

OCTOBER 1996

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10-01-96 Newmont Gold Company	WEST 95-434-M	Pg. 1891
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Review was granted in the following cases during the month of October:

Secretary of Labor, MSHA v. Island Creek Coal Company, Docket No. KENT 95-214. (Judge Hodgdon, August 28, 1996)

Secretary of Labor, MSHA v. REB Enterprises, Docket No. CENT 95-29-RM, et al. (Judge Weisberger, September 5, 1996)

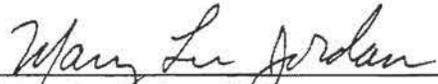
Secretary of Labor, MSHA v. Extra Energy, Inc., Docket No. WEVA 96-13. Motion for Reconsideration of October 2, 1996 Commission Order denying review. (Judge Melick, August 23, 1996)

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

Secretary of Labor, MSHA v. Extra Energy, Inc., Docket No. WEVA 96-13. (Motion for Reconsideration was granted - see above).

COMMISSION DECISIONS AND ORDERS

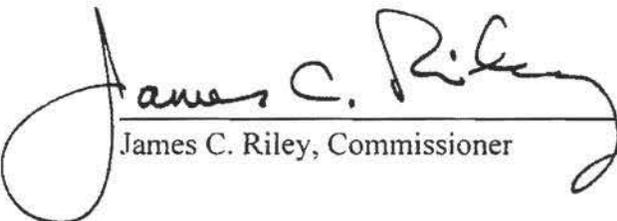
Upon consideration of the motion, we grant it. Accordingly, the Commission's direction for review in this matter is vacated and this proceeding is dismissed.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner

Distribution

Phil B. Hammond, Esq.
Hammond, Natoli & Tobler, PC.
Suite 600 National Bank Plaza
3101 North Central Avenue
Phoenix, Arizona 85012-2639

Susanne Lewald, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson Street, Suite 1110
San Francisco, CA 94105

Administrative Law Judge Richard W. Manning
Administrative Law Judge
Federal Mine Safety and Health Review Commission
1244 Speer Boulevard #280
Denver, CO 80204-3582

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 7, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 92-204
	:	
C.W. MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

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. (1994) ("Mine Act" or "Act"). At issue is a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that C.W. Mining Company ("CW") violated 30 C.F.R. § 75.220(a)(1) by operating its mine without an approved roof control plan.² Concluding that CW's old roof control plan was no longer suitable for the mine and that the plan proposed by MSHA was suitable, Administrative Law Judge August Cetti affirmed the citation. 15 FMSHRC 1559 (June 1993) (ALJ). The Commission granted CW's petition for discretionary review ("PDR"). For the reasons that follow, we affirm the judge.

¹ Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

² 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.

I.

Factual and Procedural Background

A. The Old and New Roof Control Plan Provisions

CW operates the Bear Canyon No. 1 Mine, an underground coal mine in Huntington, Utah. 15 FMSHRC at 1561. MSHA's District 9 Office revoked CW's "old" roof control plan because CW refused to adopt changes in provisions addressing (1) the distance CW could mine before permanent roof bolts were to be installed ("roof bolting development cycle") and (2) the manner and sequence of pillar extraction. *See* PDR at 3-4; S. Br. at 8.

The old plan provided:

Where the roof is strong and competent, the faces of the entries, rooms, plus crosscuts, can be advanced 120 feet prior to installing permanent roof supports.

Gov't Ex. 2, at 5, Item 3. CW customarily advanced 120 feet before roof bolting where top coal was sufficient, in its view, to provide temporary roof support. On review of the old plan, MSHA took the position that roof support and control required roof bolting every 20 feet. Gov't Ex. 35A at 6; 15 FMSHRC at 1561. The 20-foot benchmark was based on the maximum distance CW's continuous mining machines are able to cut with the operator of the machine still under supported roof. *Id.* at 1562, 1569. Under MSHA's approach, CW could no longer rely on top coal as temporary roof support.

In addition, the old plan provided that, when recovering coal by pillar extraction, CW could split the pillar without roof bolting when adequate top coal was present. Gov't Ex. 2 at 23; Gov't Ex. 32; Tr. 1005-06.³ Splitting the pillar was the first step in the sequence of cuts and divided the pillar into two blocks. Gov't Ex. 2, at 23; Gov't Ex. 32. The blocks were then mined as follows: CW would take a cut or "lift"⁴ in the middle of the block that was nearer the gob (cutting perpendicular to the split); then it would cut the inby part of that block; next it would cut the outby part of that block. *Id.* A similar pattern of cuts would take place on the other block. *Id.* Under the new plan, MSHA took the position that splitting the pillar would be done in 20 foot cuts followed by roof bolting after each cut. Gov't Ex. 33; Tr. 339-40, 593-94. The sequence of cuts into the blocks began inby and continued outby. Gov't Exs. 33, 35A at 16.

³ To "split" the pillar means to mine through it, dividing it in half. Tr. 32-33, 418. *See also* Bureau of Mines, U.S. Department of the Interior, *Dictionary of Mining, Minerals and Related Terms* ("DMMRT") at 1056 (1968) ("To divide a pillar . . . by driving through it").

⁴ A "lift" is "[a] slice taken off a pillar The extraction of a coal pillar in lifts or slices." *DMMRT* at 640.

B. History of Discussions of the Plan Provisions

On June 29, 1991, CW sent the MSHA District Manager its roof control plan (the “old” plan) for review. 15 FMSHRC at 1562. The plan had last been approved March 5, 1990. *Id.* CW stated that it did not feel any changes were needed. *Id.*

On August 9, MSHA responded by letter that the plan was inadequate. *Id.* The letter listed 30 “necessary” changes in the pillar section of the roof control plan and 10 “necessary” changes in the plan’s development section. *Id.* MSHA indicated that the old plan provisions concerning roof bolting during roof development did not comply with 30 C.F.R. § 75.202(a) and “[m]ust be revised.”⁵ Gov’t Ex. 3, at 4. As to pillar removal, MSHA stated that mining an inby block after taking a lift out of the middle of the pillar was a faulty practice and that it was necessary to use a conventional support plan or otherwise develop full overhead support. Gov’t Ex. 3, at 4, Items 28, 29, *citing* Item 6, at 2. MSHA requested CW to submit a new plan by August 26, 1991, addressing MSHA’s concerns. 15 FMSHRC at 1562-63.

On August 22, CW sent a letter to MSHA stating that the roof control systems set forth in the plan submitted for review had been used at the mine for 30 years and there had been no uncontrolled roof falls during that time. *Id.* at 1563. CW asked that the plan be approved with no change and did not otherwise respond to MSHA’s 40 concerns. *Id.*

By letter dated September 9, MSHA requested that CW respond to and comply with MSHA’s August 9 letter. *Id.* The letter informed CW that, if an acceptable plan was not received by the due date, September 30, 1991, the existing plan “may be rescinded” and any further mining under that plan would result in a citation charging a violation of section 75.220. *Id.*

On September 24, a meeting between representatives of CW and MSHA was held in Price, Utah. *Id.* Among those attending the meeting were MSHA District 9 Roof Control Supervisor William Ponceroff⁶ and CW President Bill Stoddard. *Id.* At the meeting, the participants discussed the need for full roof bolting and the other changes in MSHA’s September 9 letter. *Id.*

⁵ Section 75.202(a) states:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

⁶ Ponceroff was responsible for reviewing roof control plans for all mines in the district and for advising the district manager, who had the ultimate authority to approve plans. Tr. 24.

In a letter dated October 4, MSHA recapped the meeting discussion and noted that Stoddard agreed to submit an acceptable plan within two weeks and that the deadline for submission was extended to October 11. *Id.* at 1563-64. The letter also stated that CW must make the necessary revisions or “the currently approved roof control plan will be rescinded.” *Id.* at 1564.

On October 12, CW submitted a “new revised” roof control plan. *Id.* The plan did not provide for a permanent roof support mining cycle. *See* Gov’t Ex. 12. The “typical pillar extraction sequence” was also similar to that of the old plan. *See* Gov’t Ex. 12, Fig. 7; Gov’t Ex. 2, Fig. 10.

On October 22, MSHA faxed to CW 16 deficiencies in the “new revised” roof control plan. 15 FMSHRC at 1564. MSHA indicated that the plan must include a provision for “Full Roof Bolting” as the primary roof support. Gov’t Ex. 13, at 1, *citing* Gov’t Ex. 12, at 1, 5. MSHA further stated that “roof bolts will be drilled at 20 feet intervals.” *Id.*, *citing* Gov’t Ex. 12, at 7, Item 2. MSHA also indicated that the “Typical Pillar Extraction Sequence” was unacceptable and that pillar lifts were taken out of sequence. *Id.*, *citing* Gov’t Ex. 12, at 9, Item 3 & Fig. 7. The hard copy concluded:

Since all negotiations concerning the development of an acceptable roof control plan, in accordance with 30 C.F.R. 75.220, remain at an impasse, the currently approved roof control plan is rescinded. Any further mining activities without an approved plan is a violation of 30 C.F.R. 75.220.

15 FMSHRC at 1564-65.

Effective October 23, MSHA revoked the old roof control plan. *Id.* at 1565. Later that same day, MSHA Inspector Ted Farmer issued CW a citation alleging violation of section 75.220(a)(1) for operating without an approved roof control plan, and set a termination date of October 26. *Id.*; Gov’t Ex. 15. On October 26, Farmer extended the termination date to October 28. Gov’t Ex. 15.

On October 28, MSHA received a proposed roof control plan from CW providing that the primary method of roof support would be roof bolting. Gov’t Ex. 16. With regard to the pillar extraction sequence, CW adopted the sequence of cuts requested by MSHA. *Compare* Gov’t Ex. 16, Fig. 7 *with* Gov’t Ex. 33, Fig. 7. CW indicated that it was filing the proposed plan under protest as “dictated” by MSHA. Gov’t Ex. 16.

On October 29, MSHA Inspector Robert Baker extended the citation’s termination date to November 1. Gov’t Ex. 15. After a telephone conversation between representatives of CW and MSHA, CW further revised the plan’s pillar extraction procedure by providing for installa-

tion of breaker posts, temporary supports and roof bolting in accordance with MSHA's request. 15 FMSHRC at 1565-66; Gov't Ex. 17.

On October 30, MSHA informed CW that the submitted roof control plan remained unacceptable in six respects. 15 FMSHRC at 1566. In response, that same day, CW faxed the requested revisions. *Id.* On November 4, the MSHA district manager approved CW's revised plan. *Id.*⁷ The approved plan included the 20-foot roof bolting cycle and the new pillar extraction procedure and cut sequence. *Id.*

Before the judge, CW argued that the mine's old roof control plan was improperly revoked; that MSHA did not consult over the requested changes in good faith; and that the mine's old roof control plan was adequate, more suitable and a safer roof control plan than the new plan. *Id.* at 1559. The judge concluded that CW violated section 75.220 by operating a coal mine without an approved roof control plan. *Id.* at 1572. The judge found that the Secretary and CW had "negotiated in good faith and for a reasonable period of time" over the terms of the roof control plan, but were unable to reach an agreement on the roof bolting cycle and the pillar extraction procedure. *Id.* at 1561, 1567. The judge determined that the new plan was "suitable for the mine in question and . . . mine specific." *Id.* at 1571, 1572. For similar reasons, the judge found that the old roof plan was no longer suitable to the conditions at the mine. *Id.* at 1572. The judge relied upon the testimony of MSHA's roof control experts about changing roof conditions at the mine and specifically credited MSHA's expert witnesses over CW's witnesses. *Id.* at 1570-72.

II.

Disposition

On review, CW argues that the judge erred in finding that the Secretary properly revoked the old roof control plan as unsuitable. PDR at 2-35. CW submits that the Secretary followed neither the letter nor the spirit of his regulations, criteria, and program policy in revoking the old plan. *Id.* at 2-3, 6-7, 17, 28. CW also contends that each roof control plan must be unique and structured to meet the specific conditions of the mine. *Id.* at 4-5, 7. CW submits that no consideration was given to prevailing geological conditions, the mining system, the accident and injury history, or any of the other unique factors at its mine. *Id.* at 16-17. CW argues that the Secretary did not consult in good faith over the requested changes, did not provide reasons in writing for rejecting CW's plan, and simply adopted by fiat, the changes imposed. *Id.* at 14, 17-19. CW also argues that the old roof bolting development cycle was suitable, and that the new plan's pillar extraction method is not suitable. *Id.* at 4, 7-17, 19-35.

⁷ On November 25, 1991, MSHA corrected an inadvertent error in the approved plan's pillar extraction sequence and reissued a new copy of the approved plan. 15 FMSHRC at 1566.

The Secretary responds that substantial evidence supports the judge's decision. S. Br. at 7. He argues that MSHA consulted in good faith and properly revoked CW's roof control plan. *Id.* at 8-16. He further submits that changes in the plan were necessary due to significant changes in the mine's roof conditions and that the requested changes were mine-specific. *Id.* at 15-16 n.8, 22-23& n.13. According to the Secretary, there was a history of roof fall accidents and citations for violative roof conditions at the mine. *Id.* at 23. The Secretary contends that substantial evidence supports the judge's findings that the old provisions were no longer suitable and that the new provisions are suitable. *Id.* at 18, 20-27.

A. Revocation of the Old Roof Control Plan

We reject CW's contention, PDR at 6-7, that the Secretary's revocation of its old plan was improper because nothing in the regulations prohibit the old roof control provisions. Roof control plan provisions are not limited to implementing the substantive provisions of the Secretary's regulations and criteria; they may provide for protection in addition to those standards. Section 75.220(a)(1) states that "[a]dditional measures shall be taken to protect persons if unusual hazards are encountered." *See also* 30 C.F.R. § 75.222(a) ("Additional measures may be required in plans by the District Manager."); 30 C.F.R. § 75.207 ("Pillar recovery shall be conducted in the following manner, unless otherwise specified in the roof control plan . . ."); 30 C.F.R. § 75.223(a)(1) ("Revisions of the roof control plan shall be proposed . . . [w]hen conditions indicate that the plan is not suitable for controlling the roof . . ."). Thus, while plan provisions may implement the substantive provisions of the Secretary's standards, they may also supplement MSHA's regulations in the interest of better protecting miners' safety.

We also reject CW's argument that the Secretary's revocation or approval of roof control provisions must be based on conditions that are "unique" to the mine. *See* PDR at 4-5, 7. Neither section 75.220(a) nor its statutory source limit roof control plans to unique conditions of the mine. Section 75.220(a) stipulates only that the plan provisions be "suitable to the prevailing geological conditions, and the mining system to be used at the mine." Section 75.220(a) is based on Section 302(a) of the Mine Act, which requires each operator to adopt "[a] roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary." 30 U.S.C. § 862(a). The Commission considered and rejected the uniqueness argument in *Peabody Coal Co.*, 15 FMSHRC 381 (March 1993) ("*Peabody I*"). There, the Commission stated:

[R]oof control plan provisions must address the specific conditions of a particular mine. *Such conditions, however, need not be unique to the mine.* Indeed, a general plan provision addressing conditions that exist at a number of mines may be permissible providing those conditions are present at the mine in question.

Id. at 386 (emphasis added). Accordingly, the Secretary need show only that the provisions in question address specific conditions of the mine; those conditions need not be unique.

CW also attacks the Secretary's revocation of the old plan on factual grounds, arguing that the Secretary failed to give consideration to prevailing geological conditions, the mining system, accident and injury history, or any other factors required to be considered on a mine-by-mine basis. PDR at 16-17. We think substantial evidence supports the judge's findings that CW was encountering changing and increasingly adverse roof conditions, and that the new plan provisions were mine-specific. See 15 FMSHRC at 1571, 1572. There is considerable testimony that CW was encountering changing adverse roof conditions in the development and pillar sections of the mine. See, e.g., Tr. 32, 99-106, 284-85; Gov't Ex. 21. Because of the adverse roof conditions, CW had limited itself to a 20-foot cycle in its development sections. Tr. 41-42, 275-77. The new plan provisions were specifically aimed at those changing adverse roof conditions. Tr. 29-30, 32, 125-30.

B. Good Faith Consultations

We are not persuaded by CW's argument that "[t]he Secretary provided no reasons in writing [for disapproval of the old plan], refused to negotiate, and simply adopted by fiat, the changes imposed." PDR at 18. Substantial evidence supports the judge's finding that the Secretary consulted in good faith with CW over the roof control plan.

The plan approval process involves good faith discussions between MSHA and the mine operator. *United Mine Workers of America v. Dole*, 870 F.2d 662, 667 (D.C. Cir. 1989) ("[t]he specific contents of any individual mine [ventilation or roof control] plan are determined through consultation between the mine operator and the [MSHA] district manager"). The consultation process provides the operator with notice of MSHA's intended action and opportunity to voice objections and make suggestions concerning proposed plan provisions. This is not to say, however, that the Secretary is in the same position as a private party conducting arm's length negotiations in a free market. Ultimately, absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval. As the court noted in *Dole*:

[W]hile the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan."

