

OCTOBER 1993

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10-08-93	Sec. Labor on behalf of James Miller v. Mettiki Coal Corp.	YORK 93-155-D	Pg. 2219
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OCTOBER 1993

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

Secretary of Labor, MSHA v. Cyprus Plateau Mining Company, Docket Nos. WEST 92-370-R, WEST 92-485. (Judge Morris, August 24, 1993)

Secretary of Labor, MSHA v. RBK Construction, Inc., Docket No. WEST 93-154-M, etc. (Judge Melick, Interlocutory Review of July 13, 1993 Order - unpublished)

Secretary of Labor, MSHA v. Peabody Coal Company, Docket No. KENT 93-295. (Judge Amchan, September 15, 1993).

There were no cases filed in which review was denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. WEST 92-519-M
RHONE-POULENC OF WYOMING COMPANY :

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

DECISION

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" or "Act"). The issue is whether Commission Administrative Law Judge John J. Morris erred in denying the Secretary of Labor's motion to accept the late filing of his Proposal for Penalty. Judge Morris granted the motion filed by Rhone-Poulenc of Wyoming Company ("Rhone-Poulenc") to dismiss this proceeding on the ground that the Secretary had not demonstrated adequate cause for the late filing of his Penalty Proposal under the Commission's Procedural Rules ("Rules").¹ 14 FMSHRC 2090 (December 1992)(ALJ) For the reasons set forth below, we reverse the judge's decision.

I.

Factual and Procedural Background

Rhone-Poulenc operates the Big Island Mine and Refinery in Sweetwater County, Wyoming. On October 2, 1991, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Rhone-Poulenc pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of 30 C.F.R. § 57.12016. On May 26, 1992, the

¹ This case involves the Commission's former Procedural Rules. The current rules became effective May 3, 1993. See 58 Fed. Reg. 12158-74 (March 3, 1993), to be codified at 29 C.F.R. Part 2700 (1993). All references in this decision to the Commission's Rules are to the former rules. The time limits at issue have not changed.

Secretary notified Rhone-Poulenc pursuant to Rule 25² that MSHA was proposing a civil penalty assessment of \$1,000 for the alleged violation. Included with the notice of proposed penalty assessment was a blue, pre-printed postcard ("blue card") advising Rhone-Poulenc to sign and return the postcard to MSHA if it wished to contest the proposed assessment. On June 16, 1992, Rhone-Poulenc sent the blue card to MSHA pursuant to Rule 26.³ MSHA apparently received Rhone-Poulenc's notice of contest on June 19, 1992.

On August 14, 1992, the Secretary filed his Proposal for Penalty, pursuant to Rule 27(a),⁴ along with a Motion to Accept Late Filing of Proposal for Penalty. Under Rule 27(a) the Secretary was required to file his Proposal for Penalty within 45 days of receipt of Rhone-Poulenc's notice of contest. The Secretary filed the Proposal for Penalty with the Commission approximately two weeks late. In the motion to accept late filing, the Secretary stated that the penalty proposal was delayed because the case file was "sent by [MSHA's] Arlington office to Denver but was not received by the Denver Office of the Solicitor until August 3, 1992."⁵

² Former Rule 25, provided, in pertinent part:

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) The violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty.

29 C.F.R. § 2700.25 (1992).

³ Former Rule 26, entitled "Notice of Contest," provided, in pertinent part:

A person has 30 days after receipt of the notification of proposed assessment of penalty within which to notify the Secretary that he wishes to contest such proposed penalty.

29 C.F.R. § 2700.26 (1992).

⁴ Former Rule 27, entitled "Proposal for a Penalty," provided, in pertinent part:

(a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

29 C.F.R. § 2700.27 (1992).

⁵ The motion does not disclose the date on which the file was sent by MSHA's Arlington Office.

On August 24, 1992, Rhone-Poulenc filed a motion to dismiss the proceeding, contending that the Secretary had failed to show adequate cause to justify the late filing. In response, the Secretary stated that, due to an "unusual chain of events, the MSHA civil ... penalty office was faced with a tremendous and instantaneous influx of new and refiled cases" at the time this proceeding was pending. He stated that MSHA was "suffering from a lack of clerical personnel to process this dramatic increase in the caseload." The Secretary cited two reasons for this increase. First, MSHA was required to recalculate many proposed penalties and to serve amended proposed assessments on mine operators because of changes in the Secretary's civil penalty assessment regulations. Second, the Commission's decision in Drummond Co., Inc., 14 FMSHRC 661 (May 1992), required MSHA to reassess and refile cases involving hundreds of citations.

Relying on the Commission's decisions in Salt Lake County Rd. Dep't, 3 FMSHRC 1714 (July 1981), and Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982), the judge concluded that this case should be dismissed. The judge held that the Secretary's explanations for the delayed filing did not meet the "adequate cause" test established in Salt Lake. 14 FMSHRC at 2091. He determined that the fact that the case was not received by the Solicitor's office in Denver until August 3 was not adequate cause for the delay. The judge also determined that the unusually high workload cited by the Secretary was caused by MSHA's "own policy changes and its mistake in trying to enforce its 'excessive history program.'" 14 FMSHRC at 2092. The judge held that changes in administrative policy, an unusually high workload and shortage of clerical personnel do not constitute adequate cause under Salt Lake. He concluded that, even if the Secretary provides an adequate explanation for the delay, the proceeding may nevertheless be dismissed if the operator demonstrates that it was prejudiced by the delayed filing. 14 FMSHRC at 2091. Finally, the judge held that the Secretary should have filed a motion for an extension of time within the 45-day period set forth in the Rule. 14 FMSHRC at 2092.⁶

The Commission granted the Secretary's Petition for Discretionary Review of the judge's order dismissing this case.

⁶ The judge also rejected Rhone-Poulenc's argument that the Secretary violated section 105(a) of the Mine Act, 30 U.S.C. § 815(a), by filing the notification of proposed penalty assessment 237 days after the citation was issued (October 2, 1991, to May 26, 1992). 14 FMSHRC at 2093. Because Rhone-Poulenc did not seek review of this ruling or otherwise raise the issue in its response brief, we do not address it.

II.
Disposition

The Secretary admits that he filed the Proposal for Penalty out of time, but contends that the judge misapplied the Commission's test for excusing late filed penalty proposals set forth in Salt Lake and Medicine Bow.⁷ He argues that the judge failed to consider the fact that the operator had actual knowledge of the Secretary's allegations in the Proposal for Penalty -- the violation charged and the proposed civil penalty -- and that Rhone-Poulenc was not prejudiced by the late filing. He contends that dismissal is an extreme sanction that should not be imposed absent bad faith or prejudice. The Secretary states that his practice is to file proposals for penalty on time and that he is aware of only five instances since 1982 when such proposals have been filed out of time. The Secretary requests that the Commission review the facts de novo, including the facts supporting his claim of a heavy workload set forth in his brief on review, conclude that this evidence demonstrates adequate cause for the late filing and reverse the judge's order dismissing this proceeding.

Rhone-Poulenc contends that the judge's findings of fact are supported by substantial evidence. It argues that the judge properly applied the facts of this case to the two-part test set forth in Salt Lake and Medicine Bow and properly concluded that the Secretary failed to demonstrate adequate cause for the late filing. It maintains that the judge was correct in not considering whether Rhone-Poulenc was prejudiced by the late filing because the Commission's two-part test contemplates the consideration of prejudice only after the Secretary has shown adequate cause. Rhone-Poulenc argues that the Commission should not conduct a de novo review of the facts of this case, consider the new justifications presented in the Secretary's brief on review, or substitute its judgment for that of the judge.

In Salt Lake, the Secretary filed his proposal for penalty approximately 60 days late because of an extraordinarily high caseload and the lack of clerical help. 3 FMSHRC at 1714, 1717. The Commission held that the 45-day period in Rule 27 is not a statute of limitations.⁸ 3 FMSHRC at 1716. The

⁷ The parties and the judge state that the proposal for penalty should have been filed by July 31, 1992, 45 days after Rhone-Poulenc mailed its notice of contest of proposed penalty assessment. It would appear, however, that the proposal for penalty should have been filed by August 3, 1992, 45 days after the Secretary received the notice of contest, according to the certified mail return receipt card. See Ex. A to Rhone-Poulenc's Motion for Dismissal. Rule 27(a) provides that a proposal for penalty shall be filed by the Secretary "[w]ithin 45 days of receipt of a timely notice of contest...." See Medicine Bow, 4 FMSHRC at 882, 884 (emphasis added). This distinction does not affect our disposition of this proceeding.

⁸ The Commission held that the 45-day period in Rule 27 implements the provision in section 105(d) of the Mine Act, 30 U.S.C. § 815(d), which requires the Secretary to "immediately" advise the Commission when a timely contest of a

Commission recognized that "[s]ituations will inevitably arise where strict compliance by the Secretary [will] not prove possible." Id. The "drastic course of dismissing a penalty proposal would short circuit the penalty assessment process and, hence, a major aspect of the Mine Act's enforcement scheme." Id. In order to balance considerations of procedural fairness against the "severe impact of dismissal of the penalty proposal," the Commission concluded that "if the Secretary does seek permission to file late, he must predicate his request upon adequate cause." Id. The Commission further held that, in the event the Secretary demonstrates adequate cause, justice may require that the case nevertheless be dismissed if the operator can demonstrate that it was prejudiced in the preparation of its case by the stale penalty proposal. Id. The Commission determined that the Secretary was engaged in "voluminous national litigation and mistakes can happen" and held that the Secretary "minimally satisfied the adequate cause standard." 3 FMSHRC at 1717.

In Medicine Bow, the proposal for penalty was filed approximately 15 days late because of the lack of clerical help. 4 FMSHRC at 883, 885. The Commission reaffirmed the "two-part" test established in Salt Lake. 4 FMSHRC at 885. The Commission specifically rejected the Secretary's argument that, unless the delayed filing is caused by "significant malfeasance," a penalty proceeding should not be dismissed absent a showing of prejudice to the operator. 4 FMSHRC at 885 n.6. The Commission determined that the Secretary met the adequate cause test but warned the Secretary that the Commission could reach a different conclusion in future cases with similar facts.

We agree with the judge that, under Salt Lake and Medicine Bow, the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. In general, if the Secretary fails to demonstrate adequate cause, the case may be subject to dismissal. We disagree, however, with the judge's holding that "[s]ince at least 1981, an unusually high workload and a shortage of clerical personnel do not constitute adequate cause." 14 FMSHRC at 2092.

The reasons offered by the Secretary in the present case were the unusually high caseload at the time the penalty proposal was issued and a lack of clerical help to process those cases. The Commission may take official notice of the unique events that transpired in 1992, in which the Commission

proposed penalty assessment is filed by an operator. Salt Lake, 3 FMSHRC at 1715. The Commission noted that Congress, in discussing the filing of an initial notice of penalty assessment by the Secretary, indicated that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible." S. Rep. No. 181, 95th Cong., 1st Sess. 34, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d. Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978). The Senate Committee stated that it "does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." Id. In Salt Lake, the Commission held that this language "bespeaks the overriding concern with enforcement" and rejected the operator's argument that Rule 27 established a "statute of limitations." 3 FMSHRC at 1715-16.

played a part. On May 5, 1992, the Commission issued its decision in Drummond, holding that the Secretary's Program Policy Letter ("PPL") establishing his excessive history policy was an invalidly issued substantive rule that could not be accorded legal effect. 14 FMSHRC 661, 692. Accordingly, in Drummond and related cases, the Commission remanded the proposed penalties to the Secretary for recalculation without use of the PPL. Following that decision, about 2,780 pending cases were remanded to the Secretary for reproposal of penalties. See Jim Walter Resources, Inc., 15 FMSHRC 782, 785 (May 1993). The Commission has noted that the Secretary "recalculated thousands of penalties that had been proposed pursuant to the PPL..." Jim Walter, 15 FMSHRC at 792. The unusually heavy volume of penalty reassessments is a matter of Commission record.

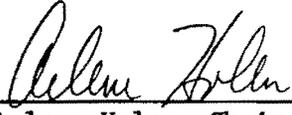
The rapid increase in new civil penalty cases in 1992 is also a matter of Commission record. Relying on Salt Lake, Chief Administrative Law Judge Paul Merlin has excused several late filed penalty proposals based on "the precipitous rise in the volume of contested cases ... as indicated by the Commission's own records." Power Operating Co., Inc., 15 FMSHRC 931, 932 (February 1993)(ALJ)(published May 1993). The judge noted that the number of new cases received by the Commission escalated from 2,029 in Fiscal Year 1990 and 2,267 in Fiscal Year 1991 to 6,032 in Fiscal Year 1992. 15 FMSHRC at 932, n. 1.

We note that the Secretary's late filing of the Proposal for Penalty is apparently a rare event. We conclude that the Secretary established adequate cause for the delayed filing on the basis of MSHA's unusually heavy 1992 caseload and its shortage of personnel to process this caseload. For the same reason, we conclude that adequate cause exists to excuse the Secretary's failure to file a motion for extension of time within the 45-day period.

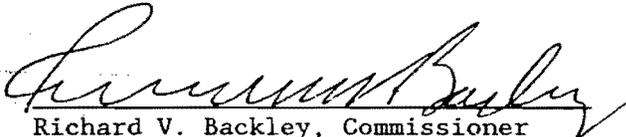
We agree with the judge that, even if the Secretary provides an adequate reason for the delay, dismissal may be warranted if the operator demonstrates that it was prejudiced. We conclude that Rhone-Poulenc has failed to demonstrate that it was prejudiced by the 11-day delay in filing. The judge found that Rhone-Poulenc was not prejudiced when the Secretary failed to notify it of the proposed penalty assessment until 237 days after the citation was issued. 14 FMSHRC at 2093. He noted that Rhone-Poulenc had asserted it was "inherently prejudiced" by the delay, but that it failed to allege "any factual basis to establish such prejudice." Id. While that finding does not resolve the issue before us, Rhone-Poulenc has similarly failed to show that it was prejudiced by the Secretary's 11-day delay under the Commission's Rules in filing the Proposal for Penalty.

III.
Conclusion

For the foregoing reasons, the judge's order dismissing this proceeding is vacated and the Secretary's Proposal for Penalty is accepted for filing this date. This case is remanded to the judge for further proceedings consistent with this opinion.



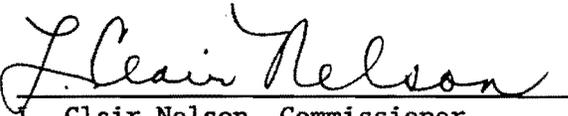
Arlene Holen, Chairman



Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



L. Clair Nelson, Commissioner

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Mining, Inc., 14 FMSHRC 76, 77 (January 1992). Here, it appears that C&B, proceeding without benefit of counsel, may have believed that it would receive additional materials for appeal. Accordingly, we will reopen the case and allow C&B to file a petition for discretionary review, as explained below.

A petition for discretionary review must state one or more of the following as grounds for appeal:

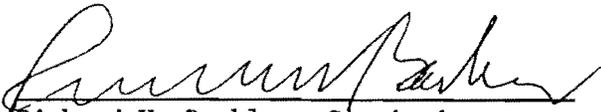
- (1) A finding or conclusion of material fact is not supported by substantial evidence;
- (2) A necessary legal conclusion is erroneous;
- (3) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission;
- (4) A substantial question of law, policy or discretion is involved;
- (5) A prejudicial error of procedure was committed.

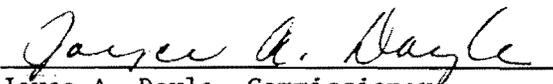
See 30 U.S.C. § 823(d)(2)(A)(ii). Each issue must be separately numbered, plainly and concisely stated, and supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or authorities relied upon. 30 U.S.C. § 823(d)(2)(A)(iii). Except for good cause shown, no assignment of error shall rely on any question of fact or law upon which the judge had not been afforded an opportunity to pass. Id.

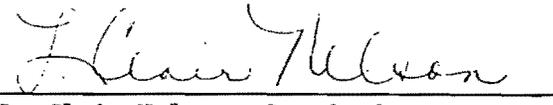
C&B's petition for discretionary review must be filed and received by the Commission at the above-noted address by November 24, 1993. 29 C.F.R. § 2700.70(a). If C&B fails to file its petition for discretionary review by that date, this case shall be closed. If C&B files its petition for discretionary review in the manner described in this order, the Commission shall then consider whether to grant C&B's petition.

For the foregoing reasons, this case is reopened, and C&B is granted leave to file its petition for discretionary review.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 25, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 93-154-M
	:	WEST 93-155-M
RBK CONSTRUCTION, INC.	:	WEST 93-156-M

DIRECTION FOR REVIEW
DECISION

This civil proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). On August 11, 1993, Commission Administrative Law Judge Gary Melick issued a certification for review of interlocutory ruling pursuant to Commission Rule 76(a)(1)(i), 58 Fed. Reg. 12158, 12172 (March 3, 1993), to be codified at 29 C.F.R. § 2700.76(a)(1)(i)(1993). The judge, on his own motion, certified that his July 13, 1993, ruling "denying the Secretary's attempted vacation of citations issued under section 104(a) of the [Mine Act, 30 U.S.C. § 814(a)] . . . involves a controlling question of law and that immediate review will materially advance the final disposition of the proceedings." Certification, August 11, 1993.

We grant interlocutory review and suspend briefing. For the reasons set forth below, we vacate the judge's order of July 13, 1993, and grant the parties' motions to dismiss these proceedings.

This civil penalty proceeding consists of eight section 104(a) citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to RBK Construction, Inc., on October 8, 1992. The citations allege safety, training, and notification violations, as well as a citation for failing to file a legal identity form. In issuing these citations, the Secretary maintained that respondent was the operator of a mine. In its answer, on February 4, 1993, respondent asserted that it was engaged in a "cut-and-fill operation for the Colorado Department of Transportation," not a mining operation, and that, therefore, MSHA was without jurisdiction. Respondent's letter of February 4, 1993.

Subsequently, the Secretary filed a letter with the judge on July 9, 1993, stating that the Secretary had vacated all the citations. The Secretary explained that, upon review of the matter, he had determined that respondent's operation was primarily related to the public "highway cut" and any mineral being processed was only incidental to that work. The Secretary cited and attached MSHA I Program Policy Manual, Sec. 4, 3 (July 1, 1988), referencing the Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"). The agreement states:

MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity. Under this circumstance, a mineral may be processed and disposed of, and MSHA will not have jurisdiction since the company is not functioning for the purpose of producing a mineral.

Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following:

. . . .

2. Public road and highway cuts

Secretary's letter of July 9, 1993, Attachment 1. The judge construed this letter to be a motion by the Secretary to dismiss.

Additionally, the record contains a note to the file by the judge regarding teleconferences on July 12, 1993, between the judge and representatives of the parties. The judge advised the parties that, in his preliminary judgment, respondent's operation was a mine and, therefore, he could not approve the Secretary's attempted vacation of the citations. The judge noted his reliance upon the inspector's statement that respondent operated a screening plant wherein cut rock was sized and then used as fill for road construction.

On July 13, 1993, respondent advised the judge that it no longer sought to contest the citations and that it would not attend the scheduled hearing. That same day the judge issued his order denying the motions to dismiss. Subsequently, the Secretary advised the judge that he too saw no basis for a hearing, since the citations had been vacated.

In response to a briefing order issued July 23, 1993, the Secretary explained his position to the judge that vacation of the citations was a proper exercise of statutory authority under sections 104 and 107 of the Act, 30 U.S.C. §§ 814, 817, and that such action was not inconsistent with section 110(k), 30 U.S.C. § 820(k). ^{1/} The Secretary asserted that, since the citations were vacated, "there simply is no penalty to be considered and there is nothing further for the Commission to decide." Secretary's letter of August 6, 1993.

The judge, on his own motion, then certified his order for interlocutory review. The judge stated that the Secretary had failed to provide adequate reasons for the "attempt to vacate"; had failed to enable the Commission to conduct an evidentiary hearing regarding the purported reasons for vacation; and had failed to secure the Commission's approval in accordance with section 110(k) of the Act and Youghiogheny and Ohio Coal Co., 7 FMSHRC 200 (February 1985). Certification, August 11, 1993.

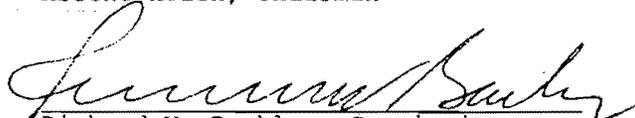
On August 24, 1993, the Secretary filed his opposition to interlocutory review. The Secretary asserted that he has exclusive enforcement authority pursuant to sections 104 and 107 of the Mine Act and that he is authorized to vacate citations and orders. Asserting that Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3 (1985) is virtually identical to the present case, the Secretary contends that his determinations to vacate citations and orders are not reviewable by the Commission. The Secretary states that his decision not to assert jurisdiction in the instant case is fully consistent with the

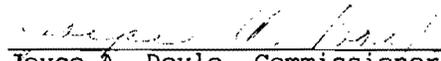
1/ Section 110(k) provides: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with approval of the court."

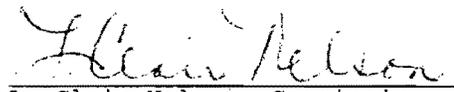
Interagency Agreement between MSHA and OSHA. Finally, the Secretary argues that section 110(k) applies only to settlements of penalties, not to vacations of citations or orders. The Secretary states that the Mine Act contains no provision for Commission approval of his decisions to vacate enforcement actions.

In Youghiogheny and Ohio, cited by the judge, the Commission concluded that "adequate reasons" were required to support a dismissal of a proceeding. 7 FMSHRC at 203. Subsequently, the Supreme Court ruled in Cuyahoga Valley Ry. that the Secretary of Labor has unreviewable discretion to withdraw a citation charging an employer with a violation of the Occupational Safety and Health Act, and that the Occupational Safety and Health Review Commission does not have the authority to overturn the Secretary's decision not to issue or to withdraw a citation. 474 U.S. at 7-8. Based on that decision, we overrule Youghiogheny and Ohio. We agree with the Secretary that he has the authority to vacate the citations in issue, and, therefore, we grant the motions to dismiss. 2/


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

2/ Parties may, in the future, file stipulations of dismissal, signed by all parties to a proceeding, in order to effect voluntary dismissal. Cf. generally Fed. R. Civ. P. 41 (a)(1)(ii). Upon the parties' filing of the appropriate stipulation, the presiding Commission judge shall enter an order dismissing the proceeding.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 26, 1993

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

v.

VIRGINIA CREWS COAL COMPANY

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Docket Nos. WEVA 92-246
WEVA 92-247

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

DECISION

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" or "Act"). Administrative Law Judge George Koutras found that Virginia Crews Coal Company ("Virginia Crews") violated its roof control plan and that the violation was of a significant and substantial nature ("S&S"),¹ but that the violation was not the result of Virginia Crews's unwarrantable failure² to comply with the plan. 14 FMSHRC 1691 (October 1992)(ALJ). Accordingly, the judge modified the section 104(d)(1) citation to a section 104(a) citation. 14 FMSHRC at 1716. The judge also found that Virginia Crews violated 30 C.F.R. § 75.400, as alleged in a subsequently issued section 104(d)(1) order. 14 FMSHRC at 1709-10. The judge concluded that, because that violation was not S&S and the underlying section 104(d)(1) citation had been modified to a section 104(a) citation, it was unnecessary to consider whether the violation was the result of the operator's unwarrantable failure. 14 FMSHRC at 1717-18. The judge modified the order to a section 104(a) citation. 14 FMSHRC at 1718. The Commission granted the Secretary's petition for discretionary review, which challenges the judge's failure to find that the violations were the result of unwarrantable failure. For the reasons that follow, we affirm the judge's findings.

¹ 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...."

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violations that are caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards...."

I.

Factual and Procedural Background

A. Docket No. WEVA 92-246 (§ 104(d)(1) citation).

Virginia Crews owns and operates an underground coal mine (the No. 14 mine) in West Virginia. On April 12, 1991, the crew on the evening shift mined the No. 6 entry in the first left section, which opened the last open crosscut ("break") between the No. 6 and the No. 5 entries and extended the working face beyond the break. On April 13, the evening shift began mining the break between the No. 6 entry and the No. 7 entry. The mine did not operate on Sunday, April 14 and production crews did not mine in the vicinity of the No. 6 entry on April 15.

On April 16, between 4:30 and 5:30 a.m., preshift examiner Ron Kennedy examined the No. 6 entry. Kennedy found that the mined portion of the crosscut between the No. 6 and No. 7 entries required roof bolting and reported this to day shift foreman Clyde Bailey.

At 6:00 a.m., Gerald Cook, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), began an inspection. He entered the mine with Bailey and the day-shift crew and, along with miners' representative Richard Patton, checked the working faces of the section.

Inspector Cook noted that the intersection of the No. 6 entry and the last open crosscut was supported. He saw, however, that the No. 6 working face had been advanced, in his estimation, 15 feet inby the last row of roof bolts, and that the No. 6 - 7 break had been advanced about 20 feet inby the last row of roof bolts. It appeared to the inspector that coal had been cleaned from the roadway and moved into the No. 6 - 7 break. Vehicle tracks were also apparent in the No. 6 heading. Cook concluded that miners must have traveled past one of the openings in the intersection to excavate the other opening.

