton Euclid haul truck to test the brake lights by applying the brake pedal. The brake light did not work. According to Field, the operator told him that he did not realize or know that the brake light did not work.

The vehicle in question travels from the plant to the Quarry and back. Part of this route goes down an incline which Field estimated to be 15 percent. In addition, two other haul trucks, a water truck, and a maintenance vehicle, travel the same route. There are no obstacles, or stop signs between the plant and the quarry.

Field issued a citation alleging a violation of 30 C.F.R. § 56.14100(b), which provides that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent a creation of a hazard to persons." Clearly the lack of a functioning brake light was a defect. Since other vehicles travel the same route, it is conceivable that should the subject vehicle have stopped without warning due to a break-down of equipment, a vehicle following it might have collided with it. Hence, this defect is one that affects safety.

In order for there to be a violation of section 56.14100(b), supra, it must be established that a defect that affects safety was not corrected "in a timely manner". The operator of the vehicle had informed Field that he did not know that the brake light did not work. There is no evidence as to how long this safety defect had existed before it was noted and cited by Field. Under these circumstances, I conclude that it has not been established that Section 56.14100(b), supra, was violated.

B. Citation No. 3866160

At approximately 10:40 a.m. on September 17, Field observed that a brake light was not working on another 35 ton Euclid haul truck. According to Field, the operator told him that he had not noticed that the brake light was not working. There is no evidence as to how long the brake light had not been working prior to the time it was noted by Field. There is also no evidence as to when the vehicle was last examined, and what was noted upon that examination. Accordingly, for the reasons discussed above regarding Citation No. 3866159 it is concluded that Petitioner has not established a violation of Section 56.14100(b), supra.

C. Citation No. 3866161

1. Violation of 30 C.F.R. § 56.14112(b)

Field indicated that when he and Fleury were at the primary portable crusher on September 17, they observed a guard on the ground. This guard was approximately 4 to 5 feet long, 3 feet high, and 16 inches wide. Fleury indicated that he did not know why it was not in place, and that he had not previously noticed that it was not in its usual place. According to Field, the lower drive pulley of the belt was exposed. He also indicated that the pinch-point of the pulley was 5 1/2 feet above the ground. The unguarded pulley was in operation. Field opined that although it would have been impossible to reach in and touch the unguarded pulley intentionally, a person could have tripped and then touched it accidentally.

Fleury did not contradict the observations of Field that the guard was not in place over the tail pulley, and that the pulley was in operation.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14112(b). Section 56.14112(b) supra, provides that guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

Inasmuch as when observed by Field, the belt and the pulley were in operation, and a guard was not in place, I find that

Section 56.14112(b), supra, was violated.[3]

2. Significant and Substantial

According to Field, he observed a loader operator walking within 4 feet of the unguarded pulley while it was in operation. He indicated that a person in close proximity to the unguarded pulley could have tripped and touched it, and a serious injury could have resulted such as loss of an arm or fingers, as the pulley was rotating at a high rpm. However, the pinch-point was 5 1/2 feet off the ground. There is no evidence that there were any significant slipping or tripping hazards present. Within this framework I find that although inadvertent contact with the pulley could have occurred, it has not been established that this event was reasonably likely to have occurred. Accordingly, I conclude that it has not been established that the violation was significant and substantial.

According to the uncontradicted testimony of Fleury, a foreman, Dennis Kelly, told him that the guards had been taken off the night before in order to facilitate the checking of the tension of a new belt that had been installed on September 16. I find this factor to mitigate Respondent's negligence herein somewhat. I find that a penalty of $75 is appropriate.

D. Citation No. 3866163

According to Field, the tail pulley of the portable stacking conveyor belt located at the discharge end of the portable crusher, was missing a top guard and two side guards. Field said that the top of the tail pulley was 6 feet above the ground, the tail pulley was 16 inches in diameter, and the pinch-point was at the bottom of the tail pulley. The pulley was in operation.

Fleury indicated that the top guard was on the ground. He said that he was told that the guard had been removed to allow the belt to be cleaned. According to Fleury, the conveyor was resting on a rock that he estimated at being almost 6 feet above the ground. He said that the opening on each side of the pulley began 6 inches above the rock, and that the tail pulley was recessed 6 inches inside the frame. I find that the testimony of

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[3] Fleury indicated that the guard had been removed the evening of September 16, as a new belt had been put on the conveyor the end of the shift of September 16, and its tension had to be adjusted. Fleury indicated that the belt had to be tested after it ran, and that it is not possible to check the tension in the belt without removing the guard. However, there is no evidence that, when cited, testing or adjusting were being performed. To the contrary, the evidence establishes that the belt was in operation when cited by Field.

Fleury is insufficient to establish, as argued by Respondent, that since exposed moving parts were more than 7 feet from walking surfaces, guards were not necessary.

I find that Respondent did violate Section 56.14112(b), supra as alleged by Field in the Citation he issued, as the tail-pulley was being operated, and the guard was not securely in place.

The pulley at issue was a self-cleaning pulley with fins that protruded from the pulley, and provided an additional source of potential injury. Field testified in essence, that he observed an employee within 3 feet of the pinch-point. He opined that it was reasonably likely that someone would contact the pinch-point sooner or later, and should this occur a serious injury would result.

Field did not measure the distance from the path taken by employees to the pinch-point, nor did he provide the basis for his opinion that the top of the tail pulley was 6 feet above the ground, and the diameter of the pulley was 16 inches. In contrast, Fleury indicated that he is 6 feet tall, and the bottom of the pulley was at eye level. According to Fleury, the pulley was set back 6 inches from the frame. He also stated that no one is assigned to work at the location in issue on a regular or irregular basis. There is no evidence of any walking or stumbling hazards in the area in question. Within this framework I conclude that it has not been established that the violation was significant and substantial. (See U.S.Steel, supra,)

According to Field, the lack of the guard was easily seen. He said that when he asked Fleury why the guard was not in place, Fleury said that he had not noticed it, and did not know why it was not in place. According to Fleury, he was told that the guard was taken off so that the belt could be cleaned. I find Fleury's testimony credible. I find that a penalty of $75 is appropriate.

E. Citation No. 3866164

On September 17, on the west side of the walkway, Field observed a spoked balance wheel at the east end of the crusher, moving at a high revolution per minute (rpm). According to Field, the wheel, which was 4 feet in diameter, was approximately 1 foot from the edge of the walkway in a lateral direction. Field indicated that, about 2 feet above the walkway rail, the top of the balance wheel was unguarded.

According to Field, the walkway was 30 inches wide. He said he observed the loader operator walk on the walkway "right by" the unguarded balance wheel in question. (Tr. 474).

On cross-examination, Field indicated that there were no pinch-points in the spokes of the wheel, and that the outside surface of the wheel is smooth. Field also indicated that diagonal straps between the walkway and the rotating wheel, could prevent a person from falling onto the balance wheel. He opined that the pinch-point still can be contacted by a person on the walkway by reaching between the crusher and the balance wheel. However, he could not recall the distance between these items.

Field 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 ...fly-wheels... and similar moving parts that can cause injury."

Due to the position of the wheel in relation to the walkway, I find that the exposed wheel can be contacted. Should one come in contact with the moving balance wheel, an injury can result. Accordingly, it has been established that Respondent herein did violate Section 56.14107(a), supra.

Field expressed his concern that since the wheel was not guarded, a person could contact the wheel by reaching around from the walkway between the crusher and the balance wheel. Field indicated that this movement could be done "very easily" over the bars (Tr. 496). However, he could not recall the distance between the crusher and the balance wheel. There is no evidence of the presence of any tripping, stumbling, or slipping hazards in the area in question. There is no evidence that persons regularly travel on the walkway. Two diagonal straps between the walkway and the exposed fly wheel could prevent a person from falling onto the balance wheel. Within this context, I conclude that although inadvertent contact with the unguarded wheel could have occurred, such an event was not reasonably likely to have occurred. Hence, it has not been established that the violation was significant and substantial (See, U.S. Steel, supra).

According to Field, the lack of the guard was "easily recognizable" (Tr. 476). The cited condition was 1 foot above the floor, and was along the walkway. Considering this fact along with the other factors set forth in Section 110(i) of the Act, I find that a penalty of $125 is appropriate.

F. Citation No. 3866165

1. Violation of 30 C.F.R. § 56.3131

According to Field, on September 17, there were several loose objects at the top of the 75 foot high highwall to the left and the right of the loader operator who was loading muck from a pile on the ground at the base of the highwall. He said that the loader operator was 30 feet to the left of a "chimney" (a series of stacked layers of limestone). He said the chimney was 6 to 8

inches wide at the top of the highwall, and had separated from the highwall. He said the separation narrowed towards the bottom of the highwall. He also described a chunk of loose material 6 feet by 8 feet by 2 1/2 feet on the top edge of the highwall in front of the loader. He indicated that, from the floor of the quarry, a gap could be seen around this chunk. Field opined that if the loader operator continued working to the left picking up muck from the pile, he then would be under this chunk. Field also observed several smaller chunks between this large chunk and the chimney. He said he also saw smaller chunks on the floor.

Field opined that if the chimney would fall it could go through the windows of the loader. He said, in essence, that the loader has roll-over, and "fall-object protective structures", but a large object falling from the highwall could knock the loader over, causing a serious injury to the operator inside the loader.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.3131 which provides as pertinent, as follows:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

Field was asked if he knows how long it took Fleury to remove the large chunk that he cited. Field answered as follows: "I believe he said he just touched it with the dozer blade or loader and it fell." (Tr.528) In contrast, Fleury indicated that he operated a 50 ton hydraulic jack between the rock and the highwall to remove the rock, and it took two hours to push it 3 feet away from the highwall when it fell. He said that it fell 50 or 60 feet to the left of where the loader operator was operating. I observed Fleury's demeanor in this regard, and found his testimony on this point credible. Fleury said that, in addition, in order to abate the Citation, he pushed loose material with his feet from the top of the highwall. He estimated this material as being between 6 inches and a foot square. Fleury indicated that he went to the bottom and top of the highwall with Field, and did not see any chimney. He said that Field did not tell him that he observed a condition that he described as a chimney. He said he did not see any crack in the wall that went down to the toe as described by Field.

Although the evidence is in conflict with regard to the existence on the highwall of a chimney or a layer of limestone to the right of the operator, I find that there was <u>some</u> loose

material at the top of the highwall. Also, there was a large chuck of material on the top of the highwall, as described by Field and not contradicted by Fleury. The presence of the loose material, and the chunk created some degree of "fall-of-material-hazard" to persons. It also is clear that following the normal course of mining, the loader operator would have been placed below the chunk of material. Hence, I find that Respondent did violate Section 56.3131, supra.

I find Fleury's testimony credible that it took the 50 ton hydraulic jack two hours to remove the chunk of material from the top of the highwall. Also, there is no evidence to predicate a finding that it was reasonably likely for the smaller pieces of loose material at the top the highwall and for the chimney condition to have fallen. I thus conclude that it has not been established that the violation was significant and substantial. For the same reasons, I conclude that the violation was of a low level of gravity. According to Field the loader operator told him that he had pointed out to his supervisor the existence of the large chunk on the highwall, small chunks, and the chimney. However, there is no evidence establishing when he pointed this out to his supervisor. Field said he asked Fleury why the conditions existed, and Fleury told him that he did not realize the conditions still existed, as he thought they had been taken care of the previous week. According to Fleury, the highwall had been blasted 3 or 4 days prior to the inspection, and he had inspected the perimeter of the highwall for loose material. Loose material was removed by an excavator. He also indicated that he reinspected the highwall on September 17, and loose material was removed. I thus find that Respondent's negligence herein was only of a moderate level. I find that a penalty of $50 is appropriate.

G. Citation No. 3866167

On September 17, Field inspected a site at the subject mine that contained six dump piles. The total area of the piles was approximately 125 feet long[4] and 50 to 60 feet wide. Access to the site was by way of a ramp, and the site was 10 feet higher than the lower level. There were no berms on the left and right side of the piles. Field indicated that Fleury told him that up until two weeks prior to September 17, dump trucks drove up the ramp, and backed up on top of the piles to dump their load. Field further indicated that Fleury told him that a bulldozer was used to push material off the piles. Field did not go to see the back side of the piles.

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[4] On cross examination Field said that total length of the piles was 50 to 60 feet, and that each pile was 8 to 10 feet wide.

Fleury testified that between March 1, 1991, and September 1, 1991, he was usually at the subject site 3 to 4 times a week, and observed operations on the dump piles. According to Fleury, in normal operations before a truck backs up to dump, a bulldozer is placed towards the edge of the pile. The truck then backs up alongside the bulldozer, which is approximately the same length as the truck, and which is used as a reference point to "spot" the trucks.

Field issued a Citation, which, as modified, alleges a violation of 30 C.F.R. § 56.9301 which provides that berms "...shall be provided at dumping locations where there is a hazard of overtravel or overturning". Since the site in question was approximately 10 feet higher than the ground below it, and since the dump trucks in their normal operation back up on the piles to unload, there clearly was a hazard of overtravel or overturning, in spite of Respondent's practice for bulldozers to "spot" dump trucks. I therefore conclude that Respondent did violate Section 56.9301.[5]

According to Field, if a truck would go over the edge of a pile, it would overturn. In that event bruises, sprains, fractures or even a fatal injury were reasonably likely to have resulted. However, although the record establishes that there was a hazard that a truck could have backed over the edge of the dumping site, there is no evidence in the record to base a finding that the conditions were such that this accident was reasonably likely to have occurred. Accordingly it must be concluded that the violation was not significant and substantial.

I find that a penalty of $75 is appropriate for this violation.

H. Citation No. 3866170

Respondent's Case 580-C backhoe ("backhoe") is equipped with a right brake, and a left brake. These two brakes can be operated independently by two separate pedals. In the alternative, if a bar is placed over both pedals, the two brakes can be operated at the same time. According to Field, on September 17, when the vehicle in question was in reverse, he had the operator apply the two brakes by stepping on the bar that applied pressure to both pedals. According to Field, the left rear wheel locked-up, and the front of the vehicle pivoted to the

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[5] I reject Respondent's argument that the Citation should be dismissed as the sites at issue were not being used at the date of the inspection. In normal operations there was a hazard of over-travel or overturning. Hence, the lack of berms constituted a violation of Section 56.9301, supra as set forth above.

right. When the backhoe was examined after Field noted the above, the left brake fluid reservoir was empty. Field said he believed that he asked Fleury where the backhoe is used and said "its throughout the plant" (Tr. 654) Field said that the backhoe goes down ramps. Fleury did not contradict this testimony.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14101(a)(3) which provides that: "All braking systems installed on the equipment shall be maintained in functional condition."

Fleury testified that after the Citation was orally issued he had only the right brake pedal applied, and the vehicle stopped.

Essentially, at the hearing, it was Respondent's position that, inasmuch as the backhoe is designed to be stopped with either brake, and does stop when either brake is applied independently, the brakes were functional. Respondent argued that there is not any regulation requiring that there be no differential between the right and left side brakes. Respondent also argues that there is no requirement for the vehicle to stop in a straight line.

According to Section 56.14101(a)(3) supra the braking systems are to maintained in "functional condition". Subsection (a) of Section 56.14101 is headed "minimum requirements", and provides that "...equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels."

I find that the backhoe can be stopped by either the right brake or the left brake operating independently. However, I further find, based on the uncontradicted testimony of Field, that when both brakes were depressed at the same time by use of a bar, the backhoe did not stop right away, but the left wheel locked-up causing the vehicle to pivot. Accordingly, since the backhoe did not stop when both brakes were applied simultaneously, the braking system was not being maintained in functional condition. I thus conclude that the Respondent did violate Section 56.14101(a)(3), supra as alleged.

Field opined that if the brakes were to be applied "hard" (Tr. 641), an operator would loose control, the vehicle would spin. He said it then could pivot and strike machinery, or a support beam, and could overturn causing serious injuries. Certainly this series of event can occur. However due to the lack of evidence in the record as to the specific distances of this vehicle to structures and other vehicles in the area it travels, I conclude that it has not been established that an injury producing event was reasonably likely to have occurred. Accordingly it is concluded that the violation was not

significant and substantial.

According to Field, he believed the backhoe operator told him he did not notice the condition of the brakes. Further, Field said that Fleury indicated that he was not aware of the condition of the brakes. I find Respondent's negligence to have been more than moderate as an operator of the backhoe should have been aware of the condition of the brakes. I find that a penalty of $100 is appropriate.

I. Citation No. 3866171

According to Field, the upper pulley of the No. 1 conveyor belt was approximately a few inches laterally removed from the walkway. He said the pinch-point of the pulley was 27 inches above the walkway. Field said that the diameter of the pulley was 8 to 10 inches, half of the diameter was not guarded, and the pinch-point was exposed. According to Field, Fleury, who was with him, said that he could see the pinch-point was exposed. Field indicated that Fleury told him that no persons are required to be in the area when the belt is in operation, but someone could go there to investigate should the belt in that area emit any noise. Field issued a Citation alleging a violation of 30 C.F.R. § 56.14107(a).

Fleury testified that, when cited by Field, the pulley in question and its pinch-point were covered by a guard as depicted in photographs taken later on that day, and before any work had been undertaken to abate the violative condition (Exhibits R-9 and R-10). Further, according to Fleury, the distance between the pinch-point and the outer edge of the guard that was in place when cited, was 1 foot 7 1/2 inches. He said that to abate the Citation, the guard that was in place was removed, and another guard was installed which was one inch longer. In rebuttal, Field testified that the pictures that Fleury referred to did not depict what he had observed. He said that the guard that he had observed extended only to the center of the diameter of the pulley, was a few inches short of the pinch-point, and did not cover the pinch-point.

I closely observed the demeanor of the witnesses when they testified, and I found Fleury to be the more credible witness. I thus find based upon the testimony of the Fleury, that the pinch-point was guarded, and hence there was no violation of Section 56.14107(a) supra.

J. Citation No. 3866172

According to Field, at approximately 2:00 p.m. on September 17, he observed the No. 2 belt, and saw that there was no guard around the bottom of the take-up self-cleaning pulley to prevent contact with the nip-points. Field said that the pulley

was a couple inches above an eye level. He said that his height is 6 feet 2 inches, and he was 4 to 6 feet away when he made his estimates that the bottom of the pulley was six feet off the ground, and the pinch-point was 6 feet 8 inches off the ground. Field did not measure the diameter of the pulley. Field said that Fleury told that an employee is required to go to the area to shovel at the base of the conveyor. Field indicated that he also observed footprints in the area.