870 F.2d at 669 n.10, quoting S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978). See also *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*") ("plan approval process

involves an element of judgment on the part of the Secretary”); *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA’s conduct throughout the process was reasonable).

Two key elements of good faith consultation are giving notice of a party’s position and adequate discussion of disputed provisions. In *Peabody I*, the Commission reversed the judge’s finding that the operator had failed to negotiate in good faith, noting that the operator communicated its legal position to the Secretary, that “adequate discussion occurred between the parties,” and that the operator requested and attended meetings with MSHA to discuss the ventilation provision and proposed an alternative. 15 FMSHRC at 388. The Commission also noted that “reliance on a cognizable legal position is not indicative of bad faith negotiation by an operator in the plan approval process.” *Id.*

Based on these principles, we affirm the judge’s finding, which is supported by substantial evidence, that the parties engaged in good-faith consultations prior to revocation of the old plan and approval of the new plan. After CW submitted its roof control plan to MSHA on June 29, 1991 for the required six-month review, the parties exchanged correspondence and fully explored the changes MSHA was proposing, the rationale behind them, and CW’s objections. MSHA notified CW of proposed changes, twice extended the deadline for CW to present an acceptable plan, and held a face-to-face meeting with CW. MSHA District Roof Control Supervisor Ponceroff testified that at the meeting, the participants discussed roof control plan provisions MSHA wanted modified. Tr. 117-121. Once it became apparent that CW officials understood the changes that MSHA desired, but simply disagreed with them, the meeting ended. Tr. 79-81, 532-33; Gov’t Ex. 7. Immediately after the meeting, Ponceroff and other MSHA officials, including MSHA Inspectors Gibson and Ted Farmer, visited the mine to verify that the conditions MSHA was concerned about were in fact still present. Tr. 119-21. When a further exchange of letters failed to result in a plan acceptable to MSHA, the agency rescinded CW’s old plan and cited the operator for failing to operate under an approved roof control plan. This bilateral process lasted almost four months from the time CW first submitted its old plan to MSHA for review.

CW also argues that MSHA gave no reasons in writing for disapproving the old plan provisions. PDR at 18, citing *Bishop Coal Co.*, 1 MSHC (BNA) 1367, 1370-71 (November 1975). The statement of reasons discussed in *Bishop* is merely a facet of the good faith discussion requirement and its purpose is to insure that the operator is informed why MSHA has disapproved the plan. Here, substantial record evidence establishes that MSHA did give CW adequate notice as to why the plan was being disapproved. In its August 9 letter, MSHA set forth in detail, by page and item number keyed to CW’s original plan, the areas in which it thought CW’s plan deficient. Gov’t Ex. 3. On October 22, MSHA also faxed to CW a communication identifying 16 deficiencies in CW’s revised plan. Gov’t Ex. 13; 15 FMSHRC at 1564.

We discern in these events adequate notice and discussion by MSHA officials. Nothing in the record suggests bad faith by MSHA, and we perceive no course of arbitrary conduct. We

therefore affirm the judge's determination that the Secretary and CW engaged in sufficient good faith consultations prior to the revocation of the old plan and the approval of the new plan.

C. Suitability

The Secretary did not object to assuming the burden of proving both that the old plan was no longer suitable to the conditions and mining system of the coal mine, and that the new plan is suitable. *See* S. Br. at 23; *see also Peabody II*, 18 FMSHRC at 691. With respect to the roof bolting development cycle required by MSHA, CW argues that the old plan was suitable to the conditions of the mine, and therefore was improperly revoked by MSHA. PDR at 27. CW does not challenge the suitability of MSHA's new provision for roof bolting. Concerning the pillar extraction provisions, CW maintains that the old plan was suitable, and MSHA's provisions are unsuitable. *Id.* at 19, 27-29, 33, 35. In *Peabody II*, the Commission defined "suitable" as "'matching or correspondent,' 'adapted to a use for purpose: fit,' 'appropriate from the viewpoint of . . . convenience, or fitness: proper, right,' 'having the necessary qualifications: meeting requirements.'" 18 FMSHRC at 690, *quoting Webster's Third New International Dictionary* 2286 (1986). The Commission held that "the Secretary carried his burden of proving the unsuitability of the former plan and the suitability of the new provision once he identified a specific mine condition not addressed in the previously approved ventilation plan and addressed by the new provision." 18 FMSHRC at 690.

1. Roof Bolting Development Cycle Provision

The old plan, although requiring full roof bolting, allowed the operator to advance 120 feet "where the roof was strong and competent" between bolting cycles. Gov't Ex. 2, at 5, Item 3. However, "[i]n areas where subnormal roof conditions [were] encountered . . . the operator [was required to] provide additional support where necessary." Gov't Ex. 2, at 5, Item 1. In finding the old provision unsuitable, the judge relied on the testimony of M. Terry Hoch, a mining engineer, who was head of the Roof Control Division of the MSHA Safety and Health Technology Center in Pittsburgh, Pennsylvania; Jerry Davidson, a geologist at the MSHA Safety and Health Technology Center in Denver, Colorado; and mining engineer David Ropchan of the Denver Center. The judge concluded:

Based upon their superior credentials I credit the opinion of the Secretary's Safety and Health Technology Center experts. Based upon their testimony and the undisputed fact that there were changing adverse roof conditions in the mine that required full roof bolting on 20 foot cycles, I find that the old roof plan was no longer suitable to the conditions of the mine in question and was properly revoked.

15 FMSHRC at 1572.

In our view, no sufficient reason has been advanced to overturn the judge's decision to credit the opinion of the Secretary's experts, and substantial evidence supports the judge's unsuitability finding. "[A]n ALJ has substantial latitude in choosing between conflicting expert testimony." *In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1844 (November 1995) ("*Dust Cases*"), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995) (quoting *L & J Energy Co. v. Secretary of Labor*, 57 F.3d 1086, 1088 (D.C. Cir. 1995)). Hoch, Davidson, and Ropchan all testified the old plan provision was unsuitable. In general, their testimony rejected CW's past reliance on the use of top coal as adequate for purposes of temporary support. Tr. 398-402, 1103-12. Hoch testified that coal roof cannot be a sole means of support because, as a material, it is inconsistent, jointed, cleated and, most importantly, can and will fall. Tr. 448; 15 FMSHRC at 1571. He stated that top coal can "mask" hidden roof problems such as joints and fractures. Tr. 398-99, 406; 15 FMSHRC at 1571. He also testified that coal left on the roof can increase the absorption of humidity into the shales and sandstone above it, increasing the dangers of roof falls. Tr. 398-99; 15 FMSHRC at 1571. Davidson testified that roof coal is not self-supporting. Tr. 345-46, 369. Ropchan testified that it is not possible to accurately predict the magnitude of tensile forces created in a coal layer left in the roof. Tr. 1095. MSHA Inspector Gibson's testimony was consistent with that of the Secretary's experts. Tr. 285-86.

Additionally, there were adverse roof conditions in the development sections of the mine and a declining presence of top coal. *E.g.*, Tr. 615, 1079. CW does not appear to dispute this point on review but, instead, states that these conditions were "temporary." PDR at 27. To the extent the adverse conditions were, in fact, temporary, we note that mine plan provisions are not set in concrete and are subject to review every six months under 30 C.F.R. § 75.223(d). Indeed, the record indicates that CW was already mining on a 20-foot cycle due to adverse conditions. The record also indicates adverse roof conditions continued to exist after MSHA revoked the plan. Tr. 320-23, 353, 400-05, 407-08.

CW argues that the judge should have credited the testimony of its witnesses, including MSHA Inspectors John Turner, Ted Farmer, and Donald Hanna, who held the view that top coal was adequate roof support. PDR at 8-9, 16, 22-24. None of the three inspectors presented any geological or engineering data to support the use of top coal as roof support or to otherwise controvert the Secretary's experts. Rather, they relied upon their past experience and general opinion. Farmer conceded that conditions in the mine had deteriorated, changing dramatically, and that in June 1991, CW was using a 20-foot roof bolting cycle to support the roof. Tr. 800-01, 804-05, 842-43. Accordingly, we conclude that the inspectors' testimony presented by JWR does not fatally undermine the Secretary's expert witnesses, whose opinion the judge accepted.

CW also relied on expert witness Dr. Krishna Sinha, a geological engineer, who testified that there was no added safety benefit in requiring installation of roof bolts in 20-foot cycles. Tr. 983-84, 992. The judge rejected Sinha's testimony. 15 FMSHRC at 1570. Sinha did not know from which areas of the mine the roof samples that he tested had been taken. Tr. 993. Sinha admitted he did not perform tensile or shear strength tests on the roof samples. Tr. 995. Sinha

also conceded that the computer program he used to analyze the roof did not consider the effect of roof bolts on the stability of the roof. Tr. 997-98. The Secretary's expert, Ropchan, explained that Sinha erroneously assumed the mine roof was homogeneous, but that evidence demonstrated that different areas of the mine had different geological formations with varying amounts of overburden. Tr. 996-99, 1090-92. On this record, we decline to disturb the judge's appraisal of Sinha's testimony. *See Dust Cases*, 17 FMSHRC at 1843-44.

CW further argues that its roof fall reports show a minimum number of falls. In view of the changing adverse roof conditions, however, CW's past record does not strike us as compelling. In sum, we conclude that the previously approved plan did not address changing adverse roof conditions, and that substantial evidence supports the judge's finding that the old plan provision relating to the roof bolting development cycle was unsuitable to the present conditions of CW's mine.

CW does not contest the suitability of the 20-foot roof bolting development cycle provision approved by MSHA. CW's letter to MSHA of October 23, 1991, simply states that the previously approved provision was as safe as the provision advocated by MSHA. Gov't Ex. 16. The 20-foot cycle addresses the hazard of roof falls under adverse roof conditions because the reach of the continuous mining machine beyond the cab operator is 20 feet. Tr. 118. Roof bolting is the universally accepted means of supporting roof. Even Inspector Hanna, testifying as CW's witness, conceded that roof bolting plus top coal was a *more* desirable system than reliance on top coal alone. Tr. 896-97. The provision for a 20-foot bolting cycle addresses the adverse roof conditions continuing at the mine. Accordingly, we affirm on substantial evidence grounds the judge's determination that MSHA's 20-foot roof bolting cycle is suitable to the conditions of CW's mine.

2. Pillar Extraction Provision

a. Unsuitability of Old Plan Provision

The judge found the old pillar extraction provision unsuitable based on the testimony of Hoch, Davidson, and Ropchan, the Secretary's expert witnesses. 15 FMSHRC at 1572. CW asserts that the testimony of the Secretary's witnesses should have been discounted because none of them ever pulled a pillar, using either the old or new method, or observed pillar removal at the mine. PDR at 28-29. CW also contends that its method of pulling pillars had been used successfully and safely for over 25 years. *Id.* at 19.

Hoch, the head of the Roof Control Division at MSHA's Pittsburgh Center, had 20 years of experience with the Department of Interior's Bureau of Mines and with MSHA dealing, in part, with the extraction of pillars. Tr. 421. Hoch indicated that during this period he visited at least 150 coal mines in every district of the United States. *Id.* Hoch visited CW's mine on August 17, 1992. Tr. 424. His basic testimony was that pillar mining is dangerous, based on the

possibility of roof falls, and that miners should not go inby unsupported roof. Tr. 427. Hoch also testified that mining inby a cut is "poor mining practice." Tr. 433.

Davidson's experience on pillar work was not noteworthy. His experience focused on non-coal mines and he indicated that he never reviewed on-site the extraction of an entire pillar at a coal mine. Tr. 353. When he visited CW's mine in January and February 1992, Davidson looked at the areas where CW was going to pull pillars and noticed their deterioration. Tr. 317, 353, 360, 361, 367-68. Davidson testified that CW's method was not a safe way to mine pillars because the process exposed miners to a large area of unsupported roof, and that there was virtually no secondary ground support. Tr. 327-35, 344-45. Davidson further stated that roofs that are not supported by "outside" means such as roof bolts and timbers are unpredictable. Tr. 346.

Ropchan's underground mining experience was with the Bureau of Mines in mining research. Tr. 1098. He had an engineering degree and did graduate study at the Colorado School of Mines and received a masters degree from Stanford University in applied mechanics. Tr. 1070. He visited the mine twice, in August 1991 and August 1992. Tr. 1078-80. During the 1992 visit, he examined the pillar extraction area. Tr. 1102-03. Ropchan testified that larger areas of open ground create greater potential danger and that, under CW's pillar extraction process, more open ground is created than under the process advocated by the Secretary. Tr. 1097.

Ponceroff also testified against CW's pillar extraction process. As the roof control supervisor for MSHA District 9, Ponceroff assisted the district manager in reviewing roof control plans and determining whether a plan should be approved. Tr. 18, 23-24. He visited CW's mine various times between 1986 and October 1991. Tr. 23, 121, 141-44. Ponceroff also had considerable actual mining experience in pulling pillars, although not in mines west of the Mississippi. Tr. 134, 137-40. He indicated the failure to have splits bolted was faulty, and that the purpose of bolting in the split was to protect miners as they advanced. Tr. 89, 239-40. According to Ponceroff, the District submitted the plan to the MSHA Denver Technical Support Division, and that Division advised that CW's pillar extraction method was a poor mining practice and unsafe. Tr. 130.

On the other hand, CW argues that its witnesses, who had actual experience pulling pillars using both methods, believed that CW's method provided adequate support and safety. PDR at 29. These witnesses included CW personnel with extensive experience in pillaring and also MSHA inspectors Turner and Farmer, who were familiar with pillaring at the mine. Tr. 546-50, 638, 662-63, 665, 669, 697, 735, 789, 806-07, 815, 1014. While CW also called MSHA Inspector Hanna as a witness, Hanna did not indicate whether CW's old procedure or the new procedure was better. Tr. 902. CW again relies upon the testimony of its expert, Dr. Sinha, whose testimony the judge found unpersuasive. 15 FMSHRC at 1570.

We conclude that CW has failed to show that the judge's credibility resolutions should be overturned. Even if the pillaring testimony of the relatively less experienced Davidson is given less weight, both Hoch and Ropchan were qualified experts and provided corroborative testimony that the previously approved plan failed to adequately address adverse roof conditions in the pillar sections by not requiring bolting in the pillar splits, and by mandating the taking of lifts in a sequence that resulted in mining inby a cut, thereby creating larger areas of open ground. Although the relevant testimony is, in part, conflicting, we cannot say that the evidence supporting the judge's finding is insubstantial. Accordingly, we affirm as supported by substantial evidence the judge's determination that the prior plan provision on pillar extraction was unsuitable to the adverse roof conditions in CW's mine.

b. Suitability of the New Pillar Extraction Provision

For similar reasons, we decline to overturn the judge's decision to credit the opinions of the Secretary's experts, Hoch, Davidson, and Ropchan, in making his determination that the new pillar extraction provision is suitable. 15 FMSHRC at 1571. Both Hoch and Ropchan testified roof bolting in the pillar split helps keep the layers of roof together, protects miners from roof failure and prevents debris falling from the roof and injuring miners. Tr. 415-16, 1087-88. Davidson indicated two reasons why the new provision was safer than the old one: (1) bolts provide secondary ground support installed where miners would be working; and (2) the size of the area most inby where miners may be working is reduced. Tr. 338-44, Gov't Ex. 32, at 7. Davidson emphasized that without roof support, miners are exposed to what could very quickly become a cave line. Tr. 345. Ropchan testified that miners would be more exposed under the old plan than under the new plan, especially with regard to mining inby. Tr. 1095-97; *compare* Gov't Exs. 40-A and 40-B.

CW takes the position that the Secretary's provision is hazardous and therefore not suitable. PDR at 27-29, 33, 35. MSHA Inspector Turner indicated CW had difficulty in pulling pillars under the new plan. Tr. 698-99. He testified that roof bolting in the pillars transfers the weight from pillar to pillar causing increased pressure on the roof bolts in the split and the ribs, and results in little warning of roof failure or rib deterioration. Tr. 699-704. In Turner's view, the provision advocated by the Secretary was neither effective nor safe. Tr. 722-23, 735. Turner emphasized that, in pulling pillars, timeliness is a necessity. Tr. 723. According to Turner, roof bolting the pillar splits conflicts with the principle of removing the coal and getting the cave quickly. Tr. 724. MSHA Inspector Farmer also expressed doubts about the suitability of the new plan provision. Tr. 811-12. Farmer felt that the roof bolter was in a fairly hazardous position when doing the pillar split bolting. Tr. 813. He was also concerned that pressure would "ride over" the roof bolts. Tr. 809-10. MSHA Inspector Hanna agreed that the longer pillars stand after cutting, the more pressure they take; he also suggested that roof bolting takes time. Tr. 901. Hanna, however, conceded that both CW's old procedure and the procedure advocated by the Secretary have been successful and could not say which one would be better. Tr. 902. *But see* Tr. 896 (suggesting Secretary's procedure better). CW's management uniformly testified against the new provision, generally along the lines of Turner and Farmer. Tr. 546-49, 550, 640-42, 669.