Cook issued a section 104(d)(1) citation alleging a violation of 30 C.F.R. § 75.220(a)(1) in the No. 6 working place.³ He concluded that Virginia Crews violated the approved roof control plan, which provides that "[o]penings that create an intersection shall be permanently supported or a minimum of one row of temporary supports shall be installed on not more than 4-foot centers across the opening before any other work or travel in the

³ Section 75.220(a)(1) states:

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

intersection." Ex. P-3, at 4, para. 3. Cook designated the violation S&S and noted that the operator's negligence was high. Cook also determined that the violation was the result of Virginia Crews's unwarrantable failure to comply with the plan because everyone working in the section was supposed to review the approved roof control plan and to know what it required.

The judge found that Virginia Crews had violated its roof control plan because the roof in the openings cited by Inspector Cook was not supported. 14 FMSHRC at 1707-08. The judge determined that work or travel had occurred in the area, crediting Cook's testimony that coal had been pushed into the No. 6 - 7 break, that tire tracks were present in the No. 6 heading, and that miners had to pass by one of the openings in the intersection to mine the other opening. 14 FMSHRC at 1708.

The judge found that the violation was not the result of the operator's unwarrantable failure. 14 FMSHRC 1715-16. He concluded that, in the "absence of credible testimony from witnesses who were actually present during the mining activities which may have taken place during the days prior to Inspector Cook's inspection," there was "no credible evidence to establish that [Virginia Crews] deliberately and consciously failed to act, or engaged in conduct which one may reasonably conclude was aggravated." 14 FMSHRC at 1716. The judge also rejected Cook's conclusion that the violation was due to unwarrantable failure because Virginia Crews knew or should have known about the requirements of its own roof control plan. Id. In addition, the judge noted the absence of any prior violations of section 75.220(a)(1). Id. Accordingly, the judge concluded that the Secretary failed to carry his burden of proving that the violation constituted an unwarrantable failure to comply with the roof control plan. Id.

The judge found that the violation was the result of Virginia Crews's "ordinary or moderate negligence" and found the violation to be S&S. 14 FMSHRC at 1713, 1718. The judge modified the section 104(d)(1) citation to a section 104(a) citation and assessed a civil penalty of \$275. 14 FMSHRC at 1719.

B. Docket No. WEVA 92-247 (§ 104(d)(1) order).

On April 29, 1991, Cook conducted another inspection of the No. 14 mine. Finding accumulations of loose coal and coal dust in several areas along the ribs and roadway in the return entry of the left mains section; Cook issued a section 104(d)(1) order alleging a violation of section 75.400. Cook relied on the previously issued section 104(d)(1) citation to support the order. He designated the violation as S&S and charged Virginia Crews with high negligence. In issuing the order, Cook determined that the violation was the result of Virginia Crews's unwarrantable failure because the accumulations were extensive and had existed for at least a month.

The judge credited the testimony of Inspector Cook concerning the accumulations and found a violation of section 75.400. 14 FMSHRC at 1709-10. The judge granted the Secretary's motion to modify the order to delete the inspector's S&S finding. 14 FMSHRC at 1714.

The judge did not consider whether the violation was the result of Virginia Crews's unwarrantable failure. 14 FMSHRC at 1717-18. He held that the section 104(d)(1) order could not stand because the underlying section 104(d)(1) citation had been modified to a section 104(a) citation. The judge modified the order to a section 104(a) citation rather than to a section 104(d)(1) citation because the order did not describe an S&S violation, which is required for the latter citation. Id. The judge found, however, that the violation resulted from a high degree of negligence and assessed a civil penalty of \$225. Id.

II.

Disposition of Issues

A. Docket No. WEVA 92-246

The Secretary argues that Virginia Crews's conduct was an unwarrantable failure to comply because the operator knew about the violative condition, but did not attempt to correct it. The Secretary asserts that the judge failed to consider the April 16 preshift examination report, which explicitly noted the need for roof bolting and that he improperly focused on whether the operator should have reasonably expected miners to work or travel in the cited area rather than on the operator's knowledge of the violative condition. Virginia Crews argues that the judge's finding that the violation was not the result of an unwarrantable failure is supported by substantial evidence and should be affirmed.

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, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC at 189, 193-94 (February 1991).

The Secretary argues that Virginia Crews knew of the violative condition because preshift examiner Kennedy reported that the No. 6 - 7 crosscut needed roof bolting. Knowledge of a preshift examiner is imputable to the operator. Rochester & Pittsburgh, 13 FMSHRC at 194-98; Mettiki Coal Corp., 13 FMSHRC 769, 772 (May 1991). Kennedy's April 16 report to day shift foreman Bailey was made at 5:45 a.m. and Cook issued the citation an hour and a half later, at 7:15 a.m. Thus, Virginia Crews had only a brief period of notice of the existence of a violation as a result of the preshift examiner's report. No activity occurred in the cited area during that period. We conclude that reliance upon the preshift report would not have supported an unwarrantable failure conclusion, and that, therefore, the absence of comment by the judge regarding this evidence is harmless.

We also reject the Secretary's argument that the judge should be reversed because he focused on the expectation of work or travel in the cited area. While the judge discussed the lack of evidence of "mining activities that may have taken place during the days prior to Mr. Cook's inspection," he did so in reaching his conclusion that there was "no credible evidence to establish that the respondent deliberately and consciously failed to act or engaged in conduct which one may reasonably conclude was aggravated." 14 FMSHRC at 1716. Based on this determination, and noting both the inspector's erroneous belief that the violation was unwarrantable solely because the operator "knew or should have known" the requirements of the roof control plan⁴ and the absence of any prior violations of section 75.220(a), the judge reasonably concluded that the Secretary had failed to carry his burden of proving that the violation was the result of unwarrantable failure. Id. at 1716.

We agree with the judge that a breach of a duty to know is not necessarily an unwarrantable failure. 14 FMSHRC at 1716. The Secretary, in relying on the "knew or should have known" language of Emery, 12 FMSHRC 2003, misconstrues the context in which those words were used. The thrust of Emery was that unwarrantable failure results from aggravated conduct, constituting more than ordinary negligence. Id. at 2004. Use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence and we reject such an interpretation of Emery.

We have reviewed the record and conclude that substantial evidence⁵ supports the judge's finding that Virginia Crews's violation of section 75.220(a) was not the result of its unwarrantable failure to comply with its roof control plan.

B. Docket No. WEVA 92-247

An MSHA inspector is required to designate a citation issued under section 104 of the Mine Act as a section 104(d)(1) citation if he finds that (1) the violation could significantly and substantially contribute to the cause and effect of a mine hazard; and (2) the violation was caused by the

⁴ Inspector Cook stated that the violation was the result of Virginia Crews's unwarrantable failure because the roof control plan was "supposed to be known by everybody who is working on that section that has to deal with roof control." Tr. 33. See 30 C.F.R. § 75.220(d). Under Cook's reasoning, virtually every breach of a roof control plan would be the result of the operator's unwarrantable failure because his employees should know the plan's requirements.

⁵ The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's conclusion. 30 U.S.C. § 823(d)(2)(A)(ii)(I). See also Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

operator's unwarrantable failure to comply with the standard.⁶ A section 104(d)(1) withdrawal order is issued if, during the same or another inspection within the next ninety days, the inspector finds another violation that was caused by the operator's unwarrantable failure to comply with a standard. 30 U.S.C. § 814(d)(1).

Based on his finding that the roof control violation was not the result of the operator's unwarrantable failure, the judge modified that section 104(d)(1) citation to a section 104(a) citation, removing the basis for the section 104(d)(1) order issued in this docket for a violation of section 75.400. Accordingly, he modified the order to a section 104(a) citation.

The Secretary urges that, if the judge's finding of no unwarrantable failure as to the underlying citation is remanded for reconsideration, this docket should also be remanded for a determination of whether the violation of section 75.400 was caused by the operator's unwarrantable failure. Because we have affirmed the judge's finding that the underlying violation was not the result of unwarrantable failure, the issue in this docket is moot.

⁶ Section 104(d)(1) states:

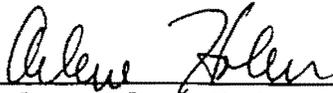
If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that ... such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation ... to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

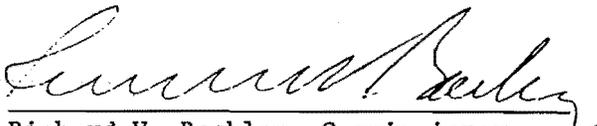
30 U.S.C. § 814(d)(1).

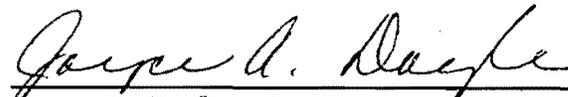
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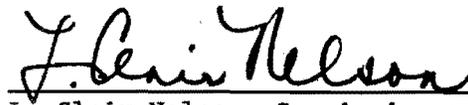
Conclusion

For the foregoing reasons, we affirm the judge's finding that Virginia Crews's violation of its roof control plan was not caused by its unwarrantable failure.


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

October 28, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION on behalf of :
FREDDY THACKER :
 :
Complainant : Docket No. KENT 93-977-D
 :
v. : Case No. PIKE CD-93-12
 :
BLACK DRAGON MINING COMPANY :
 :
Respondent. :
 :
 :

ORDER

On October 18, 1993, Administrative Law Judge Roy J. Maurer concluded that the discrimination complaint of Freddy Thacker against Black Dragon Mining Company ("Black Dragon") was not frivolously brought, granted the Secretary of Labor's application for temporary reinstatement and ordered Thacker's immediate reinstatement.

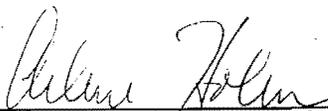
On October 22, 1993, the Secretary filed with the judge a "Motion Seeking Compliance with Temporary Reinstatement Order." Since the judge's jurisdiction ended upon issuance of his order, the Secretary's motion in this proceeding was forwarded to the Commission. Commission Procedural Rule 69(b), 58 Fed. Reg. 12171 (March 3, 1993), to be codified at 29 C.F.R. § 2700.69(b) (1993). In the motion, the Secretary asserts that Black Dragon failed to reinstate Thacker on October 20, 1993, and that it refused to pay him for that day, and, thus, violated "the plain wording and the spirit" of the reinstatement order. Therefore, the Secretary seeks an order requiring Black Dragon to pay the complainant for October 20, 1993.

On October 26, 1993, the Secretary filed a second motion before Judge Maurer. In this motion, the Secretary asserted that the complainant had received a telephone death threat pertaining

to his reinstatement as well as a number of prank telephone calls. The Secretary further asserted that these calls placed the complainant in fear for his safety and that of his family. On the basis of these assertions, the Secretary sought to have economic reinstatement for Thacker (which by agreement between the parties was to continue until his return to work on October 27) remain in effect until Black Dragon's "thorough investigation into the death threat made to Mr. Thacker, including the harassing telephone calls, and the operator's report to the Court on its investigative effort and findings." Secretary's October 26 Motion at 3.

Black Dragon responded to the Secretary's October 26 Motion on the same day, vigorously denying that Black Dragon or its employees were in any way connected with the asserted threat, suggesting that the claim of threat was an attempt to receive wages without being required to work, and requesting that the Secretary's motion for continued economic reinstatement be denied.

As noted above, the judge's jurisdiction in this matter terminated upon issuance of his October 18 Order of Temporary Reinstatement. Accordingly, we remand this proceeding to Judge Maurer for consideration of the Secretary's motions and Black Dragon's responses.


Arlene Holen, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 29 1993

SECRETARY OF LABOR, MSHA	:	DISCRIMINATION PROCEEDING
on behalf of	:	
LARRY J. HILDEBRAND,	:	
Petitioner	:	Docket No. PENN 93-388-D
	:	
V.	:	
	:	PITT CD 93-16
	:	
MEADOWS & LEONARD MINING INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

This case is before me pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement of this matter along with a settlement agreement signed by both parties which states in relevant part:

1. Upon execution of this Agreement, Respondent will immediately post on the mine bulletin board, or in a conspicuous place where notices to employees are customarily posted, and maintain for a period of 14 consecutive days from the date of posting, the Notice attached to the settlement agreement. Said Notice is to be signed by a responsible official of the Respondent and the date of actual posting is to be shown thereon.

2. Respondent will comply with the terms and provisions of said Notice.

3. Respondent agrees to pay a civil penalty to the Federal Mine Safety and Health Administration, Office of Assessments, in the amount of \$2,500.00. Payment shall be made by check in six consecutive monthly installments commencing October 1, 1993, in the following manner:

The first five (5) installments shall be in the amount of \$400.00. The sixth (6) and final installment shall be in the amount of \$500.00. Each payment shall be mailed to MSHA no later than the 7th day of the month it is due. Should any two payments be made after the 7th day of the month it is due, the entire balance of all remaining amounts shall immediately become due.

4. Respondent further agrees to pay Applicant full compensation for lost wages which resulted in Applicant's being laid off, which amount is calculated to be \$5,670.00. Payment shall be made to Applicant (Larry J. Hildebrand) by check in six consecutive monthly installments of \$945.00, commencing October 1, 1993. Each payment shall be mailed to Applicant no later than the 7th day of the month it is due. Should any two payments be made after the 7th day of the month it is due, the entire balance of all remaining amounts shall immediately become due.

5. Respondent shall purge Applicant's personnel file of any disciplinary action taken by Respondent against him as a result of Applicant's actions or inactions of January 15, 1993, or any time thereafter as relates to this matter.

6. Applicant will, upon Respondent's execution and completion of performance of this agreement, withdraw his complaint of discrimination filed with the United States Department of Labor.

7. Applicant and Respondent hereby agree that as between themselves, this settlement agreement is a compromise of a disputed claim and shall constitute a final disposition of this matter. Applicant specifically agrees to relinquish any additional claims or causes of action arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977 for the acts set forth in paragraph 5 of the Secretary of Labor's Amended Complaint filed August 25, 1993 in this matter.

8. Respondent's consent to enter into this settlement agreement does not constitute an admission by Respondent to any violation of the Mine Act or the regulations or standard promulgated thereunder, and Respondent denies that it committed any such violations. However, for purposes of this settlement, Respondent agrees and consents to a finding by the Commission of the existence of the violation, that the violation may be assessed as set forth herein. Nothing contained herein shall be deemed an admission by Respondent of a violation of the Mine Act or any regulation or standard issued pursuant thereto, in any judicial or administrative forum, by the United States Government, other than in an action or proceeding brought by the United States Government under the Federal Mine Safety and Health Act of 1977.

9. Applicant and Respondent understand that each party is obligated to fully abide by the laws of the Commonwealth of Pennsylvania pertaining to wages and other benefits, as well as Federal and State tax laws associated therewith.

Based on the foregoing and noting that both parties have signed the settlement agreement, I conclude that the proffered settlement is appropriate under the provisions of the Mine Act.

Accordingly, the motion for approval of settlement is **GRANTED** and it is **ORDERED** that this case be **DISMISSED**.

A handwritten signature in cursive script, appearing to read "Paul Merlin".

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

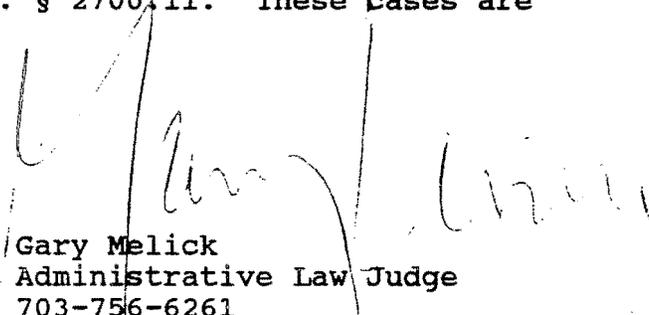
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OCT 1 1993

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDINGS
ADMINISTRATION (MSHA) on	:	
behalf of EDWARD PHILLIPS,	:	Docket No. KENT 93-878-D
JR. and BENJAMIN HOLDER,	:	MSHA Case No. BARB-CD-93-19
Applicants	:	
v.	:	Docket No. KENT 93-879-D
	:	MSHA Case No. BARB-CD-93-20
LOCUST GROVE, INC. and	:	
BOYD WILSON, an individual	:	Surface Mine No. 4
Respondents	:	Mine ID 15-16866

ORDER OF DISMISSAL

Applicants request approval to withdraw their Applications for Temporary Reinstatement in the captioned cases on the basis of mutually agreeable and comprehensive settlement agreements reached among the parties and signed by the individual Applicants. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. These cases are therefore dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 4 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 93-25-M
Petitioner : A. C. No. 30-02333-05506
v. :
 : Docket No. YORK 93-26-M
ROBERT L. WEAVER, : A. C. No. 30-02333-05507
Respondent :
 : Weaver Pit No. 2

DECISION

Appearances: Jane Snell Brunner, Esquire, Office of
the Solicitor, U.S. Department of Labor,
New York, New York, for Petitioner;
Karen Weaver, Hastings, New York,
for Respondent

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging mine operator Robert L. Weaver (Weaver) with seven violations of mandatory standards and seeking civil penalties of \$638 for those violations. The general issue is whether the violations were committed as charged and, if so, what is the appropriate civil penalty for such violations. Additional specific issues are addressed as noted.

Docket No. YORK 93-25-M

Citation No. 4080929 alleges a violation of the mandatory standard at 30 C.F.R. § 56.14132(a) and charges as follows:

The back-up alarm of the International Hough 550 front-end loader was not functional. The loader was being used to feed the screening plant and to load haul trucks. Foot traffic in this area was slight.

The cited standard provides that "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The testimony of Inspector Stephen W. Field of the Mine Safety and Health Administration (MSHA) regarding this citation is not disputed. Field was inspecting the Weaver Pit No. 2 on September 2, 1992, when he observed the cited front-end loader loading a customer's haulage truck. When the machine was placed in reverse the alarm did not activate and accordingly the citation herein was issued. Inspector Field noted that without a functioning back-up alarm reverse movement of the loader might not be detected and persons unaware could be struck. The loader was operating in an area of customer truck drivers and plant helper Chuck Fuller. The condition was obvious according to Inspector Field in that when the machine was placed in reverse no alarm could be heard. Under the circumstances I find that the violation was serious and that the operator is chargeable with negligence. There is no dispute that the violation was abated in a timely manner.

Citation No. 4080930 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14103(b) and charges as follows:

The windshield of the International Hough 550 front-end loader was severely cracked, offering the operator limited visibility. The windshield was cracked in several directions from two sources near the top. A large crack across the bottom half of the windshield caused the windshield to buckle when pressure was applied. This condition has existed for about 3 months.

The cited standard provides as follows:

If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

According to the undisputed testimony of Inspector Field the entire windshield of the Hough 550 front-end loader was shattered from top to bottom thereby seriously impairing operator visibility. The cracking was so severe that safety plastic material between the glass layers was exposed. According to Field, the windshield was so shattered and the framework so broken it was likely that the windshield would fall onto the operator. Field concluded that the violation was "significant and substantial" because of this extreme obstruction to the visibility of the machine operator. It may reasonably

be inferred under the circumstances that the loader operator could strike another vehicle working on the premises causing serious injuries.

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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (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 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Ohio Coal Co., 13 FMSHRC 912, 916-17 (1991).

Within this framework I find that this violation was "significant and substantial."

Field also concluded that the violation was the result of operator negligence in that the condition of the windshield was obvious. Foreman Richardson himself was operating the loader with this defect directly in his view. It is not disputed that the violation was abated in a timely manner.

Citation No. 4080934 charges a violation of the standard at 30 C.F.R. § 56.1000 and charges as follows:

The operator did not notify MSHA prior to commencement of mining operations. The portable screening plant has been operating for about 3 months. The operator also did not notify MSHA of a temporary closure of mine operations during the previous winter months. The mine operator was unaware of this requirement.

The cited standard provides as follows:

The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company mine name, mailing address, person in charge, and whether operations will be continuous or intermittent.

When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

The Secretary argues in this matter that the Weaver Pit No. 2 Mine was "closed" in November 1991 and reopened in May 1992 and that accordingly the operator failed to notify MSHA in accordance with the above noted regulation about such closure and such reopening. I do not find, however, that the Secretary has sustained her burden of proving that the Weaver Pit No. 2 Mine ever in fact "closed" between November 1991 and May 1992. The term is undefined in the regulation and the only credible evidence in this regard was the testimony of Inspector Field that sometime during the winter months he had approached the entrance to the mine and noted that a cable was strung across the entrance road. Field apparently also relied upon an alleged out-of-court statement attributed to Foreman Richardson that the plant was closed in November 1991 and was reopened in May 1992. However, I can give but little weight to this alleged hearsay statement since Richardson was laid off in November 1991 and was not working at the plant until recalled in May 1992.

Moreover, according to Karen Weaver, the spouse of mine operator Robert Weaver, mine product was sold throughout the period between November and May and that although employees had been laid off during that time both she and her husband continued to fill orders by loading from mine stockpile during that time. She further testified that mine product, both sand and stone, was also processed during that time, including "maybe a week" in December and two or three weeks in February.

The credible evidence clearly demonstrates that the subject mine was therefore operating intermittently from November 1991 through May 1992. Since the regulation itself requires notification to MSHA that a mine is in operation whether "continuous or intermittent," the intermittent operation in this case is consistent with an operating rather than closed mine. Indeed, the Secretary has failed to sustain his burden of proving that the mine had ever been "closed." Since it has not been proven that the mine ever was in fact "closed" as alleged, there was accordingly no need for MSHA to be notified that the mine had been "reopened" in May 1992. Under the circumstances, there was no violation and Citation No. 4080933 must be vacated.

Citation No. 4080934 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(a)(3) and charges as follows:

The Trojan 3000 front-end loader was not provided with seatbelts. The loader was being used to load a customer haul truck and does travel elevated incline roadways. The loader had previously been equipped with seatbelts and is occasionally used at the mine site.

The cited standard provides that "roll-over protection structures (ROPS) and seatbelts shall be installed on ... wheeled loaders and wheeled tractors; ..."

According to the undisputed testimony of Inspector Field there were in fact no seatbelts provided on the Trojan 3000 wheeled front-end loader and that the loader was being used by Foreman Richardson at the time it was cited. Field concluded that the condition was hazardous and a "significant and substantial" violation because the loader was operated in an area of inclined roadways and was used in the loading of other vehicles. In the event of overturning or accident with another vehicle the loader operator could, in Field's opinion, be ejected from his seat causing serious injuries. I conclude under the circumstances that the violation was indeed serious and "significant and substantial." Mathies Coal Company, supra. Because of the obvious nature of the violative condition it is clear that the operator is also chargeable with negligence.

Citation No. 4080935 charges a violation of the standard at 30 C.F.R. § 56.14101(a)(2) and alleges as follows:

The Trojan 3000 front-end loader was not provided with a functional parking brake. The loader was being used to load a haul truck. The loader is parked on level ground with the bucket lowered to ground level when the loader is left unattended.

The cited standard provides that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

According to the undisputed testimony of Inspector Field the parking brakes on the cited loader were not at all functional because the linkage between the brake handle and the brake cable had been disconnected. It was a serious hazard according to Field because it could result in uncontrolled movement of the loader while parked. He found that the hazard was somewhat mitigated by the fact that the loader was parked on level ground with the bucket down and therefore movement was inhibited. Field concluded that the operator was negligent in that the condition was obvious. I accept his undisputed findings.

Citation No. 4080936 alleges that a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

The horn of the Trojan 3000 front-end loader was not functional. The loader was being used to load haul trucks. Foot traffic in this area was slight."

The cited standard provides that "manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

According to the undisputed testimony of Inspector Field the horn on the Trojan 3000 loader was in fact not functioning at the time it was cited. According to Field the loader therefore was unable to warn persons in an emergency situation and it was in fact being used to load customers' haulage trucks. He felt that injuries were unlikely because the cited loader was used in a low traffic area. He concluded that the operator was negligent because the condition was obvious. I accept Field's undisputed findings.

Citation No. 4080932 issued pursuant to Section 104(d)(1) of the Act¹ alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14112(b) and charges as follows:

The L.B. Smith portable screener chain drive feeder sprockets were not guarded to protect persons against contact. The sprockets were about 2 and 3 feet above ground level. The guard was lying on the ground about 4 feet away and was about half covered with material built-up. This condition has existed for about 3 months. The sprockets were easily accessible to foot traffic. This condition was cited on two occasions during previous inspections. This is an unwarrantable failure.

The cited standard 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."

According to the undisputed testimony of Inspector Field the guard for the cited sprockets was indeed four feet away from its proper location lying on the ground and partially

¹ Section 104(d)(1) of the Act provides as follows:
If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

covered with sand and gravel. He noted that the chain drive feeder sprocket was therefore exposed creating a hazard from pinch-points. According to Field, material was being screened and loaded while he was present and Chuck Fuller, one of the mine employees, was working in the area. Field observed Fuller's footprints only one foot from the exposed sprockets. According to Field there was a serious potential for loss of fingers or arms and even death from the hazard.