According to Field, on September 18, when he returned to the subject site, Fleury told him that he had the pulley guarded. Field observed two side guards in place. He asked Fleury "...to extend the guard." (Tr.765)

In contrast, Fleury testified that on September 18, he was with Field at the tail pulley about noon, and at that time four guards were in place, and Field had said that the violative condition was properly abated. Also, Fleury indicated that at the time the citation was issued there two guards in place as depicted in a photograph (Exhibit R-19) taken later on that day before anything had been done to correct the violative condition. Fleury said that these guards had been installed two months prior to the date Respondent was cited. Also, according to Fleury, after the Citation was issued, two more screens were added in the front and in the back of the pulley. He said that pictures taken on September 17, measure the height of the guard and the pinch-point. (See, Exhibits R-11 and R-12 indicating the height of the pinch-point as a few inches above 7 feet).

Field cited Respondent for violating 30 C.F.R. § 56.14107(a) which, in essence, requires moving machinery parts to be guarded. I find that Section 56.14107(a), supra, must be read along with subsection (b) of Section 56.14107, supra, which unequivocally provides that guards shall not be required where the exposed moving parts are at least 7 feet away from walking or working surfaces. I place more weight upon the ruler measurement of the distance to the pinch-point taken by Fleury, as opposed to the estimate testified to by Field which was not based upon any actual measurement. I thus find that the pinch-point was more than 7 feet from the ground. Thus there was no requirement to guard the pinch-point.

However, since the pinch-point was only a few inches more than 7 feet above the ground, I find that the bottom of the pulley, which is below the pinch-point, was less than seven feet from the ground. Footprints were observed in the area by Field. Hence, I conclude that there were moving parts of the pulley less than 7 feet from a walking surface. Hence a guard was required to protect the bottom of the pulley. I observed the witnesses' demeanor, and found Fleury more credible regarding his testimony that on the date cited the pulley in question was protected by guards on 2 sides. However, even according to Fleury's testimony

2 sides were unguarded, with the moving part of the bottom of the pulley less than 7 feet off the ground. Thus Respondent did violate Section 56.14107 supra.

Taking into account the fact that the pinch-point was more than 7 feet above the ground, and the fact that exposed moving parts were close to 7 feet above the ground, I find that it has not been established that an injury producing event, i.e., contact with unguarded moving parts, was reasonably likely to have occurred. Thus it has not been established that the violation was significant and substantial. I find that a penalty of $50 is appropriate.

K. Citation No. 3866173

According to Field the C-8 belt conveyor take-up pulley, a self-cleaning pulley, was 4 feet above the ground. Although there were guards on the sides and on top, a back guard panel was missing, and the pinch-point was exposed.[6] Field said that the pinch-point was about 3 1/2 to 4 feet above the ground.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14112(b), which provides as follows: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

Section 56.14112(b) is violated if guards are not securely in place "while machinery is being operated". The only evidence of record on this point is Field's testimony regarding the conveyor as follows: "It was delivering material to the upper level." (Tr.808) This statement was provided by Field as a response to the following question: "And were you able to observe the purpose of this C-8 conveyor?" (Tr. 808). In this context, I find Field's testimony ambiguous as to whether the conveyor was actually observed in operation delivering material, or as to whether in Field's opinion such is the purpose of the conveyor. I thus find that the record is inadequate to establish that when observed by Field, the unguarded pulley was being operated. Hence, I conclude that it has not established that Respondent violated Section 56.14112(b) supra.

L. Citation No. 3866174

According to Field, on September 17, he observed the balance

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[6] I accept Field's testimony that the side parallel to the back did not have to be guarded as there was no access to that side.

wheel[7] of the "five and a half screen" (Tr. 824). Field said that the lower half of the balance wheel was exposed. According to Field, the bottom of the wheel was 4 1/2 feet above the edge of a walkway and adjacent to it, although he could not recall the lateral distance between the two. On cross-examination Field testified that the distance between the balance wheel and the walkway was a few inches. He approximated the diameter of the wheel as 16 inches. He said that the wheel was operating at a high "rpm". He was asked the location of the pinch-point and he indicated that "...To get your hand in between these spokes while this balance wheel is rotating, get your hand in the spokes and then there was a housing above it where your hand would get pinched" (sic) (Tr. 825).

Field opined that due to the protrusion of bolts on the face of the wheel, a hand coming in contact with the wheel could be lacerated or broken upon contacting the bolts.

Field issued a Citation alleging a violation of Section 56.14107(a), supra.

According to Fleury, a guard did cover most of the wheel leaving only a small segment, less than half the area of the wheel exposed, as illustrated on a photograph (Exhibit No. R-15) taken on September 17, after the area was cited and before anything had been done to cure the violative condition. He also testified that, as illustrated by Exhibit R-16, the measured distance between the subject wheel and the guard was 13 inches.[8] Also Fleury testified that employees worked only in assigned areas, and that no one was assigned to work in the cited area, and no one is required to be in the area when the conveyor is operating and the wheel is turning.

Although the evidence is in conflict regarding the extent of the unguarded portion of the wheel the record is clear that at a minimum, a section of the wheel that extended down from the top guard approximately 2 1/2 inches, was not guarded; that the wheel contained exposed bolts protruding from the surface; and that the wheel was moving. Due to its location in proximity to a walkway, it is conceivable that a person traversing the walkway could have

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[7] He testified that the wheel was spoked. However he observed the wheel only when it was spinning, and concluded that it was spoked based on the blurs that he saw at that time. A photograph of the wheel indicates that it was not spoked. (Exhibit R-15 and R-16)

[8] On cross-examination, it was elicited that he measured the distance between the wheel and a point on the guard that protruded approximately 5 inches from the surrounding surface.

fallen and come in contact with the exposed moving wheel and bolts, and could have sustained an injury. The fact that persons are not assigned to work in the area does not negate the possibility that at sometime a person could traverse the walkway, and stumble or trip in the area in question. Hence, I find that the Respondent herein did violate Section 56.14107(a).

Field opined that the lack of a guard herein was easily recognizable. However, no persons are assigned to work in the area in question. Also, Petitioner did not rebut or contradict Fleury's testimony that Respondent had not been cited in the past for inadequate guarding in this area. I conclude that Respondent's negligence was only moderate. A penalty of $20 is appropriate.

III. Docket No. YORK 92-72-M

A. Citation No. 3866180

On September 19, 1991, Field observed that when the operator of a 580-C backhoe turned on the motor for the windshield wiper, it did not work. He also noted that a wiper blade and a wiper arm were also missing. According to Field, the operator of the backhoe informed him that he had been at the quarry cleaning spillage. Field noted that there was dust on the windshield, the windshield was wet, and light rain was falling. Field said that vision through the windshield was obscured. However, he did not observe the windshield from looking at it from inside the vehicle.

Field issued a Citation alleging a violation of Section 56.14100(b), supra.

The testimony of Field establishes that, as observed by him on September 19, the vehicle in question was missing a wiper blade and arm, and the wiping mechanism did not work. The windshield had dust on it and also light rain was falling. Under these circumstances, I find that the conditions observed by Field were defects that created a hazard inasmuch as the view of the operator would certainly be obscured given the continuation of normal mining operations.

Field had previously observed and partially inspected the same vehicle on September 17, when he cited it in connection with Citation No. 3866170. He also reexaminated it again on September 18, in connection with the abatement of Citation No. 3866170. On neither of these occasions did he observe that the wiper arm and blade were missing. Also Field indicated that on September 17, the operator of the vehicle in question did not complain to him about the lack of wiper blades. According to Field, Fleury told him that no one had reported to him (Fleury) that the wiper blade and arm were missing, and he had no knowledge of these conditions.

According to Field, on September 19, 1991, the backhoe operator asked him if he could obtain a windshield wiper. Field asked the operator if he had reported the lack of a wiper to his supervisor after the pre-shift examination. Field said that the operator indicated that he had not because he and others had reported, "the condition" in the past and had not been able to get a wiper. (Tr.866) Field did not know when these reports were made. Neither the operator of the backhoe nor any other individual who allegedly made these reports testified in this matter. There is no indication whether the lack of this specific wiper and wiper blades had been reported to Respondent. Based on all these facts, I conclude that although there were defects observed by Field on September 19, there is insufficient evidence to establish that Respondent did not timely cure the defects, as it has not been established the length of time that Respondent had been aware of the conditions on the backhoe at issue. Accordingly, this Citation is DISMISSED.

B. Citation No. 3867541

At the hearing Petitioner indicated in its decision to vacate this Citation. Petitioner's request in this regard is granted.

ORDER

It is ORDERED that:

(1) Docket No. YORK 92-119 be DISMISSED; (2) The following Citation Nos. be DISMISSED: Nos. 3866158, 3866159, 3866160, 3866171, 3866173, 3866180, 3866754; (3) Respondent shall pay a total civil penalty of $1,157 within 30 days of this Decision.

Avram Weisberger
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

SEP 30 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 92-916
	:	A.C. No. 46-01309-03501 KYC
v.	:	
	:	Docket No. WEVA 92-961
UNITED ENERGY SERVICES, INC., Respondent	:	A.C. No. 46-01309-03502 KYC
	:	
	:	Docket No. WEVA 92-1045
	:	A.C. No. 46-01309-03503 KYC
	:	
	:	Docket No. WEVA 93-97
	:	A.C. No. 46-01309-03504 KYC
	:	
	:	North Branch Power Plant

SUMMARY DECISIONS

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 seven (7), alleged violations of certain mandatory safety and training standards found in Parts 48 and 77, Title 30, Code of Federal Regulations. The respondent filed timely contests and answers, contending that it is an electrical utility subject to regulation by the Occupational Safety and Health Administration (OSHA), and that MSHA has no inspection or enforcement jurisdiction over its operations. The petitioner takes the position that the respondent is an independent contractor performing services at a mine. It also takes the position that the respondent's operations, except for the cogeneration plant building itself, is "a coal or other mine" pursuant to the Mine Act because its operations includes the "work of preparing the coal" pursuant to the Act.

Issues

The principal issues presented in these proceedings are (1) whether the respondent is an independent contractor mine "operator" subject to the Act; and (2) whether the respondent's

cogeneration plant operations (except for the plant building itself), is "a coal or other mine" subject to the Act. Assuming that jurisdiction attaches, the additional issues presented include the alleged fact of violations, the special findings made by the inspectors who issued the violations, and the appropriate civil penalty assessments to be assessed for the violations taking into account the penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

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

2. Sections 110(a) and (i) of the 1977 Act, 30 U.S.C. § 820(a) and (d).

3. MSHA's Independent Contractor regulations, Part 45, Title 30, Code of Federal Regulations.

Background

The North Branch Cogeneration Plant, also referred to as the "North Branch Power Plant" or "North Branch Power Project", is located on an approximately 370 acre site near the City of Bayard in Grant County, West Virginia. The plant converts coal wastes contained in a gob pile as fuel to generate electric power. The plant was built by North Branch Partners, Limited (NB Partners Ltd.), a partnership comprised of three individuals. NB Partners Ltd., manages the plant. Approximately ninety eight percent (98%) of the plant rests on the property secured by the Bank of America, and approximately two percent (2%) of the plant, including a belt system and related equipment, is located on land owned by the Island Creek Coal Company. There is no fence separating the two properties. In addition to the portion of the conveyor belt system located on Island Creek's property, that property also contains the North Branch Mine, the North Branch Preparation Plant, and the North Branch refuse area and gob pile, all of which are operated by the Laurel Run Mining Company. The respondent asserts that the North Branch Mine and Preparation Plant are no longer in operation.

The respondent has been described by the parties as a corporation principally owned by Gilbert and Associates, a publicly traded corporation. Pursuant to a continuing services agreement with NB Partners Ltd., the respondent provides labor to operate and maintain the power plant, the conveyor system to and from the plant, and the related facilities. The respondent employs sixty-five (65) people at the plant, including plant manager Robert E. Seavy, whose deposition reflects that the

respondent has approximately 150 other similar service contracts throughout the world. Mr. Seavy stated that the respondent provides "all of the labor to operate and maintain the facility. We purchase all of the material, parts, consumables, as a service to them. They pay the bills. We just do the purchasing. We provide consulting in engineering" (Tr. 12).

Mr. Seavy stated that the respondent's presence at the site began in the fall of 1988, when it signed a services agreement contract with the plant managing company, NB Partners Ltd., but that no personnel were placed at the site until the fall of 1989. The plant and conveyor belt system were not completed at the time the service contract was signed, and substantial completion of the plant was accomplished in the late spring of 1991, when the conveyor belt system began carrying coal refuse from the gob pile to the plant (Tr. 15). The respondent's material handling supervisor, Jim Bowman, testified by deposition that his task is "to operate and maintain the movement of gob to the power plant", and that he supervises sixteen (16) material handlers to do this (Tr. 8, 11).

Mr. Seavy stated that the Wylie Construction Company had a contract with Energy America to design and install the overlaying conveyor belt system used to transport the gob to the power plant and to remove the ash after the gob is burned. He described Energy America as "the developers of the plant", and indicated that Energy America had a contract with Security National Bank (Tr. 15-16). He confirmed that with some modification, the respondent is maintaining and servicing the belt conveyor system designed and installed by the Wylie Construction Company. Although the respondent's service contract and the contract awarded Wylie Construction overlapped, Mr. Seavy confirmed that the respondent never had any contractual relationship with Wylie Construction (Tr. 16).

In its response and opposition to the petitioner's summary judgment motion, the respondent agreed to the following:

1. The Commission and the presiding Administrative Law Judge have jurisdiction to hear and decide these docketed proceedings based on MSHA's issuance of the subject citations and orders and the respondent's objections thereto based primarily on its assertion that MSHA has no jurisdiction over its operations.

2. True copies of the citation and orders were served on the respondent.

3. The citation and orders attached to the petitioner's proposals for assessment of

civil penalties in these proceedings are authentic copies of the citation and orders in issue, with all appropriate modifications or abatements.

4. At all times relevant to these proceedings, the respondent has been providing labor to operate and maintain the power plant conveyor system pursuant to a continuing service agreement with North Branch Partners Ltd.

In addition to the aforementioned "Background" information, the following facts are not in dispute:

1. Under the terms of the continuing services agreement with North Branch Partners, Limited, the respondent has, at all times relevant herein, been providing the labor to operate and maintain the plant, the conveyor system to and from the plant, and their related facilities.

2. The North Branch refuse area contains the remainder of the material mined over the years from the North Branch Mine after the marketable coal was extracted, with this remainder, or gob, having been transported to the North Branch refuse area from the North Branch Mine and the plant. The gob pile extends at least one (1) mile in length.

3. The plant uses the circulating fluidized bed process as the combustion method powering its electric generating facility.

4. The plant uses the gob from the North Branch refuse area by burning it in boilers to generate electricity.

5. In order for the electric generating facility at the plant to use the gob from the North Branch refuse Area as fuel the gob must contain no piece that measures larger than one-quarter (1/4) inch in any direction.

6. The gob from the North Branch refuse area is supplied to NB Partners under a contract with Laurel Run Mining Company, an affiliate of Island Creek, whereby gob containing at least 3,500 BTU per pound with less than ten (10) percent moisture content, is supplied, with Laurel Run providing disposal of the ash.

7. The gob received from the North Branch refuse area must contain at least seven (7) to ten (10) percent carbon to burn in the plant.

8. At all times relevant to these proceedings, the portion of the conveyor system resting on the property owned by Island Creek extends approximately three hundred (300) to five hundred (500) feet onto the Island Creek property and terminates at the North Branch Mine refuse area.

9. The respondent is authorized to operate the conveyor system on the property owned by Island Creek under the continuing services agreement with North Branch Partners.

10. There are no fences separating the conveyor system from the remainder of the property owned by Island Creek.

11. The conveyor system uses two (2) conveyor belt systems, with the first used to transport the gob to the power plant, and with the second used to transport the ash created from the burning of the gob back to the North Branch refuse area.

12. Bulldozers push the gob into a dozer trap (also referred to as the dozer feeder).

13. The bulldozers that push the gob into the dozer trap are owned by either Island Creek or Laurel Run, and the bulldozer operators are employees of Laurel Run.

14. At all times relevant to these proceedings, the dozer trap has been resting approximately three hundred (300) to five hundred (500) feet from the plant property line and is on the North Branch refuse area property.

15. As the gob is depleted, the dozer trap will be moved closer to the property line in increments, and it is expected to reach the property line in approximately ten (10) years.

16. The gob is pushed by the dozers through a hole in the end plate of the dozer trap.

17. The end plate of the dozer trap measures approximately ten (10) feet high and twelve (12) feet wide, with the hole in the end plate measuring approximately three (3) feet by three (3) feet.

18. Although the hole in the end plate of the dozer trap measures approximately three (3) feet by three (3) feet, it has, at all times relevant to these proceedings, been partially obstructed by an isolation gate, a sheet of metal that drops down over the hole so that the size of the opening can be changed.

19. At all times relevant to these proceedings, the size of the opening in the end plate of the dozer trap has been no more than two (2) feet high due to the presence of the isolation gate.

20. Items that cannot fit through the opening in the end plate of the dozer trap are pulled to the side by employees of either Island Creek or Laurel Run.

21. All gob that reaches the plant must pass through this opening in the end plate of the plate of the dozer trap.

22. The gob pushed through the opening in the end plate of the dozer trap comes to rest on an oscillating plate that measures approximately three (3) feet by three (3) feet, and which moves forward and backward through the opening.

23. The movement of the oscillating plate forces the gob to fall onto a conveyor belt.

24. As the gob is being transported up the conveyor belt described in Paragraph 23, an electrically powered magnet picks up any metal pieces that may be in the gob, such as mining bits, pieces of steel, and old wrenches.

25. The gob is deposited by the conveyor belt described in Paragraph 23 onto a grizzly feeder.

26. The grizzly feeder contains eight (8) inch bars which, when the gob falls onto the grizzly feeder,

permits only those gob pieces smaller than eight (8) inches to pass through, with those pieces larger than eight (8) inches falling out over the end, where they are put back onto the gob pile by employees of either Island Creek or Laurel Run.

27. The smaller pieces of gob that pass through the bars of the grizzly feeder fall onto a conveyor belt called Gob Moveable One, (also called Gob Mobile one (1) conveyor belt), a fifty (50) foot transportable conveyor belt, which caries the gob to the main conveyor belt, also called the No. 2 Gob Conveyor Belt.

28. The dozer trap, the conveyor belt in the dozer trap, the magnet, the grizzly, and Gob Moveable One are all owned by NB Partners, with any repairs to these items being performed by the respondent.

29. At all times relevant to these proceedings, the dozer trap, the conveyor belt in the dozer trap, the magnet, the grizzly, and Gob Moveable One have been located on Island Creek property, in the North Branch refuse area.

30. The main conveyor belt transports the gob across the property line shared with the Island Creek property on to the plant property.

31. Title to the gob passes to NB Partners when the gob is dumped into the dozer trap located in the North Branch refuse area, but payment is made by the ton based on the weight at a scale on the main conveyor belt located on the plant property.