CW's expert, Sinha, indicated only that he did not see any safety advantage in the Secretary's provision. Tr. 991-92.

Hoch and Ropchan disagreed with Turner's view that roof bolting would transfer weight to the pillars. Tr. 413-15, 1087, 1097. In their view, bolting the roof does nothing more than keep the layers together so they do not fall. Tr. 338-48, 1085-88. Hoch generally disagreed with Turner's views on pillar pulling. Tr. 444. Ropchan indicated that the purpose of roof bolting was to prevent any possible failure of the roof. Tr. 1108.

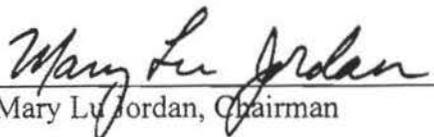
As to the effect of roof bolting, the record establishes that its purpose is to keep the layers of roof together so they do not fall. While the contrary view of CW's witnesses may be plausible, the judge did not abuse his discretion in deciding to credit the Secretary's witnesses, who testified that bolting increases safety in the pillaring operation. The Commission does not lightly overturn a judge's evaluation of expert witness testimony. *Dust Cases*, 17 FMSHRC at 1843-44. This same principle leads us to uphold the judge's crediting of the Secretary's witnesses who opined that the Secretary's provision reduces the need for miners working in by unbolted roof and is therefore safer than the old plan provision. Also supporting the judge's suitability determinations is the evidence of changing adverse roof conditions in the pillar section of the mine. In sum, we conclude that the new plan provisions address the adverse roof conditions in the pillar section of CW's mine.

Accordingly, we affirm on substantial evidence grounds the judge's determinations that the old plan provisions were unsuitable to the conditions in CW's mine, and the new plan provisions are suitable.

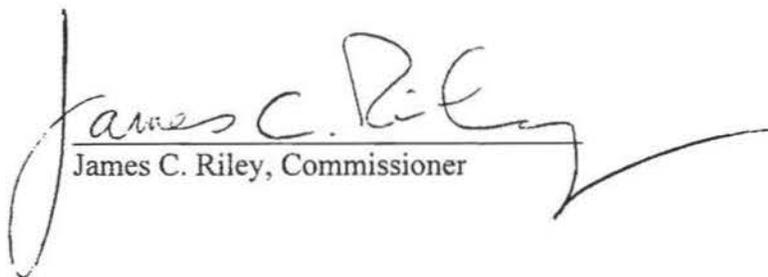
III.

Conclusion

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


Mary Lu Jordan, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner

Distribution

Colleen A. Geraghty, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Blvd.
Arlington, VA 22203

Carl Kingston, Esq.
3212 South State Street
P.O. Box 15809
Salt Lake City, UT 84115

Administrative Law Judge August Cetti
Federal Mine Safety and Health Review Commission
1244 Speer Boulevard #280
Denver, CO 80204-3582

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 95-539-RM
	:	WEST 95-540-RM
STILLWATER MINING COMPANY	:	WEST 96-131-M
	:	WEST 96-214-M

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

ORDER

BY Jordan, Chairman; Riley, Commissioner:

On September 25, 1996, Stillwater Mining Co. ("Stillwater") filed with the Commission an Application To Stay Assessment of Penalty, pending the appeal of the decision of Administrative Law Judge Arthur J. Amchan. 18 FMSHRC 1291 (July 1996) (ALJ). On that same day, Stillwater filed with the United States Court of Appeals for the Ninth Circuit a petition for review of the judge's decision.² Stillwater requests the Commission to stay, pending its appeal, that part of the judge's order that assesses a civil penalty of \$1,500.

Stillwater's application was made pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." Section 106(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 816(a)(1) (1994), states that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding once the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

² The Commission did not direct review of the judge's decision and it became a final decision of the Commission pursuant to 30 U.S.C. § 823(d)(1).

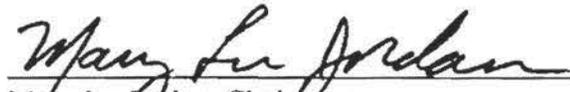
jurisdiction to consider Stillwater's motion. *Secretary ex rel. Smith v. Helen Mining Co.*, 14 FMSHRC 1993, 1994 (December 1992).

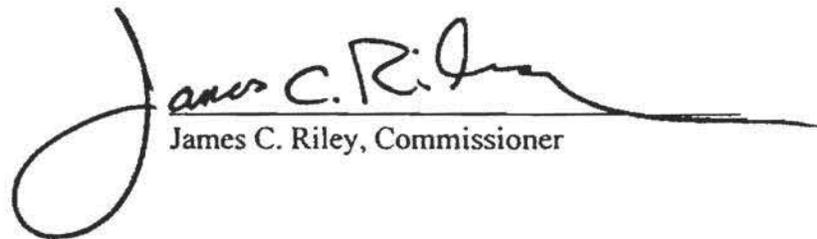
In *Secretary of Labor ex rel. Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (August 1987), the Commission held that a party seeking a stay must satisfy the factors in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Virginia Petroleum*, 259 F.2d at 925. The Court made clear that a stay constitutes "extraordinary relief." *Id.*

In support of its application, Stillwater asserts that there is a "reasonable likelihood" of success on appeal, that payment of the penalty constitutes "irreparable harm per se," and that the stay will not prejudice the Commission or the Secretary or harm the public interest or Stillwater employees.

Stillwater's assertions lack sufficient substantiation to satisfy the requirements of a stay. Stillwater has failed to provide any explanation as to why there is a likelihood of success on appeal. Its claim of irreparable injury also is not established. Recoverable monetary loss, such as the payment of the \$1,500 penalty here, "may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Stillwater has not alleged, nor substantiated, such an irreparable injury in its application. Likewise, Stillwater's assertion on the third factor, no adverse effect to others, lacks adequate proof. As to the fourth factor, Stillwater has made no showing that its sought after stay is in the public interest.

Accordingly, we conclude that Stillwater has failed to establish that a stay should be granted.³ See *W. S. Frey Co.*, 16 FMSHRC 1591, 1592 (August 1994); *Air Products and Chemicals, Inc.*, 16 FMSHRC 29 (January 1994). Upon consideration of Stillwater's application, it is denied.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner

³ Commissioner Marks votes to grant the application.

Distribution

James J. Gonzales, Esq.
Holland & Hart, L.L.P.
555 Seventeenth St., Suite 3200
P.O. Box 8749
Denver, CO 80201

Jeanne M. Bender, Esq.
Holland & Hart, L.L.P.
401 No. 31st, Suite 1500
Billings, MT 59101

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 25, 1996

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 96-13
 :
EXTRA ENERGY, INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

ORDER
DIRECTION FOR REVIEW

BY: Marks and Riley, Commissioners

On October 17, 1996, Extra Energy, Inc. ("Extra Energy") filed a motion for reconsideration of the Commission's October 2, 1996 denial of Extra Energy's Petition for Discretionary Review ("PDR"). Extra Energy's PDR sought review of Administrative Law Judge Gary Melick's decision dated August 23, 1996 in this case. Pursuant to section 113(d)(1) of the Federal Mine Safety and Health Review Act of 1977, 30 U.S.C. § 823(d)(1), the judge's decision became a final decision of the Commission forty days after its issuance.

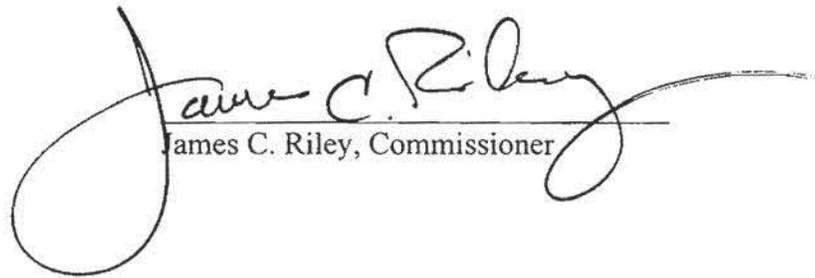
Upon consideration of the motion, and under Rule 60(b)(6), Fed. R. Civ. Pro., we reopen this matter, grant the motion for reconsideration, direct review, and set this case down for oral

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

argument. An order setting the date and terms of oral argument will issue at an appropriate time.

A handwritten signature in cursive script, reading "Marc Lincoln Marks".

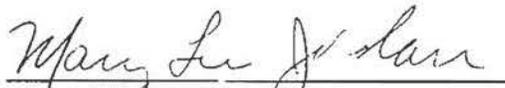
Marc Lincoln Marks, Commissioner

A handwritten signature in cursive script, reading "James C. Riley".

James C. Riley, Commissioner

Chairman Jordan, dissenting:

The judge's August 23, 1996 decision in this case became a final decision of the Commission forty days after its issuance. The operator has asked us to reopen these proceedings pursuant to Fed. R. Civ. Pro. 60(b)(6), which permits relief from a final judgment or order for "any . . . reason justifying relief from the operation of the judgment." However, because the respondent has failed to allege any rationale for relief under this rule, I find no adequate basis on which to grant it, and would therefore deny this motion.


Mary Lu Jordan, Chairman

Distribution

L. Joseph Ferrara, Esq.
Jackson & Kelly
2401 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 3 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE AND SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. SE 94-92-M
Petitioner : A.C. No. 38-00626-05502
v. :
 : Ridgeway Mine
FLUOR DANIEL INCORPORATED, :
Respondent :

REMAND DECISION APPROVING SETTLEMENT

Before: Judge Feldman

This case concerns a fatal accident caused by defective brakes on a forklift. My initial decision assessed a total civil penalty of \$27,500.00 for Citation No. 4094232 for a violation of 30 C.F.R. § 56.14101(a)(2) concerning a defective parking brake; and Citation No. 4094234 for a violation of 56.14100(a)(2) because of an inadequate preshift inspection of the subject forklift. 16 FMSHRC 2049 (October 1994). On July 30, 1996, the Commission reinstated my dismissal of remaining Citation No. 4094231 and remanded for disposition of the significant and substantial (S&S) issue, and, for a determination of the appropriate civil penalty to be assessed. 18 FMSHRC 1143.

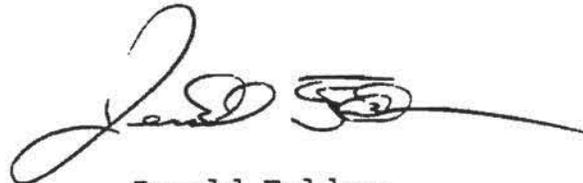
Citation No. 4094231 cited a violation of the mandatory safety standard in 30 C.F.R. § 56.14101(a)(1). This mandatory standard provides, in pertinent part, that self-propelled mobile equipment must be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

The service brake system was capable of stopping and holding the forklift when the vehicle's engine was running.¹ However, the brakes did not hold when the engine was turned off due to a defective accumulator.² In its decision remanding this matter, the Commission concluded the plain language of section 56.14101(a)(1) does not limit the braking requirement of the standard to moving vehicles with engines running. 18 FMSHRC at 1146.

On September 30, 1996, in response to the Commission's decision, the Secretary filed a Joint Motion to Approve Settlement. The essence of the parties' settlement agreement is that the respondent accepts the S&S designation for the cited violation in Citation No. 4094231. Consequently, the respondent has paid the \$7,000.00 civil penalty proposed by the Secretary for this citation. Thus, the total civil penalty imposed in this proceeding is \$34,500.00.

ORDER

I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**. Upon payment of the entire \$34,500.00 civil penalty in satisfaction of the three citations in issue, **IT IS ORDERED** that this case **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

¹ An MSHA investigation revealed the forklift service brakes satisfied the requisite performance standards for moving vehicles contained in Table M-1 of section 56.14101(b).

² An accumulator is a glass jar containing brake fluid that is designed to activate the brake system with the engine off. Citation No. 4094234, which was affirmed in the initial decision, was issued for an inadequate preshift examination that failed to reveal the malfunctioning accumulator.

Distribution:

Leslie John Rodriguez, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree Street, N.E., Room 339, Atlanta, GA 30367 (Certified Mail)

Carl B. Carruth, Esq., McNair & Sanford, P.A., 1301 Gervais Street, Suite 1800, Nations Bank Tower, Columbia, SC 29201 (Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 3 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 93-110
Petitioner : A. C. No. 15-06388-03605
v. :
: Congress Mine
GIVENS COAL COMPANY, INC., :
Respondent :

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
R. Jackson Rose, Esq., Harrogate, Tennessee,
for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of \$28,700 for four alleged violations of the mandatory safety standards in Part 75 of the regulations, 30 C.F.R. Part 75.

Two of the citations concern the March 22, 1991, fatality of Michael Keck as a result of a roof fall accident, and the respondent's rescue efforts that occurred immediately thereafter. The remaining two citations were issued as a result of the Mine Safety and Health Administration's (MSHA's) accident investigation, although the cited violations were not contributing factors in the fatality.

This case was stayed pending the resolution of a related civil suit. The stay was lifted on May 10, 1996, and this case was heard on the merits on July 30, 1996, in Pineville, Kentucky.

The parties' post-hearing Proposed Findings of Fact and Conclusions of Law have been considered in the disposition of this matter.

At the hearing the parties stipulated that Givens Coal Company, Inc., was a medium size mine operator in March 1991, and, as such, is subject to the jurisdiction of the Act. In addition, the stipulations and testimony reflect the respondent last operated a coal mine in May 1996, and that it is not currently operating any coal mine, although it anticipates reentering the coal mining business. (Gov. Ex. 1; Tr. 130-31). Givens Coal Company is a family owned corporation. The corporate stock is owned by George Givens¹ and his wife. Givens has been a coal operator since 1964.

For the reasons discussed below, the subject citations are affirmed. The respondent is directed to pay a total civil penalty of the \$1,656 in satisfaction of the four citations in issue.

Background

The Congress Coal Mine is located three miles south of Middlesboro, Kentucky on Route 74. The Congress Mine was closed in December 1993. The approved roof control plan provided for entries and crosscuts with a maximum width of 20 feet. The entries and crosscuts were developed with a minimum separation of 60 feet on center. The average height of the entries was 42 inches. Overhead support was provided by mechanically anchored bolts, 30 inches on center, fully grouted rods, 36 inches on center, or tensioned rebar bolts, 36 inches on center.

The Congress Mine extraction process was accomplished with two continuous mining machines that operated one shift per day, five days per week. The coal was transported from the faces by shuttle cars to the beltline where it was conveyed to the

¹ George Givens' cousin, Mark Givens, was an employee of Givens Coal Company, Inc., who participated in the rescue efforts. Mark Givens did not testify in this matter. George Givens testified on behalf of the respondent. All references to "Givens" in this decision pertain to George Givens.

surface. Roof supports were installed by roof bolting machines, equipped with ATRS systems.² The roof bolting machines were 30 inches in height and could be trammed with approximately 12 inches clearance from the roof above.

The Friday, March 22, 1991, shift began at 7:00 a.m. and was scheduled to end at 3:00 p.m. The No. 3 section crew entered the mine under the supervision of section foreman Ronnie Partin. Shortly after the start of the shift, mine superintendent Tommy Violet assigned Partin to supervise operations in the No. 1 section. Production in the No. 3 section continued under the general supervision of Violet. Violet relied on scoop operator Charles Phelps, who had his foreman's papers, to act as the section foreman in Partin's absence.

Michael Keck and Mark Matteson were the No. 3 section roof bolting machine operators. Keck and Matteson alternately supported the face areas following the continuous miner across the section. The roof bolting machine materials were supplied to Keck and Matteson by Phelps via the scoop.

The respondent had an "inby is out" policy that miners caught under unsupported roof were subject to immediate dismissal. Red reflective warning tags were routinely hung on the last row of roof supports. Warning decals supplied by MSHA were placed on equipment, glue boxes and at various locations throughout the mine. MSHA's post-accident investigation revealed no deficiencies in the respondent's training program or disciplinary policy.

Keck was last seen by Violet the morning of the accident. Phelps last saw Keck at approximately 1:00 p.m. when Phelps used the scoop to load Keck's roof bolter with bolting materials. Keck was last seen alive by another miner at approximately 2:15 p.m.