The condition, according to Field, was readily observable and the operator had twice before been cited for failure to guard chain drive sprockets at the same mine and for the same type of screening plant. Field maintains that Foreman Richardson also told him that the guard had been off since his return to work at the end of May 1992. Karen Weaver, testifying on behalf of the operator, disputes Richardson that the guard had been off for three months but concedes that the guard had been off for about a week.

Within the above framework of evidence it is clear that the violation was indeed "significant and substantial." There was indeed a reasonable likelihood of reasonably serious injuries resulting from the exposed working sprocket in close proximity to working miners. Mathies Coal Company, supra.

I also find that the violation was the result of the operator's "unwarrantable failure" and of gross negligence. Unwarrantable failure has been defined by the Commission as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (1987); Youghiogheny and Ohio Coal Company, 8 FMSHRC 2007 (1987). In the latter decision the Commission further stated that whereas negligence is conduct that is "inadvertent, thoughtless, or inattentive, unwarrantable conduct is conduct that is described as not justifiable or is inexcusable."

The fact in this case that the guard had been removed from the operating plant for at least one week prior to its discovery by the Inspector in this case and remained off while the machinery continued to operate with miners plainly working in the vicinity of the machinery clearly supports a finding of gross negligence and "unwarrantable failure." The existence of two similar violations in the recent past also supports the unwarrantable finding.

ORDER

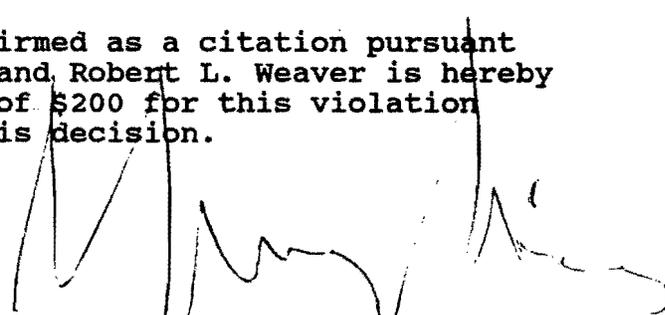
Docket No. YORK 93-25-M

Citation No. 4080933 is hereby vacated. The remaining citations are affirmed and the mine operator, Robert L. Weaver, is hereby directed to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 4080929	\$50
Citation No. 4080930	\$69
Citation No. 4080934	\$69
Citation No. 4080935	\$50
Citation No. 4080936	\$50

Docket No. YORK 93-26-M

Citation No. 4080932 is affirmed as a citation pursuant to section 104(d)(1) of the Act and Robert L. Weaver is hereby directed to pay a civil penalty of \$200 for this violation within 30 days of the date of this decision.



Gary Melick
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

OCT 7 1993

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-101
Petitioner	:	A.C. No. 44-04517-03675
v.	:	
	:	Docket No. VA 92-126
GARDEN CREEK POCAHONTAS	:	A.C. No. 44-04517-03680
COMPANY,	:	
Respondent	:	Mine: Virginia Pocahontas No. 6

DECISION

Appearances: James V. Blair, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Charlie Jessee, Esq., Jessee & Read, Abingdon, Virginia, for Respondent.

Before: Judge Barbour

These civil penalty proceedings were initiated by the Secretary of Labor ("Secretary") against Garden Creek Pocahontas Company ("Garden Creek") pursuant to sections 105(a) and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 801 et seq. In Docket No. VA 92-101 the Secretary alleges Garden Creek in two instances violated certain mandatory safety standards for underground coal mines found in Part 75, Title 30, of the Code of Federal Regulations ("C.F.R."), and in Docket No. Va 92-126 the Secretary alleges one additional violation. The Secretary further alleges that one of the violations in Docket No. Va 92-101 constituted a significant and substantial contribution to a mine safety hazard (a "S&S" violation). All of the alleged violations were cited at Garden Creek's Virginia Pocahontas No. 6 Mine ("V-P 6"), an underground coal mine located in Buchanan County, Virginia.

Garden Creek denied the existence of the violations and the Secretary's S&S allegation. Pursuant to notice, the matters were heard in Abingdon, Virginia. At the close of the hearing, counsels chose to forego briefing the issues, solely relying upon oral summations.

SETTLEMENT

Before the hearing counsel for the Secretary submitted a motion to approve the partial settlement of Docket No. VA 92-101. In essence, the motion stated the parties agreed that Garden Creek would pay the penalty proposed for Citation No. 3762880.

Counsel reiterated the agreement on the record and I stated I would make approval of the settlement part of my decision.
Tr. 3.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>	<u>Settlement</u>
3762880	12/12/91	75.316	\$620	\$620

The citation states the approved ventilation system and methane and dust control plan for the mine was not complied with in that methane in concentrations of 5.1 percent to 6.4 percent was detected at the top end of a bleeder entry. The approved plan required bleeder entries connected to areas from which pillars had been extracted to be maintained in such a manner as to control air flow through the gob and to induce the drainage of gas from all portions of the gob. This was not being done, as shown by the detected methane.

The citation also contains the inspector's finding that the violation of section 75.316 was S&S and due to Garden Creek's moderate negligence. Finally, the citation was issued in conjunction with an imminent danger order of withdrawal that closed the entire mine until the methane was reduced and the danger of explosion and fire was eliminated.

The parties have agreed the violation occurred. Clearly, it was S&S and very serious. I accept counsel's representation that it was due to moderate negligence on Garden Creek's part and that Garden Creek exhibited good faith in abating the violation. A computer printout of previously assessed violations establishes the mine has a large history of prior violations. Exh. P-1. There is no indication payment of the proposed penalty will affect Garden Creek's ability to continue in business.

Having considered the above factors, I conclude the settlement is reasonable and in the public interest. It is therefore APPROVED.

CONTESTED VIOLATIONS

STIPULATIONS

The parties stipulated as follows:

1. [VP-6] is a coal mine and is owned and operated by Garden Creek.
2. The products of VP-6 enter commerce and VP-6 is therefore subject to the Mine Act.
3. The ALJ has jurisdiction to hear and decide these cases.

4. The inspector who issued the citations is a duly authorized representative of the Secretary.
5. True and correct copies of the citations were properly served upon Garden Creek.
6. The imposition of any civil monetary penalty authorized by section 110 of the Mine Act will not affect the ability of Garden Creek to continue in business.
7. The violations were abated in good faith.
8. The communications (telephone) cable referred to in the two violations is not controlled by 75.516. The hanging of the communications cable as described in the two violations does not constitute a violation.

See Tr. 5-7.

DOCKET NO. VA 92-101

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
3800262	12/17/91	75.516

DOCKET NO. VA 92-126

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>
3763241	03/03/92	75.516

The citations allege violations of 30 C.F.R. § 75.516, the mandatory safety standard that specifies the type of support required for power wires in underground coal mines. Section 75.516, which repeats section 305(k) of the Act, 30 U.S.C. § 865(k) states:

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

Citation No. 3800262 states:

Beginning approximately 100 feet inby survey station 6656 of the No. 2 belt conveyor entry on 2 Dev. 0-East section and extending on inby for a distance of approximately 300 feet the 110 volt belt control cable, the communication line and the CO monitor cable are not supported on well-insulated insulators. The cables are tied together with nylon rope the entire 300 feet.

Exh. P-2.

Citation No. 3763214 states:

Beginning at crosscut number 35 of the No. 1 belt conveyor entry for the 0-East 4 Dev. section and extending on inby for a distance of approximately 1000 ft. the CO monitor cable, the telephone cable and the 110 volt control cable are hung together with nylon rope. The cables are also contacting the metal frame of the mono-rail at two different locations. Two-tenths [.2] of methane was detected in the affected area.

Exh. P-3. The alleged violations were abated when the cables were hung on insulated insulators. Exh. P-2, Exh. P-3.

Randall Ball, an inspector for the Secretary's Mining Enforcement and Safety Administration ("MSHA"), issued both citations. He found that neither was S&S. He also found that although the first was due to Garden Creek's low negligence, the second, which was cited approximately six weeks after the first, was due to Garden Creek's moderate negligence because, in his opinion, Garden Creek knew from the first citation that the condition constituted a violation. Tr. 12.

The issues are:

1. Whether Garden Creek twice violated section 75.516?
2. If so, what civil penalties should be assessed for the violations?

THE EVIDENCE

THE SECRETARY'S WITNESSES

RANDALL BALL

Randall Ball was the Secretary's first witness. Ball testified he believed the CO monitor cables and belt control cables were current-carrying conductors, that is, "power wires" within the meaning of section 75.516 and that the nylon rope by which they were suspended was combustible. Tr. 11, 34-35. (As noted, the parties stipulated the communications cables, although mentioned in the body of the citations, were not subject to section 75.516. Stip. 8.)

Although Ball referred to both the CO monitor cables and the belt control cables in the citations, his testimony made clear that he was not certain the CO monitor cables should have been included. He stated initially that a CO monitor cable was a power wire subject to section 75.516, but on cross examination, he stated he did not really know and that he included references to the CO cables in the citations because he was unsure whether or not they were covered. He explained that he was "not that electrically inclined." Tr. 22, see also Tr. 17. (On redirect, Ball explained further that he had "based . . . [the citations] mostly on the belt control cable." Tr. 36.)

Ball had no such doubts about the belt control cables. He felt certain suspension of such cables from nylon rope constituted a violation of section 75.516. Tr. 23, 24. Ball described the belt control cables as running parallel to and 3 or 4 feet above the belts, depending upon the height of the entries. Tr. 15. Ball noted that in discussing section 75.516, the Department of Labor, Mine Safety and Health Administration Program Policy Manual (the "Manual") defined a "power wire" as "a current-carrying conductor which may be bare, insulated, or part of a cable assembly." Tr. 35. He stated that the belt control line controlled power to the belt conveyor. Tr. 23. He also stated that at the time he wrote the citations he believed the line had a voltage of 110-volts. Tr. 23.

Counsel for Garden Creek pointed out that at Vol II, Part 18 of the Manual, "power conductor" was defined in part as, "[a] conductor that supplies electric power to an electric component or device on a machine or to a related detached component of a machine" and that "control circuit conductors" were excluded from the definition. Tr. 27; see Exh. R-6A. Ball was asked if, given this definition and the exclusion of control circuit conductors, he still believed a belt control cable was a "power conductor" within the meaning of the regulation.

Ball responded that he had not looked at or otherwise considered the definition of "power conductor" prior to the hearing. Tr. 39. He insisted that the citations were based on the fact the belt control cables were power wires carrying electricity. Tr. 27-28. As such, he believed the cables should have been hung on insulated insulators because section 75.516-1, which defines "well-insulated insulators," states in part that J-hooks may be used "for permanent installation of control cables such as may be used along belt conveyors." Tr. 28. However, any other type of insulators would have been acceptable, provided they were well-insulated and were noncombustible and would not have conducted electricity. Tr. 36.

Ball testified at the time he issued the first citation on December 17, 1991, he thought the nylon rope was combustible, even though he had never conducted any test to determine whether or not it was. Tr. 18. But between December 17 and March 3, 1992, when he issued the second citation he had seen James Franklin, a MSHA district conference officer, ignite the nylon rope with a cigarette lighter. Tr. 11-12. Thus, in his view, the power wires were not supported on well-insulated insulators and they were contacting the combustible nylon rope.

Ball maintained that when section 75.516 refers to "well insulated insulators" it means, in part, that insulators must be noncombustible, and he read the portion of the Manual that states "[a]cceptable insulators are constructed of noncombustible, nonabsorptive insulating material adequate for the high-voltage being used." Tr. 15; Exh. P-4 at 2.

He believed the hazard avoided through the use of noncombustible insulators was that of fire caused by a defect in the power wires. Tr. 15. Although, he was of the opinion that nylon could conduct electricity, he described the likelihood of it doing so as "minute." Nonetheless, it was still "possible." Tr. 19.

JAMES C. FRANKLIN

James Franklin, a district conference officer for MSHA Coal Mine Safety and Health, District 5, Norton, Virginia, was the Secretary's next witness. He explained that as a conference officer he represented MSHA at meetings held after enforcement actions had been taken by inspectors and at which operators presented arguments as to why the enforcement actions should be modified or vacated. Tr. 42.

Franklin was present at the meeting where the first citation was discussed. According to Franklin, Garden Creek took the position that the nylon rope with which the cables were hung was an acceptable insulator. As Franklin remembered it, a company safety specialist stated that Garden Creek had tested the rope

and found it be noncombustible. Tr. 44. The representative had brought some pieces of the rope to the hearing and Franklin described what happened: "[M]y cigarette lighter was laying on the table so I picked up a piece of it, set it on fire and it burned like a candle. So based on that I told him it didn't meet the requirements[.]" Tr. 44-45. (Franklin admitted that he did not know the flame spread index of the nylon -- that is, how hot it had to become before it would show any symptoms of catching fire. Tr. 46-47.)

Franklin maintained that after the demonstration with the cigarette lighter Garden Creek's representative agreed the rope was combustible, but then maintained the belt control cable was not a power-carrying or current-carrying conductor. Tr. 45.

ROY D. DAVIDSON

Roy Davidson, an electrical engineer who both conducted electrical inspections for MSHA and provided electrical technical assistance to operators on MSHA's behalf, was the Secretary's final witness. According to Davidson, each of the belt control cables had three conductors, two that carried power for the control of the belt circuit and one that was the ground conductor. The cables provided the electricity for turning the belts on and off. They have a 110-volt potential, i.e., standard household current. Tr. 53. Davidson was asked if he believed it possible for the belt control cables to set the nylon rope on fire? Davidson responded that he had not tested nylon rope but that "[g]enerally, there's enough energy in control cables to provide more heat than can be generated from a cigarette lighter. An arc can short circuit from an electric current. It's a very high heat. There's enough energy to produce fire." Tr. 55.

In Davidson's opinion, the danger section 75.516 is designed to eliminate is of an ignition source being created if a cable deteriorates or is damaged and its conductors contact one another. Under such circumstances the conductors could create a "tremendous amount of heat." Tr. 56.

Davidson acknowledged that section 75.516 refers to "power wires." Davidson, nonetheless, believed that as used in section 75.516, the term "power wires" includes cables because power wires are among the components of cables. Moreover, the standard's specific exceptions for trailing cables on mobile equipment and for those of special design implied to Davidson that unless excepted, power carrying cables are covered. Tr. 62.

With regard to the CO monitor cable, Davidson stated that it carried enough energy to ignite methane, but he was not certain it carried enough to ignite other combustible material. Tr. 56.

Davidson described his understanding of a "well-insulated insulator." He stated that the Manual defines one as being adequate for the voltage of the circuit. Whether an insulator is adequate could be determined by the dielectric rating of the insulator, a rating given to insulators by private testing companies, such as UL Testing. Tr. 57. To the best of his knowledge nylon rope never had been subjected to independent testing and been given a dielectric rating. Id.

On cross examination, Davidson identified a piece of the belt control cable used at the mine. R. Exh. 8. He also stated the belt control cable had a "P-122 MSHA" label on it, which is an MSHA approval seal. Tr. 60-61; Exh. R-8. The label meant the cable had a flame resistant outer jacket. Tr. 60. Davidson testified that each of the three conductors in the belt control cable were insulated -- they were not bare wire conductors. There were three paper-like fillers amidst the three conductors to make the entire cable assembly uniformly round, and the insulated wires were in contact with the noncombustible cable jacket. Tr. 60-62.

Finally, Davidson agreed that the Manual, at Volume II, Part 18, excluded control circuit conductors from the definition of power conductor/control conductor. Tr. 67; Exh. R-6A. However, he maintained the definition applied only to Part 18, the regulations setting forth the requirements for MSHA approval of permissible equipment. Tr. 67. According to Davidson, belt control cables are not approved under Part 18. Tr. 68.

GARDEN CREEK'S WITNESSES

MARVIN L. SMALLWOOD

Garden Creek's only witness, Marvin Smallwood, is the chief electrical engineer for the Virginia Division of Garden Creek's parent company, Island Creek Corporation. First, Smallwood testified regarding the CO monitor cables. He stated such cables carried DC power, a maximum of 24-volts. The power was supplied by batteries. Smallwood further stated the cables were considered communications cables and were not covered by section 75.516. In Smallwood's view, the CO monitor cables could not generate enough heat to set anything on fire. Tr. 74-75. Smallwood put it, "You are into milli-watts." Tr. 77. Further, there was not enough energy carried by the CO monitor cables even to constitute the transmission of power. Id.

According to Smallwood, the belt control cables were "control cables" as defined by the Institute of Electrical and Electronic Engineers ("IEEE") and the American National Standards Institute ("ANSI") and control cables did not have to be hung on well-insulated insulators. The cited belt control cables operated at between less than 1-watt and up to 5-watts of energy,

the approximate energy of a house nightlight, and as such would not heat anything enough to cause a fire. Tr. 79-80, 88. In fact, belt control cables carried such low current they were not power wires or power conductors. Tr. 79. ("It's hard electrically to define 1-watt of energy as power." Id. "When you think of power you tend to think of it being able to do something and there's just not enough energy there in my opinion." Tr. 89-90.)

Despite his belief that the belt control cables were not required to be hung on well-insulated insulators, Smallwood maintained the nylon rope that was used to hang the cables had "excellent insulation characteristics." Tr. 79. Smallwood stated that he was not aware of any testing by IEEE or ANSI to measure the nylon rope's dielectric capability, but that he had tested the rope and concluded it had infinite resistivity when impressed with 1000-volts, which was eight times greater than the operating voltage involved. Tr. 85.

Smallwood also stated that he did not know of any testing for combustibility of the nylon rope, other than that which was done by Franklin with the cigarette lighter. Tr. 85-86.

PARTIES' ARGUMENTS

THE SECRETARY

Counsel for the Secretary maintains that both the CO monitor cables and the belt control cables were power wires in that they were wires carrying power. According to counsel, the section of the Manual that excludes control circuit conductors from those things considered to be power conductors applies only to section 18.46 of the regulations and cannot be used to find that the belt control cables are not covered by section 75.516.

Counsel also argues the evidence establishes the nylon rope with which the cables were hung was combustible and, therefore, the cables were not hung on well-insulated insulators and were in contact with combustible material in violation of the standard. Tr. 99-100.

GARDEN CREEK

Counsel for Garden Creek counters that section 75.516 pertains to "power wires" and that a wire is a single conductor. The belt control cables were each a combination of three wires, not one. Further, the wires in each cable were surrounded by a noncombustible jacket and thus were not in contact with combustible material. The nylon rope was a "very good electrical insulator" and MSHA's "cigarette lighter test" did not prove the rope was combustible because it did not establish the ignition temperature of the nylon. Moreover, the CO monitor cable was

equivalent to a communication cable, which the parties stipulated was not subject to section 75.516. Tr. 101-104.

THE FACT OF VIOLATION

Section 75.516 requires "[a]ll power wires," with the exception of those specifically mentioned -- i.e., trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires -- to be supported on well-insulated insulators and it prohibits contact by such wires with three things -- combustible materials, roof and ribs. The fact of violation can be resolved by answering four questions that track the wording of the standard. Were the cited cables "power wires"? If so, were the power wires excepted by the standard? If not, were the power wires supported on well-insulated insulators? And/or were the power wires in contact with combustible materials, with the roof or with the ribs?

Were the cited cables "power wires"?

The standard does not define power wires, but, as was noted during the testimony, the Manual does. In providing guidelines for the interpretation and application of section 75.516, the Manual states " 'Power wire' means a current-carrying conductor which may be bare, insulated, or part of a cable assembly." Manual, Vol. V, Part 75 at 65 (July 1, 1988), reproduced in Exh. P-4 at 2. The Commission has recognized that in certain circumstances the Manual may "reflect a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in the [Commission] according it legal effect." King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981); see also Western Fuels-Utah Inc., 11 FMSHRC 278, 285-286 (March 1989). On the other hand, the Commission has declined to follow the Manual where its interpretation is clearly inconsistent with the plain language of the standard. Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152 (November 1989). Here, the Manual's definition of "power wire" is not clearly inconsistent with the language of the standard. Indeed, it compliments it.

The essence of a power wire is that it conducts current. Power wires can be used singly or several can be bound together to form a cable. As Davidson recognized, the standard implies that if power wires are combined to form a cable, they do not lose their essential nature as power wires for purposes of the standard. The standard's reference to "[a]ll power wires (except trailing cables on mobile equipment, specially designed cables . . . or bare or insulated return wires)" indicates that in the context of the standard the reference to "power wires" includes cables as well. Section 75.516 (emphasis added); See also Tr. 62. Thus, in my view, if the CO monitor cables and the

belt control cable were wires bound together to carrying current, that is, if they were current-carrying conductors, they were "power wires" within the meaning of the standard. That both were, is substantiated by the record.

Davidson stated his belief the CO monitor cable carried current Tr. 56. Smallwood agreed and was more specific -- the cable carried DC battery supplied power at a maximum of 24-volts. Tr. 75. Since neither the standard nor the Manual's definition of power wire couch the standard's application in terms of the amount of current carried, I conclude that in order to be a "power wire" within the meaning of section 75.516, a wire or cable must simply carry current, which the CO monitor cables did.

The same can be said of the belt control cables. Ball testified the cables controlled the power to the beltlines, and he thought, carried 110-volts. Tr. 23. Davidson was more precise. The cables provided current to the controllers that turned the belts on and off and had a 110-volt potential, the same voltage as standard household current. Tr. 53-54. Smallwood concurred that the cables carried current, although he was of the opinion the current was insufficient to pose a hazard. Tr. 74-75. There being agreement that the belt control cables carried current, I conclude that they too were power wires within the meaning of section 75.516.

Further, I cannot overlook the fact that in defining "insulated insulators", section 75.516-1 clearly contemplates that "control cables such as may be used along belt conveyors" are considered to be power wires within the meaning of the standard.

I agree with Garden Creek's counsel that if the definition of "power conductor/control conductor" contained in Vol II, Part 18 of the Manual were applied to section 75.516, the Manual might well indicate the belt control cables should be excluded from the standard. However, as Davidson testified and as counsel for the Secretary noted, Volume II, Part 18 of the Manual never was meant to apply to section 75.516. Rather, the Manual's headings make clear the interpretation, application and guidelines for enforcement contained therein apply only to the referenced parts of 30 C.F.R. Thus, the definition relied upon by Garden Creek applies to section 18.48, a section pertaining to the construction and design specifications required for MSHA approval of circuit-interrupting devices, and not to section 75.516.

For all of the foregoing reasons, I find the subject cables were "power wires" within the meaning of section 75.516.

Were the cited power wires excepted from section 75.516?

As previously noted, section 75.516 excepts from coverage, trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires. The testimony of all of the witnesses makes clear that whatever else the subject cables may have been, they were not trailing cables, high-voltage cables or ground or return wires. Hence, I find the CO monitor cable and the belt control cables were not excluded from the purview of the cited standard.

Were the cited power wires supported on well-insulated insulators?

Section 75.516-1 states that "[w]ell insulated insulators is interpreted to mean well-installed insulators," a definition Commission Administrative Law Judge Gary Melick aptly has termed "convoluted" and, as he also has noted, that may require "creditable creativity" to decipher. Consolidation Coal Co., 15 FMSHRC ____, Docket No. PENN 92-854 (August 9, 1993) (ALJ Melick). The Secretary seems, implicitly at least, to have recognized the regulatory inadequacy of defining section 75.516 with a non sequitur, for the Manual makes clear that "well-insulated insulators" must be more than "well-installed insulators." (The Secretary also has amplified in the Manual the meaning of "well-installed insulators" in terms of adequate support for the cables installed thereon and, more specifically, in terms of the tensile strength required. However, the installation of the cited power wires is not at issue in this proceeding.) To be "well insulated," the insulators must be constructed of "noncombustible, nonabsorptive insulating material adequate for the voltage being used." Manual, Vol.V, Part 75 at 65. Exh. P-4 at 3-4.

Thus, the material used for a well-insulated insulator must have specified physical properties. First, it must be noncombustible. "Noncombustible" is defined as "[a]ny material that will neither ignite nor actively support combustion in air at 1,200° F when exposed to fire." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) 754 ("DMMRT"). Second, it must be nonabsorptive. That is, it must lack the ability to take up moisture by molecular or chemical action. See Id. at 4. Third, it must be adequate for the voltage being used in that it must have an adequate dielectric strength. (For example, the Secretary has stated that an insulated J-hook may be accepted as "well-insulated" if it has a "dielectric strength of not less than eight times the voltage of the circuit." Manual, Vol V. Part 75 at 66 (Exh. P-4 at 3.)

In the context of this case the Manual's definition means the Secretary must establish the nylon rope used to hang the cited cables was not noncombustible, nonabsorptive or not

composed of material adequate for the voltage being used. The burden of proof is on the Secretary.

The evidence offered by the Secretary with respect to the noncombustibility and nonabsorptive properties of the nylon is, in my judgement, inadequate to support a conclusion regarding those properties. Ball, himself had not conducted any test on the nylon to gauge its combustible properties. Tr. 18. Ball admitted he did not know the ignition temperature of the nylon rope. Tr. 32. Rather, his belief the rope was not noncombustible was based upon having seen Franklin light a piece of the rope. Tr. 11-12, 18.