32. The main conveyor belt carries the gob and deposits it into a cone-type hopper called a truck dump.

33. The truck dump is approximately forty (40) feet square and forty (40) feet deep, and can hold approximately five hundred (500) tons of gob, which represents approximately seven (7) hours of fuel.

34. The gob feeds out of the truck dump through a vibratory feeder onto another conveyor belt

called Conveyor A, which carries the gob into the Screening Building, located on the plant property.

35. As the gob is being transported by Conveyor A inside the screening building, another electrically powered magnet picks up any remaining metal pieces that may be in the gob, such as mining bits, pieces of steel, and old wrenches.

36. Inside the Screening Building, Conveyor A deposits the gob onto a Tabor Screen, which separates the gob larger than three (3) inches square from the finer gob.

37. The gob smaller than three (3) inches square falls through the Tabor Screen onto Conveyor C.

38. The gob larger than three (3) inches square is further separated, with the gob larger than six (6) inches square being directed into a reject hopper.

39. The gob larger than three (3) inches square but smaller than six (6) inches square rides along the top of the Tabor Screen and is directed into an impactor, which crushes the gob into particles no larger than three (3) inches square.

40. After being crushed by the impactor, the gob referred to in Paragraph 38 is directed back onto Conveyor C, where it is reunited with the gob smaller than three (3) inches square. At this point, all of the gob being transported is no larger than three (3) inches square.

41. Conveyor C carries the gob from the Tabor Screen in the Screening building to the Crusher Building, where it goes into another hopper, which holds a couple of hours worth of fuel.

42. The hopper in the Crusher Building drops the gob into a Pennsylvania Crusher, which reduces the material down in size to one-quarter (1/4) inch.

43. Upon exiting the Pennsylvania Crusher, the gob drops directly onto G Conveyor, where it is transported out of the Crusher Building and carried into the plant building.

44. The ash created by the boiler in the plant building is transported out of the building by screwcoolers and by a NUVA feeder system, which releases the ash into blowers, which in turn blow the ash into the Ash Storage Silo.

45. The ash in the Ash Storage Silo, which has a capacity of eight thousand (8,000) tons, falls through the bottom of the silo into a pug mill, which mixes the ash with water and transports the mixture to the No. 1 Ash Conveyor.

46. No. 1 Ash Conveyor carries the mixture approximately two hundred fifty (250) feet to the No. 2 Ash Conveyor, which then transports the mixture approximately five hundred (500) feet to the No. 3 Ash Conveyor.

47. The No. 3 Ash conveyor transports the mixture to approximately the property line shared with the Island Creek property, where it transfers the mixture to Ash Conveyor No. 4.

48. Ash Conveyor No. 4 transports the mixture across the property line shared with the Island Creek property onto the North Branch refuse area, where it transfers the mixture onto an elevated conveyor called Ash Conveyor No. 5.

49. Ash Conveyor No. 5 deposits the mixture into an ash hopper, which is used to load the mixture onto trucks to be spread onto the area near the hopper.

50. Although NB Partners owns the five ash conveyors and the respondent operates and maintains them, neither the ash hopper nor the trucks that carry the ash are owned or operated by either NB Partners or the respondent.

MSHA's Enforcement Activity

MSHA's initial enforcement interest at the plant site began during the spring of 1991, after MSHA's Oakland, Maryland field office learned through conversations with Island Creek's personnel, that a power plant was being constructed at the site, and that the plant planned to burn the refuse (gob) that was to be trucked to the plant site from the North Branch mine. The planned trucking of the gob was apparently abandoned, and a conveyor belt system was constructed to facilitate the transportation of the gob from the North Branch refuse area on Island Creek's property to the plant. The refuse area contains the remainder of the material mined over the years from the North Branch mine after the marketable coal was extracted. That material, or "gob", was transported to the gob pile located at the refuse area from the North Branch mine and preparation plant, and the pile extends for a distance of approximately one mile in length.

On July 30, 1991, MSHA Inspector Phillip M. Wilt went to the North Branch refuse area and observed the loading operations taking place at that location, including the conveyor system carrying gob to the power plant. Mr. Wilt issued citations to Island Creek Coal Company for violations he observed at the refuse area on Island Creek's property. Mr. Wilt returned the next day, July 31, to terminate the citations, and he made additional observations of the area. He next returned to the area on August 5, 1991, with his supervisor, Barry Ryan, and after meeting with another MSHA inspector, Edwin Fetty, at the site, they inspected the refuse area, including the first conveyor belt which was 80 to 100 feet in length. Mr. Wilt and Mr. Fetty both issued citations to Wiley Construction Company, a contractor, for violations found on the North Branch mine property.

MSHA's next inspection and enforcement activity took place between February 26, 1992, and August 27, 1992, resulting in the issuance of the following citations which are the subject of the instant civil penalty proceedings.

Docket No. WEVA 92-916

This case concerns one section 104(d)(1) citation and three section 104(d)(1) orders issued on February 26, 1992, by MSHA Inspector Joseph W. Darios. The citations as initially issued by Mr. Darios reflect that they were served on Jim Gilkey, at the North Branch Mine, and the mine operator is identified as the Island Creek Coal Company. Mr. Darios subsequently modified the citations by mail on March 3, 1992, to show that they were served on Bob Seavy rather than Jim Gilkey, and the identification of the mine operator was changed to reflect United Energy Services, Inc., rather than Island Creek Coal Company. The mine

identification number was modified to add the letter "KYC" to ID Number 46-01309. The citations issued by Mr. Darios are as follows:

Section 104(d)(1) "S&S" Citation No. 3120276 cites an alleged violation of 30 C.F.R. § 77.400(d), and the cited condition or practice is described as follows:

> Three employees were observed shoveling the No. 2 Gob Conveyor Belt tailpiece at the North Branch Refuge (sic) Project with the guarding removed from the tailpiece along the roadside.
>
> Jim Bowman, supervisor, is the person responsible. This citation will be modified to show the operator name to be United Services Corporation upon issuance of a contractor identification number.

Section 104(d)(1) "S&S" Order No. 3120277, cites an alleged violation of 30 C.F.R. § 77.400(a), and the cited condition or practice is described as follows:

> The rear tailpiece guard of the grizzly belt tail pulley was removed and a side guard for the grizzly belt tail pulley was not provided. The rear tail pulley guard was simply laying on the ground behind the belt assembly exposing the roller or pulley at one side and the rear which could cause injury to persons.

Section 104(d)(1) "S&S" Order No. 3120278, cites an alleged violation of 30 C.F.R. § 77.400(d), and the cited condition or practice is described as follows:

> The grizzly gob feeder chain drive sprockets and drive chain located at the rear side of the grizzly belt assembly near the tailpiece was not guarded because the cover guard was simply laying on the ground beside the belt assembly and the exposure may cause injury to persons.

Section 104(d)(1) "S&S" Order No 3120279, February 26, 1992, cites an alleged violation of 30 C.F.R. § 77.400(c), and the cited condition or practice is described as follows:

> The Gob Mobile 1 gob conveyor belt take-up pulley guarding did not extend a distance sufficient enough to prevent contact by and/or injury to persons because the rear side of the tail pulley was exposed approximately 6 inches past the guarding provided and which could permit contact at the pinch point of the roller and belt.

Docket No. WEVA 92-961

Section 104(g)(1) "S&S" Order No. 3120293, was issued on February 27, 1992, by MSHA Inspector Phillip M. Wilt, and he cited an alleged violation of mandatory training standard 30 C.F.R. § 48.25(a). The citation, as initially issued, reflects that it was served on Bruce Hamrick, at the North Branch Mine, and the mine operator is identified as the Island Creek Coal Company. The citation was subsequently modified by MSHA Inspector Frank B. Johnson on March 13, 1992, to show the mine operator as United Energy Services Inc., and to add the letters "KYC" to the previous ID No. 46-01309. The cited condition or practice is described as follows:

> Three employees employed by the United Energy Services Corporation, Craig W. Knotts, Randy Rohrbaugh, and Homer Fletcher, were observed working near moving conveyor belt on the Island Creek Coal Company mine property during an MSHA inspection on 2-26-92 without first receiving the required training of no less than 24 hrs. of comprehensive training.
>
> The three employees are considered a hazard to themselves and others, and are removed from the mine area as required under section 115 of the 1977 Coal Mine Health and Safety Act. Jim Gilkey, manager of construction at this North Branch fuel supply as the responsible person.

Docket No. WEVA 92-1045

Section 104(d)(2) "S&S" Order No. 3720850, was issued on May 12, 1992, by MSHA Inspector Kerry L. George, and he cited an alleged violation of mandatory safety standard 30 C.F.R. § 77.502. The order was served on Jim Bowman at the North Branch Mine, and the mine operator is identified as the United Energy Services Corporation, with Mine ID No. 46-01309-KYC. The cited condition or practice is described as follows:

> A monthly electrical examination was not being conducted on any electrical components of the beltlines at the Co-Gen (sic) refuse site. The beltlines were on mine property and were the responsibility of the contractor. The area was under the supervision of Jim Bowman, Foreman.

Docket No. WEVA 93-97

Section 104(g)(1) "S&S" Order No. 3115366, was issued on August 27, 1992, by MSHA Inspector Kerry L. George, and he cited an alleged violation of mandatory training standard 30 C.F.R. § 48.25(a). The order was served on Jim Bowman at the North

Branch Mine, and the mine operator is identified as the United Energy Services Corporation, with Mine ID No. 46-01309-KYC. The cited condition or practice is described as follows:

> Stanley Dragovich, material handler, was determined to be a new surface miner who had not been given training. The miner had been employed by the contractor since April 1991. Dragovich was maintaining beltlines at the Co-Gen (sic) construction site of North Branch Mine. The area was under the supervision of Jim Bowman, Foreman.

Decisions Involving Power Plants

Old Dominion Power Company v. Donovan, 772 F.2 92 (4th Cir. 1985), concerned an electric substation erected on land owned by Penn-Virginia Resources, and leased to Westmoreland Coal Company. Westmoreland built and owned the substation, and contracted with Elro Coal Company to operate the mine on the property. Westmoreland purchased high-voltage power from Old Dominion, an electrical utility, and transmitted it to the substation for conversion to voltage suitable for use by Elro in its mining operation. The only facilities owned by Old Dominion at the substation was a metering device and other equipment used to determine how much power was purchased by Westmoreland for use through the substation. In the course of checking the meter which had reportedly malfunctioned, an employee of Old Dominion was electrocuted when he touched an energized transformer which he believed had been de-energized.

MSHA and OSHA conducted an investigation and Old Dominion was not cited by OSHA. However, MSHA concluded that Old Dominion's employees violated 30 C.F.R. § 77.704, a mandatory standard promulgated pursuant to the Mine Act, by working on high-voltage lines without de-energizing and grounding them. Confusion then arose as to who should be the recipient of the citation because Elro was using the power received at the substation, Westmoreland owned and operated the substation, and Old Dominion's employees performed the work that resulted in the fatality. MSHA initially served the citation on Elro, and then reissued it to Westmoreland. Approximately one year after the accident, the citation was modified to cite Old Dominion as the responsible mine operator instead of Westmoreland. Old Dominion contested the citation claiming it was neither an "independent contractor" or an "operator" under the Mine Act.

Former Commission Judge Richard Steffey initially adjudicated Old Dominion's claim, and he concluded that Old Dominion was an independent contractor subject to the Mine Act. Old Dominion Power Company, 3 FMSHRC 2721 (November 1981). In support of his decision, Judge Steffey cited the legislative history reflecting Congressional intent for broad coverage of the

Act, and he relied on the fact that Old Dominion had contracted to construct an electrical facility on mine property, and that the facility was essential to coal extraction taking place at the mine because the mining equipment would only operate when it was connected to electrical power.

Old Dominion appealed Judge Steffey's decision, and the Commission affirmed the decision. Old Dominion Power Company, 6 FMSHRC 1886 (August 1984). The Commission rejected Old Dominion's attempts to separate "mine" from "non-mine" work areas, and held that it was properly cited as an independent contractor performing services or construction on mine property. The Commission noted Old Dominion's longstanding relationship with Westmoreland, including the fact that its employees were at the mine at the request of Westmoreland. The Commission concluded that citing the party responsible for violations committed by its employees effectuated the purposes of the Mine Act. (Then Commission Chairman Collyer dissented, and she concluded that Old Dominion was only a vendor with limited presence at the mine).

On appeal of the Commission's decision to the Fourth Circuit, the Court reversed the commission and held that Old Dominion had no continuing presence at the mine and that its only relationship with the mine was the sale of electricity. The Court took note of the inconsistent regulations adopted by MSHA and OSHA with respect to electric utilities, and it stated as follows at 772 F.2d 99:

> Requiring electric utility employees suddenly to adhere to conflicting standards depending on their job locations can only lead to danger, especially where work around high voltage is involved. . . In addition, other MSHA standards, when applied to electric utilities, lead to irrational results.
>
> * * * * * * *
>
> OSHA had adopted strict and comprehensive safety standards which include standards specifically designed to apply to electric utilities. MSHA has adopted contradictory regulations. The Secretary of Labor has not articulated any reasons why the standards applicable to electric utilities under OSHA should be different from standards which he says are applicable to electric utilities under MSHA. We conclude that MSHA regulations do not apply, and were not intended to apply, to electric utilities such as Old Dominion whose sole relationship to the mine is the sale of electricity.

Pennsylvania Electric Company v. FMSHRC, 969 F.2 1501 (3rd Cir. 1992), concerned an electric generating station located in Homer City, Indiana County, Pennsylvania, owned by Penelec and the New York State Electric and Gas Corporation. The station burned approximately 4.5 million tons of coal a year producing electricity generated by coal combustion. The coal purchased by Penelec entered the station from a conveyor running from an adjacent mine operated by Helen Mining Company; from another conveyor running from an adjacent mine operated by the Helvetia Mining Company; and from a truck-dump facility receiving coal brought from various other Pennsylvania mines. The coal was delivered to the generating station facility by conveyor belts from the two adjacent mines to scales where it was weighed and sampled. The coal then moved by conveyor to a bin where it was combined and again sampled. It was then transported to a second bin on two conveyors, and then to an on-site coal cleaning plant where it was broken, crushed, sized, washed, cleaned, dried, and blended for the electric generation facility. The cleaning plant was located entirely at the generating station and was owned by Penelec and New York State Electric and Gas. However, the cleaning plant was operated under contract with the Iselin Preparation Company, a subsidiary of Rochester and Pittsburgh Coal Company. MSHA had previously inspected and otherwise exercised jurisdiction over the cleaning plant since 1977, but it had never regulated the conveyors used to move the processed coal leaving the cleaning plant and going to the generating facilities.

The dispute in Penelec concerned citations issued to Penelec by an MSHA inspector for failure to adequately guard the head drives of the conveyors in question to protect persons who might come in contact with the head rollers. Penelec did not dispute the fact that the cited guards were inadequate. It disputed the authority of the MSHA inspector to issue the citations claiming that it should be inspected and regulated by OHSA. Based on a joint stipulation of facts submitted by the parties to Judge Melick, he affirmed the citations and concluded that the conveyor head drives were a part of a facility that constituted a "coal or other mine" as defined by the Mine Act. Judge Melick also concluded that the coal processed at the cleaning plant for consumption in the Penelec generating station fell within the scope of "work of preparing coal" within the meaning of the Act, and that the head drives over which the coal passed on its way to the plant were "structures", "equipment", and "machinery" that was "used or to be used in" the "work of preparing the coal". Under all of these circumstances, Judge Melick concluded that "it is clear that the head drives of the 5A and 5B conveyor belts are indeed subject to the Secretary's jurisdiction under the Act." Secretary of Labor (MSHA) v. Pennsylvania Electric Company, 10 FMSHRC 1780, 1782 (December 1988).

On appeal of Judge Melick's decision, the Commission took note of the fact that MSHA's regulation of the working conditions inside Penelec's on-site cleaning plant, as well as the mines adjacent to the generating station that delivered coal directly to the station by means of the conveyor systems, were not challenged by Penelec. Although the Commission found that Mine Act jurisdiction attached to the two cited conveyor head drives in question, it found that "Because of the pervasive ambiguity in the record", it was unclear as to whether or not the cited working condition was enforced under the Mine Act, as argued by MSHA, or by regulations enforced by OSHA, as argued by Penelec, and it vacated Judge Melick's decision and remanded the case to him for further proceedings on the jurisdictional question presented and the entry of a new decision. Secretary v. Pennsylvania Electric Company, 11 FMSHRC 1875, (October 1989). In remanding the case, the Commission observed as follows at 11 FMSHRC 1884, 1885:

> At oral argument before us, counsel for the Secretary asserted that the MSHA district manager's letter reflects MSHA's policy of inspecting those areas of a power plant that involve the handling and processing of run-of-mine coal and of leaving to OSHA the inspection of those areas that involve the handling of previously processed coal. O.A. Tr. 28, 29-30, 33. We note, however, that in a prior case involving a coal handling power plant, the Commission was advised, by different secretarial counsel, that:
>
> > MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.
>
> Utility Fuels, Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss (November 29, 1985).

* * * * * * *

The importance of, and confusion concerning, the jurisdictional question presented in this case is further heightened by the fact that subsequent to the issuance of the citations in question, the Secretary through OSHA, proposed new, comprehensive safety standards applicable to the operation and maintenance of electrical power generation

facilities. 54 Fed. Reg. 4974-5024 (1989). On their face, and as explained in the accompanying explanatory materials, these regulations would appear to directly apply to operations such as Penelec's including the coal handling aspects of such operations.

* * * * * * *

These conflicting indications of Secretarial intent raise serious questions as to which agency in the Department of Labor exercises safety and health authority over power generating stations such as Penelec's. The answer is of great consequence to Penelec and its employees. It is also of importance to similarly situated operators of coal burning electric utilities who, along with Penelec, must know which safety and health standards must be complied with and which statute prescribes the rights and duties to which they and their employees must conform their conduct.

* * * * * * *

* * * Because of the pervasive ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station, and the importance of this question, we find it appropriate to order further proceedings. We encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OSHA-MSHA Interagency Agreement to resolve the conflicting positions taken on her behalf. To do otherwise would be to ignore the potential whipsaw effects to which an employer can be subjected when important jurisdictional issues appear to be resolved with no assurance that potentially competing agencies have reached a mutual and definitive determination as to their respective roles.

On remand to Judge Melick, the Secretary of Labor took vigorous exception to the Commission's comments concerning the "internal decision-making processes and intrusion . . . into her reasons and motives for such decisions. . . ." 12 FMSHRC 123 (January 1990). The Secretary believed that she had sole discretion pursuant to the Mine Act to decide whether OSHA or MSHA should inspect the subject area of the mine based on "administrative convenience". Although Judge Melick found no basis for sanctions against the Secretary, he stated that "this does to mean that the Secretary's practices disclosed at hearings should be condoned or be found to be acceptable. Indeed the Secretary's past practice of determining MSHA inspection authority over the subject area . . . . is quite bizarre and

clearly unacceptable". 12 FMSHRC 123. Judge Melick found that once Penelec raised the issued of MSHA/OSHA jurisdiction, "the matter was resolved at the local level".