² An ATRS on a roof bolting machine is an automated temporary roof support system that uses structural steel to provide initial support in order to protect the bolting machine operator. ATRS support can only extend 4 feet inby the last row of roof supports. Use of this system would not have prevented Keck's accident. (Tr. 67-68).

It was normal operating procedure late in the Friday shift to secure the working areas and remove equipment from the face in preparation for the weekend. At approximately 2:45 p.m., Violet went across the section on a buggy and met Matteson in an adjacent entry. Matteson retreated from the face by tramping his roof bolting machine to the No. 7 right crosscut. Violet looked down the crosscut and noticed that Keck had not moved his roof bolting machine from the face into the crosscut for the weekend.

Violet and Matteson traveled in the buggy to the next break to check on Keck. They observed Keck's bolting machine crossways in the entry with the lights on. Matteson exited the buggy and approached the bolting machine. Matteson hollered to Violet that Keck was inby roof supports under rock. It was ultimately determined that Keck was approximately seven feet inby the roof supports under a rock the size of a car's hood. Violet testified that he sounded the roof inby the supports with a piece of steel from the roof bolting machine. After sounding the roof Violet concluded, "what was going to fall had fell (sic)." (Tr. 142).

Violet and Matteson proceeded several feet inby into the unsupported roof area. They determined Keck was not conscious. Violet and Matteson tried to free Keck but they could not move the rock. Violet sent Matteson for help. While Matteson was gone, Violet moved the roof bolter out of the way because it was blocking the entry. Matteson returned with crew members Rodney Harrell, a continuous miner operator who testified for the Secretary, Mark Givens, Larry Poore and Grant Wilson. They attempted to lift the rock, but to no avail. Violet sent someone back for a jack that was located at the power center, approximately 250 feet from the accident site. They jacked up the rock and removed Keck.

Violet administered CPR but did not get a response. Violet placed Keck on the buggy and continued CPR until Keck was transferred to ambulance personnel at the surface. Keck was taken to the Middlesboro Appalachian Regional Hospital where he was pronounced dead at 4:02 p.m.

Preliminary Findings of Fact

Ronald Russell, then MSHA acting field office supervisor, arrived at the Congress Mine at approximately 4:30 p.m., shortly

after Keck was removed from the scene. Russell seized the mine shift examination books and issued an Order pursuant to 103(k) of the Act, 30 U.S.C. § 813(k), requiring the cessation of production pending completion of an accident investigation.

MSHA investigators James W. Poynter and Daniel Johnson arrived at the mine on Monday, March 25, 1991. The investigators observed the scene of the accident which had not been disturbed. Through measurements, they determined the accident occurred approximately 7 feet in by the last row of roof supports in an entry 42 inches in height. The size of the rock that caused the fatality was 5'6" wide by 7'6" long. The thickness of the rock varied and it had a feather edge (approximately 10 inches thick) at one end. The roof in the accident area was scaled, somewhat broken, and appeared to be composed of unconsolidated shale. Poynter observed a piece of roof material with a lifting jack under one side and three crib locks positioned under the rock in by the roof jack. Poynter also observed a slate bar and some blood evidence.

Keck was found under the draw rock with his slate bar under him.³ Given Keck's position and his proximity to the slate bar, it appeared that Keck was fatally injured when he tried to remove hanging draw rock that may have interfered with the 12 inch clearance between the roof bolter and the roof.

As a consequence of his investigation Poynter issued imminent danger Order No. 3824102⁴ and two citations for violations of the mandatory safety standard in 75.202(b), 30 C.F.R. § 75.202(b). This mandatory standard prohibits persons from traveling or working under unsupported roof. The first citation, Citation No. 3824103, was issued for Keck's exposure to unsupported roof. The second citation, Citation No. 3824104, was

³ A slate bar is a steel bar approximately 48 to 60 inches in length. It is used to remove loose roof material.

⁴ At trial the Secretary moved to dismiss imminent danger Order No. 3824102 because no miners were exposed to unsupported roof at the time the order was issued. The Secretary's motion was granted and the subject order has been vacated in this decision.

issued as a consequence of the recovery efforts that also occurred under unsupported roof.

As a result of their investigation, Johnson also issued two citations that were unrelated to the fatal accident. Johnson issued Citation No. 3837521 for the respondent's alleged failure to conduct an on-shift examination on the accident day in apparent violation of section 75.304,⁵ 30 C.F.R. § 75.304. Johnson also issued 104(d)(1) Citation No. 3837522, charging the respondent with a high degree of negligence constituting an unwarrantable failure, after he determined that methane tests were not being performed at 20 minute intervals as required by section 75.307,⁶ 30 C.F.R. § 75.307.

Inspector Richard Gibson, an inactive MSHA employee who is currently on disability, testified on behalf of the respondent. On April 3, 1991, Gibson terminated the unsupported roof citations and the citation concerning on-shift examinations. Gibson did not participate in the March 25, 1991, accident investigation. His testimony evidenced a lack of knowledge with respect to the extent of the respondent's efforts to make the requisite on-shift or methane examinations on March 22, 1991.

Citation No. 3824103 -- The Victim Under Unsupported Roof

It is undisputed that Keck violated the respondent's policy that prohibited personnel from traveling inby under unsupported roof. The respondent asserts, in essence, that it should not be held responsible for Keck's actions because Keck disregarded basic safety procedures as well as company policy.

Resolution of the unsupported roof citations requires the application of three distinct concepts that are essential in

⁵ The pertinent provisions of section 75.304 are now contained in section 75.362(a)(1), 30 C.F.R. § 75.362(a)(1).

⁶ The pertinent provisions of section 75.307 are now contained in section 75.362(d)(1)(ii), 30 C.F.R. § 75.362(d)(1)(ii).

determining the extent of an operator's liability for violations of mandatory safety standards caused by the negligent acts of its employees or management personnel. These concepts are strict liability, negligence and imputed negligence.

With respect to the misconduct of Keck as a defense to liability, the Commission and the Courts have consistently held that operators are strictly liable for the misconduct of their employees, even when such conduct involves violations of mandatory standards created by employee sabotage. Fort Scott Fertilizer-Cullor, Inc., 17 FMSHRC 1112 (July 1995).

In Fort Scott, the Commission stated:

It is well established that operators are liable without regard to fault for violations of the Mine Act. E.g., Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982) Allied Products Co. v. FMSHRC, 666 F.2d 890-94 (5th Cir. 1982); Western Fuels-Utah, Inc., 10 FMSHRC 256, 260-61 (March 1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989); Asarco, Inc., 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989). The Commission and the courts have also consistently held that a miner's misconduct in causing a violation is not a defense to liability. For example, in Allied Products, the court held that the operator is liable for violations even where "significant employee misconduct" caused the violations. 666 F.2d at 893-94. The court concluded: "If the act or its regulations are violated, it is irrelevant whose act [precipitated] the violation ...; the operator is liable." Id. at 894. Similarly, in Ideal Cement Co., 13 FMSHRC 1346, 1351 (September 1991), the Commission observed that, "[u]nder the liability scheme of the Mine Act, an operator is liable for the violative conduct of its employees, regardless of whether the operator itself was without fault and notwithstanding the existence of significant employee misconduct." See also Mar-Land Industrial Contractor, Inc., 14 FMSHRC 754, 757-58 (May 1992). Id. at 1115.

Thus, employee misconduct does not preclude operator liability. However, for penalty purposes, it is relevant to consider whether the operator's own negligence contributed to the employee misconduct. In this regard, the Commission has stated:

The operator's fault or lack thereof is also a factor to be considered in assessing a civil penalty. Asarco, Inc., 8 FMSHRC at 1636. The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982). Rather, the operator's supervision, training, and disciplining of those miners is relevant. Id.; Western Fuels-Utah, Inc., 10 FMSHRC at 261. Id. at 1116.

As threshold matters, the respondent concedes that Keck's fatality occurred because he traveled under unsupported roof. Thus, the fact of occurrence of the section 75.202(b) violation cited in Citation No. 3824103 and the significant and substantial (S&S) nature of this violation are self evident. Therefore, as noted above, the respondent is strictly liable for this violation.

With respect to determining the appropriate civil penalty to be imposed, the Secretary concedes that Keck was a rank-and-file employee with no management responsibilities. Thus, Keck's reckless conduct is not imputable to the respondent for negligence purposes. However, the inquiry does not end here. The respondent is subject to a significant civil penalty if its supervision, training, or disciplinary policies contributed to Keck's misconduct.

With respect to the first element of supervision, although Violet last saw Keck in the early morning on March 22, 1991, Keck was observed by Phelps, the acting section foreman, throughout the day. There is no evidence of any history of actions by Keck with respect to the company's "inby is out" policy that would have alerted management that Keck required extraordinary supervisor scrutiny. Employees cannot be under the watchful eye of management at all times. The fact that the respondent was unaware that Keck had gone under unsupported roof does not, alone, provide a basis for concluding he was inadequately supervised. The Secretary admits that Keck was not directed by

management to go under unsupported roof. The uncontroverted testimony of Harrell, Phelps, Violet and Givens reflects that Keck's actions violated company policy and training directives. Thus, there is no probative evidence that Keck was inadequately supervised.

Turning to the second element concerning training, as noted above, a post-accident investigation of the respondent's training program, performed by MSHA investigator Ronnie Deaton, revealed no training violations or other deficiencies. The respondent's testimony that miners were frequently cautioned that "inby is out" was uncontradicted and corroborated by former employee Steve Harrell, a witness called by the Secretary. There was also unrefuted testimony that there were warning signs posted throughout the mine cautioning miners about the dangers of unsupported roof. Consequently, there is no evidence that Keck's misconduct was attributable to a lack of training.

Addressing the final element concerning discipline, there is no evidence that the respondent lacked a relevant disciplinary policy, or, that its disciplinary policy was ineffective. While the testimony of Violet and Givens that miners caught under unsupported roof were subject to immediate termination was self-serving, their statements were confirmed by Harrell. (Tr. 27-28). Moreover, there is no evidence that MSHA investigator Deaton found the respondent's discipline policy lacking. Accordingly, there is nothing to reflect that Keck's accident was a consequence of inadequate discipline.

Thus, the Secretary has failed to establish the respondent's supervision, training, or discipline, materially contributed to Keck's violative conduct. In reaching this conclusion it is helpful to compare this case to Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982), where the Commission found a supervisor's negligent acts were responsible for a fatal roof fall accident. In Southern Ohio, the foreman left an area after directing the decedent to remove an inby row of temporary roof supports so that equipment could be brought in to remove coal. Id. at 1460. By contrast, Keck traveled inby roof supports against the advice, and without the knowledge, of management.

An operator cannot guarantee that an employee will always follow safety instructions. While, in hindsight, more frequent supervisory contact with Keck on the day of the accident may have been warranted, it is doubtful that such contact would have prevented this accident. To the extent that the respondent's supervisory efforts were negligent, if at all, it was for failing to observe Keck immediately prior to his entry under unsupported roof. Such negligence is relatively low and warrants a civil penalty amount similar to that which should be imposed under strict liability.⁷

The Secretary, however, proposes a civil penalty of \$9,500.00 for Keck's March 22, 1991, violation of section 75.202(b) based, in substantial part, on allegations that the respondent was moderately negligent. The moderate negligence charged in the citation was reduced from high negligence after the Secretary determined the company prohibited Keck's action. As noted above, as an employee, Keck's reckless conduct is not imputable to the respondent for penalty purposes. With respect to the respondent's actions, the Secretary's own post-accident investigation failed to reveal deficiencies in the respondent's supervision, training or discipline. Thus, this record, at best, demonstrates low negligence, rather than the moderate degree of negligence advanced by the Secretary.

With due regard to the serious gravity of this violation, I conclude the absence of more than low negligence by the respondent, and, the respondent's moderate operator size, are significant mitigating factors. Accordingly, a civil penalty of \$500.00 is assessed for the violation of section 75.202(b) cited in Citation No. 3824103.

⁷ Poynter's analysis of the degree of the respondent's responsibility was consistent with the doctrine of strict liability. Poynter stated that an "operator has a strict importance to instruct its employees and have knowledge of their working practices," and that a supervisor is "responsible for all actions of [his] employees." (Tr. 57, 73-77).

Citation No. 3824104 -- The Rescuers Under Unsupported Roof

Citation No. 3824104 was issued by Poynter for the recovery team's violation of section 75.202(b) in that they attempted to rescue Keck without first installing temporary roof supports. As previously discussed, it is undisputed that six individuals risked their lives by going under unsupported roof in an effort to save Keck. Consequently, the fact of occurrence of the cited violation and its S&S nature are beyond dispute. Given the strict liability regardless of fault imposed on operators for violations of mandatory safety standards, the respondent is liable for the cited violation. The extent of the respondent's liability, as manifest by the amount of civil penalty, is, in significant part, dependent on the degree of negligence to be imputed from Violet to the respondent.

The Secretary proposes a civil penalty of \$12,000 for Citation No. 3824104. The amount of the proposed penalty is based on the respondent's allegedly high negligence and the fact that the violation exposed six individuals to the hazard of unsupported roof. To support the high negligence allegedly attributable to Violet, Poynter explained that upon initially finding Keck, Violet and Matteson acted on impulse as a consequence of their anxiety. Thus, Poynter, in essence, considered Violet's initial behavior to be excusable. Poynter further opined that after Violet and Matteson were unable to lift the rock, Violet should have assessed the risk and reflected in order to avoid exposing others to danger.

Thus, Poynter concluded Violet's instructions to Matteson to get additional help, before installing temporary roof supports, removed any mitigating factors with respect to the degree of Violet's negligence. (Tr. 83-84). Consequently, Violet's behavior was deemed to be highly negligent. Poynter testified that, in issuing the citation, he relied on information provided to him by Harrell who was called upon to assist in the rescue.

In analyzing the degree of Violet's negligence, several factors must be considered. At the outset, while it is clear Violet was desperately seeking additional help, it is not so clear Violet actually ordered his subordinates under unsupported roof. In raising this question, I am not unmindful of the not so subtle pressure of a supervisor's request, under normal

circumstances, for the services of a "volunteer." However, these were not normal circumstances. Under these exigent conditions, it is understandable that a miner would voluntarily disregard danger in an effort to save the life of a fellow worker.

The conclusion that Violet did not direct others to go inby is not mere speculation. Harrell, who was called by the Secretary, testified that he was running a continuous miner when he was informed by Matteson about the accident. Harrell stated he immediately "went over there" and "tried to lift the rock off [Keck]" with everybody else. (Tr. 25-26). Harrell indicated, upon arriving at the accident scene, he did not know the extent of Keck's injuries although he could see Keck's waist was crushed. (Tr. 30-31). Harrell acted spontaneously and he stated no one directed him to go under unsupported roof. Harrell recalled:

[we] just saw him under the rock and everybody just went over. We just looked up and made sure nothing was hanging, just went and got the rock -- tried to get the rock off of him. We thought he was alive. (Tr.31).

Consistent with Harrell's testimony, Violet testified:

Everybody reacted. Okay. It was just a response. A man covered up, you know, they was going to help. There wasn't nobody directing nobody to come out there and do that. (Tr. 145).

Violet was asked if, in hindsight, he thought it was a good idea to go under unsupported roof. Violet responded without hesitation, "I'd do it again. To help somebody out, yeah." (Tr. 166).

Thus, the evidence does not adequately demonstrate that Violet directed subordinates to go under unsupported roof. Violet's own negligence in exposing himself to danger cannot be imputed to the respondent. See Nacco Mining Co., 3 FMSHRC 848, 849-50 (April 1981). Consequently, there is no negligence to be imputed to the respondent.

Assuming, *arguendo*, the evidence does support the Secretary's contention that Violet's actions were responsible for exposing the five other rescuers to the hazards of unsupported roof, Table VIII in section 100.3(d) of the Secretary's civil penalty criteria, 30 C.F.R. § 100.3(d), provides "considerable mitigating circumstances" as a guideline for a finding of "low negligence." Poynter testified it is essential to administer emergency first aid as quickly as possible, stating that any delay cuts into what rescuers refer to as the "golden hour." (Tr.47). Violet testified that it would have taken 30 minutes to cut and install roof timbers prior to rescue efforts. Johnson testified it would take approximately 15 minutes to install temporary timbers. However, Johnson's estimation did not appear to include the time required for transporting timbers to the accident site. Regardless of the time required to install supports, installation of temporary supports in a roof fall accident is problematical. While surrounding areas can be supported, it is difficult, if not impossible, to support roof directly over a victim, as it would require setting temporary supports on the debris sought to be removed. (Tr. 200-01, 263-66).

In the final analysis, while the facts support a finding of liability as a matter of law, there are "considerable mitigating circumstances" as a matter of equity. The propriety of Violet's actions must not be judged retrospectively. Rather, his behavior must be evaluated based upon his reasonable beliefs at the time of the accident -- that the roof conditions were stable, that Keck was alive, and, that further delay might result in Keck's death. Thus, on balance, Violet's actions, when viewed in a light most favorable to the Secretary, evidences no more than very low negligence even if Violet directed others to go in by roof supports. Thus, only a very low degree of negligence may be imputed to the respondent for penalty purposes.