Franklin testified that Garden Creek's safety specialist brought pieces of the rope to the conference, that Franklin picked up a piece and set it on fire with his cigarette lighter, and that it "burned like a candle." Tr. 45. Franklin too did not know the ignition temperature of the nylon. Tr. 46-47.

Davidson was forthright in testifying to his lack of first-hand knowledge regarding the combustible nature of the rope. ("I'm not familiar with the nylon rope." Tr. 54. "The nylon rope in particular, I have not any test with this nylon." Tr. 55.) His opinion as to its combustibility was based upon his general belief that defective control cables could provide enough energy to produce more heat than a cigarette lighter. ("Generally, there's enough energy in control cables to provide more heat than can be generated from a cigarette lighter." Tr. 55.) In addition, Davidson stated that he had seen a nylon rope burn when it was used to bridge two conductors carrying 4,160-volts -- but, he added "its a different nylon rope than this." Tr. 58.

The DMRT definition establishes that the word "noncombustible" has a specific meaning recognized in the mining industry. (If the Secretary intended a different meaning, no evidence was offered to that effect.) For the Secretary to have proved that the nylon material was not "noncombustible," his evidence should have matched the definition. It did not.

No evidence was offered as to what the nylon rope used to hang the cables would do when exposed to flame in air at 1200° F, and I cannot infer on the basis of a void record the temperature of the flame of the cigarette lighter Franklin used to ignite the rope at the conference. Nor can I even infer from Franklin's testimony that the rope brought to the conference by Garden Creek's safety specialist was in the same condition as when it was used to hang the cable. Franklin's testimony was extremely limited in this regard. He simply stated that Garden Creek's representative brought some pieces of the rope to the conference.

The evidence with respect to the nylon rope's nonabsorptive properties was equally unpersuasive. Ball "assumed" the nylon rope would hold water or moisture, but he added "I haven't checked it." Tr. 16, see also Tr. 17-18. Davidson believed the way the different strands of the rope were interwoven "would provide cavities enough for moisture to accumulate," testimony that may relate to the design or configuration of the rope, but does not appear to relate to the ability of nylon to take up moisture by molecular or chemical action. Tr. 58. (The rope itself, or a piece similar to it, or a picture or drawing of the rope was not offered as evidence, so it is difficult to envision exactly to what Davidson was referring.) Indeed, if anything, Davidson seems to have believed nylon had at least some nonabsorptive properties, for he also stated, "[F]rom my experience with nylon[,] it doesn't absorb moisture very well." Id. As with the question of the noncombustible nature of the nylon rope, I believe the Secretary has failed to establish the cited rope did not meet this part of the definition of "well-insulated."

Further, in my opinion, the Secretary also failed to offer sufficiently persuasive evidence that with respect to whether the nylon rope was not adequate for the voltage being used. Davidson testified MSHA makes a determination of "adequacy" by referring to a material's dielectric rating. Tr. 57. Obviously, testimony regarding the dielectric rating of nylon would have been the best evidence. No such testimony was offered.

This was not necessarily fatal to proving the rope was not adequate to the voltage being used, for it may be there is no dielectric rating of nylon. Tr. 57, 85. (Although I tend to doubt it.) Even so, the Secretary presumably could have come forward with other detailed and convincing testimony as to why the rope did not offer the resistance to the passage of electric current necessary for the cited cables. He did not. Rather, the record contains only Davidson's account of a demonstration conducted by "Kentucky Utility" involving 4160-volts and a different kind of nylon rope, a test hardly pertinent to the facts at issue. (I should also note that although Franklin testified MSHA has a policy with regard to the approval of insulators that involves their dielectric strength, he could not testify about it because it was "not [his] area of expertise." Tr. 48.)

Because I find the Secretary has not established the nylon rope was not noncombustible, nonabsorptive and not adequate for the voltage being used, I conclude he has failed to establish the power wires were not supported on well-insulated insulators.

Were the power wires in contact with combustible material, roof or ribs?

Section 75.516 prohibits the subject cables from physically touching combustible material, roof, or ribs. Consolidation Coal Co., 15 FMSHRC ____, slip op. at 4. The Secretary contends that the nylon rope used to hang the cables and with which the cables were in contact was "combustible material." (There is no allegation on the Secretary's part the cables were touching the roof or ribs.)

"Combustible" is defined as "[c]apable of undergoing combustion or of burning. Used especially of materials that catch fire and burn when subjected to fire." DMMRT at 239. As Ball and Davidson testified, the purpose of the requirement is to prevent power wires or cables from igniting the combustible material should the wires or cables for some reason become defective. Therefore, for the Secretary to establish that this part of the standard was violated it is incumbent upon the Secretary to prove the particular cables cited could, if damaged, ignite the particular "combustible material" cited. It is not enough for the Secretary simply to establish in general that the particular "combustible material" will burn. Many materials, even some which are used as insulators, will burn if subjected to a high enough temperature for a long enough time.

Here in my view, the Secretary's evidence again falls short. Precious little evidence was offered with respect to whether, if the CO monitor cables were defective, they could ignite the nylon rope. Davidson stated, "I'm not sure on their particular CO monitor system how much energy it's got for igniting combustible material." Tr. 56. Ball was not even sure he should have included the CO monitor lines in the citations. Tr. 22, 36.

Testimony was more extensive concerning the belt control cables, but it too was insufficient. Ball thought the belt control cable carried 110-volts but did know for sure. Tr. 23. Nor did he know the ignition temperature of the rope. Tr. 33. Although he believed "wires coming in contact with each other would generate heat," and although he may have been right, that alone does not permit the conclusion that the wires of the cited cables would generate enough heat to burn the nylon used to hang them.

Franklin's belief in the combustibility of the nylon rope was based solely upon the fact he had ignited a piece it with his cigarette lighter. Tr. 44-45. He did not testify regarding the effect of damaged cables upon the rope and he did not know how hot the nylon rope had to get before showing symptoms of catching fire. Tr. 47.

Davidson, while offering the opinion a damaged belt control cable could cause enough heat to produce a fire, was not, in my opinion, sufficiently responsive to the precise issue at hand -- whether the cited belt control cables if damaged could ignite the

nylon rope from which they were hung? The following exchange between the Secretary's counsel, Davidson and me illustrates the general and less-than-fully-responsive nature of Davidson's testimony:

Q. Would it be possible that the belt control cable could set this [nylon] rope on fire?

A. The belt control cable has the energy if there's an arcing short circuit . . . to generate heat to cause a fire. I'm not familiar with the nylon rope, but it has enough energy there to cause enough heat to produce a fire.

* * *

The Court: Wait a minute. Ask him the question again . . . Didn't you ask him if nylon rope could be set on fire?

[Secretary's counsel]: By the belt control cable.

The Court: Right. What's your answer to that?

A. The nylon rope in particular, I have not any test with the nylon rope. [sic] Generally, there's enough energy in control cables to provide more heat than can be generated from a cigarette lighter. An arc can short circuit from an electrical current. It's a very high heat. There's enough energy to produce a fire.

* * *

Q. What is the danger if [the belt control cable] contacts combustible materials?

A. Because if the cable deteriorates or becomes damaged and two conductors come in contact with each other they can produce a tremendous amount of heat which could be an ignition source.

Q. And, as you stated, that could set this nylon rope aflame?

A. Any combustible material could be set on fire.

Tr. 56.

As noted, the question is whether the belt control cables if damaged could have ignited the cited nylon rope. Davidson repeatedly disclaimed familiarity with nylon and his statement that "any combustible material could be set on fire" is equivocal. He may have meant either that heat from the conductors in the cited cables could have ignited the particular rope in question or simply that any material that is "combustible" could be set on fire.

Also, even if I credit Davidson's general assertion that "there is enough energy in control cables to provide more heat than can be generated from a cigarette lighter" I cannot make the logical leap of faith that because Franklin's cigarette lighter burned the nylon rope at the conference, defective belt control cables could have burned the rope used to hang the cited cables. As I have noted, there is no assurance that rope burned at the conference was in the same condition as that used to hang the cables.

In short, when the nature of Davidson's testimony is considered together with the fact that Davidson had not tested nylon and admittedly was unfamiliar with it, I find it does not support a conclusion the cited nylon rope could have been ignited by the cited belt control cables. (This being so, I need not evaluate Smallwood's assertion the cited belt control cables did not carry sufficient power to cause a fire. Tr. 80.)

CONCLUSION

Because I conclude the Secretary has not established the cited cables were not supported on well-insulated insulators and were not in contact with combustible materials, I hold that the Secretary has not proved the alleged violations of section 75.516. This, of course, does not mean the Secretary may never under similar circumstances allege and prove violations of the cited standard, only that he has not done so in this instance.

ORDER

In Docket No. VA 92-101 the Secretary is ORDERED to vacate Citation No. 3800262, 12/17/91, 30 C.F.R. § 75.516, within thirty (30) days of the date of this proceeding.

In Docket No. VA 92-126, the Secretary is ORDERED to vacate Citation No. 3763241, 3/3/92, § 75.516, within thirty (30) days of the date of this proceeding.

In Docket No. VA 92-101, Garden Creek is ORDERED to pay a civil penalty in the settlement amount of six-hundred twenty dollars (\$620) within thirty (30) days of the date of this proceeding for Citation No. 376880, 12/12/91, 30 C.F.R. § 75.316. Upon receipt of payment, this matter is DISMISSED.


David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 12 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-343-M
Petitioner	:	A.C. No. 24-00338-05531
	:	
v.	:	Docket No. WEST 92-705-M
	:	A.C. No. 24-00338-05535
MONTANA RESOURCES, INC.	:	
Respondent	:	Continental Mine

DECISION ON REMAND

Before: Judge Cetti

The stay order in Docket No. WEST 92-343-M is lifted.

On August 3, 1993, the Commission vacated the August 27, 1993, Decision Approving Settlement and remanded this matter to this Judge for appropriate proceedings.

It is clear from the record that the Commission vacated and remanded this matter because there was no true meeting of the minds of the parties as to exculpatory language in paragraph 8 of Respondent's May 17, 1993, motion to approve settlement. As stated by the Commission "it is clear that respondent's motion (to approve settlement) was prematurely filed and should have been denied."

On August 27, 1993, I issued a Post Remand Order directing the parties to inform me as to whether or not they had or could reach a full "genuine settlement agreement" on all issues. The parties were notified that if they could not reach such an agreement I would timely set the matter for a two day hearing in Butte, Montana.

On September 9, 1993, the parties informed this Judge that they had "worked out" a settlement agreement on all issues including the specific wording of the settlement agreement's exculpatory paragraph.

On October 1, 1993, the Joint Motion to Approve the Settlement Agreement was received in the Commission's Denver office. There has been no objection to any of the provisions of the settlement agreement from any source.

The parties now jointly move for approval of the settlement agreement pursuant to 29 C.F.R. § 2700.30. Under the proffered settlement agreement there is a reduction in the initial proposed penalties for a total settlement sum of \$20,000. The citations, initial proposed assessments, the proposed modifications and the settlement amounts are as follows:

Docket No. WEST 92-343-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Initial Proposed Penalty</u>	<u>Agreed Settlement</u>	
3908002	56.12017	\$178	\$110	
3906071	56.14107(a)	119	Vacated,	insufficient evidence
3606072	56.14107(a)	119	Vacated,	insufficient evidence
3906073	56.14107(a)	119	20	Not S&S

Docket No. WEST 92-705-M

3630731	56.12017	15,000	10,000
3630732	56.12006	14,000	9,850
3630733	50.12	20	<u>20</u>
TOTAL			\$20,000

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

ORDER

The motion for approval of settlement is **GRANTED**. It is **ORDERED** that the "significant and substantial" finding in Citation No. 3906073 be deleted, that Citation Nos. 3906071 and

3906072 be VACATED and that RESPONDENT PAY to the Secretary of Labor a penalty of \$20,000 within 40 days of this order. Upon receipt of payment these cases are DISMISSED.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 14 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-129
Petitioner : A.C. No. 05-04452-03501 BBO
v. :
 : Sanborn Creek Mine
JOY TECHNOLOGIES INC.,- :
COAL FIELD OPERATIONS, :
Respondent :

DECISION

Appearances: Margaret Miller, Esquire, Office of the
Solicitor, U.S. Department of Labor, Denver,
Colorado, for Petitioner;
W. Scott Railton, Esquire, Reed, Smith, Shaw
and McClay, McLean, Virginia, for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging Joy Technologies, Inc. (Joy) with one violation of the standard at 30 C.F.R. § 48.28(a). A preliminary issue is whether Joy is subject to jurisdiction under the Act as a mine "operator." If Joy is found to be within such jurisdiction, then the general issue is whether Joy violated the cited standard and, if so, what is the appropriate penalty to be assessed.

The subject Sanborn Creek Mine is an underground coal mine operated by the Somerset Mining Company (Somerset). Joy is the manufacturer of mining equipment and parts. Joy sells its equipment and provides followup services to its customers, such as expert advice on repairs and assistance in obtaining parts. Joy maintains that while it sold equipment to and provided such followup services for the Sanborn Creek Mine it was neither an "operator" nor an "independent contractor" as defined in the Act and that therefore the Secretary had no jurisdiction under the Act to issue the order at bar.

The Order, No. 3581501, was issued April 7, 1992, pursuant to Section 104(g)(1) of the Act,¹ by Coal Mine Safety and Health Inspector Larry Ramey for the alleged failure of Joy Service Representative Dixson McElhannon to have received eight hour annual refresher training required by the cited standard. There is no dispute that McElhannon had not received the training.

McElhannon had been employed by Joy as a service representative since August 1990. He is experienced as a miner, is a certified mechanic and is considered to be an expert in the mechanics of Joy mining equipment. McElhannon's job as a service representative for Joy includes acting as a "troubleshooter" for Joy equipment at mines where such equipment is used. In that capacity he often determines what parts are necessary, orders the parts and ascertains that the parts are delivered. McElhannon maintains that he does everything but the installation of the parts. In addition, when new equipment is shipped, he determines that the equipment is properly unloaded, that it is not damaged, and that it performs as it should. McElhannon testified that he continues to visit his customers regularly even after the manufacturer warranties have expired and that Joy provides such services for as long as its equipment is being used.

The evidence shows that the Sanborn Creek Mine had been reopened and coal production resumed in August, 1991 by Somerset. The documentary evidence shows that between January 24, 1992 and the date the instant order was issued on April 7, 1992, McElhannon had performed services on a number of occasions at the Sanborn Creek Mine in his capacity as a Joy service representative (Exhibit M-2). McElhannon acknowledged at hearing that he was also present in this capacity at this mine at other times not documented.

¹ Section 104(g)(1) of the Act provides as follows:

If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

On the Joy sales/service report dated January 24, 1992, McElhannon noted as follows:

Went under ground to trouble shoot cutter gear box problems. Discovered right hand high speed gear on cutting motor was bad. Also cutter head hinge pin was missing (found in magnet). They decided to run machine on afternoon shift anyway and do repairs on weekend.

On the February 19, 1992 report, McElhannon noted as follows:

Assisted mine mechanic in a complete remove rebuild and replacement of complete cutter head on the machine.

Replaced all bearings and seal throughout cutter case and both pinion bevel gears.

On the March 2, 1992 report, McElhannon noted as follows:

Assisted mine mechanics unloading new shuttle car installed electrical nip checked out everything on car. Found atmospheric relief valve on boom. Lift leaking through. Talked to Kim Ball to have valve replaced on warranty. Valve Part Number 571668. They cut side boards off of car and took it underground 3-4-92.

On the March 3, 1992 report, McElhannon noted as follows:

Assisted mine mechanics unloading new shuttle car. Hooked up power and checked car operation. No problems were found. They will cut sideboards off and the car will go underground 3-5-92.

Finally, on the April 6, 1992 report, McElhannon noted as follows:

Assisted mine mechanics unloading machine as it arrived on mine property. On 4-7-92 we started reassembling new miner and on 4-11-92 we took miner underground and on 4-13-92 miner went into production.

The machine is currently in a seven foot coal seam on 20 foot cut as is not cutting to full potential. They are developing a lower seam with more height and have asked for a variance for 40 ft cuts which will increase production dramatically.

On April 6, 1992, Joy delivered a new continuous miner to the Sanborn Creek Mine. It was delivered in sections on three trucks and was unloaded and placed in the maintenance shop. On April 7, 1992, MSHA Inspector Larry Ramey entered the maintenance shop while Somerset Maintenance Supervisor Bill Pecharich and his crew were assembling the new miner. Joy Service Representative McElhannon was also present at this time and was using a remote control device to move the main frame of the continuous miner to help a mechanic pin it together. Ramey observed another person standing at this time in front of the cutter heads on the continuous miner.

Section 3(d) of the Act defines the term "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine" In Otis Elevator Company v. Secretary of Labor and FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the court held that in Section 3(d) the "phrase 'any independent contractor performing services ... at [a] mine' means just that" and that the court "did not confront ... whether there is any point at which an independent contractor's contact with a mine is so infrequent, or de minimis, that it would be difficult to conclude that services were being performed since [Otis] conceded that it was performing limited but necessary services at the mine" (921 F.2d at 1290 n. 3). Otis had a contract to service the shaft elevators at a mine.

In Lang Brothers, Inc., 14 FMSHRC 413 (1991), Lang Brothers had an annual contract to clean and plug gas well sites for Consolidation Coal Company "to ensure that natural gas does not seep through the well into a mining area and create a safety hazard." 14 FMSHRC 414. In holding that Lang Brothers was an "operator," the Commission stated:

Lang's work at the well sites ... was integrally related to Consol's extraction of coal. Cf. Carolina Stalite, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. 14 FMSHRC at 418.

The Commission did not adopt the restrictive interpretation of Old Dominion Power Company v. Secretary of Labor and FMSHRC, 772 F.2d 92 (4th Cir. 1985) (implying that an independent contractor must have a "continuing presence at the mine" to be held to be an "operator" under the Act). Rather, it held that the de minimis standard may be measured by the significance of the contractor's presence at the mine, as well as the duration or frequency of its presence. The Commission noted that even though Lang's actual presence at the mine to clean and plug wells was for a short period its activity was an integral part of Consol's extraction process.

In Bulk Transportation Services, Inc., 13 FMSHRC 1354 (1991), the contractor had a contract with a coal mine operator to transport coal from the mine to a generating station 40 miles away. The Commission noted that Bulk had a substantial presence at the mine -- "[T]here is a constant flow of truck drivers in and out ... four to five days a week" -- 13 FMSHRC at 1359 -- but it focused on the significance of Bulk's activities to the extraction process in determining that Bulk was an operator subject to the Mine Act. "Given the undisputed fact that Bulk was Beth Energy's exclusive coal hauler between Mine No. 33 and the generating station, and given the quantities of coal hauled by Bulk, we agree with the judge that Bulk's services in hauling coal were essential and closely related to the extraction process." 13 FMSHRC at 1359.

Within the above framework of law and evidence it is clear that Joy Service Representative McElhannon had been performing limited but necessary services at the Sanborn Creek Mine before and at the time of the issuance of the order at bar. It may reasonably be inferred that these services were essential to the extraction of coal in that McElhannon determined that the Joy mining equipment, including a continuous mining machine was properly delivered, put together and in good working order. McElhannon further performed followup services for Joy mining equipment at the Sanborn Creek Mine providing "troubleshooting" advice in the underground area of the mine, ordering parts, and assisting in specific repairs of mining equipment. The continued operation of mining equipment, including continuous miners and shuttle cars, is essential and closely related to the extraction of coal and its removal from the mine. Joy's representative was therefore clearly performing limited but necessary services at the Sanborn Creek Mine and Joy was therefore an "operator" within the meaning of the Act. Otis Elevator Company, supra, 921 F.2d at 1290 n. 3.

In reaching these conclusions I have not disregarded Joy's argument that it did not in fact have a contract to perform services at the Sanborn Creek Mine and that it was presumably therefore not an independent contractor. While there is insufficient evidence in the record to conclude whether or not such a specific service contract existed, it is undisputed that Joy, as a vendor, sold mining equipment (and parts) to be used at the Sanborn Creek Mine and that Joy, through its service representative, performed continuing services in connection with those contracts of sale. Under the circumstances Joy was an independent contractor. See, e.g., 41 Am Jur. 2d Independent Contractors, § 18.

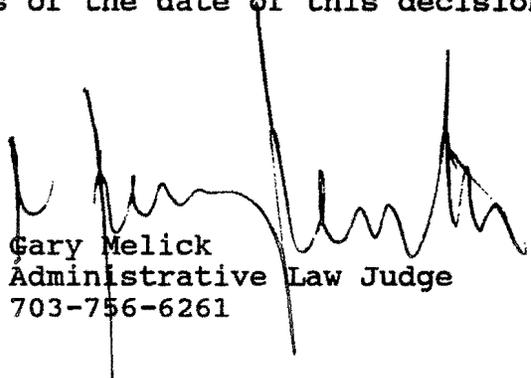
Joy also argues that it is not responsible as a mine operator because it was not "continually present" at the Sanborn Creek Mine. However, the appropriate legal test to be applied includes consideration not merely of the duration and

frequency of the contractor's presence at the mine, but also the significance of its presence usually expressed in terms of how essential and closely related such services are to the extraction process. See Otis Elevator, supra; Lang Brothers, supra; Bulk Transportation, supra.

Since there is no dispute that McElhannon had not received the safety training required by 30 C.F.R. § 48.28(a) as charged in Order No. 3581501, the violation is proven as charged. However, in light of the inability of the Secretary to have shown that McElhannon did not have, through other experience, training and resources, the requisite knowledge that would be incorporated in the subject training I am unable to find that the violation was "significant and substantial" or of high gravity. In addition, in light of the good faith legal position taken by Joy in this case that it was not subject to the Act's jurisdiction, a finding of negligence is inappropriate. Under the circumstances and considering all of the criteria under Section 110(i) of the Act, I find that a civil penalty of \$100 is appropriate.

ORDER

Joy Technologies, Inc. is hereby directed to pay a civil penalty of \$100 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
703-756-6261

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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

OCT 18 1993

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
ON BEHALF OF FREDDY THACKER, : Docket No. KENT 93-977-D
Complainant :
v. : PIKE CD 93-12
: :
BLACK DRAGON MINING COMPANY, : No. 2 Mine
Respondent :

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Carl C. Charneski, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Complainant;
Billy R. Shelton, Esq., Baird, Baird, Baird &
Jones, P.S.C., Pikeville, Kentucky, for Respondent.

Before: Judge Maurer

On September 16, 1993, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent, Black Dragon Mining Company (Black Dragon) to reinstate Freddy Thacker to the position which he held immediately prior to his June 19, 1993, discharge, or a similar position at the same rate of pay, and with the same or equivalent duties assigned to him. The application was supported by an affidavit of Lawrence M. Beeman, who is the Chief, Office of Technical Compliance and Investigations, Coal Mine Safety and Health, Mine Safety and Health Administration (MSHA) and by a copy of the original complaint filed by Thacker with MSHA.

On September 27, 1993, Black Dragon filed a responsive pleading, denying that the Secretary is entitled to the requested Order of Temporary Reinstatement, denying that it violated the Mine Act in discharging Thacker and requesting a hearing on the Secretary's Application.

The requested hearing was held pursuant to notice on October 7, 1993, in Prestonsburg, Kentucky.

The relevant scope of this hearing, at this preliminary stage of the proceedings; is limited to a determination of whether the miner's complaint is being frivolously brought. I stated on the record at the hearing and will reiterate here that

I am not at this time determining the merits of Thacker's discrimination complaint, but only whether that complaint is frivolous, as that word is commonly used.

The Secretary has produced evidence that Thacker was a shuttle car operator with Black Dragon for about 5 days or so when he was discharged. During his short tenure with the company, Thacker was quite vocal with regard to complaints concerning defective steering and brakes on the shuttle car which he operated at Black Dragon's No. 2 Mine. There is also other evidence that mine management was well aware of the shuttle car's steering and brake problems. On June 24, 1993, after MSHA Inspector Buster Stewart wrote a 104(a) citation against the shuttle car, management removed it from service and repaired it.

Mr. Thacker believes, as does the MSHA investigator who testified, that Thacker was discharged for complaining about the steering and brakes being bad on the shuttle car he was assigned to operate. The complaint has a lot of common sense appeal. Here is an employee with but a few days seniority making a big to-do over a mechanical condition that the evidence would suggest has been of long-standing duration. This begins to look to management like the company might have hired a chronic complainer and it might be prudent at this point to remove the source of irritation. Ergo, Thacker is discharged.

However, there being two sides to nearly every story, Black Dragon maintains they took all these safety complaints in stride. Rather, it was Thacker's unfortunate proclivity to pull the shuttle car's cable off the reel, or pull the cable in two, or otherwise cut the cable — he did so three times in the 5 days he worked there, that caused him to be let go. Mine Foreman Russell Lewis emphatically states that he was not fired for being too slow or because of making safety complaints.