Upon reconsideration of the case, and in an evenly split decision, the Commission allowed Judge Melick's decision on remand to stand as if affirmed. 12 FMSHRC 152, 1563 (August 1990). The Commission reaffirmed its previous finding concerning Mine Act jurisdiction over the cited conveyor head drives. With respect to MSHA/OSHA jurisdiction, the Commission observed as follows at 12 FMSHRC 567-1568:

> The evidence produced by the Secretary on remand makes clear that the particular area in question has been inspected by MSHA since at least 1982 and no evidence was produced to show that OSHA has ever inspected it. As a consequence, the Interagency Agreement has no bearing on this case because no question or conflict between OSHA and MSHA existed. We now know that the Secretary has consistently inspected the head drives under the Mine Act rather than the OSHA Act. As discussed above, Penelec had notice of this fact.

Penelec filed an appeal with the Third Circuit, and the Court affirmed the Commission's decision. Pennsylvania Electric Company v. FMSHRC, 969 F.2D 1501 (3rd Cir. 1992). The court upheld MSHA's authority to regulate coal handling and processing areas at an electric power generating station, and it further held that the cited work activity was clearly antecedent to and separate from the process of producing electric power, and instead, constituted coal preparation. The court observed that "it is clear that Penelec's head drives come under the Mine Act jurisdiction, regardless of whether the facility receiving the coal for processing is also under Mine Act jurisdiction. We need only look to MSHA's regulation of the conveyors leading to the coal cleaning facilities to reach the proper decision in this case" 969 F.2d 1504.

Westwood Energy Properties v. Secretary of Labor (MSHA), 11 FMSHRC 105 (January 1989), concerned a large culm bank refuse pile located in Tremont, Pennsylvania on property owned by Westwood Energy, the operator of a power generating plant located on the premises. The plant was built on the site of an anthracite mine that ceased operations in 1947, and the culm pile was created as the refuse product of the previously operated mine and preparation plant. The pile contained coal mine refuse, including rock, slate, shale, wood, metal, both ferrous and nonferrous, granite, quartz, pyrite, and a small percentage of coal and other carbonaceous material. Westwood used the material in the culm pile as fuel to generate electrical power which was sold to the Metropolitan Edison Company. Westwood engaged a

contractor to remove the material from the Culm bank and load it into hoppers where wood and other materials larger than 12 by 12 inches were removed. Metal was removed by means of a magnet and a metal detector. The culm material was then transported to a silo and crushed in two steps to a particle size of one-eighth of an inch. It was then transported to the combuster where it was burned in a process called a circulating fluidized bed process of combustion. This process resulted in steam which drove turbines and created electrical power.

On October 27, 1987, MSHA inspectors appeared at the Westwood site seeking entry to conduct an inspection. Westwood took the position that it was a power generation facility not subject to MSHA's jurisdiction, and it denied entry to the inspectors. MSHA obtained a restraining order permitting the inspection, and the inspectors returned on November 14, 1987, conducted an inspection, and issued several citations. At the time of the inspection, the work was being done by Westwood's contractor and its 30 to 35 employees, but Westwood was in overall charge, and except for the question of jurisdiction, it did not dispute the violations.

Commission Judge James Broderick found that Westwood's activities were subject to the Mine Act and to MSHA's jurisdiction, and he affirmed the citations. Judge Broderick reasoned as follows at 11 FMSHRC 111, 115-116:

> The Secretary of Labor is given the initial responsibility for determining whether a facility is subject to the Mine Act. She is in a unique position to determine the dividing line between MSHA and OSHA jurisdiction, since both programs are administered by her. I assume that the issuance of citations by MSHA to Westwood reflects the Secretary's determination that the subject facility is a mine and therefore is subject to the Mine Act. Although such a determination is not binding on the Commission, it must be accorded great weight in our consideration of the jurisdictional question.
>
> * * * * * * *
>
> Westwood argues that "it is a power plant, pure and simple"; that it utilizes a stockpile of fuel as a conventional power plant would use a stockpile of coal. It consumes fuel and does not produce a marketable mineral. Westwood's argument emphasizes the latter distinction as if the marketing of coal or other mineral is essential to the idea of mining or coal preparation. But it is not uncommon for mine operators to themselves consume the products of their mines. And Westwood does more than burn the culm material; it

> prepares it "for a particular use." Elam, supra: it extracts the culm from the bank and loads it into hoppers, where certain waste materials are removed; it then transports it on a conveyor belt where ferrous metals are removed by a magnet; thereafter a metal detector seeks other metals which are rejected. The residual fuel is then crushed or sized to particles approximately one quarter inch in size. All this takes place prior to the fuel being introduced into the boiler building. These activities closely resemble the "work of preparing the coal" as defined in the Act.
>
> I am persuaded that the sweeping definition of a coal or other mine in the Act, and the admonition in the Legislative History that the term be given the broadest possible interpretation brings Westwood's facility within its terms. Any doubt that the culm bank is or includes "lands . . . . structures, facilities, . . . or other property including impoundments, . . . on the surface or underground, used in, . . . or resulting from the work of extracting such minerals from their natural deposits . . ." must be resolved in favor of coverage.
>
> I am further persuaded that Westwood's use of the culm includes the work of preparing the coal, since it breaks, crushes, sizes, stores and loads anthracite, and does other work of preparing coal usually done by the operator of a coal mine.
>
> In both of these conclusions, I am giving deference to the determination by the Secretary of Labor that Westwood's facility and operation are subject to the Mine Act.

Westwood appealed Judge Broderick's decision to the Commission. Westwood Energy Properties v. Secretary of Labor (MSHA), 11 FMSHRC 2408 (December 1989). Westwood contended that its operations at the culm bank were but one component of an operation of an electric generating facility subject to the OSHA Act, rather than the Mine Act. The Secretary asserted mine Act jurisdiction in connection with Westwood's culm bank activities, but did not assert Mine Act jurisdiction with respect to the working conditions inside the power generating facility itself, and it took the position that those activities were subject to OSHA jurisdiction. Westwood maintained that the entire facility, including the culm bank, was properly regulated by OSHA.

The Commission found that Westwood's activities fell within the Mine Act's definitions of "mine" or "work of preparing the coal", and it concluded that the Secretary had statutory authority to make safety standards applicable to the disputed

area. However, the Commission was unable to conclude from the record whether the Secretary chose to exercise her authority to regulate Westwood's operation under the Mine Act or the OHSA Act, and it remanded the matter to Judge Broderick for the taking of further evidence and the entry of a new decision. In remanding the matter to Judge Broderick, the Commission stated as follows at 11 FMSHRC 2414-2415:

> We conclude that Westwood literally engages in the "work of preparing the coal" in that the processes undertaken by Westwood on the mine waste material, including coal, are among those specified in the statutory definition. We further conclude that although Westwood does not undertake to prepare the coal contained in the mine refuse to meet market specifications, it does engage in the enumerated processes, as does the normal coal mine operator, for the purpose of making the mined material suitable for a particular use; here, as a fuel to be consumed at an electric generating facility.
>
> Although Westwood further argues that it is exempt from Mine Act jurisdiction because it does not prepare the culm for resale but rather is the ultimate consumer of the culm, we rejected a similar "ultimate consumer" argument in Pennsylvania Electric. 11 FMSHRC at 1881. We noted that under the Mine Act consumers of coal who otherwise meet the applicable definition of "mine" or "work of preparing the coal" are not provided any per se exclusion from the Act's jurisdiction. We held instead that the determination of Mine Act jurisdiction is governed by the two part analysis first set forth in Elam and followed in subsequent cases. (footnote omitted).
>
> And, further at 11 FMSHRC 2419:
>
> * * * *As we did in Pennsylvania Electric, we encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OHSA-MSHA Interagency Agreement to resolve the conflicting positions taken on her behalf.

On August 3, 1990, Judge Broderick issued his decision on remand, 12 FMSHRC 1625 (August 1990), when he approved a settlement submitted by the parties. Westwood agreed to pay civil penalty assessments in settlement of the contested citations, and Judge Broderick dismissed the case subject to payment by Westwood. The decision summarizes the settlement as follows at 12 FMSHRC 1625:

> The settlement agreement provides that Westwood will withdraw its contest proceedings and pay the $900 in civil penalties assessed in my decision of January 26, 1989. It further provides that MSHA will not assert jurisdiction over Westwood's facility in the future, so long as Westwood does not materially change the manner in which it processes culm as described in the Commission decision. If MSHA determines that a material change has occurred and decides to reassert its jurisdiction, it will so notify Westwood. Westwood does not admit MSHA's jurisdiction over any portion of the Westwood facility and its withdrawal of the notices of contest is without prejudice to its right to contest any future assertion of jurisdiction by MSHA.

Air Products and Chemicals, Inc. v. Secretary of Labor (MSHA), 13 FMSHRC 1657 (October 1991), concerned an electric generating facility (Cambria CoGen) utilizing two combustion boilers with bituminous coal refuse as its primary energy source to power a steam turbine generator. Air Products operated the facility, and its primary business was the production and sale of electricity to the Pennsylvania Electric Company, and the production of steam for a local nursing home. Air Products was cited with a violation of section 103(a) of the Mine Act for refusing to allow an MSHA inspector to enter its facility for an inspection. The matter was adjudicated by Commission Judge Gary Melick, and the issues included whether or not the facility areas in issue were a "coal mine" within the meaning of the Act and therefore subject to MSHA jurisdiction, and if so, whether MSHA exercised its authority in a manner sufficient to displace OSHA's enforcement authority.

Judge Melick described the process taking place at the facility as follows at 13 FMSHRC 1658:

> The fuel is obtained from bituminous coal refuse piles located at a mine owned by RNS Services, Inc. (RNS), and supplied by RNS. The coal refuse is delivered by truck to the Cambria CoGen facility and dumped into a hopper at the refuse receiving building. The product then passes through a grizzly which screens out large objects, including rock, slate, timbers, roof bolts, and large pieces of coal. The product is then transported to a refuse storage building and then conveyed as need to the Bradford breaker building. It is there fed onto a rotating Bradford drum breaker which further screens and sizes the material for easier handling and to prevent damage to other equipment in the facility.

> The remaining minus-6 inch material then proceeds onto the C-1 belt to a refuse storage dome. A stacker distributes the piles and a reclaim machine places coal on another conveyor as needed. The C-2 belt then transports coal to the crusher building where screens separate minus-2 inch material. That material is then further crushed to one-quarter inch to zero-inch size with a roll crusher. This product is then conveyed to the boiler building storage facility, where it is stored until conveyed to the boilers by way of the boiler plant feed belt. The Secretary acknowledges that MSHA jurisdiction would not extend beyond the point where the coal product is dumped onto the plant feed belt. (Emphasis added).
>
> In addition to refuse coal, run-of-mine coal is used in the boilers to maintain a proper mix of combustibility. This coal is delivered by truck and transported by belt to the run-of-mine coal storage tepee. That material then proceeds to the crusher building where it is screened down to one-quarter inch by zero-inch size. The material is then fed to the boiler building but stored separate and apart form the refuse coal for later mixing as needed for the boilers.

Citing the statutory definitions of a "coal or other mine", Judge Melick concluded that the cited areas came within Mine Act jurisdiction, and he stated as follows at 13 FMSHRC 1661:

> Within this framework, it is clear that in at least a portion of the Cambria CoGen facility cited by MSHA in this case, coal refuse is broken, crushed, sized, and/or cleaned in preparation for consumption in the generating facility. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(i) of the Mine Act. It is also clear that the area at issue includes "structures," "equipment," and machinery" that are "used in or to be used in" the "work of preparing the coal." It is therefore clear that the areas cited in this case were indeed subject to Mine Act jurisdiction. In this regard it is also noted that Air Products acknowledges that the nature of the facility herein is essentially indistinguishable from the nature of the facility found by the Commission in Westwood Energy Properties, 11 FMSHRC 2408 (1989), to be within Mine Act jurisdiction.

Notwithstanding his jurisdictional finding, Judge Melick further concluded that the Secretary failed to clearly designate whether OSHA or MSHA should exercise regulatory authority over the working conditions at the Air Products facility, and he cited the Commission's prior discussions in the Westwood Energy and

Pennsylvania Electric cases. Judge Melick concluded that the record before him failed to reflect "a reasoned resolution of the jurisdictional questions by the Secretary and her agencies", and that MSHA's inspection of the facility "simply resulted from an **ad hoc** unilateral assertion of jurisdiction by MSHA". 13 FMSHRC 1663. Under all of these circumstances, Judge Melick vacated the contested citation issued to Air Products, and both parties appealed the matter to the Commission. The Commission granted review on November 15, 1991, 13 FMSHRC (November 1991), and the matter is still pending.

Petitioner's Arguments

In support of its motion for summary judgment in the instant cases, the petitioner maintains that the respondent's operations are subject to Mine Act jurisdiction under two separate statutory provisions. First, petitioner asserts that the respondent is an "operator" under section 3(d) of the Act because it is an "independent contractor . . . performing services" at a mine. Second, petitioner believes that the respondent is subject to the Act because an analysis of the functions it performs requires the conclusion that its entire operations preceding the entry of the gob into the plant building must be considered a "coal or other mine" under section 3(h) of the Act because its operations perform the "work of preparing the coal" under section 3(i) of the Act.

Petitioner points out that all of the contested citations and orders that are the subject of these proceedings were issued for violative conditions found on the North Branch Mine property. MSHA concludes that the operations taking place on North Branch's property clearly constitute "a coal or other mine" as that term is defined in section 3(h) of the Act, citing Secretary of Labor, MSHA, v. Westwood Energy Properties, 11 FMSHRC 2408 (1991) (culm bank is a "mine"); Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986) (coal refuse pile is a "mine").

Citing Secretary of Labor, MSHA v. Otis Elevator Co., 11 FMSHRC 1896 (October 1989), aff'd, 921 F.2d 1285 (D.C. Cir. 1990); National Indus. Sand Ass'n. v. Marshall, 601 F.2d 289 (3rd Cir. 1979); and Old Dominion Power Co., v. Secretary of Labor, 772 F.2d 92 (4th Cir. 1985), petitioner asserts that an independent contractor's proximity to the mining process, and the extent of its presence at the mine, are critical factors in determining whether an independent contractor is an "operator" under the Act. Petitioner further relies on the Commission's decision in Secretary of Labor, MSHA v. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1357 (September 1991), holding that an independent trucking company hauling a substantial amount of coal from a mine to an electric generating station was the exclusive coal hauler between the mine and the station, and that these services constituted essential services closely related to

the coal extraction process subjecting the trucking company to jurisdiction under the Act and to MSHA's enforcement jurisdiction.

Petitioner points out that the conveyor system operated and maintained by the respondent is the exclusive means of transportation for substantial amounts of gob from the mine refuse area to the plant which is the only customer for the gob. Under the circumstances, the petitioner concludes that the respondent's operations on the North Branch Mine property clearly perform an essential service for the mine. Petitioner further concludes that the extent of the presence of the respondent on the mine property must also be held to be clearly sufficient. In support of this conclusion, petitioner points out that the conveyor and related equipment have been continually present at the mine refuse area since their construction, and they are expected to continue their presence there for the next ten years. Further, the petitioner asserts that the respondent's employees must frequently and regularly enter on the mine property in order to clean the grizzly conveyor magnet each day, adjust the isolation gate in the end plate of the dozer trap, inspect, maintain, and repair the conveyor belt system, and clean up spills around the conveyor belts.

In support of its argument that the respondent is an "operator" because it operates, controls and supervises the coal mine operations of the power plant at that property, the petitioner asserts that the respondent's work activities preceding the entry of the gob into the power plant building are the same as those found by the Commission to constitute the "work of preparing the coal" in Westwood Energy Properties, supra. In support of this conclusion, the petitioner relies on the fact that the gob is excavated by bulldozers, then subjected to a series of filters to remove the larger particles. Because the plant uses the same circulating fluidized bed process as in Westwood to burn the gob, the gob is broken and crushed to a small uniform size no greater than one-quarter (1/4) of an inch. After the gob is cleaned through the use of magnets which removes the metal, it is stored in hoppers at the truck dump and in the crusher building, where it is gradually released into crushers. Under all of these circumstances, the petitioner asserts that the Westwood decision demands the conclusion that the processes undertaken by the respondent on the mine gob waste material, including coal waste, constitutes the "work of preparing the coal" because they are among the processes specified in the statutory definition.

The petitioner also relies on the Third Circuit's holdings in Pennsylvania Electric Co., supra, that the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation "usually done by the operator of a coal mine", 969 F.2d at 1503, and that this was true "regardless of whether

the facility receiving the coal for processing is also under Mine Act jurisdiction", 969 F.2d at 1504. Petitioner concludes that the Court's holding demands that the entire conveyor system outside of the power plant building be found to be a "coal or other mine", including the portion of the conveyor belt system operated and maintained by the respondent in the instant proceedings on mine property. Since the entire operations of the respondent, preceding the entry of the gob into the plant building, constitute the "work of preparing the coal" as defined in Section 3(i) of the Mine Act, petitioner concludes that these operations are a "coal or other mine" under Section 3(h) of the Act, and that it had jurisdiction under the Act to issue the citation and orders for the conditions found at the respondent's operations being conducted on the North Branch Mine property.

Respondent's Arguments

Citing the Mine Act statutory definitions of "coal or other mine" and the"work of preparing coal", the respondent asserts that it is clear from the definitions and the scope of the Act that a two (2) step analysis is applicable in determining whether its activities fall within the Act; namely, (1) which if any, of the enumerated processes apply to the respondent's operations, and (2) whether the enumerated processes are undertaken "as is usually done by the operator of a coal mine". The respondent believes the relevant issue is whether the coal is being prepared for commercial purposes. Citing the Commission's decision in MSHA v. Oliver M. Elam, Jr., 4 FMSHRC 5 (January 7, 1982), the respondent points out that the Commission recognized that the generally broad interpretation of the Act has certain limits, and that simply because an operator in some manner handles coal does not mean that its operations constitute a "mine" subject to the Act. The respondent further points out that the Commission has acknowledged that it is not sufficient to check-off whether the enumerated processes are being performed, and that the nature of the processes must also be considered.

The respondent asserts that the Commission followed the aforementioned two-step process in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), and Donovan v. Inland Terminals, Inc., 3 MSHC (BNA) 1893 (DC SD Ind., March 28, 1985), in determining whether the enumerated coal processes were being performed in order to release the coal into the chain of commerce. Respondent also cites the Pennsylvania Electric Company decision, supra, in support of its argument that the performance of listed work activities and the nature of the operation performing those activities are relevant in determining whether "coal preparation" is taking place.