In conclusion, because of compelling mitigation, a civil penalty of \$6.00 shall be imposed for the section 75.202(b) violation cited in Citation No. 3824104. Despite this *de minimus* penalty, I wish to note that I share Inspector Poynter's concern that all reasonable precautions must be taken to ensure that rescuers do not suffer the same fate as the victim of a roof fall. However, there is an inadequate basis for imposing a significant civil penalty for the rescue efforts in this case

under these circumstances. Moreover, an insignificant penalty in this instance is not inconsistent with a primary goal of the Mine Act that seeks to ensure that safety concerns are not subordinated to concerns related to productivity.

Citation No. 3837521 - On-Shift Examination

A preshift examination is conducted each shift, prior to personnel entering the mine, by a certified person designated by the operator. This examination is intended to identify and correct all hazards before the shift begins. The mandatory safety regulations also require at least one on-shift inspection of each working section by a certified person designated by the operator during each shift. The operable safety standard in effect for on-shift examinations in March 1991 was section 75.304, 30 C.F.R. § 75.304. On-shift examinations are intended to identify hazards that occur as a result of changing conditions once coal production on a shift begins, such as methane or coal dust accumulations, adverse roof conditions, and ventilation problems.

During the course of Inspector Johnson's accident investigation, Violet advised Johnson that he had not conducted an on-shift examination in all working headings on the day of the accident on March 22, 1991, because he had stayed with the continuous miner and shuttle car operators that day. Consequently, Johnson issued 104(d)(1) Citation No. 3837521 alleging a violation of section 75.304.

Johnson opined it was reasonably likely that serious injury will occur as a result of a problem with undiscovered draw rock, similar to the roof condition that caused Keck's fatality.⁸ Johnson also noted that coal dust and/or methane accumulations could go unnoticed without remedial rock dusting or ventilation curtain adjustments. It was reasonably likely such hazardous conditions occurring during a shift will result in a methane ignition or coal dust explosion that will expose miners to

⁸ There is no evidence that the cited violation contributed to the fatal accident. It is doubtful that an on-shift examination would have prevented Keck's disregard of company policy.

serious or fatal injuries. Therefore, Johnson characterized the violation as S&S.

Johnson also concluded the violation resulted from the respondent's high negligence attributable to an unwarrantable failure. The citation was subsequently modified to a 104(a) citation associated with moderate negligence when it was learned that on-shift examinations had been performed in most, but not all, of the working places. (Tr. 104).

Violet testified that he had assigned Phelps to conduct the on-shift examinations as Phelps drove the scoop from heading to heading supplying the roof bolters and cleaning coal dust that had accumulated behind the dusters. Violet confirmed that he had not done the on-shift examinations on March 22, 1991. When asked if he had informed MSHA that Phelps had done the on-shifts, Violet testified:

I felt -- you know, after the inquiry and all this they asked me if I done it, I said -- you know, I told them, no, I didn't do it, which I didn't. They didn't ask me if anybody else done it. They just asked me if I done it. So I told them I didn't do it. But as far as it being done, Charles Phelps done it and I showed [MSHA supervisor] Ronnie Russell where he had done it. (Tr.147-48).

Phelps testified that he informed MSHA investigators on the Monday following the accident that he had performed on-shift examinations on March 22, 1991. Phelps stated that he showed the inspectors three different places that he had examined on the section. (Tr. 172). However, Johnson stated there are seven working headings in the No. 3 section. (Tr. 104).

Ronnie Russell testified in this proceeding. He was never asked to corroborate Violet's account about being shown evidence of on-shift examinations. Significantly, Russell does not recall seeing any on-shift examination entries in the examination book for March 22, 1991. Russell recalled the entries in the examination book for March 22, 1991, were incomplete.

George Givens attempted to explain the reasons for the incomplete March 22, 1991, examination book entries, and the inaccurate information provided to MSHA investigators on March 25, 1991. Givens testified:

... the day of the investigation was the day of the funeral. And the men -- all the men -- the men were all wanting to go to the funeral. They were going to have an investigation. Nobody was right at that time, Your Honor. Nobody even paid any attention to what was going on. If some -- you know, I mean, it just was a situation I've never been in before. I never had a fatality before and the behavior of the men and what went on. And what was going on in the investigation didn't seem important to a lot of people at that time. Because a lot of people that worked there were personal friends and related to Michael Keck. (Tr. 244-45).

While grief over the death of a fellow worker may have interfered with the accuracy of the information provided to the MSHA investigators, I must make findings on the evidence presented. Section 75.304 required on-shift examinations in "each working section" during each coal-producing shift. Even Phelps did not allege that he informed MSHA that he had performed the on-shift in each working section. Moreover, there is no evidence that the examination book contained entries documenting that a complete on-shift had been conducted. Finally, Violet never clearly communicated to investigators that an on-shift had been done.

The belated exculpatory testimony of Violet and Phelps that a complete on-shift examination had in fact been performed on March 22, 1991, is self-serving and must be afforded little probative value. Consequently, the Secretary has established, by a preponderance of the evidence, that the cited section 75.304 violation in fact occurred.

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

1984); Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving S&S criteria in Mathies).

Whether a particular violation is significant and substantial must be based "on the particular facts surrounding the violation...." Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). In Manalapan Mining Company, Incorporated, 18 FMSHRC ___ (August 30, 1996), the Commission recently noted the significant hazards created by a violation caused by the failure to perform a preshift examination. In fact, in Manalapan, Chairman Jordan and Commissioner Marks, in a concurring opinion, suggested "violations of the preshift standard are presumptively S&S." Id., slip op. at 21. Consistent with Manalapan, I conclude that it is reasonably likely that serious or fatal injuries from fire or explosion will occur in the absence of complete on-shift examinations because of undetected hazardous conditions, such as methane build-up, that occur during the mining process. Accordingly, the S&S characterization in Citation No. 3837521 is affirmed.

In considering whether the \$6,000 civil penalty proposed by the Secretary for Citation No. 3837521 is appropriate under section 110(i) of the Act, I note that the respondent is a moderate operator that is not currently engaged in mining operations. Although the gravity of the violation is serious, the degree of negligence attributable to the respondent must be considered to be less than moderate given the Secretary's concession that many of the working sections were examined. Accordingly, a civil penalty of \$350 is assessed for Citation No. 3837521.

Citation No. 3837522 -- Methane Examinations

The pertinent mandatory safety standard in effect in March 1991, concerning methane examinations was section 75.307, 30 C.F.R. § 75.307. This mandatory standard required examination for methane at the start of each shift and at intervals of not more than 20 minutes during the operation of energized electric equipment.

On March 25, 1991, during the course of his accident investigation, Johnson determined Violet was the only person on the section with a hand held monitor. In this regard, Johnson learned, although hand held monitors were stored at the surface, neither roof bolt operators Keck and Matteson, nor continuous miner operator Harrell, had hand held methane monitors with them while operating their equipment at the face on the day of the accident. Since Keck was not seen by Violet for several hours prior to his discovery at 2:30 p.m., and as Violet was the only person on the section with a portable methane monitor, Johnson concluded the requisite methane tests were not being taken at 20 minute intervals.

As a result of his findings, Johnson issued Citation No. 3837522 for an alleged violation of section 75.307. Johnson characterized the violation as S&S because sparks caused by the continuous miner drill bits, or arcing in a defective piece of permissible electric equipment, are likely ignition sources that could initiate an explosion of undetected methane.

Johnson attributed the violation to the respondent's unwarrantable failure because only Violet had a methane detector and there was a continuous miner, two roof bolting machines and an electric scoop on the section that were operated without the requisite methane testing.

Violet testified that Johnson was mistaken in his belief that Violet was responsible for the methane testing. Violet stated he had assigned Phelps to perform the required methane testing on March 22, 1991. (Tr. 149). However, Violet's testimony is inconsistent with the information provided by Phelps at the hearing. Although Phelps stated he obtained the required methane readings, he also testified he departed the mine at 2:15 p.m. when he took the scoop outside. Mining operations were scheduled to continue until 3:00 p.m. Moreover, Phelps testified he last saw Keck at 1:00 p.m. Thus, even Phelps' testimony reveals no methane testing at the No. 7 heading between 1:00 p.m. and Phelps' departure at 2:15 p.m. It is apparent, therefore, that scoop operator Phelps, given his varied duties of cleaning and supplying bolters, was not in a position to take methane readings at each working face within 20 minute intervals.

Givens' testimony that a hand held methane detector was found on Keck's roof bolting machine is inconsistent with MSHA's investigation findings. It is also inconsistent with Violet's statement that Phelps had the only methane tester in the section. Givens was not underground on the day of the accident and he does not have the first hand knowledge of Violet who was in charge. Accordingly, I credit the testimony of Phelps and Violet which reflects neither roof bolting machine operators Keck nor Matteson, had methanometers on the day of the accident.

Finally, it is apparent that the provisions of section 75.307 contemplated that equipment operators are best suited to take the mandatory methane readings at frequent intervals during their equipment operation. In this regard, the respondent admitted that hand held monitors are made available on the surface for each equipment operator at the beginning of each shift. Thus, the evidence supports the fact of a section 75.307 violation.

With respect to the S&S issue, although the Congress Mine was not classified as a gassy mine, the liberation of methane at the face is a constant hazard that requires constant monitoring to ensure proper ventilation. Undetected methane concentrations, in the presence of potential ignition sources from electric powered equipment and sparks generated by the continuous miner extraction process, create the likelihood of an explosion and fire that will result in serious or fatal injuries.⁹ Accordingly, the record also supports Johnson's S&S designation.

Johnson also attributed this violation to the respondent's unwarrantable failure. Unwarrantable failure constitutes aggravated conduct that exceeds ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.* At 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 194-94 (February 1991). When an operator allows roof bolter operators and continuous miner operators to enter a mine without hand held methanometers that are stored at

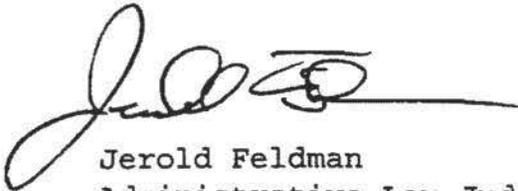
⁹ Johnson conceded the cited violation was not a contributing cause of Keck's death. (Tr. 120-21).

the surface, it does so at its own risk. Under these circumstances, the systematic failure to take methane readings at the face at a minimum of 20 minute intervals as required by the mandatory safety standard manifests a "serious lack of reasonable care" evidencing an unwarrantable failure. Consequently 104(d)(1) Citation No. 3837522 is affirmed.

The Secretary seeks a \$1,200 civil penalty for this citation. Given the moderate size of the respondent as well as the other penalty criteria in section 110(i) of the Act, I find that a civil penalty of \$800 is appropriate. This penalty amount recognizes the respondent's high degree of negligence. It also reflects the serious gravity of the violation and the absence of special circumstances, in that the cited violation did not contribute to the fatal accident.

ORDER

In view of the above, the Secretary's Motion to Dismiss Imminent Danger Order No. 3824102 **IS GRANTED**. **ACCORDINGLY, IT IS ORDERED** that Imminent Danger Order No. 3824102 **IS VACATED**. **IT IS FURTHER ORDERED** that 104(a) Citation Nos. 3824103, 3824104 and 3837521 **ARE AFFIRMED**. **IT IS ALSO ORDERED** that 104(d)(1) Citation No. 3837522 **IS AFFIRMED**. **CONSEQUENTLY**, the respondent shall pay a total civil penalty of \$1,656 to the Mine Safety and Health Administration in satisfaction of the citations in issue. Payment shall be made within 30 days of the date of this decision. Upon timely receipt of payment, this case **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215
(Certified Mail)

R. Jackson Rose, Esq., P.O. Box 540, Cumberland Gap, TN 37724
(Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 10 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 93-261
Petitioner : A.C. No. 12-02033-03596
v. :
: Docket No. LAKE 93-268
BUCK CREEK COAL INC., : A.C. No. 12-02033-03597
Respondent :
: Docket NO. LAKE 93-273
: A.C. No. 12-02033-03598
:
: Docket No. LAKE 93-278
: A.C. No. 12-02033-03599
:
: Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal Inc. pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 12 violations of the Secretary's mandatory health and safety standards and seek penalties of \$13,612.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of \$13,612.00.

These cases are the first in a long line of proceedings involving Buck Creek. At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating

that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate" Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before

issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal Inc., in default in these cases. Accordingly, Citation No. 3823590 in Docket No. LAKE 93-261, Order No. 3843663 in Docket No. LAKE 93-268, Citation Nos. 3843336, 3843337 and 4054443 in Docket No. LAKE 93-273 and Order Nos. 3037120, 3843435 and 3843582 and Citation Nos. 3843379, 3843380, 3843334 and 4055317 in Docket No. LAKE 93-278 are **AFFIRMED**. Buck Creek Coal Inc. is **ORDERED TO PAY** civil penalties of **\$13,612.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604
(Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

/lt

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 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-8
Petitioner	:	A.C. No. 12-02033-03600
v.	:	
	:	Docket No. LAKE 94-13
BUCK CREEK COAL INC.,	:	A.C. No. 12-02033-03601
Respondent	:	
	:	Docket NO. LAKE 94-21
	:	A.C. No. 12-02033-03602
	:	
	:	Docket No. LAKE 94-41
	:	A.C. No. 12-02033-03603
	:	
	:	Buck Creek Mine

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek Coal Inc. pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 26 violations of the Secretary's mandatory health and safety standards and seek penalties of \$58,865.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of \$58,865.00.

These cases are several in a long line of proceedings involving Buck Creek.¹ At various times during the past two years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

¹ Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket number of the cases involved.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**"

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On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. § 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate" Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal."

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal Inc., in default in these cases. Accordingly, Order No. 3843585 and Citation Nos. 4054841 and 4054842 in Docket No. LAKE 94-8, Citation Nos. 3843335 and 3843394 in Docket No. LAKE 94-13, Order Nos. 3843374, 3843376, 3843377, 3843501, 3843502 and 3843503 and Citation Nos. 3843366, 3843367, 3843666, 4055778, 3843668 4054885 in Docket No. LAKE 94-21 and Citation Nos. 3846207, 3843338, 3843523, 3843524, 3843525, 4259924, 3843806, 3843526 and 3843531 in Docket No. LAKE 94-41 are **AFFIRMED**. Buck Creek Coal Inc., or its successor,² is **ORDERED TO PAY** civil penalties of **\$58,865.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.


T. Todd Hodgdon
Administrative Law Judge

² According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604
(Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 21 1996

KERMIT CAMPBELL,	:	COMPENSATION PROCEEDING
Applicant	:	
v.	:	Docket No. KENT 96-305-C
	:	
JOHN CHANEY TRUCKING CO., INC.:	:	Mine ID 15-13936 R10
and/or WATTS AND CHANEY	:	Star Fire Mine
TRUCKING, INC.	:	
Respondent	:	

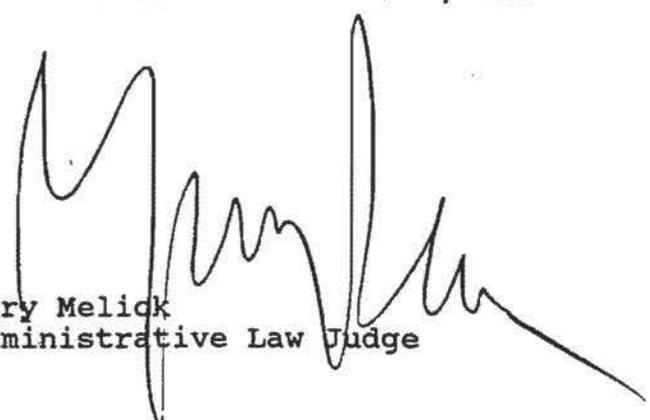
ORDER OF DISMISSAL

Before: Judge Melick

On July 18, 1996, the Applicant, Kermit Campbell, filed an application for compensation under Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", based upon alleged idlement because "Federal Mine Inspector Frank Mayhew inspected and put my truck out of service". It was not alleged that a withdrawal order caused the idlement. Section 111 of the Act authorizes entitlement to compensation only following the issuance of a withdrawal order under the Act. Accordingly the Applicant was ordered to show cause why his case should not be dismissed.

In response to the show cause order the Applicant submitted a copy of the "Section 104(a)" citation which he maintains was the basis for this application for compensation. Applicant further stated that the inspector "neglected to write a withdrawal order on the citation."

Under the circumstances, since the alleged idlement was not the result of the issuance of an order under the Act, this case must be dismissed.