There is another aspect of controversy with regard to Thacker's maintenance of the shuttle car. Management testified he was not properly maintaining the equipment. Thacker insists he was. There is evidence from others on both sides of the issue.

I note that the record contains a great deal more relevant evidence than is recited or dealt with herein, including some evidence that tends to rebut or refute portions of the Secretary's evidence. However, at this stage of the proceedings I do not need to weigh the evidence or make findings on the ultimate issues. At this time I am only required to determine if Thacker's complaint was frivolously brought.

Quite frankly, while this is not the strongest case I have ever seen, at least in the current state of the record, there is ample evidence in the record that Mr. Thacker engaged in

protected activity during his short tenure at Black Dragon and it is also undisputed that he was fired after only 5 days on the job. It is less clear whether this adverse action had any substantial connection to the protected activity, but it is at least arguable and the evidence in the record is sufficient to satisfy the complainant's burden of proof that his complaint was not frivolously brought. In reaching this conclusion, I do not mean to portend, one way or the other, what the ultimate findings concerning the merits of this case might be, as both parties will have further opportunities to enlarge the record.

I have carefully considered the entire record of this proceeding in that light and I conclude that Thacker's complaint is not clearly without merit, fraudulent or pretextual in nature. Therefore, I conclude that Thacker's complaint is not frivolously brought.

ORDER

Respondent is **ORDERED** to immediately reinstate Freddy Thacker to the position from which he was discharged on or about June 19, 1993, or to an equivalent position, at the same rate of pay and with the same or equivalent duties.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 18 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 92-474-M
Petitioner	:	A.C. No. 31-02078-05504
v.	:	
	:	Docket No. SE 93-54-M
RENNEY'S CREEK MINE,	:	A.C. No. 31-02078-05505
Respondent	:	
	:	Renney's Creek Mine

DECISION

Appearances: Rafael Batine, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Andy Purifoy, Vice-President, Renney's Creek Mine, New Bern, North Carolina, for Respondent

Before: Judge Melick

These consolidated cases are before me upon petitions for civil penalties filed by the Secretary of Labor under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Renney's Creek Mine with violations of mandatory standards. The general issue is whether Renney's Creek Mine violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

Docket No. SE 92-474-M

Citation No. 3885035 alleges a violation of the mandatory standard at 30 C.F.R. § 56.12018 and charges that "[t]he electrical circuit breakers located at the central shop, were not labeled to identify the circuits, and identification by location was not possible."

The cited standard provides that "[p]rincipal power switches shall be labeled to show which units they control, unless identification can be made readily by location."

The undisputed testimony of Inspector Terry Scott of the Mine Safety and Health Administration (MSHA) was that on July 8, 1992, during the course of an electrical inspection at the Renney's Creek Mine he discovered the cited violation. He noted that these circuits provided power for inside the shop and if the wrong circuit were cut and an uncut circuit

worked upon then a shock and electrocution hazard was presented. He concluded that serious injuries were "unlikely" however because the main breaker was in fact used to cut all power to all of the circuits and no separate breakers were used. He concluded that the violation was the result of operator negligence because other control boxes were properly labeled throughout the mine. I accept the undisputed findings of Inspector Scott.

Citation No. 3885036 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.4104(a) and charges that "[s]even open containers of used motor oil and transmission fluid was [sic] allowed to accumulate in the shop, where welding, cutting and smoking was permitted, which could create a fire hazard."

The cited standard provides that "[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard."

According to the undisputed testimony of Inspector Scott, during the course of his inspection on July 8, 1992, he in fact observed seven open containers, some with motor oil and some with transmission fluid in the shop area within 10 to 15 feet of an area in which welding had occurred. Scott also observed cigarette butts within 10 to 15 feet of the motor oil. Scott thought that it was reasonably likely that if a fire started you could have injuries trying to put the fire out or trying to escape from the fire. He opined that "slag" or hot metal emitted during the welding process could ignite the motor oil and transmission fluid.

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 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (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 (1987) (approving Mathies criteria).

The third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed will result in an event in which there is an injury. (U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (1984), and also that in the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also, Halfway Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991)).

According to Renney's Creek Mine Owner Calvin Hawks the oil observed by Inspector Scott was the result of a recent oil change and would be burned in their heater. Hawks testified that in fact welding was not performed in the presence of the used oil. Considering this undisputed testimony, I find that the potential ignition source from welding was not present in the shop area and accordingly there was no likelihood of an ignition from that source. There is similarly no evidence that cigarettes were smoked in the presence of these liquids. Under the circumstances I can not find that the violative condition was either a serious hazard nor "significant and substantial." Inasmuch as the operator was reportedly also about to pour the used motor oil into another container and did not have the oil present during welding I find reduced negligence.

Citation No. 3885037 alleges a violation of the standard at 30 C.F.R. § 56.14206(b) and charges as follows:

The bucket on the Trojan, F.E.L. SNT 175581 was suspended in mid air, approx. 2 to 3 feet from the ground. The loader was unattended.

The cited standard provides as follows:

When mobile equipment is unattended or not in use, dippers, buckets and scrape blades shall be lowered to the ground. Other movable parts, such as booms, shall be mechanically secured or positioned to prevent movement which would create a hazard to persons.

It is undisputed that the bucket on the Trojan front-end loader was indeed some 2 to 3 feet off the ground, and the loader was unattended, with its motor running at the time it was cited. According to Inspector Scott the bucket could fall on someone resulting in the loss of a foot or leg. He concluded that the operator was negligent because he "should have known" that this was a violation.

Calvin Hawks admitted that he left the bucket in an elevated position on this occasion but only because he was nervous by the presence of the inspector. He stated that it was his practice to always let the bucket down. Under the circumstances, and crediting Hawks testimony, I find that the violation was reasonably serious but that the operator is chargeable with only minor negligence.

Citation No. 3885038 charges a violation of the standard at 30 C.F.R. § 506.12030 and alleges that "[t]he conduit was pulled from the junction box located at the No. 1 screen, allowing the single insulated wires to lay against the metal box."

The cited standard provides that "[w]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

It is undisputed that the condition existed as cited. According to Inspector Scott, with the conduit pulled from the junction box and the single insulated wires rubbing against the metal box a shock hazard could eventually result. He considered the operator to be moderately negligent because the condition was readily visible. I accept the inspector's undisputed findings and conclude that a violation did occur as charged.

Citation No. 3885039 alleges that "[t]he motor junction box cover was not in place on the No. 1 screen motor." The cited standard, 30 C.F.R. § 56.12032, provides that "[i]nspection and coverplates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

It is not disputed that the conditions existed as charged and that the fact that the junction box cover was not in place was plainly visible from the ground area. It is undisputed that there was a shock and electrocution hazard if there were bare wires inside the box and if someone placed their hands inside the box. Inspector Scott found the violation not to be serious however because, in fact, the wires were protected inside the junction box. I accept the undisputed findings of the inspector and find that the violation occurred as charged.

Docket No. SE 93-54-M

Citation No. 3884837 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.4402 and alleges as follows:

About 1/4 gallon of gasoline/oil mixture for 2 cycle engine (weed eater) was stored in a milk jug (plastic) immediately to the right of the large entrance door in the shop beside the outer wall on the floor. The gasoline [sic] was not in a safety can and was not labeled to indicate the contents.

The cited standard provides that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents."

The testimony of MSHA Inspector Ronald Lilly is undisputed that in the course of his inspection on September 2, 1992, there was a quarter gallon of gas/oil mixture for a 2 cycle weedeater stored in a plastic milk jug near the entrance door in the shop. It was neither stored in a safety can nor labeled to indicate its contents. Inspector Lilly opined that the violation was serious and "significant and substantial" because the plastic container in this case could easily have been punctured and was near electrical cables, including an extension cord and welding cables. In addition, according to Lilly, "when you put a spark to gasoline, especially when it's vaporized, you get an explosion and enormous fast-acting fire."

Calvin Hawks did not dispute that the gasoline/oil mix was kept in the plastic jug but maintained that the jug was less likely to spill gas when filling the weedeater than safety cans.

Within this framework I find that the violation was serious and "significant and substantial." See Mathies Coal Co., supra. The operator was also negligent in knowingly using the plastic container rather than a safety can.

Citation No. 3884838 alleges a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

The backup alarm on the 645-B Fiat-Allis front-end loader (altered to use shovel for cleaning conveyors at the plant) was defective and would not give an audible sound when the machine was placed in reverse. A signal person was not being utilized.

The cited standard provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

It is not disputed that the cited front-end loader did not in fact have its back-up alarm in a functioning condition at the time it was cited. According to Inspector Lilly someone behind the front-end loader could be struck due to the lack of visibility to the rear and the lack of an operative back-up alarm. He believed the hazard was "unlikely" however based on the limited area of operation and the absence of persons in the area. Lilly also concluded that the operator was negligent because it was obvious that the alarm did not function. I accept the undisputed findings of Inspector Lilly.

Citation No. 3884839 alleges a violation of the standard at 30 C.F.R. § 14.1001(a) and charges that "[t]he 645-B Fiat-Allis front-end loader (altered to use as a shovel for cleaning conveyors in the plant) had not been inspected in regard to back-up alarm, before placing the machine in service."

The cited standard provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

There is no dispute that the cited loader was in fact not inspected before being placed in operation on the shift at issue. According to Calvin Hawks, his son-in-law Andy Purifoy had not yet had an opportunity to inspect the loader when it was cited in this case. According to Purifoy it was indeed his responsibility to check the loader and he acknowledged that it was not inspected that day. I accept the undisputed findings in this case that the negligence was "moderate" and that injury was "unlikely" under the circumstances.

ORDER

Docket No. Se 92-474-M

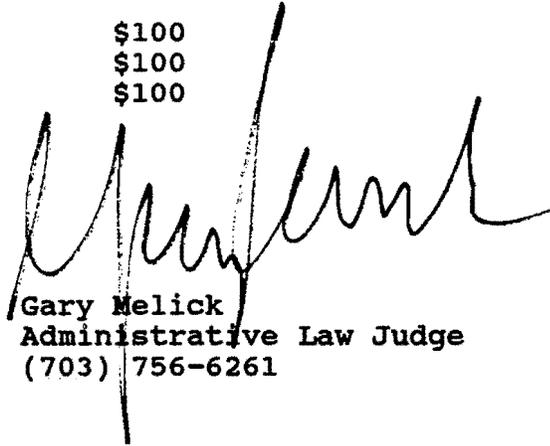
The citations in this case are hereby **AFFIRMED** and Renney's Creek Mine is directed to pay the following civil penalties for the violations charged in those citations within 30 days of the date of this decision:

Citation No. 3885035	\$ 75
Citation No. 3885036	\$ 75
Citation No. 3885037	\$ 50
Citation No. 3885038	\$100
Citation No. 3885039	\$ 75

Docket No. SE 93-54-M

The citations in this case are **AFFIRMED** and Renney's Creek Mine is directed to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 3884837	\$100
Citation No. 3884838	\$100
Citation No. 3884839	\$100



Gary Melick
Administrative Law Judge
(703) 756-6261

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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OCT 18 1993

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-420-D
on behalf of :
ANITA DENICE SAMUELSON, : DENV CD 91-04
Complainant :
: Caballo Mine
v. :
: :
CLEAN RITE SERVICES, INC., :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Allen Van Tassel, Gillette, Wyoming,
appearing pro se, for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed by the Secretary of Labor on behalf of Anita Denice Samuelson against Clean Rite Services, Inc. ("Clean Rite"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. (the "Act").

A hearing was held in Gillette, Wyoming, on August 3, 1993.

The parties submitted their views in oral arguments.

The Secretary of Labor, as representative of the Mine Safety and Health Administration ("MSHA"), alleges Complainant Anita Denice Samuelson was employed as a janitor by Clean Rite at a surface mine and therefore was a "miner," as defined by Section 3(g) of the Act.

The Secretary further charges Clean Rite violated Section 115(b) of the Act in failing to reimburse Complainant for exercising her statutory rights under the Act. Further, the

Secretary charges Respondent thereby violated Section 105(c) of the Act.

The Secretary also seeks a civil penalty against Clean Rite for the violations.

Section 105(c)(1) of the Act provides:

"(c)(1) 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 this Act.

The credible evidence establishes the following:

FINDINGS OF FACT

1. ANITA DENICE SAMUELSON began working for Clean Rite as a janitor on June 23, 1991. She worked until July 16, 1991 earning \$5.75 an hour. (Tr. 9-10, 23).
2. Ms. Samuelson worked at the Caballo Mine operated by the Carter Mining Company in Gillette, Wyoming. (Tr. 10).
3. In order to work at the mine, she had to take the MSHA class. She took the training after she started to work. (Tr. 10-11, 20).
4. The training took two days. She had two 10-hour training classes. (Tr. 11).
5. Ms. Samuelson was not paid by Clean Rite for the time spent in MSHA training. (Tr. 12, 15).

6. Ms. Samuelson had been hired by Mr. Van Tassel, president of Clean Rite. Her duties included cleaning at a surface coal mine eight to ten hours a day for five or six days a week. (Tr. 14).

7. She worked at the Caballo Mine before receiving required training for 20 hours. (Tr. 14).

8. A part of her training included a tour of the mine. She had no prior training or experience as a miner before starting work with Clean Rite. (Tr. 14, 16).

9. The place where she was trained was three or four miles from her home. (Tr. 15).

10. Mr. Van Tassel (Clean Rite) loaned the money to Ms. Samuelson as an advance to attend the MSHA class. Ms. Samuelson later repaid him for this advance. (Tr. 17).

11. DALE HOLLOPETER investigated this case for MSHA. (Tr. 19).

12. In MSHA's opinion Ms. Samuelson was subject to the provisions of Section 105(c) of the Act. (Tr. 20).

13. She is also required to have 24 hours of new miner training. (Tr. 21).

14. Ms. Samuelson did not receive the cost of the training. Other employees also stated they had not been paid by Clean Rite. (Tr. 21, 22).

15. Ms. Samuelson was entitled to \$50 for the cost of the training. In addition, she was entitled to be paid for the 20 hours for classroom work. (Tr. 22, 23).

16. ALLEN VAN TASSEL testified that Clean Rite is in Chapter 7 bankruptcy. (Tr. 30).

17. When Ms. Samuelson worked for him, Clean Rite had a contract with the Caballo Mine to provide cleaning services to Carter Mine Company. (Tr. 36).

18. Clean Rite employees worked on the surface of this open-pit mine. Clean Rite also had an MSHA contractor I.D. number at the time. (Tr. 36).

DISCUSSION AND FURTHER FINDINGS

The evidence is uncontroverted that Ms. Samuelson was employed by Clean Rite to work in a surface coal mine. She had no prior mining experience and, after being employed, she was sub-

ject to the statutory right provided by Section 115(a) of the Act. The failure of Clean Rite to fulfill its obligations under Section 115(a) constituted a violation of Section 105(c) of the Act, since her activities were protected under the Mine Act.

In Emery Mining Corporation v. Secretary of Labor et al., 783 F.2d 155 (10th Cir. 1986) and Brock v. Peabody Coal Company, et al., 822 F.2d 1134 (D.C. Cir. 1987) the respective appellate courts held that certain unemployed miners were not "miners" within the meaning of the Act. However, the case at bar is factually different since Ms. Samuelson was working as an employee and technically was a "miner" when the discrimination occurred.

It follows that the Commission has jurisdiction over these matters and Ms. Samuelson was a "miner" within the meaning of the Act. It is, accordingly, appropriate to consider Complainant's damages.

Under Section 115(a)(2) ¹ Ms. Samuelson, as a new miner with no surface experience, is entitled to 24 hours of training.

The record indicates she received 20 hours. Under Section 115(b) she is also entitled to her normal rate of compensation of \$5.75 per hour or a total of \$115.00.

In addition, under Section 115(b), ² she is entitled to be compensated for the additional costs she incurred in attending

¹ (2) New miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

² (b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

such training sessions. On this record these additional costs include tuition for training and mileage cost.

Ms. Samuelson testified the school tuition was \$150 but I credit the testimony of Messrs. Hallopeter and Van Tassell that the tuition was \$50. These last two witnesses are more knowledgeable than Ms. Samuelson as to the school tuition since they frequently deal with these issues.

Additional costs include mileage from home to school and return. Two days at six miles per day involved a total of 12 miles. The mileage reimbursement to government employees at the time of this incident was 24 cents per mile or a total mileage reimbursement of \$2.88.

Ms. Samuelson further seeks damages for an additional 14 hours because she was unable to work in certain portions of the mine because she had not secured her MSHA training. However, the evidence does not support Ms. Samuelson's claim as to these 14 hours. Ms. Samuelson agrees she didn't miss any hours of work because she didn't receive her mine tour in time or because of the training. (Tr. 27). In fact, she worked anyway, even though she wasn't qualified to enter certain areas of the mine. (Tr. 27). Further, she didn't recall any time when she wasn't able to work the full shift because she was not properly trained. (Tr. 28). In short, Ms. Samuelson failed to prove the 14-hour loss.

Ms. Samuelson's total damages are as follows:

Twenty hours at \$5.75 or	\$115.00
School tuition	50.00
Mileage at \$0.24 a mile	<u>2.88</u>
	\$167.88

Under Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988) the Commission directed that in discrimination cases it would use the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest for periods commencing after December 31, 1986.

I further conclude that the training expenses should have been paid a week after Ms. Samuelson began to work for Clean Rite. Accordingly, interest should begin to accrue from June 30, 1991. The interest on \$167.88 from June 30, 1991, to the date of this decision (October 22, 1993) is \$31.85. Accordingly, the total damages incurred by Complainant are \$199.73.

CIVIL PENALTY

The Secretary also seeks a civil penalty against Clean Rite for violating the Mine Act.

The statutory criteria for assessing civil penalties are contained in Section 110(b) of the Act.

Considering the criteria, I note that the record shows Clean Rite is in bankruptcy proceedings. Since the operator is no longer in business, the assessment of a penalty will not affect its ability to continue in business.

There is evidence Clean Rite failed to pay other employees for MSHA training. As a result, its prior history must be considered as adverse. Clean Rite was negligent since training courses are available from a local college. Mr. Van Tassel asserts the difficulty here lies with the inability of his company to secure competent workers. Basically, the workers are hired, take the training, and quit. I can understand Ms. Van Tassel's position; however, his suggestion that workers be hired and permitted to work for a period of time before training is required has not been adopted. It may not be adopted since such employees would be exposed to mining hazards without having had any training.

The gravity is high since the employee was working in a mine without prior training.

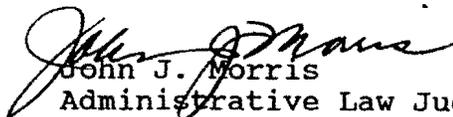
Prompt abatement was not an issue in this case.

Based on the statutory criteria, I conclude that a civil penalty of \$250 is appropriate.

For the foregoing reasons I enter the following:

ORDER

1. The petition for discrimination herein is **AFFIRMED**.
2. Complainant Samuelson is awarded the total amount of \$199.73 to be paid by Respondent.
3. A civil penalty of \$250 is **ASSESSED** against Respondent.


John J. Morris
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

R. Allen Van Tassel, CLEAN RITE SERVICES, INC., P.O. Box 122, Gillette, WY 82717 (Certified Mail)

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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

OCT 19 1993

COSTAIN COAL INCORPORATED, Petitioner	:	CONTEST PROCEEDINGS
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 93-102-R Order No. 3552700; 10/16/92
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. KENT 93-103-R Order No. 3552934; 10/16/92
v.	:	
COSTAIN COAL INC., Respondent	:	Wheatcroft No. 9 Mine
	:	
	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 93-325 A.C. No. 15-13920-03803
	:	
	:	Pyro #9 Wheatcroft
	:	

DECISIONS

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner/Respondent;
Carl B. Boyd, Esq., Henderson, Kentucky, for the
Respondent/Contestant.

Before: Judge Koutras

DECISIONS

Statement of the Proceedings

These proceedings concern a civil penalty proceeding initiated by the petitioner (MSHA) against the respondent (Costain Coal Incorporated) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four (4) alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations and assessments, and also filed Notices of Contest pursuant to Section 105(d) of the Act, seeking review of two of the section 104(d)(1) orders which are the subject of the civil penalty proceeding. The matters were consolidated and heard in Evansville, Indiana. The parties

filed posthearing briefs and I have considered their arguments in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory safety standards, (2) whether the alleged violations were "significant and substantial" (S&S), (3) whether the alleged violations were the result of an unwarrantable failure by Costain Coal to comply with the cited standards, and (4) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act.

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. Commission Rules, 29 C.F.R. § 2700.1 et seq.
3. Mandatory Safety standard 30 C.F.R. § 75.400.

Discussion

Section 104(d)(1) "S&S" Order No. 3552700, issued on October 16, 1992, cites an alleged violation of 30 C.F.R. § 75.1704, and it was consolidated with contest Docket No. KENT 93-102-R. The cited condition or practice is described as follows:

The primary designated intake escapeway for the longwall "y" panel tailgate entry was not maintained with 6 feet of clearance and coal bed height located one cross-out inby overcast and two cross-cuts outby survey station No. 69745, where a previous roof fall had occurred and is rubbed off. But evidence indicates shale roof material was scooped (pushed) outby fall in order to crib or support area, leaving low clearance from immediate roof.

This area was inspected on 10-15-92 by this authorized representative and conditions of primary escapeway were noted and discussed with the operator in detail.

Before any enforcement action was taken reference of this violation was brought to the attention of District #10 MSHA ventilation supervisor along with Roof control Specialists.

MSHA's counsel asserted that the evidence now known to her reflects that the gravity findings of the inspector should be modified to reflect the number of persons affected by the cited conditions as five (5), rather than ten (10), as originally noted by the inspector. In addition, it is noted that the order was modified by the inspector on October 19, 1992, to change his initial gravity finding to "Highly Likely", rather than "Occurred".

MSHA's counsel stated that the evidence supports a modification of the contested section 104(d)(1) "S&S" order to a section 104(d)(1) "S&S" citation, and that the respondent has agreed to pay a civil penalty assessment of \$4,500, in settlement of the modified citation. Respondent's counsel confirmed the proposed settlement agreement, and it was approved from the bench (Tr. 136-137).

Section 104(d)(1) non-"S&S" Order No. 3552934, issued on October 16, 1992, cites an alleged violation of 30 C.F.R. § 75.220, and it was consolidated with contest Docket No. KENT 93-103-R. The cited condition or practice is described as follows:

Loose rock from a previous roof fall had been pushed into the tailgate entry of the "y" panel which would have prevented miners from traveling the intake escapeway entry. The roof control plan was not being followed on page 17 which requires certain safety precautions to be followed in the event of a failure or blockage in the tailgate entry. The safety precautions had not been implemented. The blocked tailgate was discovered on 10/15/92, and the longwall unit was in production. Roof control plan dated February 5, 1992.

Costain Coal's defense is that the partially blocked entry was the result of additional rock that had fallen from the brow of the previous fall and that all longwall personnel were notified of the situation, immediate action was taken to correct the cited condition, and the condition was corrected before the inspector wrote the order.

MSHA's counsel asserted that the available evidence supports a modification of the Section 104(d)(1) order to a section 104(a) citation, and that the parties agreed to settle the violation on that basis and the respondent has agreed to pay a civil penalty assessment of \$500, as part of their settlement agreement. Counsel for the respondent confirmed that this was the case, and the settlement was approved from the bench (Tr. 133-136).

Section 104(d)(2) "S&S" Order No. 3552424, issued on March 17, 1992, cites an alleged violation of 30 C.F.R. § 75.316, and the cited condition or practice is described as follows:

Item 5 of the dust control plan that is written in the modified order was not being followed in that the No. 1 Shear cut out in one item 5 states when the No. 1 shear cuts out, a step-out procedure will be conducted. The full web will not be cut out in one pass.

MSHA's counsel stated that the facts and evidence now known to her support a modification of the contested section 104(d)(2) order to a section 104(a) citation with "S&S" findings, that the parties have agreed to settle this matter on that basis, and that the respondent has agreed to pay a civil penalty assessment of \$500, to settle the violation. The respondent's counsel confirmed the proposed settlement agreement, and it was approved from the bench (Tr. 132-137).

In addition to the aforementioned arguments presented by the parties in support of the settlements, the parties agreed that Costain Coal is a large mine operator, and MSHA presented information concerning Costain's history of prior violations for all of its mines for the period July 23, 1990, through July 22, 1992. In addition, the record reflects that all of the cited violative conditions were timely abated and that two of the violations (No. 3552934 and 3552424) were terminated within five minutes of their issuance.

Section 104(d)(1) "S&S" Order No. 3553244, issued on October 29, 1992, cites an alleged violation of 30 C.F.R. § 75.400, and the cited condition or practice is described as follows:

Accumulation of combustible materials consisting of loose coal, coal dust, and float coal dust from 4 inches to 12 inches in depth had been allowed to accumulate underneath and alongside the No. 4 unit belt conveyor head drive dumping on the 11C belt conveyor.

Starting at the No. 4 unit 11B belt conveyor head drive and continuing outby on the No. 11C belt conveyor for an approximate distance of 150 feet as measured with a metal measuring tape.