Acknowledging the fact that the legislative history of the Act reflects that the statutory definitions should be given the broadest possible interpretation, the respondent concludes that

Congress never intended for ultimate consumers of coal, like the plant in question, to be regulated by the Act, and that the Congressional intent was to regulate only traditional mines, and to establish a single mine safety and health law applicable to all mining activity. Citing and quoting Commissioner Doyle's dissent in Pennsylvania Electric Company, 11 FMSHRC 2t 1889-1890, the respondent argues that there is no indication of any Congressional intent to "follow the coal wherever it may go" and to regulate other industries such as electric utilities or steel mills. The respondent maintains that coal-fired power plants have historically been regulated by OSHA rather than MSHA, even though the plants engage in many of the enumerated processes defined as the "work of preparing coal" under the Mine Act. Accordingly, the respondent concludes that the Act has consistently been construed as less than all-encompassing, and that Congressional acquiescence in this interpretation is conclusive evidence that MSHA's insistence that it has jurisdiction over the power plant in the instant proceedings is inconsistent with years of prior policy.

The respondent asserts that the applicable definitions of "coal mine" and "work of preparing the coal" at issue in these proceedings also apply to cases decided under the Black Lung Benefits Act, 30 U.S.C. § 901-945, a subchapter of the Mine Act. Citing several cases decided in the context of black lung disability claims, the respondent argues that unless a commercial purpose is involved, the phrase "preparation of coal" has no application. The respondent cites the case of Wisor v. Director, OCWP, 748 f.2d 176, 179 (3rd Cir. 1980), as a holding by this Commission that the definition of a coal mine "includes a commercial purpose requirement".

The respondent asserts that the Court majority in the Pennsylvania Electric Company case misconstrued the two black lung cases it relied on in reaching its decision. The respondent maintains that if the Commission accepts MSHA's contention that its operations constitute "the work of preparing coal" based upon the occurrence of the previously discussed enumerated processes, then the Commission must totally disregard any exception for the ultimate consumer of coal, a result that the respondent believes would extend Mine Act jurisdiction far beyond the point intended (quoting from the dissenting judge in the Pennsylvania Electric Company case).

The respondent further argues that reliance on an evaluation of the presence of enumerated processes without an assessment of the nature of the operation in terms of whether it is the ultimate consumer of the coal would require that at least that portion of any business which uses coal would be subject to the Act. The respondent concludes that an abandonment of the "ultimate consumer stream of commerce" test would not provide any reasonable guidance in future cases on the issue of where milling

preparation ends and manufacturing begins. Citing Old Dominion Power Company, supra, at 772 F.2d 99, the respondent further concludes that accepting the position of the petitioner with respect to MSHA's enforcement jurisdiction would also have potentially serious safety consequences. For all of the reasons noted, the respondent believes it is evident that its activities do not constitute the "work of preparing coal" as contemplated by the Mine Act, and that the Act is not applicable.

MSHA vs. OSHA Enforcement Jurisdiction

As an alternative argument, the respondent maintains that MSHA has failed to exert its regulatory authority in such a manner as would preempt OSHA jurisdiction. Citing Columbia Gas of Pennsylvania, Inc., v. Marshall, 636 F.2d 913, 915-16 (3rd Cir. 1980), the respondent maintains that in order to preempt OSHA's jurisdiction, MSHA must specifically show that it has exercised its authority by promulgating regulations in the disputed area, and that these concurrent regulations cover specific "working conditions" purportedly within OSHA's jurisdiction.

The respondent asserts that a review of the regulatory history regarding the power plant in question fails to demonstrate that the Secretary of Labor has consistently and unequivocally exercised authority under MSHA. The respondent points out that even if one were to presume that MSHA has promulgated regulations which apply to its operations, in the totality of the circumstances existing at the time the subject citations and orders were issued, it could not reasonably have been known that it was subject to regulation under MSHA. In support of its position, the respondent cites the following:

1. The April 17, 1979, MSHA OSHA Interagency Agreement, drawn up to apprise facilities of the limits of MSHA jurisdiction, cited facilities closely related to traditional mining activities as examples of facilities included within MSHA jurisdiction, and the issue of jurisdiction over coal handling at electric plants was not specifically addressed.

2. In a November 29, 1985, Motion to Dismiss filed with the Commission in Utility Fuels, Inc., Docket No. CENT 85-89, Counsel for the Secretary represented that:

   "MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite a particular memorandum incorporating this policy, MSHA and its predecessors have

consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power and that the power plant process is more feasibility regulated by OSHA." 969 F.2d 1501, 1515 (3d. Cir. 1992).

3. On January 31, 1989, OSHA issued proposed Rule 29 C.F.R.1910, relating to Electric Power Generation, Transmission, Distribution and Electric Protective Equipment. In the proposed Rule, OSHA stated that the rule was intended to cover work practices at "[f]uel and ash handling and processing installations such as coal conveyors and crushers." 54 Fed. Reg. 4973-5024 (Jan. 31, 1989).

4. On January 28, 1989, at oral argument in Westwood Energy Properties v. Secretary of Labor, MSHA, 11 FMSHRC 2408 (Dec. 1989), counsel for the Secretary stated that coal consumers such as steel mills and aluminum plants may be subject to the Mine Act jurisdiction if they engage in coal processing activities. However, even though Westwood did engage in such activities, MSHA settled the case and declined to assert jurisdiction. (MSHA has refused to settle the present dispute in a similar manner.)

5. During construction of the plant in question in these proceedings, plant officials met with OSHA representatives to discuss the functions of plant and compliance with applicable OSHA regulations.

6. The plant in question in these proceedings was constructed in compliance with OHSA standards and specifications, and OSHA asserted jurisdiction over the plant by conducting inspections.

7. In August, 1991, MSHA inspected the dozer trap and portion of the conveyor system which is located on Island Creek Coal Company's property for the first time. At that time, the dozer and the conveyor system were being

operated by Wiley Construction Incorporated. This inspection was the result of an individual inspector's decision to carry out the inspection after having being asked about it while inspecting the North Branch Mine, and it was not the result of any Secretarial policy decision, nor the result of any MSHA/OSHA agreement at the District Manager level pursuant to the Interagency Agreement, nor the result of any decision by the MSHA District Manager that such an inspection was within MSHA's jurisdiction.

8. On September 5, 1991, counsel for North Branch Partners wrote to OSHA's Area Director requesting that a jurisdictional determination be made pursuant to the MSHA/OSHA Agreement that OSHA had inspection and enforcement jurisdiction over the power plant in question. A response was received on April 8, 1992, indicating that both MSHA and OSHA would have jurisdiction over the power plant and that MSHA's jurisdiction would stop at the property line. The respondent does not believe that the OSHA response was a definitive response to counsel's inquiry as contemplated by the OSHA/MSHA Interagency Agreement.

9. In between the time of the requested OSHA determination noted in paragraph eight (8), and the response thereto, MSHA again inspected the power plant's dozer hopper and the portion of the conveyor system located on Island Creek property, and one citation and four orders were issued by MSHA on February 26, and 27, 1992.

10. At the time the subject citations and orders were issued by MSHA, no official Department of Labor policy existed which assigned coal handling and processing activities undertaken by an electric utility to MSHA's jurisdiction. In fact, the inspectors who actually issued the citations and orders were and are themselves unsure of the limits of their jurisdiction, as evidence by the fact that their inspections stopped at what they perceived to be the property line even though the coal handling and processing activities undertaken above the property line were

essentially the same as those undertaken below the property line.

11. Before the last two orders which are at issue in these proceedings were issued on May 12, 1992, and August 27, 1992, respondent's counsel specifically requested counsel for the Secretary to apprise it of the status of interagency negotiations regarding whether MSHA or OSHA would have jurisdiction over the operations conducted by the respondent . Such information was sought through the discovery process in this case, and the Secretary objected, based on a "interagency predecisional deliberative process privilege." The respondent concludes that the Department of Labor had not (and still has not) made up its own mind which agency, MSHA or OSHA, should regulate the activities of the respondent.

12. The respondent points out that while insisting that it has jurisdiction over the coal handling processes and the conveyance of coal at the plant in question, MSHA has not asserted jurisdiction over similar operations which are regulated by OSHA. As an example, the respondent asserts that similar coal handling and conveyor processes and procedures at the AES Beaver Valley Power Plant (as documented by a videotape, Exhibit F), are regulated entirely by OSHA and not MSHA.

The respondent also cites the following relevant deposition testimony of MSHA'S inspectors: (1) Inspector Darios' admission that MSHA does not inspect power plants but does inspect the conveyance system that transport coal to some power plants; (2) Inspector Ryan's admission that MSHA inspects coal delivery processes going to the Mt. Storm Power Plant, but asserts no jurisdiction once the coal is delivered; (3) Inspector George's admission that he had never been in a power plant until the day prior to his deposition when he toured the plant in question in these proceedings, and his belief that MSHA has a duty to inspect any coal handling or conveyance procedures that are similar to those at the plant; and (4) Inspector Fetty's admission that he had never inspected any power plant previous to his inspections in these cases, and that his prior power plant inspections were of the systems that delivered the coal to the plant.

The respondent believes that it has been given conflicting signals about its obligations under the Mine Act, and it

concludes that the evidence does not demonstrate that it knew when the citations and orders were issued that its operations were subject to MSHA citation. Further, since the Secretary has failed to issue the findings of his interagency negotiations with respect to MSHA/OSHA jurisdiction, the respondent concludes that "the regulatory confusion highlighted by this case has yet to be resolved". The respondent further concludes that the Secretary's position in these proceedings is unreasonable in that it leaves the plant operator in the position of being required to guess what the Secretary's regulatory position will be on any given day, and that position, may, in fact, vary in different areas of its operation.

The respondent further contends that overlapping authority by MSHA and OSHA at the plant would result in inconsistent standards mandating significant differences in the design of equipment, and employee work safety rules and training. Under the circumstances, and assuming that MSHA has jurisdiction, the respondent suggests that before any citations and/or orders can be upheld, the Secretary must provide a clear statement regarding the jurisdictional limits for prospective enforcement. In support of this position, the respondent cites Air Products and Chemicals, Inc., supra, where Judge Melick vacated a citation because the Secretary failed to clearly designate whether MSHA or OSHA should exercise regulatory authority.

In conclusion, the respondent acknowledges that deference is to be accorded interpretations by the agency charged with enforcing a law. However, in the instant proceedings, the respondent takes the position that the Secretary is not entitled to such deference because his attempts to assert jurisdiction over electric power generating plants, or to put the operators of such facilities on notice of liability under the Mine Act, did not occur until the late 1980's, well after the 1978 effective date of the Act. Further, the respondent believes that it is clear from the record in these proceedings that the first efforts toward inspecting its facilities came from a single inspector, and subsequently his District Manager in 1991, and there is no indication that their efforts represent the Secretary of Labor's interpretation of the Act. Because the Secretary of Labor's interpretations are both late in coming and inconsistent, the respondent asserts that any deference that would ordinarily be due the Secretary in interpreting the Act is not appropriate in this instance. Accordingly, the respondent suggests that even assuming that Mine Act jurisdiction attaches, the citations and orders should nonetheless be vacated.

Findings and Conclusions

The Jurisdictional Question

These proceedings are the result of MSHA's inspection of that portion of the gob conveyor belt that extends approximately 300 to 500 feet on to the North Branch Mine and preparation plant owned by Island Creek Coal Company and operated by its affiliate, the Laurel Run Mining Company. Although the respondent asserts that the mine and preparation plant are no longer in operation, it is undisputed that the mine was operational at the time the MSHA inspectors conducted their inspections and issued the violations. The mining operation included the aforesaid portion of the belt, a preparation plant, and the refuse and gob pile, all of which were within the confines of the mine, and not on property owned by the respondent or the owners and operators of the power plant.

It does not appear from the record before me that the respondent has any ownership interest in the power plant, plant equipment, the conveyor belt, or the gob that is transported from the North Branch Mine gob pile to the power plant site. Based on the available information, including the undisputed facts, the respondent has a continuing services agreement with NB Partners Ltd., the partnership entity that constructed and manages the power plant, to provide the labor and material for operating the plant and servicing and maintaining the belt conveyor system. The respondent has approximately 150 similar service contracts worldwide. The Island Creek Coal Company, the Laurel Run Mining Company, and NB Partners Ltd., are not parties in these proceedings, and the civil penalty proceedings were initiated against the respondent United Energy Services, Inc.

Section 4 of the Mine Act provides as follows: Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervisors a coal or other mine or any independent contractor performing services or construction at such mine." (Emphasis added).

MSHA's Independent Contractor regulations, which provide certain requirements and procedures for contractors to obtain MSHA identification numbers, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c): "'Independent Contractor' means any person, partnership, corporation,

subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *"

The Commission's decision in Secretary of Labor, MSHA, v. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1357 (September 1991), summarizes the basis for coverage of independent contractors under the Act.

> Section 3(d) of the Mine Act expanded the definition of "operator" previously contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), to include "any independent contractor performing services or construction at such mine." The legislative history of the Mine Act demonstrates that the goal of Congress in expanding the definition of "operator" was to broaden the enforcement power of the Secretary to reach a wide range of independent contractors, not just owners and leases. The Report of the Senate Human Resources Committee explained that the definition of operator was expanded in order to "include individuals of firms who are . . . engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process . . . ." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (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 o 1977, at 602 (1978) (Legis. History.")
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> The Conference Report likewise explained that the expanded definition "was intended to permit enforcement" of the [Mine] Act against independent contractors "performing services or construction and "who may have a continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. at 1315. The Commission has consistently recognized that the inclusion of independent contractors in the statutory definition reflects a Congressional purpose to subject such contractors to direct MSHA enforcement under the Mine Act. [Citation omitted].

In Otis Elevator Company, (Otis I), 11 FMSHRC 1896 (October 1989), and Otis Elevator Company, (Otis II), 11 FMSHRC 1918 (October 1989), aff'd, 921 F.2d 1285 (D.C. Cir. 1990), the Commission affirmed two decisions by the presiding Judges holding that an elevator service company that inspected, serviced, and maintained a mine elevator under a contract with the mine operator was an independent contractor "operator" subject to the Act and to MSHA's enforcement jurisdiction. The Commission

affirmed the Judges' findings that Otis had a continuing, regular, and substantial presence at the mine site performing services on an elevator which was a key facility and essential ingredient involved in the coal extraction process. In making its determination, the Commission reviewed the case laws regarding independent contractors, including National Indus. Sand Ass'n v. Marshall, 601 F.2d 289 (3rd Cir. 1979), and Old Dominion Power Co. v. Secretary of Labor, 772 F.2d 92 (4th Cir.), relied on the expanded definition of "operator" found in the Act, and examined the independent contractor's proximity to the extraction process and the extent of its presence at the mine to determine whether the independent contractor was an operator under the Act. This same analysis is relevant and appropriate in these proceedings.

I conclude and find that the operations taking place at the North Branch Mine property, when the violations were issued, including the mine preparation plant and refuse or gob pile, constitute a "coal or other mine" as that term is defined in section 3(h) of the Act. Secretary of Labor, MSHA v. Westwood Energy Properties, supra; Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986). Respondent's material handling supervisor James Bowman, confirmed that the gob that is transported to the power plant over the conveyor belt system is a waste product from the coal (Deposition, Tr. 91). Plant Manager Robert Seavey, who is employed by the respondent, acknowledged that the "mine extraction" process takes place at the North Branch mining facility, and that the gob, or refuse, is the by-product of the mined coal after it has been processed through the mine preparation plant, and that the respondent accepts the gob or refuse material, from Island Creek Coal Company (Deposition, Tr. 44, 54, 59).

The undisputed facts reflect that the gob that is transported by the conveyor belt system to the power plant is the product of coal mining which has taken place at the North Branch Mine. After the sale of the marketable mined coal, the remainder is transported to the mine refuse pile from the mine preparation plant. The gob is sold to NB Partners Ltd. by Laurel Creek Mining Company, and it must meet certain essential contract specifications. The bulldozers used at the gob pile to facilitate the loading of the gob onto the conveyor belt for transportation to the power plant are owned by either island Creek or Laurel Run, and the bulldozer operators are employees of Laurel Run.

According to Mr. Seavy, the respondent entered into the services agreement in the fall of 1988, had employees in place at the facility in the fall of 1989, and that substantial completion of the plant took place in late spring of 1991, when the conveyor belt system began transporting the gob from the pile to the plant. The gob pile extends for a distance of one mile, and it

is estimated that the conveyor belt system will supply the power plant for at least the next ten years. The gob is provided exclusively to the power plant for its use in generating electricity, and the exclusive means of transporting the gob is by the conveyor system in question.

Mr. Seavy's deposition testimony confirms that the respondent maintains and services the conveyor belt system pursuant to the continuing services agreement with NB Partners Ltd. (Tr. 16-17). Although Mr. Seavey denied an contractual relationship between the respondent and owners and operators of the North Branch Mine (Island Creek and Laurel Run), he testified that the respondent is authorized to operate the conveyor belt on Island Creek's property as part of the continuing services agreement. Although "he's been told" that an easement has been granted, he has never seen it in writing (Tr. 21-22).

The deposition testimony of respondent's material handling supervisor, James Bowman, whose duties include the supervision of sixteen (16) material handlers employed by the respondent, establishes that these employees perform maintenance on the belt conveyor and associated equipment, such as the dozer trap, on a regular basis, and that the work includes the greasing of bearings and belt conveyor rollers, and making repairs to the belt as necessary (Tr. 23, 60, 62, 90). Mr. Bowman testified that he visually observes the dozer trap door once every two weeks, that at least one or two employees work in that area, and they would observe the trap door every day, and that all of the 16 employees working for him take turns working at the dozer feeder and trap areas (Tr. 28-30). He confirmed that the respondent's employees clean up the spills from the conveyor belt at the refuse pile area (Tr. 64). He also confirmed that as the gob material is used up as gob feeding is taking place at the bottom of the gob pile, the dozer trap will be moved up the conveyor line, and it will eventually reach the power plant property line in approximately 10 years (Tr. 88-98).

In view of the foregoing, I conclude and find that at the time the violations were issued in these cases, the respondent had a continuing presence on the North Branch Mine property performing services at that mine. Although the respondent's presence at the mine was by virtue of its service contract with NB Partners, Ltd., rather than Island Creek or Laurel Run Mining Companies, the owners and operators of the mine, I find nothing to rebut the strong inference that the respondent's presence on mine property had the approval of Island Creek and Laurel Run. Indeed, the additional posthearing discovery by the parties reflected the existence of an unsigned easement agreement between Laurel Run and NB Partners, LTD., which was apparently not adopted in lieu of the services agreement. In any event, notwithstanding the absence of any contractual relationship between the respondent and Laurel Run or Island Creek, I still

conclude and find that the respondent had a continuing presence at the North Branch Mine performing services at that mine within the meaning of section 3(d) of the Act, at the time the violations were issued.