Gary Melick
Administrative Law Judge

Distribution:

Kermit Campbell, General Delivery, Rowdy, KY 41367

George J. Miller, Esq., Wyatt, Tarrant & Combs, 1700 Lexington
Financial Center, Lexington, KY 40507

/jff

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 21 1996

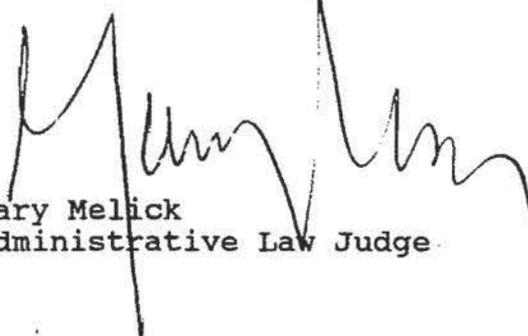
GROVER NAPIER, : COMPENSATION PROCEEDING
Applicant :
v. : Docket No. KENT 96-298-C
JOHN CHANEY TRUCKING CO., INC., : Mine ID 15-13936 F10
Respondent : Star Fire Mine

ORDER OF DISMISSAL

Before: Judge Melick

On June 17, 1996, the Applicant, Grover Napier, filed an application for compensation under Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", based upon alleged idlement caused by the issuance of a "Section 104(d)(1)" citation. However because Section 111 of the Act authorizes entitlement to compensation only following the issuance of a withdrawal order under the Act, an order was issued to the Applicant on September 13, 1996, to show cause why this case should not be dismissed.

In response to the show cause order the Applicant submitted a copy of the "Section 104(d)(1)" citation which he maintains was the basis for this application for compensation. Under the circumstances, since the alleged idlement was not the result of the issuance of an order under the Act, this case must be dismissed.



Gary Melick
Administrative Law Judge

Distribution:

Grover Napier, General Delivery, Rowdy, Kentucky 41712
George J. Miller, Esq., Wyatt, Tarrant & Combs, 1600 Lexington
Financial Center, 250 West Main Street, Lexington, KY 40507

\jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 22 1996

DAANEN & JANSSEN, INC. : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. LAKE 95-180-RM
: Citation No. 4318581; 12/16/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. LAKE 95-181-RM
ADMINISTRATION (MSHA), : Citation No. 4318582; 12/16/94
Respondent :
: Docket No. LAKE 95-182-RM
: Citation No. 4318583; 10/06/94
: :
: Docket No. LAKE 95-183-RM
: Citation No. 4318584; 10/06/94
: :
: Bay Settlement Mine
: Mine ID No. 47-03045
: :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 95-290-M
Petitioner : A. C. No. 47-03045-05501-M
v. :
: Docket No. LAKE 95-313-M
DAANEN & JANSSEN, INC., : A. C. No. 47-03045-05502
Respondent :
: Docket No. LAKE 95-352-M
: A. C. No. 47-03045-05503
: :
: Bay Settlement Mine

DECISION

Appearances: Christine Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, and Ernest K. Alvey, Conference and Litigation Representative, Duluth, Minnesota for the Secretary;
Eric E. Hobbs, Esq., and John J. Kalter, Esq., Michael, Best, & Friedrich, Milwaukee, Wisconsin, for Contestant/Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§815, 820) (Mine Act or Act). They involve four citations issued by the Secretary's Mine Safety and Health Administration as the result of a fatal accident that occurred at the Bay Settlement Mine, a limestone quarry mined by Daanen & Janssen, Inc. (Daanen & Janssen or the company). The quarry is located in Brown County, Wisconsin.

Three of the citations were issued pursuant to section 104(a) of the Act (30 U.S.C. §814(a)) and one was issued pursuant to section 104(d)(1) (30 U.S.C. §814(d)(1)). All of the citations allege that Daanen & Janssen violated specified mandatory safety standards for surface metal and nonmetal mines and that the violations were significant and substantial contributions to mine safety hazards (S&S violations). In addition, the section 104(d)(1) citation alleges that the violation was the result of Daanen & Janssen's unwarrantable failure to comply with the standard (unwarrantable violation). The Secretary seeks a civil penalty for each alleged violation ranging from \$81 to \$5,000.

Daanen & Janssen challenges the validity of the citations, asserting the alleged violations did not occur; or, if they did, were not the result of the company's negligence and that the inspector's S&S and unwarrantable findings are invalid. The company also challenges the civil penalty proposals.

A hearing was conducted in Green Bay, Wisconsin. Subsequently, counsels filed helpful briefs.

THE ISSUES

1. Whether the violations existed as alleged.
2. Whether the inspectors' S&S and unwarrantable findings are supported by the evidence.
3. The amount of the civil penalties that must be assessed for any violations found, taking into account the applicable statutory civil penalty criteria.

STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

1. [T]he ... Commission has jurisdiction over this proceeding.
2. [T]he Bay Settlement Mine is a limestone mine located in [Scott], Wisconsin.
3. [T]he ... [m]ine is operated by Daanen & Janssen ... and another operator, Northeast Asphalt, Incorporated.
4. Daanen & Janssen and its ... [m]ine [are] subject to the jurisdiction of the ... Act.
5. [T]he [m]ine's operations affect interstate commerce.
6. [T]he ... [m]ine worked approximately 65 hours in the fourth quarter of 1994.
7. Daanen & Janssen worked approximately 35,349 hours at all of its mines during the fourth quarter of 1994.

* * *

19. [T]he proposed penalties of each citation will not affect Daanen & Janssen's ability to continue in business.

20. [T]he certified copy or MSHA assessed violations history [Joint Exh. 2] accurately reflects the history of Daanen & Janssen for two years prior to October 6, 1994 (Tr. 12-14, See also Tr. 15).

The parties also stipulated with respect to the authenticity of certain exhibits (Tr. 13-14, 15), that the number of hours worked at the mine in the fourth quarter of 1994 was "very small" (Tr.14-16), and that Daanen & Janssen exhibited good faith in abating the alleged violations (Tr. 176-177). In addition, the Secretary's counsel agreed that the company's applicable history of previous violations was "small" (Tr. 15).

THE ACCIDENT, THE INVESTIGATION, AND THE CITATIONS

At the quarry, limestone is extracted and stockpiled on the quarry floor where it is loaded into haulage trucks by front-end loaders (loader). As a result, loaders and trucks are the types of mobile equipment most commonly used.

All such mobile equipment reaches the quarry floor via an access road that runs approximately 520 feet from the rim to the floor. The road is 22 feet wide and is "bermed" on both sides. The road has an overall grade of approximately 10 percent, but the descent is not even. The road becomes more level for a brief distance near its mid point, and then resumes its steep decent.

The berms are composed of boulders, stones and granulated material. The granulated material is used as "fill" around and between the boulders and stones. The berms are from 3 to 4 feet wide. They vary in height, but are approximately 48 inches at their highest.

On the morning of October 6, one loader, driven by Richard VanVonderen, was operating at the quarry. Four haulage trucks waited to be filled. To reach the waiting trucks, VanVonderen drove the loader down the access road. He got about one third of the way down, when the loader drifted to the far left (the west side) of the road and twice hit the left berm. The loader traveled approximately 34 feet more, ran through and over the left berm, fell 40 feet to the quarry floor, and overturned.

The only eye witness to the accident was Mark Bray, a foreman of the other company that mined at the quarry. He saw the loader traveling down the road. He looked away briefly and when he looked back, he saw the loader go over edge of the road and fall to the quarry floor.

Bray ran to the loader. He called out, but received no answer. He returned to his work station, got another employee, and they ran back to the loader. They found VanVonderen out of the operator's seat and up against one of the columns of the loader's cab. Bray ran to telephone for help. He also called the company to report the accident.

Within minutes, county rescue personnel arrived at the scene. They examined VanVonderen and detected no vital signs. He was taken by ambulance to a local hospital where he was pronounced dead. An autopsy revealed internal injuries and broken forearms.

That same day, Thomas Pavlat, an MSHA investigator, was assigned by the agency to investigate the accident. Initially, there was confusion concerning whether OSHA or MSHA had jurisdiction and both began investigations. However, it was decided that jurisdiction lay with MSHA, and Pavlat conducted the only complete federal investigation of the incident.

Pavlat's investigation had two stages, from October 6-14, 1994, and from November 8-11, 1994. During these periods Pavlat estimated that he spent a total of 5 1/2 days at the quarry.

As a result of the investigation Pavlat served the company with the four citations here at issue. Citation No. 4318581 (Joint Exh. 1A) charges a violation of 30 C.F.R. § 56.14130(h) in that the seat belt of the loader did not meet the requirements of Society of Automotive Engineers (SAE) Schedule J386. Citation No. 4318582 (Joint Exh. 1B) charges a violation of 30 C.F.R. § 56.14101(a)(3) in that the service brake slack adjusters for both rear brakes were "frozen" and did not work. Citation No. 4318583 (Joint Exh. 1C) charges a violation of 30 C.F.R. § 56.9101 in that VanVonderen "did not or could not maintain control" of the loader. Finally, Citation No. 4318584 (Joint Exh. 1D) charges a violation of 30 C.F.R. § 56.9300(a) in that the left berm was not substantial enough to provide VanVonderen with the opportunity to regain control of the loader.

DOCKET NO. LAKE 95-180-RM
DOCKET NO. LAKE 95-290-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Penalty</u>
4318581	56.14130(h)	12/16/94	\$ 81

The citation states:

The seat belt provided for the ... front-end loader ... did not meet the requirements of SAE J386, Operator Restraint Systems for Off-Road Work Machines. The seat belt and seat were not tethered to the floor of the loader cab as required by the manufacturer. The provided seat belt was side mounted and the seat was hinged on the front. The operator could be forced forward into the cab in the event of a severe accident (Joint Exh. 1-A).

Section 56.14130(h) states in pertinent part:

Seat belts shall meet the requirements of SAE J386. "Operator Restraint Systems for Off-Road Work Machines".

SAE J386, is incorporated by reference into the standard, and its requirements are therefore mandatory. The purpose of SAE J386 is to provide minimum performance and test requirements for operator restraint systems (see Sec. Exh. 1 at 1. Purpose).

THE VIOLATION

At the hearing, Pavlat explained that he cited the violation because "of the type of seat that was in this [loader]. It was hinged on the front with a locking device in the back, and there wasn't a tether provided to restrain the seat from going forward in the event of an impact or whatever circumstances may force that seat" (Tr. 39, see also 114-115). He also testified there was another condition that he believed was a violation of SAE J386 -- "[t]he seat belt ... was not provided with a sticker, which J386 requires it to have" (Tr. 39). (Pavlat did not include this condition in the descriptive portion of the citation.)

To establish a violation of section 567.14130(h), the Secretary must prove a violation of SAE J386. SAE J386 is divided into three parts. Part I contains definitions, Part II contains seat belt assembly requirements, and Part III contains machine-related requirements for the testing and performance of seat belt assembly attachments, tether belts, and seat belt assembly installations. Pavlat maintained the company failed to meet three of the definitions in Part I, one of the seat belt assembly requirements of Part II, and one of the machine related requirements of Part III (see Tr. 113-116).

The definitions cited by Pavlat are those for "Anchorage," "Extension (Tether) Belt," and "Operator Restraint System" (Tr. 114-115, 116). The problem with relying on these definitions is that they do not state mandatory requirements with which an operator must comply. "Anchorage" is defined as, "The point where the seat belt assembly and/or extension (tether) belt is mechanically attached to the seat system or machine" (Gov. Exh. 1 at 3.2). "Extension (Tether) Belt" is defined as, "Any strap, belt, or similar device ... that aids in the transfer of seat belt loads" (Id. at 3.6). "Operator Restraint System" is defined as, "The total system composed of the seat belt assembly, seat system, anchorages, and extension (tether belt, if applicable) which transfers the seat belt load to a machine" (Id. at 3.9).

Because these definitions contain no language requiring an operator to do or not to do something, I must exclude the definitions as a basis for finding a violation.

I also must exclude the machine related performance standard of Part III that Pavlat referenced. Part III 5.1.2. states, "If the means of attachment joining the seat assembly to the seat system cannot withstand the seat belt assembly load of Part III, paragraphs 5.2.2., 5.2.3. or 5.2.4., extension (tether) belts may be used" (Gov. Exh. 1) (emphasis added).

It is clear Pavlat believed safety considerations dictated that the seat be tethered (Tr. 39, 44, 114-115). However, it also is clear, as counsel for Dannen & Janssen pointed out during cross examination and on brief, that the language of the requirement is permissive not mandatory (Tr. 181, 183; Resp. Br. 6). Under the conditions specified in Part III 5.1.2., an operator "may" not "shall" use a tether belt. Moreover, even if I read the SAE standard to require the use of a tether belt, the Secretary did not establish "the means of attachment" could not withstand the specified seat belt assembly load requirements.

The remaining part of SAE J386 that Pavlat believed the company violated is Part II 4.1.5. (Tr. 116). It states:

MARKING (LABELING) - Each seat belt assembly and/or section of belt assembly shall be permanently and legibly labeled with year of manufacture, model or style number, and name or trademark of manufacture or importer, and shall state compliance with SAE J386 JUN85. Part II (Gov. Exh. 1).

Pavlat testified the seat belt did not have such a label (Tr. 39, 45, see also Tr. 115). Although this condition was not charged in the body of the citation, counsel for the company did not object at the hearing or on brief to its inclusion in the record and to testimony concerning it. I therefore conclude Daanen & Janssen neither was surprised nor prejudiced by the testimony and that the Secretary effectively amended his pleadings to allege that the Company's failure to comply with Part II 4.1.5. was a part of the violation. Further, because Daanen & Janssen presented no evidence to refute Pavlat's contention that the required label was missing, I find that the loader's seat belt assembly was not labeled as required by Part II.4.1.5. In this respect, and in this respect alone, the company violated section 56.14130(h).

S&S and GRAVITY

The concept of S&S is well understood. For the purpose of this violation, it is sufficient to note two holdings of the Commission. First, that a violation is properly designated S&S, "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)); and second, that the question of whether any particular violation is S&S must be based on the particular facts surrounding the violation (Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)).

Because the sole allegation the Secretary established is that Daanen & Janssen violated section 56.14130(h) by failing to comply with the labeling requirement of SAE J386, I conclude the violation was not S&S. The lack of a proper label does not mean that the seat belt assembly was unsafe or did not functionally meet the SAE requirements. Perhaps the assembly violated the requirements, perhaps it did not. The Secretary's evidence does not support finding either way.

Indeed, Pavlat did not even know if VanVonderen was wearing a seat belt when the accident occurred (Tr. 56-57). VanVonderen was found outside of his seat, the seat belt was not torn, and there was no evidence that it failed during the accident (Tr. 132). Further, Pavlat agreed that the coroner's report indicated VanVonderen's injuries were inconsistent with seat belt use (Tr. 133).

Based upon these particular facts, I find that the labeling violation was not reasonably likely to contribute to a hazard of a reasonably serious nature and therefore that the violation was not S&S.

I also find that the violation of section 56.14130(h) was not serious. It long has been held that to determine the gravity of a violation for purposes of penalty assessment, the violation should be analyzed in terms of its potential hazard to the safety of miners and the probability of the hazard occurring (Robert G. Lawson Coal Co., 1 IBMA 115, 120. (May 1972)). While the lack of a required label presented a potential hazard to miners if there was a basis to infer the seat belt or its assembly could not adequately restrain the vehicle operator, the facts allow no such inference here. Since I am unable to find a potential hazard, I cannot gauge its probability.

NEGLIGENCE

Pavlat believed the company's negligence was moderate (Tr. 55, 57), and I agree. The SAE requirement clearly states that the seat belt assembly must be labeled properly. The lack of such a label was visually obvious. The loader belonged to Daanen & Janssen, and the company should have known of the violative condition and corrected it. In failing to do so, it failed to meet the standard of care required (Tr. 251).

CIVIL PENALTY ASSESSMENT

This was not a serious violation, and the company was moderately negligent in allowing it to exist. The other civil penalty criteria to which counsels either stipulated or otherwise agreed (the company's small history of previous violations, its small size, its good faith abatement of the violations, and the fact that the penalties proposed would not affect its ability to continue in business) do not warrant a large penalty. Therefore, I conclude that a penalty of \$50 should be assessed.

DOCKET NO. LAKE 95-181-RM

DOCKET NO. LAKE 95-313-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Proposed Penalty</u>
4318582	56.14101(a)(3)	12/16/94	\$ 1,000

The citation, which was issued pursuant to section 104(d)(1) of the Act, 30 U.S.C §814(d)(1), states:

The ... front end loader ... had been operated while the rear service brake slack adjusters on both wheels were not functional. The adjusters were "frozen" and could not be adjusted any more. Verbal and written evidence, including the weekly vehicle defect review reports, dated 8/19/94, 9/9/94 and 9/16/94 indicated the company production manager was aware of the brake conditions. The reports were reviewed by the manager and he verbally indicated the loader was scheduled for brake maintenance when another loader in the shop was completed and removed. The loader was damaged beyond repair in an accident. It could not be determined if the condition of the brakes contributed to the accident because of the damage to the loader and conflicting testimony concerning the quality of the loader brakes. This is an unwarrantable failure (Joint Exh. 1-B).