Petitioner's Testimony and Evidence

MSHA Inspector Donald L. Milburn, confirmed that he issued the contested order after finding accumulations of combustible material in a belt entry outby the No. 4 working unit. He observed coal spillage on the back side and bottom of the "mainline" belt conveyor head drive. The belt was running in the accumulations in an area of 10 to 15 feet. He also observed loose coal spillage down the belt entry at several places for a distance of approximately 150 feet. The coal "looked like it had been there for several shifts" (Tr. 14-18).

Mr. Milburn stated that he issued the section 104(d)(1) order after finding "high negligence" because the respondent's belt boss Philip Prince informed him that there was an ongoing problem with the belt, that the condition was present for several shifts, if not days, and that people had been working for several days cleaning up the spillage. Mr. Milburn stated that the belt was later replaced because of some tears and bad splices, and he indicated that with these conditions present "you're going to lose some coal". Mr. Milburn observed no one cleaning the belt when he observed the accumulations (Tr. 18-19).

Mr. Milburn believed that the respondent failed to take adequate corrective measures "to stay on top of it where they knew they had a spill" (Tr. 20). Mr. Milburn confirmed that in addition to Mr. Prince, he discussed the matter with maintenance foreman Don Gess and former belt boss Bruce Morris, and Mr. Gess agreed that the spillage was excessive and that he would assign people to take corrective action. Mr. Milburn stated that Mr. Morris showed him a "belt book" for a different belt, but later produced the correct belt book, and "the same conditions were in it as the first book I looked at" (Tr. 22).

Mr. Milburn stated that the mine is on a ten-day spot inspection cycle because of the high liberation of methane. The loose coal spillage was black in color and he observed no rock dust on the spill. There were no additional belt violations or problems and he observed no stuck rollers running in the coal. However, the accumulations presented a fire hazard because most fires occur on belt conveyor entries because of stuck rollers or a belt rubbing against the frame creating friction and heat build-up (Tr. 23-24).

Mr. Milburn confirmed that there was a fire suppression system at the belt head drive location. However, the spillage was also located feet 150 outby and down the entry, and the available CO monitoring system would only serve as a quick reference to locate any fire, but it would not control any fire. He indicated that 16 miners normally would be present in the working section, and with the location of the affected area "it would take some time for them to even get to the area to put out a fire" (Tr. 25).

Mr. Milburn stated that he had previously inspected the mine over a ten month period prior to his inspection of October 29, 1992, and has issued other violations of sections 75.400 and 75.402, and discussed them with the respondent's personnel, including Mr. Gess, Mr. Morrison, and Mr. Prince (Tr. 26-27).

Mr. Milburn confirmed that the respondent has had an effective mine examination program to correct problems with equipment and permissibility, and has greatly reduced its repeat violations. However, he believed "they still needed to improve

on their rock dust applications and accumulations in the mine" (Tr. 28). Mr. Milburn was aware of only one prior mine fire or ignition, and this was an explosion that occurred in 1989, but he was not at the mine at that time, and that incident occurred "several thousand feet away" from the cited area that he inspected on October 29, 1992 (Tr. 29).

On cross-examination, Mr. Milburn stated that the accumulations located 150 feet outby the 11-C belt were at the side by the belt, and it was two feet deep at the head drive up to the bottom side of the belt. He did not know what caused the spillage at the time of his initial observations, but later found out that a baffle-type board had been installed on the backside of the belt to catch any coal spillage. He confirmed that the person in charge of the conveyors, Ricky Phillips, told him that the baffle-board had been installed "a couple of days prior" to October 29, and that there was an ongoing problem and that people were assigned each day to shovel the area and they were trying to stay on top of it. Mr. Phillips acknowledged the spillage problem and he had people working on it, but Mr. Milburn observed no one in the spillage area when he observed it during his inspection (Tr. 33).

Mr. Milburn examined copies of certain entries made by the belt examiners in the 11-C and 11-B belt books for October 28, the day before his inspection, and although he did not believe the entries showed that corrective measures were written in the books, he agreed that a notation indicating "spillage is good" might indicate some improvement. However, he stated that "without seeing any corrective measure, I had no idea at that time what they had done to the spill" (Tr. 35-38).

Mr. Milburn confirmed that based on the amount of coal spillage that he observed, he concluded that it must have been there for sometime (Tr. 38). He agreed that a malfunction of the belt skirting or baffle board could cause coal to accumulate rather quickly (Tr. 39). He confirmed that the 11-C and 11-B belt books indicated a spillage problem with the two belts that were connected together, and that although people may have been in the areas working on the problem on the days prior to his inspection, no one was there at the time of his inspection (Tr. 42).

Mr. Milburn stated that he was told that the 11-C belt was going to be changed out because of the tears and bad splices, and that the backboard had been installed, but he did not believe it was adequate enough to correct the condition (Tr. 42). He further confirmed that Mr. Phillips may have told him that the area had been cleaned up the day before his inspection, and that a mechanical malfunction had been corrected and was not present the morning of his inspection. He further explained as follows at (Tr. 43-44):

Q. Mr. Milburn, what, in your eyes, would the company have had to do in order for their negligence to be less than aggravated conduct in this -- on this violation if you'd been the operator?

A. I'm not saying that they didn't make a -- an attempt previously on days prior to this inspection to correct the problem. I'm saying that they didn't take adequate measures.

They knew they had a problem of spillage in this area. They installed this backboard brace. They knew they had spillage in this area. They should've had somebody on top of this and observing this after they installed this backboard to see if it was going to correct the condition.

At the time of inspecting it, the -- the excessive amount of accumulation I observed and measured just couldn't have happened that morning. It had to have happened for several days if -- if not several shifts.

Q. What would you have them do different on October 29 before you got there at 11 o'clock in the morning?

A. Personally, I think they -- they knew they had a problem in this area. They installed a back -- this backboard. And the reason for installing the backboard, the belt, like I say, shifts from side to side when loaded with coal. They installed this backboard to catch the coal before it would shift to one side or it wouldn't spill.

They should have changed this belt. I -- they knew they had a bad belt, bad tears, splices. They should have changed this out prior to this day. They knew they had a recurring, ongoing problem.

And, at (Tr. 45-46):

THE COURT: If you observed somebody shoveling through fairly well that day, would you have found that that was sufficient?

WITNESS MILBURN: I would assume that if there were -- if they had a condition recorded in the belt

books that they had a problem in this area and they had people working on it, then to me they were -- would have been making an effort to correct the condition.

THE COURT: Am I correct in this assumption that you agree that -- with what Mr. Phillips told you when you spoke to him, that he told you that there was a problem. They installed the backboard. They were attempting to do something with it. You don't disagree with all that, do you?

WITNESS MILBURN: No, I don't disagree.

THE COURT: It's just that you found these accumulations that day, and you came to the conclusion that nothing was being done about it that day to take care of the problem?

WITNESS MILBURN: Yes, sir.

Respondent's Testimony and Evidence

Clifford D. Burden, Director of Loss Prevention, produced copies of the belt book for the No. 11-C belt, for the dates October 21, through November 23, 1992 (Exhibit R-1; Tr. 58-60). He confirmed that the third shift entries for October 28, are for the shift immediately before the 11:00 A.M. time period when Inspector Milburn conducted his inspection (Tr. 61).

Mr. Burden explained the entries made in the belt book, beginning on October 28, 1992, and he identified a copy of notes given to him by belt supervisor Ricky Phillips who told him that the spillage was caused by a missing skirt board belt component where the coal was being dumped and that the coal found by the inspector was fresh belt spillage that was accumulating very rapidly (Tr. 63-64; Exhibit R-2). Mr. Burden confirmed that he was personally familiar with the 11-C and 11-B locations and he explained the belt book entries for those locations (Tr. 66-67).

On cross-examination, Mr. Burden reviewed and explained the belt book entries for October 24 through 28 (Tr. 68070). In response to further questions, Mr. Burden confirmed that the entire belt was 2,000 feet long, and based on the belt book entries, he concluded that the conditions noted changed from day to day during the period from October 25 through 28, and that there was "light spillage" (Tr. 78).

Robert Bailey, belt mechanic, testified, that the 11-C belt was one of his responsibilities, and that on October 28, 1992, while checking out the belt header, he found a spill on the back

side of the 11-B header on the 11-C belt. He described the spill as one-foot to one-and-one-half foot deep, extending over a 20 to 25 foot area. He stated that he cleaned up the spill with a shovel at approximately 1:00 P.M. in the afternoon and put the coal back on the belt. He stated that he did not observe any coal accumulations under the belt at the header area, and did not observe the belt running in coal. He also observed accumulations behind the inby 11-B header wiper and he cleaned that up (Tr. 81-84).

Mr. Bailey stated that the 11-B header, as well as all belt headers along the belts, have sprinkler-type fire suppression systems which shut the belt down and turn on the water sprays in the event of a fire (Tr. 85). He also confirmed that the belt is equipped with computerized CO sensors which will quickly detect any fire (Tr. 86).

Mr. Bailey stated that he returned to the area on the second shift on October 29, after the cited accumulations had been cleaned up and he had no trouble for the rest of the evening (Tr. 86-87). An hour or two later, Mr. Phillips asked him if there had been a coal spill the night before, and Mr. Bailey told him "no" (Tr. 88). Mr. Phillips stated that Ben Wilson, another belt mechanic, informed him that a belt skirt rubber came out and caused a spill where the 11-B belt dumped on the 11-C belt, but that it had been put back on the belt and that he should watch it to make sure it would be all right that day (Tr. 88-89).

On cross-examination, Mr. Bailey stated that he worked the first day-shift on October 28, and the second shift on October 29. He stated that he was a certified belt examiner and that he worked for Mr. Phillips and Mr. Prince. He confirmed that he makes regular belt rounds once or twice a day, and that if a serious problem develops "I'll stay with it" until it is fixed (Tr. 92).

Mr. Bailey described the spillage that he observed on October 28, as "more than normal", and that prior to this time he had no problems with the belt and had no prior occasion to clean up the amount of spillage he cleaned up that day (Tr. 94). He stated that a belt skirt and baffle board are essentially the same thing, and that they are used at every belt dumping point. He confirmed that the only problem he had with the 11-C belt was the spillage that he cleaned up. He stated that "we were in the midst of replacing that belt at the time" because some of the belt was narrow and there was an increase in the coal that was being loaded on the belt (Tr. 95).

In response to further questions, Mr. Bailey reiterated that Mr. Wilson advised him about the header skirt board problem after Inspector Milburn had been to the area on October 29 in order to make sure that "it didn't spill on me like it did - - - had on

him" (Tr. 100). Mr. Bailey stated that had he observed the accumulations described by the inspector he would have cleaned them up, and if the skirt board had come out, he would have replaced it and aligned the belt to prevent spills (Tr. 102).

Benjamin Wilson, day shift belt mechanic, testified that he was familiar with the 11-C belt. He stated that on October 29, 1992, he worked the day shift from 6:00 A.M. until 4:00 P.M. He stated that he observed the 11-B belt header at the junction of the two belts at approximately 7:30 A.M. or 8:00 A.M. He checked the header rollers, skirt, and splices, and observed an inch of coal, six foot long, under the header. He saw no problems and left the area to check other belts. He observed no pile of coal dust with the belt running, and he observed no accumulations for any substantial distance (Tr. 103-105).

Mr. Wilson stated that he was called back to the area at approximately 11:00 A.M. and saw the spill, and was told to get some shovels and have it cleaned up. He confirmed that the spill he observed at this time was more extensive than what he had previously observed earlier in the morning, and someone told him that the skirt rubber came out and went under the belt. When this occurs, coal will spill over the edge of the belt (Tr. 105-107). Mr. Wilson stated that he worked the day shift on the prior day, and passed by the same area. The accumulations were the same as those he previously observed (Tr. 108). He was not aware of any 11-E belt problems except for some narrow belts, and the physical condition of the belt was okay (Tr. 108).

On cross-examination, Mr. Wilson stated that other than "the little spill" that he initially observed on the 11-C belt, "which it does every day with, you know, the narrow belt running through it", he observed no problems on that belt during the week prior to October 29, and observed no accumulations other than what he would consider "normal" (Tr. 110). He confirmed that he has been a certified belt examiner for six or seven years (Tr. 111).

Mr. Wilson confirmed that a new production unit had started up a few days before October 29, and if two units are dumping on a narrow belt "it will affect the way the belt runs" (Tr. 113). In such a situation, he would observe how the belt runs. He did not believe any changes were necessary until he observed the spill when he was called back to the belt on October 29 (Tr. 114).

Randy Wiles, employed in the respondent's loss prevention department, testified that he was informed of the coal spill cited by the inspector on October 29, and was told that "a skirt rubber had kicked out" on the 11-C belt at the 11-B dumping point (Tr. 115-116). He was not aware of any tears or bad splices in the 11-C belt prior to this time (Tr. 117).

Inspector Milburn was recalled by the presiding judge, and he confirmed at the time of his inspection he did not speak with any of the respondent's witnesses who testified in this case or with the belt mechanics (Tr. 119-120). In response to a question as to whether he gave any credence to the explanations offered by the respondent's witnesses, Mr. Milburn stated as follows at (Tr. 120-124):

WITNESS MILBURN: They said they had a problem with it for several days, and they were going to change the belt out. And they had -- where they had -- they said spillage each day, and they had people down there to correct it, shovel it. But on this particular day, they didn't have anybody down there in this area.

And my question to him was why didn't -- if this belt had a history of spilling or ongoing problem, why they didn't have somebody there at this stage to watch this belt.

THE COURT: Is it altogether possible that -- that this event happened that day just due to this malfunctioning belt rubber and that that belt rubber was causing the spillage?

WITNESS MILBURN: Part of it might have been attributed to -- to that right at the head drive, but the spillage down the belt was not related to the head drive.

* * * * *

WITNESS MILBURN: I didn't know at the time what was causing all the spillage. I could only guess that it was either bad splices or tears until I got outside, and later on they mentioned to me, Philip Prince, that they were going to change the belt out, that they had a problem with that belt before. And they had a problem with splices and tears in this belt, and they were going to change the whole belt out.

THE COURT: Now, in order to terminate this, though, they just simply cleaned up the spillage, right?

WITNESS MILBURN: Yes, sir.

THE COURT: How soon after this event was this belt replaced; do you have any idea?

WITNESS MILBURN: I don't have those statistics as far as when they did change it out.

THE COURT: But the fact is that they didn't change the belt out to abate this particular cited condition.

WITNESS MILBURN: No, sir.

THE COURT: Do you suppose that Prince and Morris and Phillips were telling you all this just trying to justify the accumulations?

WITNESS MILBURN: I think they were trying to tell me that they had a problem with this belt, and I didn't question them. And I'm not going to question that they didn't have people down there working on this spill each day. But this particular day -- if they knew they had a problem with it previous days and had people assigned to it, why didn't they have somebody down there this day watching it?

THE COURT: But you don't know that the problems that they had earlier was at the magnitude they had the day that you showed up, in other words, whether they had previous spills of this magnitude? When I say "magnitude," I'm talking a hundred and fifty feet.

WITNESS MILBURN: That -- that I don't know. The crosscuts underground, there are a lot of places that are not marked. You don't have survey stations and place little tags in the roof telling you where you're at.

Findings and Conclusions

Fact of Violation. Order No. 3553244.

The credible testimony of the inspector establishes the existence of the coal and coal dust accumulations that he cited during the course of his inspection on October 29, 1992. The existence of such accumulations constitutes a violation of the cited section 75.400. See: Old Ben Coal Company, 2 FMSHRC 2806 (October 1980); C.C.C. -Pompey Coal Company, Inc., 2 FMSHRC 1195 (June 1980); Utah Power & Light Company, 12 FMSHRC 965, 968C May 1990). I conclude and find that the violation has been established, and IT IS AFFIRMED.

The Unwarrantable Failure Issue

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 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 than 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. * * *

Costain Coal asserted that MSHA failed to establish the proper underpinning for the unwarrantable failure order in question because the inspector cited Citation No. 3857525, issued on October 4, 1992, as the underpinning, and that citation was not produced by MSHA's counsel in the course of the hearing. Even if the proper underpinning is established, Costain Coal takes the position that the facts presented in this case do not justify the inspector's unwarrantable failure finding.

Notwithstanding its failure to produce the underlying citation recorded by the inspector in support of the order, MSHA points out that Costain has conceded a previously issued section 104(d)(1) Citation No. 3552700, October 16, 1992. Since Costain did not contest that citation, MSHA concludes that the contested Order in this case was properly issued under the sequence requirements found in section 104(d) of the Act.

I agree with MSHA's position with respect to the procedural correctness associated with the section 104(d) "chain" and I conclude and find that the previously issued section 104(d)(1) citation of October 16, 1992, which was not contested, may serve as a proper underpinning for the order issued by the inspector in this case. However, for the reasons which follow, I cannot conclude that the disputed unwarrantable failure finding of the inspector is supportable.

The inspector cited two areas where he observed coal accumulations. He concluded that the 4 to 12 inch deep coal at the conveyor head drive had existed "for several shifts". At the second location, outby the head drive and extending for a distance of 150 feet, he observed spillage at several places that he believed had existed "for awhile" (Tr. 18). It seems clear to me that the inspector did not know how long the accumulations in question had existed, and he simply concluded that from the amount of coal he observed that it was there "for sometime". The respondent's evidence, including the belt examination book entries for at least four days prior to the inspection on October 29, confirmed some spillage along the belt line, but not to the extent that it existed at the head drive at the time of the inspection. Indeed, the inspector admitted that he did not know the extent of any earlier spills or accumulations (Tr. 124). The inspector's testimony concerning the description of the accumulations outby the head drive and down the entry ranges from sparse to nil.

The inspector alluded to prior coal accumulation citations that he issued at the mine, but there is no evidence that they

were at the same cited locations that were cited during the inspection in question, and although the inspector believed that the respondent needed to improve "on their rock dust applications and accumulations", he confirmed that the respondent has an effective mine examination program to correct equipment and permissibility problems and has "greatly reduced its repeat violations" (Tr. 28).

The respondent's belt examination books contain notations by the belt examiner for the preceding work shifts which reflect "light to medium" spillage in the crosscuts, and "good" spillage condition. Other entries show some header spillage which was cleaned up, and belt mechanic Benjamin Wilson testified credibly that when he observed the area at the start of the shift before the inspector's arrival, he observed "an inch of coal and no problems" and left the area. When he was called back to the area, he observed the spill cited by the inspector and he was informed by someone that it was caused by a belt rubber skirt that had come loose and caused the coal on the belt to spill over the edge and accumulate.

Certified belt examiner Robert Bailey, who was responsible for the 11-C belt, testified that he routinely checks the belts once or twice a day. He confirmed that he found some spillage around the header the day before the inspection but cleaned it up. He confirmed that belt supervisor Ricky Phillips informed him that belt examiner Wilson had informed him that a displaced belt rubber skirt had caused some spillage where the 11-B and 11-C belts came together, but that it had been cleaned up, and Mr. Bailey was told to watch it to avoid additional spillage. Although Mr. Phillips did not testify, respondent's loss prevention director Clifford Burden introduced a copy of Mr. Phillips' notes (Exhibit R-2), which contain notations concerning the defective skirt device which all of the respondent's witnesses believed caused the spillage cited by the inspector. After careful review of all of the testimony in this case, I am not convinced that the cited coal accumulations existed for an unusual or protracted period of time prior to the arrival of the inspector on the scene.

The inspector confirmed that he was informed by mine management personnel of the belt problem at the time of his inspection and that people were assigned to clean up the spillage. The inspector testified that he had no reason to doubt what he was told. Although he indicated that someone had mentioned a problem with belt splices and tears, and he suggested that this way have caused the spillage problem, I take note of the fact that the inspector abated the violation after the spillage was simply cleaned up and the replacement of the belt was accomplished at some later time.

I conclude and find that the respondent's evidence supports a reasonable conclusion that the coal spillage and accumulations found by the inspector were the result of the defective rubber belt skirting problem described by the respondent's witnesses. The inspector did not question the respondent's contention that people were assigned to take care of the spillage in question (Tr. 124).

However, the inspector questioned why no one was there when he was in the area. In my view, the fact that no one was shovelling at the precise moment the inspector appeared on the scene, does not constitute "aggravated conduct" amounting to an unwarrantable failure to comply with the requirements of section 75.400.

Based on the foregoing findings and conclusions, and after careful review and consideration of all of the testimony and evidence in this case, I conclude and find that MSHA has failed to prove that the violation in question constituted an unwarrantable failure on the part of Costain Coal. Under the circumstances, the inspector's finding of an unwarrantable failure IS VACATED, and the section 104(d)(1) order IS MODIFIED to a section 104(a) citation.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly 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).

In support of the inspector's "S&S" finding, MSHA asserts that it is undisputed that there was a large and deep accumulation of loose coal and coal dust on the cited 11-C belt line at the time of the inspection. MSHA concludes that there are "clearly a confluence of factors sufficient to find that an ignition was reasonably likely to result from this accumulation". In support of this conclusion, MSHA states that the mine liberates a great deal of methane, has a history which includes a deadly explosion in 1989, that the belt was running in coal, and that a number of belt rollers were sticking or had other problems. Given this combination, MSHA further concludes that it would take a very short time for an ignition to occur.

The respondent asserts that the accumulations would have been cleaned up in the normal course of business, and that the 11-B header was equipped with a spray fire suppressant system to attack any fire, and that CO monitors were located along the beltway to alert the respondent about such an event. In response to these arguments, MSHA points out that the next person who would have been in the area according to the respondent's normal course of business would be the preshift examiner for the second shift, and he would not have been in the area for a number of hours. With regard to any fire, MSHA states that everyone testifying in this case agreed that the sprays located at the head drive would be inadequate to deal with an ignition down the beltline. As for the CO monitor, MSHA points out that it notifies someone on the surface after smoke or heat are detected. MSHA believes that a serious mine fire could occur during the four or five minutes travel time required under normal

circumstances given the location of the miners working inby and the speed at which a fire can spread in the high presence of methane. Further, MSHA believes that it cannot be assumed that the miners could travel the same path or in the same amount of time as under normal circumstances.

Although Inspector Milburn testified that he observed no problems with the beltline itself, other than the spillage that he cited, he confirmed that the belts were running at the time of his observations, and that the accumulations were dry and black in color. He further testified that the 11-B "short belt" dumped coal onto the 11-C "main line" belt, and that at the back side and head drive of the 11-B belt where he observed a large amount of spillage, 4 to 12 inches in depth, the belt was running in the spillage for a distance of 10 or 15 feet. From that point outby for a distance of approximately 150 feet along the 11-C beltline, the inspector observed similar coal spillage along the side of the belt. He confirmed that the mine is a "gassy" mine and that it is on a ten-day "spot inspection" cycle because of the amount of methane liberated (Tr. 16-23).

Inspector Milburn testified that most underground mine fires occur at belt conveyor entries where coal is transported out of the mine, and that fires are started by stuck belt rollers or the belt rubbing against the belt frame (Tr. 24). In the instant case, the inspector believed that the belt running through the combustible coal accumulations at the 11-B belt head drive would result in friction against the belt frame, and that the belt rollers turning through these accumulations would create and provide a heat source (Tr. 23-24).

The belt inspection reports for the 11-C belt (Exhibit R-1), for the three shifts on October 28, 1992, the day before the accumulations were observed by the inspector on October 29, 1992, identify eleven (11) rollers by number. The third shift report for October 29, 1992, for that same belt also contains a notation concerning those same rollers. Although the reports do not further explain these entries, and the individuals who made them were not called to testify, respondent's loss control director Burden testified that identifying the rollers by number indicates a problem with the roller, such as sticking or a loose bearing, but that "sticking would be the main thing" (Tr. 70).

The respondent's position that the cited accumulations did not constitute an "S&S" violation because the accumulations would have been detected in the ordinary course of business and that any fire would have been detected or taken care of by the CO monitoring system is not well taken and it is rejected. Although the inspector made reference to a fire suppression spray at the head drive, he pointed out that while it may have taken care of a fire at that particular location, it would have no effect on the

accumulations outby that location for a distance of some 150 feet down the 11-C beltline. The inspector further pointed out that the CO monitoring system along the beltline would not control any fire and that the system only serves to indicate the location of a fire (Tr. 24-25).

The respondent's belt mechanic, Robert Bailey, testified that the fire suppression sprinkler and sensors at the belt head drive would activate in the event of a fire, and that water would automatically be sprayed on the head drive and the sensors would shut the belt down (Tr. 85-86). However, Mr. Bailey confirmed that the CO monitoring system deals with the entire belt system, and that the water sprays and sensors located at the head drives serve only the head drives, and if there were a fire down the beltline where the belt is running in coal or in a major spillage, the head drive sprays would not provide water at those locations. He also confirmed that the CO monitoring system along the beltlines, which is the only defensive fire suppression system available at those locations, including the location of the major spillage where the rubber belt skirting was located, may or may not detect a fire (Tr. 97-98).