In addition to the respondent's continuing presence at the North Branch Mine, I conclude and find that there is a sufficient nexus between the work and services performed by the respondent with respect to the operation of the conveyor belt system, including the servicing, repairing, cleaning, and maintaining the belt system, and the coal extraction and coal processing and stockpiling that have taken place at the mine preparation plant, and the gob refuse pile. The services performed by the respondent are essential, not only to the power plant that depends on a steady supply of gob to fuel its boilers, but they are also essential to, and closely connected with, the extraction of the coal that is processed through the mine preparation plant and rendered into a saleable product that produced income for Island Creek and Laurel Run. Since the power plant is the only customer for the gob, and is dependent on delivery by the conveyor belt system in question, the exclusive means of transporting the gob from the mine refuse pile to the power plant, it is essential that the conveyor belt system be maintained in serviceable condition in order to insure a regular supply of fuel for the power plant. Without the delivery of a steady supply of fuel over a dependable and well-maintained belt conveyor system, it seems obvious to me that the power plant will not stay in business very long, and Island Creek and Laurel Run could conceivably lose its sole customer to whom it sells its gob.

On the basis of the foregoing findings and conclusions, and after careful consideration of the arguments advanced by the parties, I conclude and find that at the time the violations were issued to the respondent at the North Branch Mine property, the respondent was an independent contractor performing services at that mine pursuant to section 3(d) of the Act, and it was accordingly subject to the jurisdiction of the Act as well as the inspection and enforcement jurisdiction of MSHA while performing these services on mine property.

The respondent's suggestion that MSHA is confused and has not yet made up its mind as to where its jurisdiction lies is not well taken, and it is rejected. I take note of the fact that in response to an inquiry of June 25, 1992, from the respondent's plant manager Robert E. Seavey, MSHA's District Manager, Ronald L. Keaton, advised Mr. Seavey by letter dated July 13, 1992, that "MSHA's position is that you are under our jurisdiction any time that you are working on coal mine property".

I have carefully reviewed the depositions of MSHA Inspectors Darios, Fetty, Wilt, and George, and I find no evidence of any confusion on their part with respect to the areas they were to inspect while at the North Branch Mine. Although Inspector Darios mentioned some confusion created by information supplied by an Island Creek employee as to whether or not the conveyor belt was on mine property, and Inspector Fetty mentioned a "controversy" generated by his inability to obtain any definitive information from Island Creek as to who was in charge of the refuse pile, all of the inspectors apparently knew that their inspections were to be confined to mine property and that they were not to venture beyond a certain property "boundary line" delineated by a foot bridge which marked the dividing line between mine property and power plant property. Further, the depositions of Supervisory Inspector Barry Ryan and Inspector Wilt, the individual who initially inspected the refuse area, reflects that they were not confused as to the metes and bounds of their inspection and enforcement jurisdiction on mine property. There may have been some confusion as to where mine property may have begun and ended, who owned the equipment, or whether a piece of equipment was on or off mine property, but I find no confusion about the fact that MSHA's inspection jurisdiction terminated at the power plant property line and that this was clear to the inspectors, as well as to the respondent.

The respondent's position seems to be that the entire belt conveyor system, as one self-contained piece of equipment, is part and parcel of the power plant and not subject to MSHA's inspection and enforcement jurisdiction. Such a notion is rejected. Although MSHA's inspectors have inspected the North Branch Mining operations, as well as that portion of the conveyor belt located on mine property, the inspections have stopped short of the point where the belt bisects the property line separating mine property and the power plant property. Further, the issue as I view it, is whether or not the respondent, as an independent contractor "operator" pursuant to the act, may be held accountable and liable or violations and penalty assessments for violations occurring in the course of its contractor work performed on mine property. I have concluded that the answer to this question is "Yes".

The respondent's assertion that MSHA has not established that it has preempted OSHA's jurisdiction is not well taken and it is rejected. It seems clear to me that MSHA has always exercised its inspection and enforcement jurisdiction over all mining activities taking place at the North Branch Mine, and has issued violations to Island Creek Coal Company as well as a previous contractor (Wiley Construction Co.) for violations on mine property. It also seems clear to me that MSHA exercised its inspection and enforcement jurisdiction in these proceedings when it issued the violations for conditions observed by the inspectors on mine property and that it is seeking civil penalty

assessments for those violations, rather than any violative conditions observed and cited on power plant property.

Insofar as the power plant property is concerned, particularly with respect to whether MSHA or OSHA will exercise jurisdiction, the record reflects that negotiations are still taking place pursuant to the OSHA-MSHA Interagency Agreement, and the petitioner asserts that it has specifically refrained from exercising jurisdiction over any power plant facilities on plant property until a decision is reached pursuant to the Agreement. Pending that determination, the petitioner concludes that the facts presented in these proceedings establish that the cited violative conditions were and are under MSHA's jurisdiction, and that the respondent should be held accountable and liable for the violations and the proposed civil penalty assessments for those violations.

The petitioner asserts that in addition to being an independent contractor performing services at a mine, the respondent is also a mine operator in its own right pursuant to the Act because it operates, controls, and supervises the coal mine operations of the power plant at the North Branch Mine Property. The petitioner views that portion of the conveyor belt located on the North Branch Mine property, together with the remainder of the belt conveyor system transporting the gob to the power plant, and the associated equipment used to process the gob as it moves on its way to the power plant along the conveyor belt system, to be a coal mine operation that provided the jurisdictional basis for the issuance of the violations.

It would appear from the facts in these proceedings that the processing and treatment of the gob material that is transported from the North Branch mining operation over the conveyor belt system to the power plant is subjected to the same type of pre-burning processes as were presented in the Westwood Energy Properties and Pennsylvania Electric Company cases, supra. However, unlike those cases, where the civil penalty proceedings were initiated against the power plant owners and operators for violations on plant property, MSHA, in the instant proceedings, issued the violations for conditions found off power plant property, and has instituted penalty proceedings against the respondent as an independent contractor and not against NB Partners Ltd., the power plant owner. Further, although the respondent suggests that it is an electric utility, I find no evidence that it has any ownership interest in the power plant or its equipment, and it would appear that the true ownership of the utility lies with NB Partner Ltd., or the bank that apparently holds the mortgage, none of whom are named as parties in these proceedings. Under these circumstances, I do not find it appropriate or necessary to expand my jurisdictional finding

beyond my conclusion that the respondent is an independent contractor subject to the Act and to MSHA's enforcement jurisdiction.

The Alleged Violations

Docket No. WEVA 92-916

This case concerns a section 104(d)(1) citation and three section 104(d)(1) orders issued on February 26, 1992, alleging violations of the equipment guarding requirements found in mandatory safety standards 30 C.F.R. § 77.400(a), (c), and (d).

In its answer of August 17, 1992, to the petitioner's civil penalty proposals, the respondent stated that it did not contest the violations but did contest MSHA's jurisdiction over its operations. The respondent made the same responses in its August 17, 1992, replies to the petitioner's interrogatories.

In its response of August 31, 1992, to the petitioner's request for an admission that the description of the conditions or practice upon which the citation and orders are based, as stated in sections 8 and 15 of the citation and orders ("Condition or Practice" and "Area or Equipment"), are true and accurate, the respondent replied that it did not contest the citation or orders and only contested MSHA's enforcement jurisdiction (Admission No. 12). In response to several requests for admissions with respect to the inspectors gravity, negligence, "S&S", and unwarrantable failure findings (Admission Nos. 13 through 18), the respondent simply incorporated by reference its response to Admission No. 12, which states that "United Energy does not contest the citation and/or orders. United Energy contests MSHA's assertion of jurisdiction."

In a facsimile letter of September 1, 1992, to the petitioner's counsel regarding the consolidation of Docket Nos. WEVA 92-916, WEVA 92-961, and WEVA 92-1045, respondent's counsel stated part as follows:

> This is to memorialize our recent telephone conversations regarding consolidation of the above-referenced petitions. You and I have agreed that it is logical to consolidate the three (3) petitions <u>because United Energy is contesting jurisdiction rather than the underlying citations and/or orders</u>. Therefore, I will file a motion to consolidate as soon as possible. Also, because the discovery responses in case 961 would be essentially identical to the responses already made in case 916, I do not plan to file responses to the Secretary's First Request for Admissions, Second Request for Production or Secretary's Second Set of

Interrogatories in case 961. If you have any objections to the foregoing, please notify me as soon as possible. (emphasis added).

In its April 1, 1993, opposition to the petitioner's summary judgment motion, the respondent states as follows with respect to each of the violations:

United Energy does not dispute that on February 26, 1992, three employees of United Energy were shoveling at the number two gob conveyor belt tailpiece while the guarding was removed from the tailpiece along the roadside. Further, United Energy does not dispute MSHA Inspector Joseph W. Darios' evaluations as set forth in blocks 10.A, 10.B and 10.D and of said citation. (Citation No. 3120276).

United Energy does not dispute that on February 26, 1992, the rear tailpiece guard of the grizzly tail pulley operated by United Energy, was not in place and was exposing the roller or pulley at the rear, with the rear tailpiece guard lying on the ground behind the belt assembly. (Order No. 3120277).

United Energy does not dispute that on February 26, 1992, a side guard of the grizzly belt tail pulley operated by United Energy was not provided, and was exposing the roller or pulley at the side. (Order No. 3120277).

United Energy does not dispute the evaluations of Inspector Joseph W. Darios' contained in blocks 10.A, 10.B, and 10.D of Order No. 3120277.

United Energy does not dispute that the cover guard for the grizzly gob feeder chain drive operated by United Energy was not in place and was exposing the chain drive sprockets and chain drive located at the rear side of the grizzly belt assembly near the tailpiece with the rear tailpiece guard lying on the ground behind the belt and assembly as set forth in Order No. 3120278.

United Energy does not dispute the evaluations of MSHA Inspector Joseph W. Darios contained in blocks 10.A, 10.B and 10.D of Order No. 3120278.

United Energy does not dispute that on February 26, 1992, guarding for Gob Movable 1 conveyor belt take-up pulley operated by United Energy did not extend a sufficient distance sufficient to prevent contact by and/or injury to persons, with the rear side of the

tail pulley at the side being exposed approximately six (6) inches past the guarding provided and permitting contact at the pinch point of the roller and belt, as set forth in Order No. 3120279.

United Energy does not dispute the evaluations of MSHA Inspector W. Darios contained in blocks 10.A, 10.B and 10.D of Order No. 3120279.

Despite its statements that it does not dispute the inspector's gravity findings that there was a reasonable likelihood of permanently disabling injuries affecting one to three miners as a result of the cited conditions or practices, the respondent states that it still disputes the inspector's "S&S" determinations associated with each of the violations on the ground that its activities do not constitute "work of preparing the coal" as contemplated by the Act. The respondent also disputes the inspector's determinations that each of the violations resulted from the respondent's unwarrantable failure to comply with the cited standards.

Docket No. WEVA 93-97

In this case the respondent is charged with a violation of MSHA's mandatory training regulation at 30 C.F.R. § 48.25(a), after MSHA Inspector Kerry L. George determined that material handler Stanley Dragovich, "a new surface miner employed by the contractor since April 1991", and who was maintaining the beltlines at the mine site, had not been given training. Citing section 104(g)(1) of the Act, the inspector ordered the removal of the cited employee from the mine. The inspector's gravity findings reflect that an injury was "reasonably likely", that the injury could reasonably be expected to be "permanently disabling" and that one (1) person was affected. The inspector concluded that the cited violation was "significant and substantial" (S&S), and that it was the result of "high negligence.

In its answer of January 27, 1993, to the petitioner's proposal for assessment of civil penalty, the respondent admitted that the cited individual did not have MSHA training, and it admitted that the order was issued. However, the respondent specifically stated that it contested the order in its entirety, as well as the findings and determination of the inspector.

In a January 27, 1993, motion to consolidate this docket with Docket Nos. WEVA 92-916, WEVA 92-961, and WEVA 92-1045, the respondent stated that it did not contest the fact that the order in question was issued, but that it did contest jurisdiction as well as the determinations and findings of the inspector.

On March 8, 1993, the respondent filed its responses to certain discovery requests for admissions served by the petitioner. Requested admission No. 8, stated as follows:

> The descriptions of the conditions or practices upon which each of the citation(s) and/or order(s) that are at issue in this case are based, as set forth in each of the citation(s) and/or order(s) under Section 8, "Condition or Practice", and Section 15, "Area or Equipment", are true and accurate.

In its response, the respondent stated as follows:

> United Energy admits that Stanley Dragovich was not given MSHA training. However, United Energy believes that Mr. Dragovich was adequately trained for his job at a power plant employee. Further, because United Energy does not believe that MSHA's assertion of jurisdiction over this facility is proper, it does not believe Mr. Dragovitch needed MSHA training. Further, United Energy states that the facility was built and has been operated in compliance with OSHA requirements. Moreover, United Energy asked for an interagency determination of whether MSHA or OSHA has jurisdiction over this facility in a September 5, 1991, letter from its counsel, Ricklin Brown, to Stanley Elliot. (This letter has previously been provided to the Court an to counsel MSHA). No definitive response has ever been received.

In response to certain requests for admissions concerning the inspector's gravity, "S&S", and "high" negligence findings, the respondent replied "Denied. See response to Request No. 8". The respondent gave the same answer with respect to Admission Request No. 14, requesting the respondent to confirm that the order was the result of an unwarrantable failure. However, I take note of the fact that the order in question was issued as a section 104(g)(1) order rather than a section 104(d) unwarrantable failure order.

In its April 1, 1993, opposition to the petitioner's summary judgment motion, the respondent does not dispute that the cited employee, Stanley Dragovich, a material handler in its employ since April, 1991, was maintaining the belt lines at its operation without receiving the required MSHA training. However, the respondent does dispute the inspector's gravity and negligence findings on the ground that it has consistently maintained that it is not subject to MSHA's jurisdiction, and that the cited employee was adequately trained for his job and has not been injured or suffered any work-related illness. Further, notwithstanding the fact that the order was not issued as a section 104(d) unwarrantable failure order, the respondent

denies any unwarrantable failure violation and maintains that it is insulated from such a finding because of its consistent and good faith jurisdictional arguments.

In a footnote at page two of it summary judgment motion, the petitioner asserts that it served its request for admissions on the respondent within 20 days of the filing of its penalty assessment proposal as provided for in Commission Rule 29 C.F.R. § 2700.55(A), but that the respondent did not respond within the 15 days provided for in Rule 57, 29 C.F.R. § 2700.57. Under the circumstances, the petitioner asserts that the admissions are admitted and conclusively established. In support of this position, the petitioner relies on the procedural regulations at 29 C.F.R. § 18.20(b) and 18.20(e).

The petitioner's reliance on the cited regulations found in 29 C.F.R. § 18.20(b) and 18.20(e), are without merit. Those regulations apply to matters before that Department of Labor's Administrative Law Judges and they are not binding on this Commission's Judges. Commission Rule 57, which has since been replaced by Rule 58, 29 C.F.R. § 2700.58(b), effective May 3, 1993, did not provide for adoption of proposed admissions where the responses are untimely filed. The present Rule 58(b), authorizes the presiding Judge to order a longer or shorter time for responding to admissions, and any matter that is in fact admitted is conclusively established for the purpose of the pending case unless the Judge, on motion, permits a withdrawal or amendment of the admission. However, since I find no evidence of any prejudice to the petitioner because of the late responses by the respondent, the petitioner's arguments ARE REJECTED, and its suggestion that its proposed gravity and negligence admissions should be deemed to be conclusively established are likewise REJECTED.

WEVA 92-961

In this case, the respondent was charged with a violation of MSHA's mandatory training regulation at 30 C.F.R. § 48.25(a), on February 27, 1992, after MSHA Inspector Phillip Wilt observed three of the respondent's employees the previous day working near moving conveyor belts on Island Creek Coal Company property without first receiving "no less than 24 hours of comprehensive training". The inspector considered the cited employees to be "a hazard to themselves and others", and citing the training requirements of section 115 of the Act, and section 104(g)(1) of the Act, he ordered the withdrawal of the three employees (Craig W. Knotts, Randy Rohrbaugh, and Homer Fletcher). The inspector's gravity findings reflect that an injury was "reasonably likely", that the injury could reasonably be expected to be "permanently disabling", and that three (3) persons were affected. The inspector also concluded that the cited violation was

"significant and substantial" (S&S), and that it was the result of "high" negligence.

In its initial answer of August 21, 1992, to the petitioner's civil penalty proposal, the respondent took the position that it was an electric utility subject to OSHA, rather than MSHA, jurisdiction, and stated that "it does not contest the violation".

In its responses of August 21, 1992, to the petitioner's initial interrogatories, the respondent stated it intended to contest MSHA's jurisdiction and did not intend to contest the citation or order. In response to certain questions concerning the special "significant and substantial" (S&S) finding associated with the citation, the respondent answered "N/A". In responding to the petitioner's discovery requests, the respondent made the following general statement that is included in all of its responses in these proceedings:

> By responding to the discovery requests, United Energy does not concede the relevance of any matter at issue in any of the Secretary's Interrogatories, does not agree to the admissibility in evidence of any information or document provided, and expressly reserves all evidentiary objections to the time of hearing in this proceeding.

On September 14, 1992, the respondent filed a motion to consolidate Docket Nos. WEVA 92-916, WEVA 92-961, and WEVA 92-1045, and stated that although it contested MSHA's jurisdiction, it did not contest the violations which gave rise to the proposals for assessment of civil penalties. This statement was repeated again by the respondent when it filed a motion on January 8, 1993, to compel the petitioner to answer its discovery requests and to continue the scheduled hearings.

In its April 1, 1993, opposition to the petitioner's motion for summary judgment, the respondent states that it does not dispute that three of its employees, Craig W. Knotts, Randy Rohrbaugh, and Homer Fletcher, were working near moving belts which were part of its opertation without receiving MSHA training.

The respondent disputes the inspector's gravity findings, and it takes the position that the cited employees have always been adequately trained for their jobs with the respondent and have not suffered any job related accidents or injuries despite working in the cited area for some time before MSHA's inspection. For these same reasons, the respondent also disputes the inspector's "high negligence" finding. In addition to its claim that the employees were trained, the respondent asserts that since it believed in good faith that MSHA lacked jurisdiction

over its operations and that MSHA training was not required, it was not negligent in failing to provide MSHA training for the cited employees.