Section 56.14101(a)(3) requires that, "All braking systems installed on ... [self-propelled mobile] equipment shall be maintained in functional condition."

THE VIOLATION

There was essential agreement among the witnesses regarding the function and purpose of loader's service brake system and of the system's slack adjusters.

Richard Sobieck is Daanen & Janssen's assistant mechanic. He repairs machinery and equipment used at the quarry. He explained that the loader's service brake system has two brake shoes for each wheel and that each shoe has one adjuster bolt. There are eight adjustment bolts in all (Tr. 239; see also Tr. 451 (testimony of Robert Svenson)). The adjuster bolts are turned manually, and the brake shoes move closer to the brake drum when the bolts are turned.

The shoes are moved to compensate for wear on the brake linings (also referred to as the brake pads). In this way, the shoes continue to be applied evenly to the brake drums and to exert the maximum amount of stopping power for the brake system (See Tr. 111, 390).

Robert Svenson is the former chief engineer of the company that manufactured the loader's brakes. Prior to his retirement in 1982, Svenson had 35 years of experience in brake design and manufacture. Svenson testified that the frequency at which the adjuster bolts need to be turned depends upon the rate at which brake linings wear (Tr. 452). Because wear is inevitable when brakes are applied, the only way to forego use of the adjuster bolts is never to use the brakes, or continually to install new brake shoes.

Pavlat testified that during the investigation he learned VanVonderen reported to the company there was a problem with the brakes. According to Pavlat, these reports were made "over an extended period of time" (Tr. 96, see also Tr. 116). The "problem" was that the slack adjusters were "frozen" and would not turn (Tr. 109). As a result, the brakes shoes at times did not fully engage the drums and the brakes did not hold as they should.

The reports to which Pavlat referred were completed weekly by VanVonderen. Then, the reports were given to Daanen & Jassen's assistant mechanic, Richard Sobieck, to review. Following that, Daanen & Janssen's production supervisor, Aaron Kinney, read them. (Tr. 101-102).

VanVonderen's report dated August 19, 1994, indicated that all of the systems of the loader were in good condition and that the overall condition of the loader was satisfactory, but it also contained a note added by Sobieck that the loader "needs brakes all around" (Gov. Exh. 9). Sobieck explained that he did not mean that the loader actually needed new brakes, but rather that the adjuster bolts on the braking system needed to be changed because they were frozen (Tr. 222, 241). Sobieck made the notation after going to the mine on August 20, and inspecting the brakes. (He inspected the loader because VanVonderen told him it was pulling to the left (Tr. 242).)

Sobieck was able to free and to move the slack adjusters on August 20, and to thereby adjust the brakes. However, once he made the adjustments, he could not again turn the bolts. They were frozen.

Sobieck testified that he told Kinney about the problem and that Kinney planned to fix or replace the bolts in October when space would become available in the repair shop. (Tr. 229, see also Tr. 102 (Pavlat's testimony)). Therefore, the adjuster bolts were not changed or otherwise unfrozen from August 20, to the date of the accident.

While there is ample evidence that the slack adjusters did not work at the time of the accident, there is no basis to find that anything else was wrong with the loader's braking system. For reasons that were never fully explained, MSHA's investigation did not include an inspection or examination of the brakes, or of what was left of them. (Tr. 107). The alleged violation was based upon what Pavlat was told and upon his review of the company's inspection reports. Except for allegations regarding the adjuster bolts, no testimony was offered by the witnesses that the brakes were in any other way defective. Therefore, the question of whether there was a violation of section 56.14101(a)(3), turns upon whether the presence of the frozen slack adjusters meant that the loader's braking system was not maintained in functional condition.

Section 56.14101(a)(3) is, as the standard's wording makes clear, a maintenance standard. It describes how an operator is required to maintain all braking systems -- i.e., "in functional condition." It does not mandate that brakes meet specific performance requirements.

Although Daanen & Janssen argues that this distinction is "nonsensical," "given the [s]tandard's plain language equating compliance with the braking system's function or performance" (Op. Br. 12 (emphasis in original)), I do not agree. Daanen & Janssen's argument equates section 56.14101(a)(3) with

sections 56.14101(a)(1) and 56.1410(a)(2), thereby making section 56.1410(a)(3) redundant. Also, its argument ignores the "plain language" of the standard.

The adjective "functional" connotes something being able to perform its regular function, that is, it connotes something being able to work as intended (see Webster's Third New International Dictionary 921 (1986) (Webster's)). Under section 56.14101(a)(3), the "something" that must be functional is the braking system, which is made up of numerous component parts. For the system to work as intended all of its component parts must work.

The wording of section 56.14101(a)(3) clearly distinguishes it from preceding sections 56.14101(a)(1) and 56.14101(a)(2). They describe how service and parking brake systems must perform, i.e., they must be "capable of stopping and holding the equipment with its typical load on the maximum grade it travels" (30 C.F.R. §§ 56.14101(a)(1) and 56.14101(a)(2)).

The Secretary recognizes this distinction in his Program Policy Manual (PPM), which states:

Subsection (a) [of section 56.14101] is divided into three parts. Part (1) ... sets a minimum performance standard for service brake systems on self-propelled mobile equipment. Part (2) sets a minimum performance standard for parking brakes on self-propelled mobile equipment. Part (3) sets a maintenance standard for all braking systems on self-propelled equipment.

Standard [56].14101(a)(1) should be cited if a service brake system is not capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

Standard [56].14101(a)(2) should be cited if the parking brakes are not capable of holding the equipment with its typical load on the maximum grade it travels.

Standard [56].141012(a)(3) should be cited if a component or portion of any braking system is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above (PPM Vol IV 55-55(a) (emphasis added)).

The Secretary argues that this interpretation deserves deference (Sec. Br. 19-22), but this claim is beside the point. Chevron teaches that where the wording of a statute, or in this

case of a standard, is clear, the question of deference need not be reached. Rather, effect must be given to the clear and unambiguous language (Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43).

The adjuster bolts were integral parts of the loader's braking system. They were frozen and inoperable. I therefore conclude the loader's braking system was not maintained in functional condition and that this was a violation of section 56.14101(a)(3).

S&S AND GRAVITY

In Mathies Coal Co, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth four things the Secretary must prove in order to sustain an S&S finding:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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, 104-105 (5th Cir. 1988) (approving Mathies criteria).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated 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 Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Finally, an S&S determination must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC 327, 329 (March 1981); Halfway, Incorporated, 8 FMSHRC 8 (January 1986)).

The Secretary proved three of the four Mathies elements. There was a violation of the mandatory safety standard and the violation contributed to a discrete safety hazard. The brake lining wore as the loader was used. At some point, the brakes would have to be adjusted to be able to slow down or stop the equipment. Because the adjuster bolts on the rear brakes were inoperable, the rear brakes could not be adjusted using the bolts unless the bolts were replaced or otherwise fixed. As mining continued this subjected the loader operator and others working in the vicinity of the loader to hazards resulting from the loader operator being unable to slow or stop. Further, if an accident occurred, it was reasonably likely to result in the serious injury of the loader operator, of other miners, or of both.

However, the Secretary failed to prove there was a reasonable likelihood the hazard contributed to would result in an injury. There is no evidence to the contrary, and I credit Sobieck's testimony that after he last turned the slack adjusters on August 20, 1994, the brakes worked properly (Tr. 238-239). Joseph Judeikis, assistant to the chief of the MSHA Approval and Certification Center, agreed that if slack adjusters are adjusted to within acceptable limits and are then frozen, the braking system will still work (Tr. 392). As he put it, the slack adjusters "are not necessary at a given point in time if the brakes are adjusted to allow the [braking] system to perform" (Tr. 422). Svenson added that the brakes will continue to work properly "until such time as lining [wear] takes place or lining or drum wear takes place to the extent that [another] adjustment has to be made" (Tr. 454).

Sobieck estimated that a brake adjustment on a loader at the mine lasts for about 1 year of use or about 3,000 hours before the brakes have to be readjusted. Svenson observed that this time period was "not uncommon" for off-road equipment (Tr. 257, 453). Judeikis, on the other hand, believed that under normal usage, an adjustment on a loader lasts approximately 1 ½ to 2 months, and Judeikis stated that he had no reason to think the loader involved in the accident was subject to other than normal use (Tr. 410, 412).

I credit Sobieck's estimate. As the mechanic who made such adjustments, he was familiar with the way in which the loader was used at the quarry. Judeikis, on the other hand, made clear that his knowledge of how the loader was used was not first hand (Tr. 412). He forthrightly admitted that he could not state that Sobieck's time estimate was unreasonable. ("I can't speculate as to whether or not ... [approximately one year] would be a reasonable time for that particular machine in its

particular operating environment. That really is a function of the loader operator, the quality of the mining and the operating conditions that the loader is subject to" (Tr. 396)).

Further, no evidence was introduced that there were unusual circumstances at the quarry that would cause the brakes to wear more quickly. Indeed, Judeikis stated that the fact that a loader was operated on a grade did not necessarily mean that its brakes would wear more quickly. The loader operator might control the speed of the loader through gear selection and therefore not need to use the brakes as frequently (Tr. 394, 396).

Sobieck told Pavlat the company planned to take the loader to the shop for repair by the end of October (Tr. 102), and Sobieck confirmed this was the company's intention (Tr. 257-258, 259). There is no evidence to support finding this was a fabrication, and I find that, indeed, the company intended to replace or repair the adjuster bolts by the end of October.

I have found that the brakes were last adjusted on August 20 and that they worked as required up until the time of the accident. Also, I have accepted Sobieck's testimony that the brakes would not need to be adjusted for up to a year from the August 20, 1994. Finally, I have accepted the company's testimony that as mining continued, the adjuster bolts would have been repaired or replaced by the end of October 1994. Obviously, this would have been well before the brakes needed to be readjusted. Therefore, I conclude that as mining continued, it was not reasonably likely that the frozen adjuster bolts would have lead to an injury causing accident.

I also conclude that this was not a serious violation. As noted, the evidence requires finding that the frozen adjuster bolts did not affect the ability of the brakes to stop the loader, and in the normal course of mining, would not have affected that ability before the bolts were replaced or repaired. Thus, while it is true that at some point this violation could have become serious, even life threatening, that point was not reached nor reasonably could have been expected to be reached within the relevant time frame of this case.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "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 (December 1987); Youghioghney & Ohio Coal Co., 9 FMSHRC 2007

(December 1987)). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care" (Emery, 9 FMSHRC at 2003-04).

Clearly, Sobieck knew that the adjuster bolts were inoperable and needed to be changed. Indeed, Sobieck testified that when he wrote on the September 6 inspection report that the brakes were "bad again. Cannot adj[ust] anymore," he did so to remind himself that when the loader ultimately was taken to the shop for repairs, the adjusting bolts needed to be changed because they could not be adjusted (Gov . Exh. 12; Tr. 219, 243, 256). Sobieck further testified that on September 12, he instructed VanVonderen to check the "service brakes not good" box on the inspection forms in order again to remind management that new adjustor bolts needed to be installed (Tr. 255). Kinney, Daanen & Janssen's production manager, reviewed these forms (Tr. 230, 267-269).

Kinney testified that he recalled Sobieck telling him that one of the front slack adjustors was frozen but that Sobieck was able to free it. He did not recall Sobieck telling him anything about the rear brakes and rear slack adjusters. (Tr. 269-270). However, Sobieck testified that prior to the accident he told Kinney that the adjuster bolts needed to be replaced (Tr. 232).

I believe that Sobieck advised Kinney that the rear slack adjusters were inoperable. I find it highly unlikely that Sobieck told Kinney about an adjuster bolt he was able to keep in working condition, yet failed to tell him about those he could not free. Indeed, Kinney stated he knew that "when it was convenient" the loader would have to be taken to the repair shop "and we would work on the adjustors, and ...replace them or free them or whatever" (Tr. 304), which certainly implies he knew the adjuster bolts did not function. For these reasons, I find that the management of Daanen & Janssen, through Kinney, knew that the rear slack adjustors were inoperable.

In the face of its knowledge that the slack adjustors required replacement or repair, Daanen & Janssen elected to put off the work until late October. I have found that despite the frozen adjuster bolts, the brakes reasonably could have been expected to function adequately for up to 1 year from August 20, 1994. In view of this finding, I conclude, that Daanen & Janssen was not indifferent to the violation. Its decision to replace or repair the adjuster bolts at a time when it was convenient--i.e., in late October 1994--was reasonable in light of the minimal risk the violation posed to the loader operator and to others. Therefore, the violation was not the result of Daanen & Janssen's unwarrantable failure to comply with the standard.

Although the company was not guilty of a serious lack of reasonable care in allowing the violation to exist, it was negligent. Kinney knew of the violation. There was at least a possibility -- however minimal -- that the loader would be used other than normally and that the inability of the slack adjusters to function would affect the brakes before the end of October. In electing to put off replacing or repairing the slack adjusters, the company assumed the risk that continuing to use the loader would endanger the loader operator and/or others. The risk was slight, but it was there, and Daanen & Janssen was negligent in assuming it.

CIVIL PENALTY ASSESSMENT

The violation was not serious. The record does not support finding that the violation contributed in any way to VanVonderen's death. The violation was not caused by Daanen & Janssen's unwarrantable failure to comply. The company was slightly negligent. Given the small size of the company, its small history of previous violations and the fact that the other civil penalty criteria do not warrant either increasing or decreasing the resulting penalty, I find that a civil penalty of \$300 should be assessed.

DOCKET NO. LAKE 95-182-RM
DOCKET NO. LAKE 95-352-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Proposed Penalty</u>
4318583	56.9101	12/16/94	\$ 5,000

The citation states in pertinent part:

[A] front end loader operator was fatally injured on October 6, 1994, when the ... loader he was operating went through the berm and off the edge of a 40 foot elevated roadway. The loader operator did not or could not maintain control of the equipment while it was in motion, and went through the berm and over the road edge.

In issuing the citation, Paylat found the violation to be S&S and due to Daanen and Janssen's moderate negligence.

Section 56.9101 states:

Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with

conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used.

THE VIOLATION

The record allows for no other plausible explanation for the accident than that VanVonderen failed to control the moving loader. (Certainly, there is no suggestion he drove intentionally off the road).

Daanen & Janssen offered speculative testimony as to why he failed to maintain control. It suggested that wasps got into the cab and distracted him (Tr. 318, 339, 470). It also suggested that he might have looked over his shoulder and lost track of where he was going (Tr. 317-318).

For his part, the Secretary, through Pavlat, suggested excessive speed as the cause, a suggestion founded upon what Bray reportedly told Pavlat of VanVonderen's driving habits (Tr. 68-69). However, Pavlat's recollection of what he was told was not confirmed by Bray, and Pavlat himself never observed VanVonderen operating the loader (Tr. 135).

These speculations, even if established, at most would explain why there was a violation, they would not excuse it. The accident itself speaks to the violation. As Pavlat noted, the loader was for no apparent reason on the far left side of the road. (There was no other vehicle on the road.) It twice bumped the berm. It traveled another 34 feet, went over the berm and off of the road's left edge (Tr. 68). These things would not have happened if VanVonderen had maintained control while the loader was in motion.

Although Daanen & Janssen points to Pavlat's testimony that he did not "know for a fact that [VanVonderen] was out of control" (Op. br. 32 citing to Tr. 137), I do not find this compelling or conclusive. Of course Pavlat did not "know for a fact." The only person who knew with absolute certainty was VanVonderen. Violations can be found by induction. Here, the record provides no other logical explanation for the accident than that VonVonderen failed to maintain control, and I conclude that the violation occurred as charged.

In reaching this conclusion, I recognize there is an argument to be made that section 56.9109 contemplates the equipment operator be conscious while operating the moving vehicle, and that proof he or she is not, obviates the violation. However, I do reach this argument because the evidence does not permit finding VanVonderen was unconscious. If anything, the

injuries to his forearms (Tr. 133) and the fact that he was sitting up straight when the loader went off the edge (Tr. 359), suggest exactly the opposite.

S&S AND GRAVITY

The violation was both S&S and very serious. The failure to maintain control of the loader while it was in operation on a road with deep drop offs on both sides and with a grade of approximately 10 percent was reasonably likely to result in an injury of a reasonably serious nature; and, in fact, resulted in death.