Based on the testimony and evidence in this case it would appear to me that the coal spillage resulting from the backed-up rubber skirting at the belt head drive was causing a rather rapid buildup of accumulations of dry, black, combustible coal materials under the back of the head drive as well as outby along the 11-C beltline. The credible testimony of the inspector establishes that the belt and belt rollers were running and turning through these coal accumulations, and I find that they were potential sources of ignition. Further, although there is no direct evidence that any of the eleven belt rollers along the beltline were in fact sticking, based on the testimony of the respondent's own witness (Burden), as corroborated by the section inspection reports, there was a problem with the rollers. Indeed, Mr. Burden indicated that they were most likely sticking.

I have concluded that a violation of section 75.400, has been established, and the violation has been affirmed. After careful consideration of all of the evidence and testimony, I conclude and find that the cited accumulations of loose coal, coal dust, and float coal dust, which I conclude were combustible materials within the meaning of section 75.400, constituted a discrete hazard of a potential mine fire. The belt and belt rollers were turning in the accumulations at the belt head drive while the belts were running, and some of the rollers along the beltline were more than likely sticking, thereby creating potential ready sources of ignition. Although there is some testimony that water sprays were located at the immediate head drive, belt mechanic Bailey confirmed that if a fire were to occur along the beltline where there is major spillage, and the belt is turning in the coal, there would be no available water

because the sprays are only located at the head drives and not along the belt. Although CO monitors are installed along the beltline, the evidence reflects that such monitors only serve to signal the existence and location of smoke or fire, and do not act as fire suppression devices. Further, Mr. Bailey indicated that these sensors may or may not detect a fire at a major spillage along the beltline (Tr. 98).

In view of the foregoing, I conclude and find that in the normal course of continued mining at the time the inspector observed the cited coal accumulations, it was reasonably likely that an ignition would have occurred as the dry black combustible coal continued to accumulate and turn in the belt and rollers, and that a belt fire was reasonably likely to occur as a result of these accumulations and ready sources of ignition that were present. I further conclude and find that in the event of a belt fire, it would be reasonably likely that the men on the section would suffer smoke inhalation, and fire related injuries of a reasonably serious nature. Under the circumstances, I conclude and find that the violation was significant and substantial (S&S), and the inspector's finding in this regard IS AFFIRMED.

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

The pleadings reflect that as of January 6, 1993, the mine had an annual production of 2,021,177, and the overall production for all of the respondent's mines was 12,670,082. I conclude and find that the respondent is a large mine operator. In the absence of any evidence to the contrary, I further conclude and find that payment of the civil penalty assessment for the violation that was litigated and affirmed in this case will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The respondent's history of prior violations for the period July 23, 1990, through July 22, 1992, reflects that the respondent paid \$211,195, in civil penalties for 1,239 violations. The print-out reflects 165 prior violations of section 75.400, six (6) of which were issued as section 104(d)(2) orders. Considering the size of the respondent's mining operations, I cannot conclude that its overall compliance record is particularly bad. However, given the number of past violations for coal accumulations, it would appear to me that the respondent needs to pay closer attention to its cleanup practices and I have considered this in the penalty assessment that I have made for the violation.

Gravity

Based on my "S&S" findings and conclusions, I find that the violation was serious.

Negligence

I conclude and find that the respondent failed to exercise reasonable care to insure that all of the cited accumulations were timely removed from the mine, and that this failure on its part constitutes a moderate degree of negligence.

Good Faith Compliance

The record establishes that the violation was timely abated in good faith.

Civil Penalty Assessment

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 a civil penalty assessment of \$2,000, is reasonable and appropriate.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Order No. 3553244, October 29, 1993, 30 C.F.R. § 75.400, IS MODIFIED to a section 104(a) "S&S" citation, and the respondent IS ORDERED to pay a civil penalty assessment of \$2,000, for the violation.
2. Section 104(d)(1) "S&S" Order No. 3552700, October 16, 1992, citing a violation of 30 C.F.R. § 75.1704, IS MODIFIED to a section 104(d)(1) "S&S" citation, and the respondent IS ORDERED to pay the agreed upon settlement amount of \$4,000, for the violation.
3. Section 104(d)(1) non-"S&S" Order No. 3552934, October 16, 1992, citing a violation of 30 C.F.R. § 75.220, IS MODIFIED to a section 104(a) non-"S&S" citation, and the respondent IS ORDERED to pay the agreed upon settlement amount of \$500, for the violation.
4. Section 104(d)(2) "S&S" Order No. 3552424, March 17, 1992, citing a violation of 30 C.F.R.

§ 75.316, IS MODIFIED to a section 104(a) "S&S" citation, and the respondent IS ORDERED to pay the agreed upon penalty amount of \$500, in settlement of the violation.

Payment of the aforementioned civil penalty assessments, including the settlement amounts, shall be made to the petitioner (MSHA) within thirty (30) days of the date of these decisions and Order. Upon receipt of payment, these matters are dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

OCT 20 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. SE 92-196-M
	:	A. C. No. 54-00001-05522
v.	:	
	:	Docket No. SE 92-233-M
PUERTO RICAN CEMENT COMPANY, Respondent	:	A. C. No. 54-00001-05523
	:	
	:	Ponce Cement Plant
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. SE-92-197-M
	:	A. C. No. 54-00001-05504 BOY
v.	:	
	:	Ponce Cement Plant
MAR-LAND INDUSTRIAL CONTRACTORS INCORPORATED, Respondent	:	
	:	

DECISION

Appearances: Jane Snell Brunner, Esq., Office of Solicitor,
U.S. Department of Labor, New York, New York,
for Petitioner;
Daniel R. Dominguez, Esq., and Miguel A. Maza,
Esq., Law Office Dominguez & Totti, Hato Rey,
Puerto Rico, for Respondents.

Before: Judge Barbour

STATEMENT OF THE CASE

In these consolidated civil penalty proceedings, brought by the Secretary of Labor ("Secretary") against Puerto Rican Cement Company ("Puerto Rican Cement") and Mar-Land Industrial Contractors, Incorporated ("Mar-Land") 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 Puerto Rican Cement with three 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 Mar-Land with two violations. In addition, the Secretary asserts that four of the alleged violations were significant and substantial contributions to mine safety hazards ("S&S" violations).

All of the alleged violations were cited on December 16, 1991, by inspectors of the Secretary's Mining Enforcement and Safety Administration at Puerto Rican Cement's Ponce Cement Plant, a cement processing plant located at Ponce, Puerto Rico.

In answer to the Secretary's subsequent proposals for the assessment of civil penalties, Puerto Rican Cement denied that the violations had occurred, and argued in the alternative that in any event the employees involved in the violations either were under the exclusive control of Mar-Land, were employees of Mar-Land, or that the area involved was under the exclusive control and supervision of Mar-Land. For its part, Mar-Land denied the violations.

The matters were among a series of cases called for hearing in Hato Rey, Puerto Rico. Shortly before the scheduled hearing, counsel for Mar-Land, Enrique M. Bray, requested a continuance, stating he was required to appear in a case in Federal District Court in San Juan on the same day as the hearing. Because the hearing in the Puerto Rican Cement\Mar-land cases had long been scheduled and because a continuance would have unduly prolonged the cases, I denied the motion. Counsel then moved for permission to withdraw. I advised counsel that I would permit him to withdraw only if Mar-Land obtained replacement counsel. This was done when counsel for Puerto Rican Cement entered an appearance on Mar-Land's behalf as well, and I then granted Mr. Bray's motion to withdraw. Tr. 5.

At the hearing, counsel speaking on behalf of both Respondents, stated that the recent interview of the Respondents' potential witnesses had caused the companies to re-evaluate their positions. Counsel stated:

The last thing that Puerto-Rican Cement and Mar-Land want to ever give the impression is that Puerto Rican Cement or Mar-Land will go into a case with witnesses that may not be stating the truth . . . and Puerto Rican Cement and Mar-Land want to make it very clear that they would never go into a situation for creating a credibility issue, when there is no credibility issue.

So, under those circumstances, Mar-Land . . . and . . . Puerto Rican Cement will accept liability

Tr. 6-7. Counsel then stated that both companies withdrew their contests of the alleged violations and "accept[ed] the fine[s]." Tr. 8.

In response, I expressed my concern about the Respondents' late decision to admit liability. I noted that had theirs been the only cases to be heard, the government would have been put to unnecessary expense arranging for the hearing, and I noted that

it was incumbent upon counsel to be more expeditious in evaluating cases. I expressed the expectation that in the future Puerto Rican Cement and Mar-Land fully would meet their duty in this regard. Tr. 8. Counsel stated that he and co-counsel were "very conscious" of their obligations. Tr. 9.

I then inquired of counsel for the Secretary whether the penalties proposed for the admitted violations were commensurate with the statutory penalty criteria. Counsel stated that she believed they were and added that she had no objection to Respondents' withdrawing their contests of the penalties.

CONCLUSION

After review and consideration of the pleadings and submissions, I agree with counsel for the Secretary and find that the proposed penalties faithfully reflect the statutory civil penalty criteria and are each appropriate for the subject admitted violations. Accordingly, the civil penalties in these matters are assessed as follows:

PUERTO RICAN CEMENT

Docket No. SE 92-196-M

<u>Citation</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>
3878262	12/16/91	56.16009	\$98
3878266	12/16/61	56.12030	\$98

Docket No. SE 92-233-M

<u>Citation</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>
3878268	12/16/91	56.18002(a)	\$20

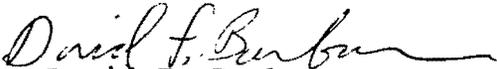
MAR-LAND

Docket No. SE 92-197-M

<u>Citation</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Assessment</u>
3878261	12/16/91	56.16009	\$136
3878264	12/16/91	56.12030	\$112

ORDER

The citations referenced above are AFFIRMED. Puerto Rican Cement and Mar-Land are ordered to pay civil penalties for the violations as assessed above within thirty (30) days of the date of this decision and upon receipt of payment this proceeding is DISMISSED.


 David F. Barbour
 Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 22 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 93-9
Petitioner	:	A. C. No. 40-03011-03534
v.	:	
	:	Docket No. SE 93-10
S & H MINING, INC.	:	A. C. No. 40-03011-03535
Respondent	:	
	:	Docket No. SE 93-98
	:	A. C. No. 40-03011-03540
	:	
	:	S & H Mine No. 7

DECISION

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

Before: Judge Feldman

These cases are before me as a result of petitions for civil penalties 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 proceedings were conducted on September 28 and September 29, 1993, in Knoxville, Tennessee. Mine Safety and Health Administration Inspector Don A. McDaniel testified on behalf of the Secretary. The respondent called Paul G. Smith, President of S & H Mining, Incorporated. The parties waived the filing of posthearing briefs.

These matters concern a 104(a) citation and ten 104(d) orders that were issued as a result of the respondent's alleged unwarrantable failure. The total civil penalty proposed by the Secretary for these 11 alleged violations is \$27,420.00. At the hearing, I issued a bench decision disposing of the 104(a) citation in issue and three of the 104(d) orders in question. After extensive testimony and several adjournments for the purpose of settlement discussions, the parties proffered a

settlement motion for the remaining seven 104(d) orders which was granted on the record. This decision formalizes my bench decisions and incorporates the parties' settlement agreement. The substance of my bench decisions and the parties' approved settlement result in a civil penalty assessment totaling \$10,775.00.

Bench Decisions

The following alleged violations¹ concern the respondent's failure to make current annotations to its mine map for its No. 3 Right Section; the respondent's lack of adherence to its approved roof-control plan in its No. 3 Right Section; and mud and water conditions observed by McDaniel in the respondent's main entry intake escapeway. The text of the bench decisions concerning each of these four alleged violations, with non-substantive edits, is as follows:

Order No. 3382919 (Gov. Ex. 3) was issued on July 21, 1992, by Inspector McDaniel for an alleged violation of section 75.1202. This mandatory safety standard requires that mine maps must be kept up-to-date with temporary notations and revisions. The testimony of McDaniel was that updated maps of different entries are important because once an entry is sealed, there is no way of determining the configuration of the sealed entry. If there is any subsequent mining adjacent to a sealed entry, it is important for the sealed area to be accurately reflected on a map in order to avoid unanticipated structural problems.

McDaniel testified that the map he observed during his July 21, 1992, inspection did not reflect pillars after the 35th crosscut. Therefore, pillar rows 35, 36 and 37 were not depicted on the map.

However, the testimony is undisputed that on June 2, 1992, approximately seven weeks prior to the date McDaniel issued this order, the respondent submitted a map to MSHA that was accompanied by its proposed ventilation plan that illustrated everything midway through the 37th row of pillars. Thus, the only area not shown on the map submitted to MSHA on June 2, 1992, that was inconsistent with McDaniel's observations on July 21, 1992, was essentially the No. 1 through No. 6 entries between the 37th and 38th crosscut outby.

¹ The parties stipulated that the cited mandatory health and safety standards contained in 30 C.F.R. Part 75, revised as of July 1991, shall apply in these proceedings. (Vol. II, tr. 4).

As such, the mine map that MSHA had on June 2 was substantially accurate, even though McDaniel may have been shown a mine map that was less accurate during his inspection. Consequently, I find that the likelihood of injury is substantially reduced because the only inaccuracy on the map in MSHA's possession (which is also maintained by the respondent) is the lack of the 38th crosscut.

In summary, I am crediting the testimony of McDaniel that he was shown a map without current annotations. However, the substantially accurate June 2 Map is a significant mitigating factor. Therefore, I am modifying Order No. 3382919 to a 104(a) citation, and I am deleting the significant and substantial designation. I am also lowering the degree of the respondent's negligence from high to moderate. The penalty assessed for this citation is \$200.00. (Tr. Vol. II, 43-47).

Order No. 3382964 (Gov. Ex. 7) was issued by McDaniel on July 23, 1992, for an alleged violation of section 75.220 for the respondent's purported failure to adhere to its approved roof-control plan. The respondent was cited for beginning to mine a pillar by making a 38 inch wide cut in the pillar without first installing timbers in the outby crosscut. This cut was witnessed by McDaniel. The respondent has stipulated to the fact of a technical violation but has asserted that the cut was inadvertently made by the continuous miner operator during the cleaning of an entry.

The Secretary has the burden of proving that the pillar was being mined. McDaniel arrived at the respondent's mine on July 23 at 6:15 a.m. Order No. 3382964 was issued at 1:30 p.m. The continuous miner operator, Steve Phillips, was aware of McDaniel's presence at the mine. It is inconceivable that Phillips would mine a pillar without setting timbers knowing that McDaniel was on the premises. In view of the angle and size of the cut (38 inches in width), the Secretary has failed to meet his burden of establishing that this was a willful rather than a negligent act. Accordingly, I am removing the unwarrantable failure designation.

The integrity of the pillars prior to installation of pertinent timbers is fundamental to the roof support system. Therefore, I am affirming the significant and substantial characterization of this violation.

Accordingly, Order No. 3382964 is modified to a significant and substantial 104(a) citation with a

reduction in the degree of associated negligence from high to moderate. A civil penalty of \$400.00 is assessed. (Tr. Vol. II, 56-58).

Order No. 3382962 (Gov. Ex. 14) was issued by McDaniel on July 22, 1992, for an alleged failure by the respondent to follow its approved roof-control plan in violation of section 75.220. The plan required the first pillar cut to be 13 feet wide. However, due to the dimension of the entries and the size of the continuous miner, the respondent's first cut was wider than the approved width. After the first cut, the respondent was able to maneuver the continuous miner to comply with the subsequent pillar cuts in its roof-control plan. (See tr. VOL. II, 66-68).

McDaniel has confirmed that there was an impossibility of performance with regard to the width of the first cut. However, it is incumbent on the operator to seek modification of its existing roof control plan if it cannot be followed. Any other approach would encourage the operator to ignore its approved roof-control plan if it finds that it is unwilling or unable to comply with it. Such unilateral action by the operator would render the roof control approval process meaningless. Significantly, the evidence reflects that the roof-control plan with respect to the first pillar cut has never been followed. Therefore, I am attributing this violation to the respondent's unwarrantable failure.

Turning to the issue of significant and substantial, the roof control-plan was ultimately modified to essentially conform to the respondent's method of initial pillar cut. Thus, I am unable to conclude that the respondent's mining in this instance was structurally unsound. Moreover, the evidence does not reflect that any personnel were exposed to unsupported roof. Therefore, I am deleting the significant and substantial designation.

The continued operation in violation of the roof support plan is a serious matter. Thus, I am affirming Order No. 3382962 as a 104(d) order and I am assessing a civil penalty of \$2,100.00. (Vol. II, tr. 84-87).

Citation No. 3382967 (Gov. Ex. 2) was issued by McDaniel on August 10, 1992, for an alleged significant and substantial violation of section 75.1704 which requires maintenance of escapeway passages to ensure passage at all times. The citation noted mud and rock

from the portal inby to the No. 2 head drive in the main entry intake escapeway.

McDaniel testified that the escapeway in the No. 3 Right Section had been recently cleared and was well maintained. (See Vol. II, tr. 119). The photographic evidence and the testimony support the respondent's contention that there was also a recent attempt to clear the main entry intake escapeway of mud and water. However, the attempted clearing was unsuccessful because the scoop became stuck in ruts in the mud. These ruts are clearly visible in the photographs proffered by the respondent. (Resp. ex. 12). Thus, I find that the respondent's effort to clear this area, as evidenced by these ruts, is a mitigating factor.

However, consistent with the Commission's decision in Eagle Nest, Inc., 14 FMSHRC 1119 (July 1992), I conclude that mud and water in a primary escapeway creates a hazard that, when viewed in the context of continued mining operations, is reasonably likely to result in a slip and fall injury of a reasonably serious nature. Therefore, I am sustaining this 104(a) citation as significant and substantial and assessing a civil penalty of \$75.00. (Tr. VOL. II, 119-122).

Approved Settlement Agreement

As noted above, the parties' motion to settle the seven remaining 104(d) orders in these proceedings was granted on the record. Order Nos. 3382920, 3382961 and 3382918 concern the respondent's bleeder system in its No. 3 Right Section. These orders concern the respondent's purported failure to comply with its approved ventilation plan; the respondent's failure to adequately ventilate the section; and the respondent's failure to perform weekly examinations for hazardous conditions in its bleeder system. McDaniels' significant and substantial designations with respect to these citations were retained. The settlement agreement, however, acknowledged that the respondent was in the process of mining through the 36th crosscut between the 7th and 8th entry at the time of the inspection. This operation ultimately cleared a blockage in the bleeder system which permitted the free flow of return air.

In addition, the respondent was operating in an area of poor roof conditions which interfered with weekly hazard examinations. In view of these mitigating circumstances, the terms of the settlement removed the unwarrantable failure findings with

respect to these violations. Therefore, these orders were modified to reflect 104(a) citations. Consequently, the Secretary moved to substantially reduce the civil penalties for these citations.

The parties settlement agreement did not disturb the significant and substantial or unwarrantable failure designations for Order Nos. 3382915, 3382916 and 3382917. These orders concern violations of the respondent's approved roof-control plan and pillar mining methods that exposed the continuous miner operator to unsupported roof.

Finally, the Secretary moved to vacate Order No. 3382914. This order involved an alleged violation of the respondent's approved roof control-plan with respect to pillar No. 38. However, due to poor roof conditions, McDaniel was unable to position himself to clearly observe the condition of this pillar. Therefore, the Secretary has concluded that there is insufficient evidence to support the fact of the cited violation.

As a final matter, there appears to be an animus between MSHA inspectors and the respondent's personnel. Both McDaniel and Smith advised me that it is not uncommon for the respondent's employees to disagree with the objective observations of the inspectors. For example, in these proceedings, the respondent has denied McDaniels' testimony concerning missing timbers. However, there is no evidence that McDaniels was ever advised by the respondent at the inspection of its belief that the subject timbers were in fact present.

Therefore, I have urged the parties to initiate a voluntary procedure whereby any dispute concerning the objective findings of the inspectors should be conveyed in writing by the respondent's personnel to the inspector. If a disagreement remains, in the spirit of good faith and cooperation, the inspector should initial and date the written objection which should be retained by the respondent. This written objection will serve to document and preserve the respondent's position in the event of subsequent litigation. McDaniel and Smith, the respondent's president, have both indicated that this procedure would be helpful. (See vol. II, tr. 172-184).

ORDER

Consistent with the above bench rulings, **IT IS ORDERED** that:

1. Order No. 3382919 **IS MODIFIED** to a 104(a) citation, thus reducing the degree of associated negligence from high to

moderate. In addition, the significant and substantial designation is deleted. The civil penalty assessed for this citation is \$200.00.

2. Order No. 3382964 **IS MODIFIED** to a 104(a) citation, thus reducing the degree of underlying negligence from high to moderate. The civil penalty assessed for this citation is \$400.00.

3. Order No. 3382962 **IS MODIFIED** to remove the significant and substantial designation and is affirmed as modified. A civil penalty of \$2,100.00 is assessed for this order.

4. Citation No. 3382967 **IS AFFIRMED**. The respondent shall pay a civil penalty of \$75.00.

Consistent with my approval of the parties' settlement agreement, **IT IS FURTHER ORDERED** that:

5. Order No. 3382920 **IS MODIFIED** to a 104(a) citation, thus reducing the degree of negligence from high to moderate. The respondent has agreed to pay a civil penalty of \$400.00.

6. Order No. 3382961 **IS MODIFIED** to a 104(a) citation, thus reducing the degree of negligence from high to moderate. The respondent has agreed to pay a civil penalty of \$400.00.

7. Order No. 3382918 **IS MODIFIED** to a 104(a) citation, thus reducing the degree of negligence from high to moderate. The respondent has agreed to pay a civil penalty of \$1,200.00.

8. Order No. 3382915 **IS AFFIRMED**. The respondent has agreed to pay a civil penalty of \$2,500.00.

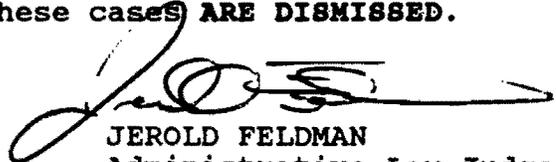
9. Order No. 3382916 **IS AFFIRMED**. The respondent has agreed to pay a civil penalty of \$2,500.00.

10. Order No. 3382917 **IS AFFIRMED**. The respondent has agreed to pay a civil penalty of \$1,000.00.

11. Order No. 3382914 **IS VACATED**.

IT IS FURTHER ORDERED that the respondent shall pay, within 30 days of the date of this decision, a total civil penalty of

\$10,775.00 in satisfaction of the above citations and orders.²
Upon receipt of payment, these cases ARE DISMISSED.



JEROLD FELDMAN
Administrative Law Judge

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/11

² The \$10,775.00 total civil penalty assessed in these cases represents: a \$75.00 penalty assessed in Docket No. SE 93-9 for Citation No. 3382967; a \$1,400.00 penalty assessed in Docket No. SE 93-10 for modified Citation Nos. 3382919, 3382920, 3382961 and 3382964; and a \$9,300.00 penalty assessed in Docket No. 93-98 for Order Nos. 3382915, 3382916, 3382917 and modified Citation No. 3382918.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 26 1993

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-964
Petitioner	:	A.C. No. 15-16678-03521
	:	
	:	No. 4 Mine
V.	:	
	:	
KIAH CREEK MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

Statement of the Proceeding

This proceeding concerns proposals for assessment of a civil penalty filed by the Petitioner against the Respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for one alleged violation of a certain mandatory safety standard found in Part 77, Title 30, Code of Federal Regulations.

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

<u>Citation No.</u>	<u>Date</u>	30 C.F.R. <u>Section</u>	<u>Assessment</u>	<u>Settlement</u>
3811870	04/22/92	75.220	\$94	\$85

In support of the proposed settlement disposition of this case, the Petitioner has submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act, included information regarding Respondent's size and ability to continue in business and history of previous violations.

In particular, with regard to Citation No. 3811870, the parties note the violation of the approved roof control plan did not affect two persons, as indicated by the inspector but rather affected one.

CONCLUSION

After review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I find that the proposed settlement disposition is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the settlement amount shown above in satisfaction of the violation in question. Petitioner IS ORDERED to modify the citation to indicate that only one person was affected. Payment is to be made to MSHA within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is DISMISSED.


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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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OCT 26 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 92-526-M
Petitioner : A.C. No. 04-02251-05524
: :
v. : Slaughterhouse Canyon
: :
ASPHALT, INCORPORATED, :
Respondent :

DECISION

Appearances: J. Mark Ogden, Esq., Office of the Solicitor, U.S.
Department of Labor, Los Angeles, California.
for Petitioner;

Ray E. Ehly, Jr., President, ASPHALT INC.,
El Cajon, California, appearing pro se,
for Respondent.

Before: Judge Morris

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

A hearing on the merits was held in San Diego, California, on August 25, 1993. The parties waived the filing of post-trial briefs.

SETTLEMENTS

At the commencement of the hearing, Asphalt moved to withdraw its contest as to Citation Nos. 3930399, 3930400, and 3930681.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion to withdraw was **GRANTED** and it is **FORMALIZED** in this decision.

Citation No. 3930396

This citation alleges Asphalt violated 30 C.F.R. 56.11002.¹ The citation issued under Section 104(a) of the Act, alleged the violation was significant and substantial.