The respondent also disputes "the Secretary's assertion that the violation cited in Order No. 3120293 issued under section 104(d) of the Mine Act was caused by the unwarrantable failure" of the respondent to comply with the cited standard. The Secretary's assertion is erroneous. The disputed order was not issued pursuant to section 104(d) of the Act, and it is not an "unwarrantable failure order". The order simply served as the statutory mechanism for removing the untrained personnel from the cited mine area, and the petitioner's civil penalty proposal is based on the alleged violation of the training requirements found in the cited mandatory regulation at 30 C.F.R. § 48.25(a).

WEVA 92-1045

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.502, for failing to conduct monthly electrical examination of the electrical components of the belt lines at the refuse pile located on mine property. The inspector's gravity finding reflects that an injury was "reasonably likely", that the injury could reasonably be expected to result in "lost workdays or restricted duty", and that one (1) person was affected. The inspector concluded that the violation was "significant and substantial" (S&S), and that it was the result of "high" negligence,"unwarrantable failure" by the respondent.

At page 33 of its Motion for Summary Judgment, the petitioner states as follows:

> As for the question of the validity of the citations and orders and the correct civil penalty to be applied, all facts relating to these questions, except for those arising from Docket No. WEVA 92-1045, were admitted by the respondent. As for the facts arising from Docket No. WEVA 92-1045, the Respondent's Answer acquiesces in the facts underlying the order contained therein, with the motion to consolidate and other documentation reiterating this agreement. No motion to Amend Answer having been filed, no facts have been disputed in Docket No. WEVA 92-1045 other than those regarding jurisdiction.

In its answer of September 10, 1992, the respondent stated that it did not contest the violation. However, it challenged MSHA's jurisdiction, and claimed that it was an electric utility subject to OSHA jurisdiction. In its subsequently filed motions for consolidation and enforcement of its discovery requests, the

respondent again stated that it did not dispute the violation which gave rise to the civil penalty proposal filed by the petitioner.

In its opposition of April 1, 1993, to the petitioner's motion for summary judgment, the respondent stated that it does not dispute that it had not conducted the required MSHA monthly electrical examination of the electrical components of the belt lines at its operation. I take note of the fact that the respondent's statement does not specifically address that portion of the order which states that the cited belt lines "were on mine property and were the responsibility of the contractor".

The respondent disputes the inspector's gravity findings. It also disputes the inspector's "high" negligence and unwarrantable failure finding on the ground that its consistent jurisdictional position and good faith belief that it was not subject to Mine Act jurisdiction insulates it from such findings.

In support of summary judgment in its favor, the petitioner asserts that except for Docket No. WEVA 92-1045, the respondent has admitted to all of the facts relating to the validity of the citations and orders that are in issue in Docket Nos, WEVA 92-916; WEVA 92-961, and WEVA 93-97. With respect to WEVA 92-1045, the petitioner maintains that the respondent's answer and other documentation reflects the respondent's acquiescence in the facts underlying the order, and that the respondent has disputed no facts other than those regarding jurisdiction. The petitioner concludes that there are no genuine issues of any material facts in any of these cases, except for disputes regarding the application of the law to these facts, and that summary judgement is appropriate.

I agree with the petitioner's position that the respondent has opted not to contest the conditions or practices cited as violations of each of the cited mandatory safety standards. Indeed, it seems clear to me from the pleadings filed in these matters, including the answers and the discovery responses filed by the respondent, as well as its admissions filed as part of its arguments in opposition to the petitioner's summary judgment motion, that the respondent does to deny the existence of the conditions or practices cited by the inspectors as violations.

Apart from the respondent's admissions concerning the cited conditions and practice, I have reviewed and considered the deposition testimony of the inspectors who issued the violations in these proceedings. In Docket No. WEVA 92-916, Inspector Darios testified as to the facts and circumstances that prompted him to issue the four guarding violations (No. 3120276, Tr. 56-57, 72-73, 86-87, 89-91; No. 3120277, Tr. 99-104;

No. 3120278, Tr. 108-109; No. 3120279, Tr. 112-113). The cited mandatory guarding regulations, sections 75.400(a), (c), and (d), require that tail pulleys and similar exposed moving machine parts be guarded, that all guards be securely in place while the machinery is being operated, and that conveyor drive, head, and tail pulley guards extend a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

In Docket No. WEVA 93-97, Inspector George testified that he observed Mr. Dragovich arrive at the gob area in a truck owned by "the power plant", and he determined that Mr. Dragovich came to the gob area to inspect the conveyor belt that was on mine property. Mr. Dragovich informed Mr. George that he worked for the respondent, and when asked about his training, Mr. Dragovich informed Mr. George that he last received training when he worked for Island Creek as an underground miner (Tr. 73-74). Since Mr. George found no evidence that Mr. Dragovich had received any MSHA surface mining training, he issued the order in question (Tr. 83-84).

Supervisory Inspector Ryan, who accompanied Mr. George during his inspection, testified that contractor personnel who work in surface areas of underground mines for any period in excess of five days are required to have MSHA comprehensive training. If such employees had worked underground, they would have to receive 40 hours of comprehensive training, or hazard training (Tr. 35, 86, 89). Mr. Ryan testified that he was with Inspector George when he issued the training violation concerning Mr. Dragovich. Mr. Ryan stated that Inspector George observed Mr. Dragovich at the gob area, and asked him if he had any training. Mr. Dragovich informed Mr. George that he had previously worked for Island Creek and had some training in that job, but had not received any miners' training "since approximately two years ago" (Tr. 107). Island Creek then summoned Mr. Bowman to the area, and he could produce no training records for Mr. Dragovich (Tr. 107).

In Docket No. WEVA 92-1045, Inspector George testified that after conducting an inspection of Island Creek's preparation plant, its heavy equipment, the railroad, and the gob pile, he asked to see the electrical examination records, but that the respondent's representative, Jim Bowman, and Island Creek's representative, Tom Lobb, could not produce them (Tr. 43). Mr. George stated that Mr. Bowman contended that MSHA had no jurisdiction over the respondent, and confirmed that the electrical examinations were not being conducted (Tr. 51). The cited mandatory regulation section 77.502, requires frequent examination of electric equipment, and record keeping of such examinations.

In Docket No. WEVA 92-961, Inspector Wilt testified that in the course of an inspection at the mine site on February 27, 1992, he issued citation No. 3120293 after determining that three of the respondent's employees working near the conveyor belt on mine property had not received the required MSHA training. Mr. Wilt confirmed that these were the same three employees cited by Inspector Darios the previous day, February 26, for shovelling at the belt tailpiece with the guarding removed (Tr. 33-34). Mr. Wilt stated that he issued the violation after the respondent's representative, Mr. Bowman, could not produce any training records for the employees in question (Tr. 36). Mr. Wilt also considered the fact MSHA training was required for any contractor employee doing work on Island Creek's mine property (Tr. 37).

Inspector George testified that at the time of his May 12, 1992, inspection, he asked Mr. Bowman about the training violation previously issued by Inspector Wilt, and inquired as to whether it had been abated. Mr. Bowman informed him that the respondent's management was of the view that it did not have to provide MSHA training, and that the prior order issued by Mr. Wilt had not been abated. (Tr. 54-55). Mr. George then informed Mr. Bowman that until the cited personnel were trained they could not work in the area, and Mr. Bowman made no comment other than to indicate that "he was not complying because there was a dispute over jurisdiction" (Tr. 56).

In view of the foregoing, I conclude and find that the evidence and testimony of record in these proceedings establishes that the cited conditions or practices as described by the inspectors on the face of the citation and orders in question constitute violations of the cited MSHA mandatory safety and training regulations. Accordingly, the violations ARE AFFIRMED.

With respect to the "significant and substantial" (S&S), and "unwarrantable failure" issues presented in these cases, I reject the petitioner's suggestions that the respondent has capitulated on all of these issues and that its admissions with respect to the citation and orders should be adopted as absolute proof that all of the violations were significant and substantial and resulted from an unwarrantable failure on the part of the respondent to comply with the cited mandatory standards. Having carefully reviewed all of the pleadings filed in these proceedings, I cannot conclude that the respondent intended to waive its right to litigate the special findings made by the inspectors with respect to the violations.

The Unwarrantable Failure Issues

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Energy Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Docket Nos. WEVA 92-961 and WEVA 93-97

As noted earlier, the orders issued in these cases are not unwarrantable failure orders pursuant to section 104(d) of the Act, and the arguments advanced by the parties on this issue are irrelevant and inapplicable.

Docket No. WEVA 92-916

Inspector Darios testified by deposition that in the course of his inspection on February 26, 1992, he spoke with fellow inspector Phillip Wilt who informed him that he had issued citations and orders for miners shoveling around the belt in different areas with the guards removed during prior inspections. Mr. Darios confirmed that the prior citations and orders were issued to Island Creek Coal Company and that Mr. Wilt had spoken to Island Creek's management about the matter (Tr. 73). Mr. Darios also confirmed that no representative of the respondent accompanied him during his inspection on February 26, and that the events of that day were "really vague" (Tr. 84-85).

Mr. Darios confirmed that he observed the three cited employees (3120276) simply drive up and begin shoveling after removing the side belt guard, and that this activity lasted approximately five minutes (Tr. 89). He concluded that this was a "common practice" because of "the way that it was performed" and the number of citations and orders previously issued by Mr. Wilt (Tr. 92). He explained his "high negligence" and unwarrantable failure findings as follows at (Tr. 93-96):

> A. When management is aware -- been made aware of hazardous conditions, they are to take action to correct, prevent, or eliminate those hazardous conditions or practices from their mining operation. From the apparent attitude, just perceived, of these miners just driving up and pulling off a guard and shoveling, it was like there was nothing wrong with it. That was part of management's accepted practice.
>
> * * * * * * * *
>
> A. Where serious hazards are involved, and it becomes, in my opinion, blatant disregard for the safety and health of miners, then there is a high degree of negligence. That is strictly my opinion.

Mr. Darios did not know whether or not the respondent in these proceedings had been previously cited by Inspector Wilt. Mr. Darios stated that it was his understanding that the management of the Wiley Construction Company and the respondent's management had changed in name only, but he could not recall who informed him of this (Tr. 94). He confirmed that a meeting was held with Island Creek's management when the citation was abated, and that the citation was subsequently changed to reflect that it was served on the respondent rather than Island Creek. Mr. Darios also commented that the contractor management system was "a mess" and that "I can't understand the whole framework of this management system (Tr. 97).

With regard to the cited unguarded grizzly tail pulley order (3120277), Mr. Darios stated that he based his order on the fact that Mr. Wilt had earlier informed him that people were removing guards and shovelling the belts and that "it was becoming more and more evident at that time that people were not having any regard to guarding belts on this particular belt line, or areas of the pulleys or drives" (Tr. 100). Mr. Darios did not know whether or not any management representative of the respondent was present after he issued his initial citation and continued his inspection (Tr. 100). Mr. Darios also confirmed that no one was working in the immediate cited area, and he could nor recall observing anyone working in that area earlier in the day (Tr. 102).

Mr. Darios stated that he based his section 104(d)(1) order on the previously issued section 104(d)(1) citation and his belief that routine daily safety checks of the belt equipment were not being made so that conditions such as those he observed could be discovered and corrected (Tr. 105). When asked to explain the meaning of "the unwarrantable series", Mr. Darios responded "Knew, or should-have-known of conditions by the operator" (Tr. 106). Mr. Darios confirmed that "management" assigned someone to replace the guards in order to abate the order, but he could not recall whether an Island Creek employee or an employee of the respondent replaced the guards (Tr. 107).

With regard to the order citing the unguarded grizzly feeder chain drive sprockets (3120278), Mr. Darios stated that he did not clearly remember the conditions, but after referring to his notes, he confirmed that the guard was laying on the ground beside the chain drive area (Tr. 108). He based his "high negligence" finding on "repeated findings of guards being removed or missing, and not in position", and he stated that "this refers back to the 104(d)(1) citation" (Tr. 110).

With regard to the order citing a conveyor belt pulley that was not sufficiently extended to prevent contact with persons (31202279), Mr. Darios stated that "based on the number of violations that I had already issued previously on guarding that

day, I was almost to the point of frustration and ridiculousness, as far as I was concerned, to the extent that the guarding was being let go. And I felt that it was very unwarrantable on management's part to permit that" (Tr. 113).

Inspector Edwin Fetty's deposition testimony reflects that he began an electrical inspection at Island Creek's mine site in August, 1991. Mr. Fetty stated that on August 5, 1991, he was at the mine with Inspector Wilt and they met with Jim Lemons, Island Creek's maintenance and electrical supervisor, and that Mr. Wilt and Mr. Lemons accompanied him during his inspection on that day (Tr. 13). Mr. Fetty stated that he issued a belt citation (3316749) that day to Island Creek, but that someone mentioned that Wiley Construction was the responsible party (Tr. 17-19). Mr. Fetty stated that the citation was issued for failing to replace a belt drive unit guard that had been removed (Tr. 23).

Supervisory Inspector Barry Ryan testified by deposition that Island Creek Coal Company had received unwarrantable failure citations prior to Inspector Wilt's encounter with contractors at Island Creek's gob pile on July 30, 1991 (Tr. 49, 52). Mr. Ryan alluded to a conference held by Mr. Wilt with Island Creek concerning MSHA's Repeat Violation Reduction Program (RVRP) (Tr. 52). Mr. Ryan stated that he and Mr. Wilt met with Island Creek Coal personnel and "some contract people from Wiley Construction" at the refuse pile on July 30, 1991, and he confirmed that they discussed MSHA's jurisdiction of the conveyor belt line and an imminent danger order that Mr. Wilt had issued (Tr. 57-60). Mr. Ryan stated that he was informed that Wiley Construction operated the belt line at that time (Tr. 63).

Mr. Ryan stated that he and Mr. Wilt returned to the site on August 5, 1991, for additional inspections, and Inspector Fetty was also there for an electrical inspection (Tr. 77). Mr. Ryan confirmed that Mr. Wilt issued several citations to Island Creek Coal Company, and that several citations were subsequently modified to show Wiley Construction as the responsible party (Tr. 80). Mr. Ryan confirmed that discussions were held on August 5, 1991, with Wiley Construction's maintenance foreman concerning the guarding violations issued by Inspector Wilt (Tr. 83-84). Mr. Ryan stated that Island creek repeatedly maintained that Wiley Construction was responsible for maintaining the conveyor belts, and that he observed Island Creek and Wiley Construction personnel working together trying to locate a belt guard that had been removed (Tr. 90).

Inspector Wilt testified that he initially inspected Island Creek's North Branch mining operations on July 30, 1991, and issued an imminent danger order and citation to Island Creek after observing a bulldozer operating too close to a backhoe while pushing material on the gob pile. Mr. Wilt observed "a contractor's employee" working in the area where the backhoe was

loading material, but he didn't know the identity of the contractor. He could not recall any hazards associated with the work being performed by the contractor employee, and he issued no violations to the contractor that day. He also observed some missing conveyor drive and rotor guards but did nothing about that on July 30 (Tr. 5-12).

Mr. Wilt stated that he continued his inspection on August 5, 1991, and issued two citations to Island Creek Coal company for lack of audible backup alarms on a front-end loader and a refuse truck (Tr. 13-15). He also issued a citation to Island Creek after determining that the backhoe operator Dale Miller, an Island Creek employee, had not received the 24-hour surface mining training after being transferred from his underground job (Tr. 15-17). He issued seven additional citations to Island Creek, but they were subsequently modified to show the Wiley Construction Company as the responsible party after he determined that Wiley Construction had a contractor ID number on file in the MSHA Morgantown office (Tr. 17, 20). Mr. Wilt alluded to several missing conveyor guards, but he provided no further details concerning these citations, and his testimony is devoid of any further information concerning these prior citations, and copies of these violations were not provided as part of the record in these proceedings.

Respondent's plant manager Robert Seavy testified by deposition that Wylie Construction Company was hired by Energy America, the plant developers, to design and install the plant conveyor belt system which is the same system now maintained and serviced by the respondent United Energy Services, Inc. However, Mr. Seavy stated that there have been no relationships in the past two years between Wylie Services and the respondent, and he did not know who owned Wylie Construction (Tr. 15-16). He was not aware of any Wylie Construction directors serving as directors of the respondent's company, and he indicated that only one or two of the respondent's employees previously worked for Wylie Construction (Tr. 17-18).

Respondent's material handling supervisor James Bowman testified by deposition that he was hired by the respondent on September 15, 1990, and that the Wylie Construction Company was already on-site constructing the conveyor system. He was responsible for overseeing the construction work at that time (Tr. 12). He confirmed that the respondent's employees are responsible for repairs and maintenance of the completed belt conveyor system, including "any repairs that need to be done - - - like the structure, the greasing of the rollers" (Tr. 62). He also confirmed that the respondent's employees are responsible for cleaning all main conveyor belt spills "from the refuse area down to the truck dump" as well as spills on the gob movable one conveyor belt (Tr. 64).

Mr. Bowman testified that he was overseeing the belt construction work when Wylie Construction was cited by MSHA in July an August, 1991, and he was aware that the inspectors issued the violations and that Wylie Construction was working on the belt that time (Tr. 101-102).

After careful review and consideration of all of the aforementioned evidence and testimony of record in these proceedings, I conclude and find that it does not support the unwarrantable failure findings made by the inspector. The inspector's belief that an unwarrantable failure finding may be supported by a "Knew, or should-have-known" standard falls far short of the "aggravated conduct" standard enunciated by the Commission in its controlling decisions. Further, I find no credible, reliable, or probative evidence to support the inspector's unsupported opinions and conclusions that the respondent United Energy Services, Inc., intentionally engaged in or condoned a common practice of removing belt guards while the equipment was in operation. On the contrary, it would appear to me that any such practice was carried out by Island Creek Coal Company and Wylie Construction Company. In the absence of any evidence that Wylie Construction and United Energy Services had common ownership or management, I cannot conclude that the respondent here should be held accountable for any aggravated conduct by another contractor or mine operator who are themselves subject to the Act and to MSHA's enforcement jurisdiction. Under all of these circumstances, the section 104(d) (1) citation and section 104(d)(2) orders issued by Inspector Darios ARE VACATED, and they all modified to section 104(a) citations.

WEVA 92-1045

With respect to Inspector George's unwarrantable failure finding in connection with the respondent's failure to conduct the required electrical inspections of the belt conveyor components that were on mine property, Mr. George stated that during every prior mine inspection that he conducted in early 1991 or 1992, he was accompanied by Island Creek personnel. He confirmed that he did not contact any representative of the respondent before starting his May 12, 1992, inspection. However, he did speak with respondent's representative, Jim Bowman, and Island Creek's representative, Tom Lobb, and they could not produce any records of any electrical examinations for his review (Tr. 42-43). Mr. George stated that he informed Mr. Bowman that Inspector Fetty had previously cited the same violation and that Island Creek had taken the position that the contractor was responsible for the belt line. Mr. Bowman informed Mr. George of his opinion that the respondent's operations were not under the jurisdiction of MSHA (Tr. 44). Mr. George confirmed that the violation was abated after Island Creek's certified electrician performed the required electrical examination.

Mr. George stated that Mr. Bowman indicated to him that he did not believe that MSHA should be inspecting the respondent's operation, and that he informed Mr. Bowman that he did have the authority to inspect the operation on mine property and issued the violation to the respondent and to Island Creek (Tr. 45). He confirmed that Mr. Bowman told him that the electrical inspections were not being conducted, and Mr. George proceeded to issue the order. It was terminated within a half-hour after an Island Creek Coal Company certified electrician conducted an electrical examination (Tr. 52). Mr. George "conferenced" the order with Mr. Bowman and discussed the fact that other citations and orders had been issued for the lack of electrical inspections (Tr. 54).

Mr. George made reference to a previously issued section 104(d)(2) Order No. 3720849 issued to Island Creek Coal Company for not conducting electrical examinations on certain trailers and portable generators (Tr. 49-50). Mr. George's inspection notes reflect that power was established to that equipment on May 7, 1992, and that the order was issued as a "non-"S&S" order. However, the order is not a matter of record in this case. I take note of the fact that Mr. George's order of May 12, 1992, cites the previously issued guarding Order No. 3120277, issued on February 26, 1992, by Inspector Darios, as the underpinning for his May 12 order.

Mr. George stated that the failure to conduct the required electrical examinations was previously brought to the attention of the respondent's personnel and he believed that "it was a condition that was continuing" (Tr. 60). Under the circumstances, Mr. George concluded that the violation was the result of "high" negligence by the respondent and warranted a section 104(d) order (Tr. 61).

I have reviewed the deposition testimony of MSHA electrical inspector Edwin Fetty, and apart from the previous guarding citation that he issued on August 5, 1991, I find no testimony regarding any prior citations or orders that he may have issued regarding the failure to conduct electrical examinations, and the petitioner has not submitted any evidence of any such prior violations being served on the respondent in these proceedings.

After careful review of all of the evidence and deposition testimony in these proceedings, I cannot conclude that it supports the inspector's unwarrantable failure finding. In short, I cannot conclude that the petitioner has proved that the violation in question was the result of any "aggravated conduct" on the part of the respondent in this case. Under the circumstances, the section 104(d)(2) order issued by Inspector George IS VACATED, and it is MODIFIED to a section 104(a) citation.

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).

With regard to guarding Violation No. 3120276, concerning the three cited employees shoveling at the No. 2 gob conveyor belt tailpiece with the guarding removed, Inspector Darios believed that if the unguarded pulley were to contact a shovel it would "cause the shovel to slip and strike somebody. It is a tight position, it can cause you to be drug under the belt by holding onto the shovel handle. If they slip, it could drag them into the belt and permanently diable, crush, or kill them" (Tr. 91). In response to a question as to why he believed that an injury was "reasonably likely". Mr. Darios responded as follows at (Tr. 91):

> A. If the condition is permitted to continue, and if people are permitted to continue to shovel the belts without guards, the probability increases that somebody is going to get caught into, slip into, or caught by, based upon history and nature of mining.

In response to a question as to why he found that an injury could reasonable be expected to be permanently disabling. Mr. Darios stated as follows at (Tr. 92):

> A. Again, that is where the person who gets caught in it is not going to be able to get himself out. If the shovel handle flips back and hits him in the eye or some particular part of the body, it can dismember him. It can poke his eye out. I he gets caught in it, it could take his hand, his arm, or his entire body into it.

In response to a question asking him to explain the basis for his "S&S" determination with respect to the violation, Mr. Darios stated as follows at (Tr. 93):

> A. Any time that a condition exposes a miner to a degree of hazard that would possibly cause him permanently disabling injury, and is reasonably likely to occur then it would be significant and substantially hazardous to him.
>
> Q. That is based upon your previous training, experience, and your knowledge of the MSHA requirements?
>
> A. Based on my experience in mining, period, ma'am.

I agree with the inspector's "S&S" finding with respect to the three employees shovelling at the gob conveyor tailpiece with the guarding removed. The inspectors's notes, which are a part of the record in this case, include a sketch which places the

three employees in close proximity to the unguarded tailpiece, and they corroborate his testimony that the three employees simply drove up to the belt, removed the guard, and started shovelling while the belt was running. Given the fact that there were three people in what appears to be a relatively small area, I believe it would be reasonably likely that in the course of shovelling, and while attempting to stay out of each other's way, or through inattention, one or more of the shovels would contact the exposed piece of equipment in question. If this were to occur, I believe that it would reasonably likely result in an injury. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

With regard to the unguarded grizzly belt tail pulley, violation No. 3120277, Mr. Darios testified that his notes reflected that there was a ten-inch opening, 30 inches long, at the rear and one side of the grizzly that was not guarded. He described the area as "a tight area where a person can slip and get their feet in, or if they are cleaning, be caught in with a shovel. It is just a tight area where you can really get pinched or caught" (Tr. 101). He confirmed that he observed no one shovelling with the belt running, and he observed no one in the cited area when he observed the condition. However, he did observe someone cleaning, but could not recall whether it was earlier or later during the work shift (Tr. 102). Mr. Darios explained his gravity and "S&S" findings as follows at (Tr. 104-105):

> A. Based upon what I had seen previously on this shift, people just removing guards and shovelling, I would presume that people would walk in there and start shoveling just like they would in any other belt pulley or drive in the mine.
>
> Q. So that is why you made the reasonably likely designation for illness or injury?
>
> A. Yes ma'am.
>
> Q. Is that also why you made designation B, that permanently disabling injury or illness was reasonably expected?
>
> A. Similar condition, similar expectancy of occurrence.
>
> Q. Tell me why you said that this was a significant and substantial situation?
>
> A. The same. Based on the degree and nature of the injury that occur.

Q. You indicate under block 10-B that the number of person affected is one, but your notes indicate that no one was shoveling in this area at the time. How did you arrive at the indication for 10-B.

A. One would be - without having anybody exposed, you would normally suppose that one person would be assigned to work kin this area because it is tight.

For the reasons stated in my affirmance of the inspector's "S&S" finding with respect to citation No. 3120276, I conclude and find that the inspector's "S&S" finding with respect to Order No. 3120277, was warranted, and it IS AFFIRMED.

With regard to the unguarded feeder chain drive sprockets and chain, Violation No. 3120278, Mr. Darios stated that if anyone working in the area were to slip or fall, the unguarded sprocket "will drag them in a hurry, and they can't get away from it" (Tr. 108). He stated that a bulldozer operator and a backhoe operator were "in close proximity" to the area earlier, but they were not in the "immediate area" (Tr. 108). He believed that the cited condition posed a hazard to these two individuals, as well as "anybody that would be working in that area to clean the belt or to do work around the belt" (Tr. 109). His inspection notes reflect that the cited area had bottom irregularities, "a close fit in tight area, approximately 2 feet wide by guard", and Mr. Darios noted his concern over other employees simply driving up and removing guards in order to cleanup while the belt was running.

Although I am not totally convinced that the bulldozer operator or backhoe operator were close enough to the unguarded feeder sprocket to pose a hazard to them, Mr. Darios believed that they were used on several occasions to clean up around that area. Further, Mr. Bowman testified that the respondent's employees are responsible for cleaning and maintaining the belt in question, and it would appear that one or more of these employees would be in the area. Given the bottom irregularities in the area, and the rather confined work area adjacent to the unguarded sprocket, I believe that it would be reasonably likely that someone would contact the exposed and unguarded sprockets and chain with a shovel, or with his hand or other body part if he were to slip. If this were to occur, I further believe that it would be reasonably likely that serious injuries would result. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

With regard to Violation No. 3120279, for an inadequately guarded gob belt take-up pulley, Mr. Darios explained his gravity findings as follows at (Tr. 113, 117-118):

A. The exposure of the pulley, again, without sufficient length guarding, and based on the number of violations that I had already issued previously on guarding that day, it was almost to the point of frustration and ridiculousness, as far as I was concerned, to the extent that the guarding was being let go. And I felt that it was very unwarrantable on management's part to permit that.

Q. Would your testimony be the same regarding the gravity designations that you made as the explanations that you have given earlier?

A. Yes, ma'am.

I cannot conclude that the evidence in this instance supports the inspector's "S&S" finding. I have reviewed the inspector's notes with respect to this violation, and I take note of a notation by the inspector that the unguarded pinch point that concerned him was six-and-one feet above ground level. In the absence of further evidence, I cannot conclude that it was reasonably likely that anyone could have contacted the exposed area that concerned the inspector. Further, the explanation offered by the inspector in support of his gravity finding speaks more to the respondent's negligence rather gravity. Under the circumstances, the inspector's "S&S" finding IS VACATED, and the violation IS MODIFIED to a non-"S&S" violation.

WEVA 92-961

Inspector Wilt's deposition is devoid of any relevant testimony concerning his special "S&S" finding associated with the three untrained employees who were cited on February 27, 1992. Although Inspector George alluded to the violation, he simply indicated that three individuals whose names he could not remember, and who he identified as "maintenance personnel for the belt line", were not provided with training (Tr. 55). Under the circumstances, I conclude and find that the evidence presented it this case does not establish that the violation in question was "S&S", and the inspector's finding is this regard IS VACATED. The violation IS MODIFIED to a non-"S&S" violation.

WEVA 92-1045

Inspector George believed that the failure to conduct the electrical examinations was an "S&S" violation and would reasonably likely result in an injury because "any fault could be there without their realizing it, and an injury could occur" (Tr. 58). He confirmed that no one was working in the areas where the electrical belt components were located, and he did not know whether any examinations had been conducted pursuant to any

OSHA regulations. He further confirmed that he found no problems with any of the electrical belt components, and he conceded that he observed no conditions that would result in a fatality or permanently disabling injury. However, he believed "that there could be a shock or a burn injury", and that one individual would normally be working in the cited area. He identified that individual as "cleanup, maintenance, or whatever" (Tr. 59-60).

I cannot conclude that the inspector's "S&S" finding is supportable. Although I have found that a violation occurred, and would agree that it is possible that anyone contacting a faulty piece of electrical equipment could suffer injuries, there is no credible or probative evidence to support any reasonable conclusion that it was reasonably likely that someone would be injured as a result of the violation in this case. None of the electrical components are identified or explained, and there is no evidence that any of the cleanup or maintenance personnel would be in close proximity to any of the components that may not have been examined. Further, Mr. George found nothing wrong with those components, and although he mentioned shock and burn injuries, I find no evidence to support the reasonable likelihood of such injuries. Under all of these circumstances, the inspector's "S&S" finding IS VACATED, and the violations IS MODIFIED to a non-"S&S" violation.

WEVA 93-97

Inspector George testified that after finishing his inspection of the Island Creek preparation plant on August 27, 1992, he went to the gob area and observed Mr. Dragovich "working in that area". Mr. George stated that Mr. Dragovich had come to the area in a truck owned by "the power plant" to inspect the beltline at the gob area. Mr. Dragovich informed Mr. George that he worked for the respondent, and when asked about his training, Mr. Dragovich informed Mr. George that he last received training when he worked for Island Creek as an underground miner (Tr. 73-74).

Mr. George concluded that Mr. Dragovich's lack of surface training could reasonably likely result in an injury because "the man had not received any type of surface training. He could run into a situation that he was not familiar with, and an accident could occur" (Tr. 80). Mr. George confirmed that he made a gravity finding of "lost work days or restricted duty", and he observed nothing that would lead him to conclude that Mr. Dragovich's lack of surface training would result in a fatality or permanently disabling injury. He also stated that Mr. Dragovich's lack of knowledge of surface situations could result in a "minor accident", and he based this opinion on the fact that he found no other violations at the dozer hopper or belt area where he observed Mr. Dragovich. Mr. George confirmed that he was aware of the fact that Mr. Dragovich had previous

underground mining experience, and had worked for the respondent since April 1991, with no problems, injuries, or accidents (Tr. 81-84).

I cannot conclude that the evidence of record supports any conclusion that Mr. Dragovich's lack of MSHA training constituted a significant and substantial violation. I find no credible or probative facts to support any conclusion that the lack of training would reasonably likely result in injuries to Mr. Dragovich or others. At the time that the inspector observed Mr. Dragovich he had apparently driven by the conveyor in a truck visually observing the beltline and that he got out of his truck when he reached the gob pile area. Given the fact that Mr. Dragovich had worked for the respondent in surface areas for over a year, had previous mining experience, and had never encountered any safety difficulties on the job, I cannot conclude that his lack of MSHA training would place him or others at risk. Under the circumstances, the inspector's "S&S" finding IS VACATED, and the violation IS MODIFIED to a non-"S&S" violation.

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

The petitioner asserts that during the last few months of 1992, and after the citation and orders in these cases were issued, the North Branch refuse area was split from the North Branch Mine I.D. renamed North Branch Fuel Supply, and given I.D. No. 46-08253. However, it is still operated by the Laurel Run Mining Company.

The petitioner states that the underground portion of the North Branch Mine has merged into Potomac Mine, I.D. No. 46-04190, a mine that it connects with underground, and that North Branch Mine is now called the North Portal of Potomac Mine, is under the I.D. number of Potomac Mine, and is still operated by Laurel Run. Further, the petitioner states that the surface area of the North Branch Mine and the North Branch Preparation Plant have remained under the I.D. number of the North Branch Mine, I.D. No. 46-04190, and are being shut down, with the coal and refuse from the North Portal of Potomac Mine being sent elsewhere, and that Island Creek Coal Company is the operator for I.D. No. 46-04190 while the operations are being closed down. The petitioner concludes that these differences have no effect on the issues in these proceedings since the citation and orders were issued while active operations were taking place at the North Branch Mine, North Branch Preparation Plant, and the North Branch Refuse area.

The petitioner states that the respondent has 65 employees at the plant site and that its operations require approximately 135,200 annual work hours. Petitioner concludes that this constitutes a medium-sized operation. I agree.

The petitioner takes the position that payment of the proposed civil penalty assessments of $2,900, for all of the violations in these proceedings will not adversely affect the respondent's ability to continue in business. Although the respondent has conceded as part of its admissions in these cases that payment of the proposed penalties will not adversely affect its ability to continue in business, it takes the position that being subject to MSHA's enforcement jurisdiction could impact on its ability to continue in business.

In a contested civil penalty case the presiding judge is not bound by the penalty assessment regulations and practices followed by MSHA's Office of Assessments in arriving at initial proposed penalty assessments. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. § 820(i), and the information relevant thereto. Shamrock Coal Co., 1 FMSHRC 469 (June 1979); aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company; 5 FMSHRC 287, 292 (March 1983). As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir., 1984).

It seems obvious to me that the respondent would rather be regulated by OHSA rather than MSHA. However, the fact that an operator must spend money to bring its operations into compliance with MSHA's safety and health standards, or fails to budget money for paying penalties, is no basis for not imposing civil penalty assessments for proven violations. See: J & C Coal Corporation, 8 FMSHRC 799 (May 1986); Town of Canandaigua, 2 FMSHRC 2154 (August 1980). The respondent's suggestion that subjecting it to MSHA's enforcement jurisdiction may adversely affect its ability to continue in business IS REJECTED. This argument could be raised by any mine operator or contractor who is not too enchanted with being regulated by MSHA, and who would prefer to be regulated by OSHA, as "the lesser of two evils". The respondent is free to present evidence that payment of any particular proposed civil penalty assessment may adversely affect its business. However, in the instant proceedings, I cannot conclude that the payment of the penalties that I have assessed for the violations in question will adversely affect the respondent's ability to continue in business.

History of Previous Violations

The petitioner has confirmed that the respondent has no history of previous violations. I adopt this as my finding and conclusion on this issue.

Good Faith Abatement

The petitioner asserts that the violations were abated in good faith within the times set for abatement. The abatement information reflects that the grizzly gob feeder chain guard was replaced in two hours (Order No. 3120278); the rear tailpiece pulley guard was replaced and a new side guard was installed in two hours (Order No. 3120277); the conveyor belt take-up pulley was expanded a distance sufficient enough to prevent contact by and/or injury to persons within 1 1/2 hours (Order No. 3120279); and that the electrical inspection was completed and recorded by a certified person within 35 minutes.

Gravity

Based on my "S&S" findings and conclusions with respect to the violations in these proceedings, I conclude and find that the guarding violations 3120276, 3120277, and 31202778, issued by Inspector Darios were serious violations. I further conclude and find that all of the remaining violations were non-serious.

Negligence

Although I have no reason not to believe the respondent's assertions that it had a good faith belief that it was not subject to MSHA's enforcement jurisdiction, based on all of the evidence and testimony of record in these proceedings, I am not convinced that the respondent was totally oblivious to the fact that MSHA was asserting jurisdiction in those mine areas where contractor work was being performed.

The testimony of the inspectors reflects that Mr. Bowman was informed prior to the issuance of the violations in these proceedings that any contractor performing work on mine property was subject to MSHA's regulatory and enforcement jurisdiction and would be held accountable for any violations by contractor employees while working on mine property. Mr. Bowman stated that the was "overseeing" some of the conveyor construction work as early as September 1990 (Tr. 94). He also stated that prior to working for the respondent, he worked for a coal company for ten years, including a job as plant manager. He also worked for eight years building and operating coal preparation plants (Tr. 9-12). He confirmed that he was aware of the differences between the OSHA and MSHA conveyor and guarding standards (Tr. 95). He also confirmed that in July and August, 1991, he was aware of the fact that MSHA was asserting jurisdiction over the conveyor belt on North Branch property, and that he was aware that Wylie Construction had been cited with violations by MSHA for violations incident to that conveyor (Tr. 100-104).

Although Mr. Seavey indicated that he had no knowledge of MSHA when he was first hired at the plant on October 1, 1991, he

stated that "I knew of the interface at the refuse pile, where we accepted the refuse from Island Creek Coal (Tr. 44).

In view of the foregoing, I conclude and find that all of the violations in these proceedings were the result of the respondent's failure to exercise reasonable care to prevent the violative conditions which it knew or should have known existed at the time they were observed by the inspectors, and that this amounts to ordinary or moderate negligence.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
3120276	2/26/92	77.400(d)	$200
3120277	2/26/92	77.400(a)	$95
3120278	2/26/92	77.400(d)	$95
3120279	2/26/92	77.400(c)	$75
3120293	2/27/92	48.24(a)	$60
3720850	5/12/92	77.502	$80
3115366	8/27/92	48.25(a)	$75

ORDER

The respondent IS ORDERED to pay the civil penalty assessments enumerated above within thirty (30) days of the date of these decisions and order. Payment is to be made to the petitioner (MSHA), and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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