The citation reads as follows:

A section of planking in the elevated wooden walkway, alongside the base belt was rotten.

A person walking in this area could step through this section and injure a foot or ankle.

[If] there was a handrail located alongside, a person would not fall through to the ground below.

Although persons were seldom in the area an injury was likely to occur.

Based on the evidence, I enter the following:

FINDINGS OF FACT

1. ALLEN BRANDT, a federal mine inspector, conducted an investigation of the Slaughterhouse Canyon Mine on April 23, 1991. (Tr. 8, 9).
2. Asphalt is a sand and gravel crushing operation. (Tr. 9).
3. When the Inspector arrived at 7 a.m., the plant was not running as it was down for maintenance. (Tr. 10).
4. The Inspector identified Citation No. 3930396. (Tr. 11, 12).
5. Employees would use the elevated walkway on an as-needed basis. (Tr. 12).
6. The walkway constructed of two by ten planking was eight to ten feet from the ground. (Tr. 13).

¹ 56.11002. Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

7. The planking at one end of the plank was in a splintered condition. There was a 3- to 4-inch by 10-inch hole in the planking. (Tr. 14).

8. The condition of the planking had existed for a month or so. It could cause slips, trips, and/or falls. (Tr. 15).

9. The Inspector believed a person could suffer a lost-time injury. Although a worker could not fall through the planking, he could injure a leg or an ankle. On this basis, the Inspector considered the gravity as "reasonably likely." The Inspector further believed the violation was "S&S." (Tr. 15, 16).

CONTENTIONS, DISCUSSIONS, AND FURTHER FINDINGS

RAY E. EHLY, JR., President of Asphalt, argues that on the day prior to the MSHA inspection, the company conducted a routine monthly safety inspection. Upon finding some safety defects, the plant was closed and the following morning the first order of work was to repair the safety deficiencies.

Mr. Ehly argues that it seems self-incriminating, unreasonable, and unfair to be cited while the company was in the process of doing repairs. (Tr. 3, 4).

I am not persuaded by this argument. In this case, the evidence shows the defective planking, the missing stop-cord, and the step-off existed for more than several days. In this period of time, workers were exposed to the violative conditions. In addition, daily and not monthly inspections are required. In fact, Asphalt's evidence in Exhibits R-1 and R-2 shows the company did, in fact, conduct daily inspections.

ASPHALT'S EVIDENCE

JERRY RICHESON, superintendent and plant manager for Asphalt since 1970, testified for the company. (Tr. 38).

I find Mr. Richeson's uncontroverted testimony supported by the daily reports to be credible. On the day of Mr. Brandt's inspection the plant had been shut down so repairs could be made. In particular, Mr. Richeson intended to repair the stop-cord and the step-off at the stairs.² (Tr. 39). The defective planking "did not catch his eye." (Tr. 39, 44).

² These violations are discussed, infra.

Mr. Richeson establishes statutory good faith for Asphalt. However, the evidence shows the violative conditions existed for at least a few days before the MSHA citations were issued.

Based on the uncontroverted evidence, this citation should be affirmed. The S&S allegations are discussed infra.

Citation No. 3930397

This citation, issued under 104(a) of the Act, alleged Asphalt violated 30 C.F.R. § 56.14109(a).³

The citation reads as follows:

The stop-cord located along the #2 dust belt had not been reinstalled after construction work was completed.

If a person fell onto or into the belt, it would not be able to be stopped.

People were seldom in the area; there were no other conditions present that would make an injury likely to occur.

FINDINGS OF FACT

10. A dust belt is a conveyor belt which delivers fine sand into a pile. (Tr. 17, 31).

11. The dust belt is about 50 feet long and 36 inches wide. (Tr. 17).

12. The belt is not protected with any type of guard or cover over the top. (Tr. 17).

13. After the walkway was extended, Asphalt failed to replace the stop-cord. (Tr. 17, 18). However, the stop-cord was lying on the walkway. (Tr. 29).

³ 56.14109 Unguarded conveyors with adjacent travelways.

Unguarded conveyors next to the travelways shall be equipped with--

(a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor;

14. The walkway is for people to walk to the head of the belt to perform maintenance repairs. Employees would use this walkway. (Tr. 18).

15. The dust belt conveyor was equipped with a railing on the outside portion. However, there was no railing between the walkway and the conveyor. (Tr. 18, 19).

16. At the time of the inspection there was no stop-cord, nor any other emergency device to de-activate the conveyor drive motor. (Tr. 19, 20).

17. The company representative, **ROGER JANSSEN**, stated the plant had been running for about a week after the construction involving the walkway. (Tr. 20, 21).

18. If an individual fell against the conveyor, he could sustain broken bones or a dislocated shoulder. (Tr. 21).

19. The Inspector considered the gravity to be "unlikely." Since there were no tripping hazards, the possibility of a person falling would also be unlikely. As a result, the violation was not S&S. (Tr. 22).

20. Asphalt properly abated the violation. (Tr. 22).

Based on the uncontroverted evidence confirmed by Mr. Richeson's testimony, it is established that emergency stop-cords were not provided. Accordingly, this citation should be affirmed.

Citation No. 3930398

This citation alleges Respondent violated 30 C.F.R. § 56.11001.⁴

The citation reads:

The stairway located alongside the #2 dust belt leading to the elevated walkway did not extend to the ground. After the construction to lengthen the conveyor belt was completed, there was a 36- to 42-inch drop from the bottom step to the ground. Although

⁴ The cited regulation reads:

56.11001. Safe access.

Safe means of access shall be provided and maintained to all working places.

people were seldom in this area, a person getting off especially, could injure an ankle or leg.

FINDINGS OF FACT

21. Mr. Brandt read the citation into the record and testified workers would use this stairway to gain access to the length of the belt to do any repairs or maintenance. (Tr. 23).

22. An ankle sprain or maybe a broken leg could result from this condition.

23. Slips, trips, and falls are the most common injury in any workplace. (Tr. 24).

24. The Inspector considered the violation to be S&S. (Tr. 24).

25. The violation was abated by extending the stairway to the ground. (Tr. 24).

The uncontroverted evidence shows that the 36- to 42-inch step-off existed at the end of the stairway. Accordingly, safe access was not provided to a working place and this citation should be affirmed.

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 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 that:

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, 1575-1575 (July 1984).

The Secretary designated the planking citation (No. 3930396) and the 24- to 36-inch step-off citation (No. 3930398) to be S&S.

The "rotten planking" described in Citation No. 3930396 was a hole 3 to 4 inches by 10 inches. The Inspector indicated a person could not fall through the planking; however, he believed a worker could injure an ankle or leg.

Based on these facts and in applying the Commission's decisions I am unable to conclude that an injury would be reasonably serious based on this minimal record.

Accordingly, the S&S allegations as to Citation No. 3930396 are stricken.

Citation No. 3930398 involves a step-off of 36 to 42 inches from the bottom step of a walkway to the ground. By comparison, most business desks are less than 36 inches in height. If a worker stepped 36 to 42 inches from the end of a walkway, I believe there would be a reasonable likelihood that his injury would be reasonably serious. In sum, I agree with Inspector Brandt that an ankle sprain or broken leg could result. An ankle sprain is certainly more likely from such a step-off than from a worker somehow becoming entangled in a 3 by 10 inch hole in planking through which he could not fall.

The S&S allegations should be affirmed as to Citation No. 3930398.

CIVIL PENALTIES

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

The proposed assessment indicates Asphalt is a small operator since it annually produced 18,377 tons.

The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I find that the payment of penalties will not cause Respondent to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974).

There is no evidence of the operator's history of previous violations.

The operator was negligent since the defective planking, missing stop-cord, and the 36- to 42-inch step-off were open and obvious.

Concerning gravity: the planking has been previously discussed. Based on the hazard involved, I believe the gravity is low.

The failure to provide a stop-cord for the short space involved presents a situation of moderate gravity.

The step-off, as previously discussed, involves a situation of high gravity.

Asphalt demonstrated good faith both by prompt abatement of the violative conditions. While the conditions should have been abated when they were discovered by the company, the company somewhat enhanced its good faith by scheduling repairs the day the MSHA Inspector arrived.

I believe the penalties set forth in this order are appropriate and accordingly, I enter the following:

ORDER

1. Citation No. 3930399 and the proposed penalty of \$157 are **AFFIRMED**.

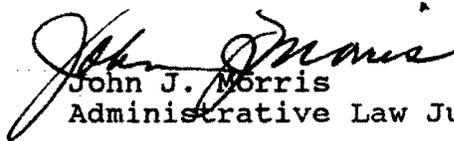
2, Citation No. 3930400 and the proposed penalty of \$252 are **AFFIRMED**.

3. Citation No. 3930681 and the proposed penalty of \$267 are **AFFIRMED**.

4. Citation No. 3930396 is **AFFIRMED** and a penalty of \$150 is **ASSESSED**.

5. Citation No. 3930397 is **AFFIRMED** and a penalty of \$150 is **ASSESSED**.

6. Citation No. 3930398 is **AFFIRMED** and a penalty of \$275 **ASSESSED**.


John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

OCT 28 1993

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-954-D
on Behalf of KIRBY SENTER, :
Complainant : PIKE CD 93-05
v. :
: No. 1 Mine
BLACK DRAGON MINING COMPANY, :
Respondent :

**DECISION APPROVING SETTLEMENT
AND DISMISSING PROCEEDING**

Before: Judge Broderick

On October 27, 1993, the parties by counsel filed a joint motion for approval of a settlement of this discrimination proceeding brought by the Secretary on behalf of Kirby Senter. Mr. Senter also signed the motion.

On August 18, 1993, I issued an order that Respondent temporarily reinstate Kirby Senter effective August 12, 1993. Senter has been in receipt of economic reinstatement since that time. Counsel for the Secretary stated that the back wages to which Senter would be entitled if he were successful in his case would run from approximately January to April 1993.

The settlement agreement provides that Respondent shall pay Kirby Senter the sum of \$8000 and Senter will relinquish his rights and claims under the Mine Act against Respondent "or any other company owned by Todd Kiscaden." Respondent further agrees to expunge all references to matters being litigated in this matter from Senter's personnel records, and agrees that it will not give Mr. Senter a negative or unfavorable reference regarding his job performance at Respondent.

I have considered the motion in the light of the purposes of section 105(c) of the Act and conclude that it is in the public interest and should be approved.

Accordingly, **IT ORDERED:**

1. The settlement motion is **APPROVED**.

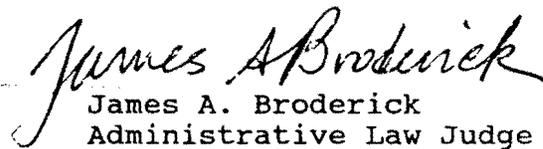
2. The order of temporary reinstatement issued August 18, 1993, **IS DISSOLVED**;

3. Respondent shall pay to Kirby Senter the sum of \$8000 in settlement of his claims;

4. Respondent shall pay to the Mine Safety and Health Administration a civil penalty of \$200;

5. The hearing scheduled for November 4, 1993, in Pikeville, Kentucky, **IS CANCELED**;

6. Upon payment of the agreed-to amount to Kirby Senter and the civil penalty, this proceeding **IS DISMISSED**.


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 28 1993

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 93-115-M
Petitioner : A. C. No. 18-00010-05517
: :
v. : Marriottsville Quarry
GENSTAR STONE PRODUCTS :
COMPANY, :
: :
Respondent :

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a motion to approve settlement of the one violation presented by the Secretary's penalty petition.

The original assessed penalty was \$8,500 and the proposed settlement is \$5,250. A citation was issued after a fatal accident at the operator's quarry. An employee attempted to pick up a sheet of steel with a hydraulic crane when the lift lines contacted a 7,600 volt overhead power line. A second employee who was handling the hook-up block was killed when he tried to clamp the gripper device to the sheet of metal. The storage area where the sheeting was located was under a 7,600 volt line.

30 C.F.R. § 56.12071 provides that when equipment must be operated within 10 feet of energized high voltage lines, the lines shall be deenergized or other precautionary measures taken. There is apparently no dispute that a violation of the cited standard occurred. However, the settlement motion advises that not only has the operator not had an accident like this before, but on the contrary it has been the recipient of many safety awards which are detailed in the motion. The Mine Safety and Health Administration would reduce negligence from high to moderate because the victim had received extensive training covering situations like this and the crane operator had over 15 years experience in his job. The operator was unaware what these two individuals were doing since their actions took place in a remote area of the quarry.

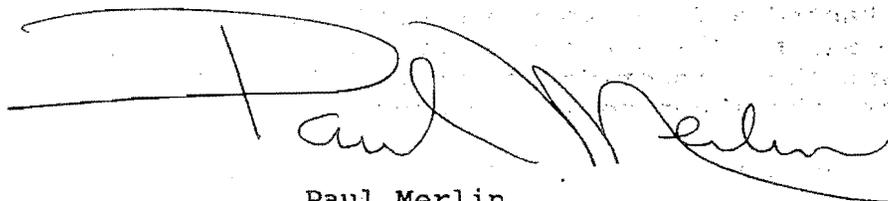
The parties also have advised with respect to the remaining statutory criteria under section 110 of the Act. In particular, the operator is medium in size, its ability to continue in business will be unaffected by payment of the recommended penalty and the violation was abated in good faith.

Because a fatality occurred, the closest scrutiny must be given to the parties' settlement motion, involving as it does a reduction in the penalty amount. After careful consideration, I determine there is adequate basis to accept the motion's representations regarding negligence. Under Commission precedent I find that because of the operator's training policies and procedures, negligence may be reduced from high to moderate. Southern Ohio Coal Company, 4 FMSHRC 1459, 1463-1464 (August 1982); Mar-Land Industrial Contractor, Inc., 14 FMSHRC 754, 758-759 (May 1992); Compare also the recent decision of Administrative Law Judge David Barbour in Lyman-Richey Sand & Gravel Company, 15 FMSHRC 1378, 1398-1401 (July 1993). I also take note of the operator's previously excellent safety record, but I caution the operator that this is not a circumstance which could be considered in the future as a mitigating factor in determining the appropriate amount of a penalty.

In light of the foregoing, I determine that the recommended settlement is in accordance with the provisions of the Act.

It is therefore **ORDERED** that the proposed settlement be and is hereby **APPROVED**.

It is further **ORDERED** that the operator **PAY** \$5,250 within 30 days of the date of this order.



Paul Merlin
Chief Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 8 1993

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
ON BEHALF OF JAMES W. MILLER, : Docket No. York 93-155-D
Complainant : MSHA Case No. MORG CD 93-06
:
v. : Mettiki Mine
:
METTIKI COAL CORPORATION, :
Respondent :

ORDER DENYING RESPONDENT'S MOTION TO DISMISS
ORDER DENYING RESPONDENT'S MOTION TO CONSOLIDATE
ORDER PERMITTING DISCOVERY
NOTICE OF HEARING

Before me are the respondent's motion to dismiss the Secretary's Application for Temporary Reinstatement and, in the alternative, a motion to consolidate this temporary reinstatement proceeding with any future hearing on the merits if the secretary determines that a violation of section 105(c)(1) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(1), has occurred. This order formalizes an October 5, 1993, telephone conference with the parties during which time I denied the respondent's motions, established a schedule for discovery and scheduled a hearing date.

The respondent's motion to dismiss is based on its assertion that the subject complaint is vague and does not clearly address the nexus between the complainant's alleged protected activity and the termination of his employment. In addition, the respondent argues that the Secretary's application for temporary reinstatement is defective because the application was not filed within the 90 day investigatory period provided in Section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). The Secretary has filed an opposition to the respondent's motion to dismiss.

As a threshold matter, the 90 day investigation period provided in the Act for initiation of a discrimination or related temporary reinstatement action by the Secretary is not jurisdictional in nature. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987), rev'd on other grounds, 866 F.2d 1433 (D.C. Cir. 1989). In the instant case, James W. Miller's complaint was

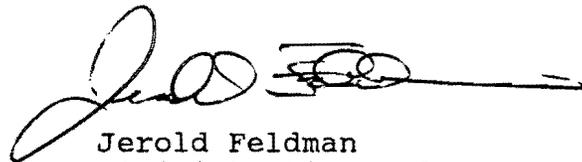
timely filed on June 9, 1993. Although the Secretary's application for temporary reinstatement was filed on September 17, 1993, approximately eight days after the expiration of this 90 day investigatory period, the respondent has failed to demonstrate that it has been unduly prejudiced by this delay. Moreover, in balancing the public interest in mine safety with the respondent's private interest in controlling its workforce, the public interest in ensuring the expeditious reinstatement of employees who are discharged for engaging in protected activities must prevail. Jim Walter Resources, Inc. v. Fed. Mine Safety & Health Review Commission, 920 F.2d 738, 746 (11th Cir. 1990). Accordingly, this matter shall be heard and the respondent's motion to dismiss is denied.

Turning to the motion to consolidate, the respondent has conceded that this motion is premature in that the Secretary has not yet initiated a discrimination action. Accordingly, the respondent's motion to consolidate this temporary reinstatement proceeding with any future discrimination proceeding is also denied.

During the course of the October 5, 1993, conference call, in response to the respondent's assertion that Miller's complaint lacks specificity, I granted the respondent's request for discovery. I established a limited discovery schedule whereby both parties will be permitted a maximum of six interrogatories. The interrogatories shall be served on or before October 15, 1993, and answers shall be provided on or before October 25, 1993.

Finally, due to a scheduling conflict of respondent's counsel, it was agreed that this proceeding will be heard at 9 a.m. on November 3 and November 4, 1993, if necessary, in the vicinity of Morgantown, West Virginia. The courtroom location will be specified by subsequent order. The respondent has stipulated that, if temporary reinstatement is ordered, such reinstatement will be retroactive to October 18, 1993.

As noted above, the respondent's motions to dismiss and to consolidate **ARE DENIED**. **IT IS ORDERED** that the parties must comply with the discovery procedures discussed herein.



Jerold Feldman
Administrative Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**OFFICE OF ADMINISTRATIVE LAW JUDGES
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OCT 13 1993

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH : PROCEEDING
ADMINISTRATION (MSHA), :
ON BEHALF OF JAMES W. MILLER, : Docket No. York 93-155-D
Complainant : MSHA Case No. MORG CD 93-06
:
v. : Mettiki Mine
:
METTIKI COAL CORPORATION, :
Respondent :

**ORDER DENYING RESPONDENT'S MOTION FOR
CERTIFICATION OF INTERLOCUTORY RULING**

This temporary reinstatement proceeding is scheduled for hearing in Morgantown, West Virginia, on November 3 and November 4, 1993. By Order dated October 8, 1993, I denied the respondent's motion to dismiss the Secretary's reinstatement application. In denying the motion, I rejected the respondent's assertion that the subject reinstatement application is defective because it was not filed within the 90 day investigatory period set forth in Section 105(c)(3) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(3). I also was not persuaded that the underlying complaint in this proceeding failed to allege a nexus between the alleged protected activity and the complainant's termination of employment, although I permitted limited discovery through interrogatories.

The respondent has now filed a motion for certification for interlocutory review by the Commission pursuant to Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a)(1). In support of its motion, the respondent contends that the timeliness and legal sufficiency of the Secretary's application involve controlling questions of law and that immediate review of these issues will materially advance the final disposition of this proceeding. I disagree.

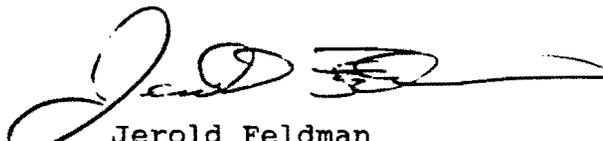
Interlocutory review by the Commission is not a matter of right but is committed to the sound discretion of the Commission. 29 C.F.R. § 2700.76. To support such a request for review, the respondent must identify dispositive questions of law which are novel or otherwise unresolved. In the instant case it is well settled that the 60-day time period provided in Section 105(c) of the Act for the filing of a complaint with the Secretary and the

90-day period for the Secretary to complete his investigation of the complaint are not jurisdictional. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (August 1987), rev'd on other grounds, 866 F.2d 1433 (D.C. Cir. 1989). Rather, the timeliness of discrimination related complaints must be determined on a case by case basis by examining whether the delay in filing deprives a respondent of a meaningful opportunity to defend. See Roy Farmer v. Island Creek Coal Company, 13 FMSHRC 1226, 1231 (August 1991), citing Donald R. Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986) (emphasis added).

In this case the respondent seeks dismissal because the Secretary filed the reinstatement application on September 17, 1993, eight days after the expiration of the statutory 90 day investigatory guideline. Surely this eight day delay has not deprived the respondent of its ability to meaningfully defend the application in issue. As the Commission has noted, material legal prejudice means more than the necessity of defending a case that could have been avoided if the filing delay were treated as a jurisdictional defect. 13 FMSHRC at 1231. Consequently, the respondent has failed to demonstrate any unresolved controlling question of law with respect to the jurisdictional filing issue.

Turning to the remaining issue concerning the legal sufficiency of the complaint, the respondent has conceded that the complainant has engaged in protected activity. (Motion to Dismiss, p. 4). The complainant alleges disparate treatment during the course of a reduction in force that resulted in termination. Although the complaint states a cause of action, pursuant to the respondent's request for discovery conveyed during an October 5, 1993, telephone conference, I established a schedule for limited discovery through interrogatories prior to trial. However, my desire to accommodate the respondent's request for discovery is not indicative of any novel or unresolved issues of law concerning the legal sufficiency of the Secretary's application for temporary reinstatement. The interlocutory review process is not the appropriate vehicle for determining the merits of this reinstatement application or whether the underlying complaint has been frivolously brought. These issues must be resolved through the hearing process. Accordingly, I decline to certify the legal adequacy issue to the Commission for interlocutory review.

In view of the above, the respondent's motion for certification of interlocutory review by the Commission **IS DENIED**. The parties should continue to adhere to the discovery schedule contained in my October 8, 1993, Order.


Jerold Feldman
Administrative Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 22 1993

ENERGY WEST MINE COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 94-22-R
: Order No. 3587924; 10/4/93
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Deer Creek Mine
ADMINISTRATION (MSHA), : Mine ID 42-00121
Respondent :

ORDER DENYING
MOTION FOR EXPEDITED HEARING
AND PREHEARING ORDER

On October 13, 1993, Energy West Mining Company, by counsel, filed a Notice of Contest of Order No. 3587924 issued on October 4, 1993, at the company's Deer Creek Mine by an inspector for the Mine Safety and Health Administration. The order was issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1). As part of the Notice, Contestant stated that "Energy West requests that an expedited hearing in this matter be held in Price, Utah."

Subsequently, on October 20, 1993, Energy West filed a Motion for Expedited Hearing in accordance with Commission Rules 10 and 52, 29 C.F.R. §§ 2700.10 and 2700.52. Energy West asserts that it requests an expedited hearing on the contested order "because the order put Energy West on the § 104(d) unwarrantable failure 'chain' which imposes a continuing threat of closure under § 104(d)(2)." Contestant avers that the only issue in this case is whether the alleged violation resulted from an unwarrantable failure to comply with the Secretary's regulations.

The Secretary of Labor, by counsel, opposes the motion. The Secretary argues that "[a]n expedited hearing is an extraordinary remedy that is not to be given to the operator just for the asking" and that in this case Energy West has presented no basis for expediting the hearing. He points out that Energy West is in no different position than any other mine operator contesting a Section 104(d)(1) withdrawal order.

The Secretary's point is well taken. Energy West is not in a unique position. Every mine operator contesting a Section 104(d)(1) order is under "a continuing threat of closure under § 104(d)(2)." For that matter, every mine operator receiving a citation under Section 104(d)(1) faces the possibility of a subsequent withdrawal order.

More is required to justify an expedited hearing. In two similar cases, Commission Administrative Law Judges William Fauver and John J. Morris also denied requests for expedited hearing. Pittsburg & Midway Coal Mining Company v. Secretary of Labor, 14 FMSHRC 2136 (December 1992) and Medicine Bow Coal Company v. Secretary of Labor, 12 FMSHRC 904 (April 1990). I find their reasoning persuasive.

Accordingly, the request for expedited hearing is **DENIED**.

However, having determined that an expedited hearing will not be held does not mean that this proceeding cannot be handled with dispatch. Therefore, in accordance with the provisions of Section 105(d) of the Act, 30 U.S.C. § 815(d), the proceeding will be called for hearing on the merits at a time and place to be designated in a subsequent notice.

1. On or before **November 19, 1993**, the parties shall confer for the purpose of discussing settlement and stipulating as to matters not in dispute. If a settlement is reached, a motion for its approval shall be filed by the Secretary of Labor no later than **November 19, 1993**.

2. If settlement is not agreed upon, the parties shall send to each other and to me no later than **November 19, 1993**, synopses of their expected legal arguments, expected proof, lists of exhibits that may be introduced, and matters to which they can stipulate at the hearing. Each party shall also state its best estimate of the length of time necessary to present its case at the hearing.

3. Failure by any party to comply with this order will subject the party in default to a show cause order and possible default decision.



T. Todd Hodgdon
Administrative Law Judge

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/lbk