NEGLIGENCE

Pavlat described the negligence of Daanen & Janssen as "moderate" (Tr. 80). He based this assessment on Bray's reported statement that VanVonderen had a history of operating the loader at excessive speeds and that it was "commonplace" for him to speed (Tr. 148, 150). However, there is insufficient evidence to support Pavlat's assessment.

Bray was called as the Secretary's witness and Bray never was asked whether he had any knowledge of VanVonderen's driving habits and if so, what those habits were. Aside from Bray, Pavlat identified by name no other person who gave him information about VanVonderen's alleged propensity to speed. Further, Bray was not a reliable judge of speed. He was asked if he was able to tell how fast a loader was going when he saw one being operated, and he replied he could not (Tr. 351).

Moreover, even if I could find that VanVonderen had a propensity to speed, the record contains no indication that Daanen & Janssen knew or should have known about it. Pavlat testified that VanVonderen "pretty much worked by himself" (Tr. 80). Kinney testified he never saw VanVonderen driving at what Kinney considered excessive speed (Tr. 334), and when counsel for the Secretary asked Bray whether Bray ever observed VanVonderen operating the loader with excessive speed when Kinney was present, Bray responded, he had not (Tr. 357-358). Finally, there is no suggestion Daanen & Janssen was deficient in training or disciplining VanVonderen.

Therefore, I conclude that Daanen & Janssen was not negligent.

CIVIL PENALTY ASSESSMENT

The violation was a direct cause of VanVonderen's death. It was both S&S and very serious. The violation was not the result of the company's negligence. The company is small, as is its history of previous violations. The other civil penalty criteria warrant neither increasing nor decreasing the penalty assessed. I conclude that a penalty of \$400 is appropriate.

DOCKET NO. LAKE 95-183-RM
DOCKET NO. LAKE 95-352-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Proposed Penalty</u>
4318584	56.9300(a)	10/6/94	\$ 5,000

The citation states in pertinent part:

The ... front end loader operator was fatally injured when the loader he was operating went through a berm and off the edge of a 40 foot elevated roadway ... The loader pushed out the boulders and some of the other materials used for berm prior to going over. The boulder material used for the berm failed to impede or moderate the force of the loader, which would have provided the operator an opportunity to regain control of the vehicle. Some of the remaining berm was below mid axle height on the equipment involved in the accident (Joint Exh. 1D).

Section 56.9300(a) states:

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

Section 56.9000 defines a "berm" as:

A pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway.

THE VIOLATION

The essence of the alleged violation is that the berm failed to impede the loader from going over the edge of the road. "Impede" is defined as, "to interfere with or to get in the way of the progress of" (Webster's 1132). It is a word containing

the same concept of delaying and inhibiting as the word "restraining." Referring to the berm standard for surface coal mines (30 C.F.R. § 77.1605(k)) -- a standard wherein a "berm" is defined as "a pile or mound of material capable of restraining a vehicle" (30 C.F.R. § 77.2(d)), the Commission stated that "[r]estraining a vehicle" does not mean ... absolute prevention of overtravel ... under all circumstances". Rather, it means "reasonable control and guidance of vehicular motion" (United States Steel Corporation, 5 FMSHRC 3 at 6, n.6 (January 1983)).

Because I conclude that the meanings of "berm" in the metal and nonmetal mine berm standard and the surface coal mine berm standard are the same, I find that "to impede the vehicle's passage over the bank of the roadway," the berm need not prevent overtravel but must allow for reasonable control and guidance of vehicular motion.

This is precisely the way in which Pavlat interpreted the standard. He consistently testified that he found a violation of section 56.9003(a) because, in his judgement, the berm did not hinder sufficiently the loader's motion to allow VanVonderen to regain control.

However, Pavlat's proper interpretation does not establish a violation. The Commission also has held that under a standard such as section 56.9300(a), the adequacy of a berm must:

.... be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. [T]he Secretary is required to present evidence showing that the operator's berms ... do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadways elevation and angle of incline, and the amount, type, and size of traffic using the roadway (United States Steel Corporation, 5 FMSHRC at 5).

Neither Pavlat nor any other of the Secretary's witnesses presented such evidence. Pavlat speculated that the composition and the dimensions of the berm were the cause of its inability to impede the loader. He described the berm as not having a consistent composition and as having "multiple heights" (Tr. 82).

He suggested that the inclusion of smooth bottoms stones and boulders in the berm may have contributed to the alleged violation because the smooth bottomed made the rocks more susceptible to sliding (Id.). He speculated that the berm should have been wider and composed of something other than the stones used (Tr. 83-84, 88).

However, Pavlat did not know what that something else should have been. When I asked him, the following exchange took place:

Judge: And what should [the berm] have been made up with?

Pavlat: I think there were gaps between the berm. There wasn't a solid stone. Additional height. We talk about a mid axle height. Now that's not the basis of this citation, but volume -- we're talking about the minimum requirements. Considering the nature of the roadway the vehicle was traveling --I think there should have been twice as much berm there.

Judge: Well, is it the materials themselves that constitute the violation or is it the amount of the materials?

Pavlat: I don't feel as though you can separate it. It's both.

Judge: So in your opinion, could Daanen & Janssen have complied by using the same type of rock ... only had more of it?

Pavlat: Wider, wider area, possibly could have done it. I don't know specifically what would have done it I know this didn't (Tr. 84-85).

Later, the company's counsel asked Pavlat about this testimony.

Counsel: In ... response to one of the Judge's questions you testified that you don't really know what could have been or would have been enough with respect to the berm to do the job; is that true?

Pavlat: True.

Counsel: Then how would the company know?

Pavlat: I don't know (Tr. 187).

The combination of speculation and lack of knowledge offered to prove the alleged violation does not provide a basis for finding what kind of harm a reasonably prudent person would have provided under the circumstances. Therefore, I conclude that the Secretary did not prove a violation of section 56.9300(a).

ORDER

DOCKET NO. LAKE 95-180-RM
DOCKET NO. LAKE 95-290-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318581	56.14130(h)	12/16/94

The Secretary is **ORDERED** to modify the citation by deleting the S&S finding. Daanen & Janssen is **ORDERED** to pay a civil penalty of \$50 within 30 days of the date of this decision.

DOCKET NO. LAKE 95-181-RM
DOCKET NO. LAKE 95-313-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318582	56.14101(a)(3)	12/16/94

The Secretary is **ORDERED** to modify the citation by deleting the S&S finding and to change the authority under which the citation is issued to section 104(a) of the Act (30 U.S.C. § 814(a)). Daanen & Janssen is **ORDERED** to pay a civil penalty of \$300 within 30 days of the date of this decision.

DOCKET NO. LAKE 95-182-RM
DOCKET NO. LAKE 95-183-RM
DOCKET NO. LAKE 95-352-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318583	56.9101	12/16/94

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318584	56.9300(a)	10/6/94

Daanen & Janssen is **ORDERED** to pay civil a penalty of \$400 (Citation No. 4318583) within 30 days of the date of this decision and the Secretary is **ORDERED** to vacate Citation No. 4218584 within 30 days of the date of this decision.

Upon receipt of the payments and upon modification and vacation of the citations, these proceedings are DISMISSED.

David F. Barbour

David F. Barbour
Administrative Law Judge

Distribution:

Christine Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (Certified Mail)

Eric E. Hobbs, Esq., John J. Kalter, Esq., Michael, Best, & Friedrich, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108 (Certified Mail)

Ernest K. Alvey, Conference and Litigation Representative, 515 West 1st Street, No. 228, Duluth, MN 55802 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

OCT 28 1996

CONTRACTOR'S SAND AND : EQUAL ACCESS TO JUSTICE
GRAVEL, INC., : PROCEEDING
Applicant :
v. : Docket No. EAJ 96-3
SECRETARY OF LABOR, : Formerly WEST 93-462-M
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

**FINDINGS AND AWARD OF FEES AND OTHER EXPENSES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

This case is before me on an Application for Award of Attorney's Fees and Other expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, et seq. filed with the Federal Mine Safety and Health Review Commission ("FMSHRC") on April 24, 1996.

I

The Underlying Proceedings

On June 28, 1993, the Secretary filed a Proposal for the Assessment of Civil Penalty with respect to Citation No. 3911909 (included in Docket No. WEST 93-462-M). The Secretary proposed a \$7,000.00 penalty for the alleged violation of the electrical grounding standard set forth at 30 C.F.R. § 12025. In addition, on July 8, 1994, the Secretary filed an action to assess a \$6,000.00 penalty against corporate agent Eric Schoonmaker alleging a knowing violation of the same electrical grounding standard 30 C.F.R. § 12025 (Docket No. 94-409-M). These matters were the underlying action that was part of consolidated proceedings against the Applicant which involved nine dockets and 29 total citations.

In October 1995, the parties filed cross-motions for Summary Decision agreeing that there were no material facts in dispute and seeking a Decision on the pleadings on Citation No. 3911909. On March 25, 1996, I issued my Summary Decision¹ vacating Citation 3911909 in both dockets and dismissing the 110(c) action

¹ My Decision of March 25, 1996, is attached as Appendix A.

against Eric Schoonmaker. In that decision I vacated the \$13,000 proposed penalties for Citation No. 3911909.

On April 24, 1996, Contractors Sand and Gravel Supply, Inc., ("Applicant") through its counsel Gregory Ruffennach, Esq., filed its Application for an Award of Fees and Expenses Under the Equal Access to Justice Act.

II

The April 24, 1996 Application under EAJA

In the April 24, 1996 Application under the EAJA, Applicant, Contractor's Sand and Gravel, Inc., seeks to recover attorney fees and other expenses from Respondent, Secretary of Labor, Mine Safety and Health Administration. The attorney fees and other expenses were incurred by Applicant when it successfully challenged Citation No. 3911909 in the underlying civil penalty proceeding in Docket No. WEST 93-462-M.

The Secretary does not dispute that Applicant "prevailed" in the underlying proceedings when I issued a Summary Decision in favor of Applicant (then Respondent) on March 25, 1996. The Summary Decision, which vacated Citation No. 3911909, resulted in the dismissal of a \$7,000 assessment against Applicant and a \$6,000 assessment against Applicant's general manager. The Summary Decision also enabled the parties to negotiate a settlement of the remaining eight consolidated civil penalty dockets.²

In the Application, Applicant also seeks to recover attorney fees and other expenses from the Secretary that were incurred in connection with preparing and defending the Application in the instant EAJA proceeding, Docket No. EAJ 96-3. Periodically, during the course of this EAJA proceeding, Applicant moved to amend its April 24, 1996, Application to reflect additional attorney's fees and other expenses that had been incurred as a result of the Secretary's opposition to the Application. I granted each of the motions to amend the April 24, 1996, Application.

As a preliminary matter, I find, and the Secretary has not disputed, that Applicant, having a net worth of less than \$7 million and fewer than 500 employees, is "eligible" for an award of attorney fees under the EAJA. 29 C.F.R. § 2704.104. I further find, and the Secretary has not disputed, that the April 24, 1996, Application meets all of the present requirements for an application for an award of attorney fees and other expenses set out by the Commission Rules that presently implement the Equal Access to Justice Act, 29 C.F.R. § 2704.204.

² The May 28, 1996 "Decision after Remand Approving Settlement" of the remaining eight consolidated penalty dockets is attached as Appendix B.

In considering the remaining issues presented by the April 24, 1996, Application, as amended, I am addressing the two dockets, for which Applicant is requesting fees, separately.

A. Fees and Other Expenses for the Underlying Proceeding

In its Application, as amended, Applicant seeks to recover \$19,669.72 in attorney fees in connection with the underlying proceeding, Docket No. WEST 93-462-M, and \$4,457.83 in total expenses. In his Answer, the Secretary opposed such an award on two basic grounds. First, the Secretary argued that its position in the underlying proceeding was "substantially justified." Second, the Secretary argued that Applicant's fee request was excessive. I address each of the Secretary's arguments in turn.

B. Substantial Justification

Under the EAJA, a prevailing party may recover attorney fees "unless ... the position of the United States ... [is] substantially justified." 5 U.S.C. § 504(a)(1). The Supreme Court has stated that "substantially justified" means "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis in both fact and law." Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 2550, 101 L.Ed. 490 (1988). To make a showing of substantial justification, the Secretary bears the burden of proving that his position was reasonable in law and fact. 29 C.F.R. § 2704.105.

In the underlying proceeding, I clearly indicated that the Secretary's position was unreasonable. The Secretary argued that the electric motors at issue were not effectively grounded as required by the cited standard (30 C.F.R. § 56.12025) because they used crusher frame as a ground path. Having considered both aspects of this argument, I again find that the Secretary's legal theory was not reasonable and that there was no reasonable connection between the Secretary's legal theory and the undisputed facts.

I find the Secretary's legal interpretation, that the cited standard prohibited frame grounding, an unreasonable one. In my Summary Decision I stated:

The Secretary should not be permitted through interpretation to expand the regulation beyond its plain meaning. The Secretary's purported longtime interpretation of the regulation to prohibit per se frame grounding constitutes an impermissible expansion of the plain meaning of the standard.

Summary Decision at p. 4-5. Any interpretation that "impermissibly" ignores the plain meaning of a cited standard, is per se

unreasonable. Lancashire Coal Co. v. Secretary of Labor, 968 F.2d 388, 393 (3rd. Cir., 1992) ("We cannot conclude that the Secretary's interpretation is reasonable in this case insofar as it conflicts with the language of the statute.") Had the Secretary's legal interpretation been reasonable, I would have considered according it deference. Wamsley v. Mutual Mining, Inc., CA Nos. 95-1130 and 95-1212 (4th Cir. April 3, 1996) ("the Commission should have deferred to the Secretary's interpretation of the Act if it found that interpretation to be a reasonable one.")

Again, on review of the record, I find that there is no reasonable interpretation of the facts that supports the Secretary's theory that the motors were not effectively grounded. I specifically held in my Decision that:

the motors in question were connected with the ground to make the earth part of the circuit. There is no contrary evidence.

Summary Decision at p. 5 (emphasis added). Because there was "no contrary evidence," i.e. no evidence which could have supported the Secretary's theory that there was not an effective ground, the connection between the facts alleged and the legal theory advanced by the Secretary was unreasonable.

Moreover, in addressing Applicant's fair notice argument, I made a specific finding with respect to reasonableness of the connection between the Secretary's facts and the law. I found:

With respect to the application of the reasonable, prudent person test, I find that a reasonable, prudent person familiar with the mining industry would have recognized that the two motors, which were connected to earth through a series of metal frame and wire connections, were grounded and were, thus, in compliance with requirement of the cited regulation.

Summary Decision at p. 5 (emphasis added).

The Secretary offered nothing in this proceeding to persuade me that my findings of unreasonableness in the underlying proceeding were incorrect. The Secretary merely reiterates arguments that I have previously considered and rejected.

In this connection, I would point out that all the other administrative law judges that have considered the Secretary's legal theory have concluded that it is not reasonable. See e.g. Mulzner Crushed Stone Company, 3 FMSHRC 1238 (Laurenson, May 1981), McCormick Sand Corporation, 2 FMSHRC 21, 24 (Michaels, 1980); Tide Creek Rock, Inc., 18 FMSHRC 390, 396 (Manning, March

25, 1996). While the unappealed decisions of the other administrative law judges are not determinative on the issue of substantial justification, the decisions are strong indicia that Secretary's litigation position was unreasonable. Pierce, 487 U.S. 552, 567-572, 108 S.Ct. 2541, 2551-53, 101 L.Ed. 490 108.

The unreasonableness of the Secretary's position is clearly evident from the plain language of the regulation in the underlying proceeding. Haitian Refugee Center, 791 F.2d 1489, 1497 (D.C. Cir. 1986) (citing Spencer v. NLRB, 712 F.2d 539, 559-60 (D.C. Cir. 1983); see also Jean v. Nelson, 863 F.2d 759, 767 (11th Cir. 1988). As I emphasized in my Summary Decision, the Part 56 regulations, as well as the National Electrical Code, clearly define "grounded" in a manner that does not support the Secretary's legal interpretation of the cited standard. The Secretary's contrary interpretation was never published in MSHA's Program Policy Manual.

Based on all of the foregoing, I conclude that the Secretary's litigation position in this matter was not substantially justified.

Given the unreasonableness of the Secretary's litigation position under the established facts of this case, I do not find it necessary to address the reasonableness of the Secretary's pre-litigation positions. 5 U.S.C. § 504(b)(1) (E). I would point out, however, that I have some difficulty with MSHA's decision not to test the effectiveness of the ground path during the original inspection and the Secretary's subsequent decision to ignore post-citation test results that showed the ground paths in place were effective.

C. Fee Request

Having determined that the Secretary's position is not substantially justified, I address the Secretary's arguments that Applicant's fee and expense request is "excessive." The Secretary identified three grounds on which I could find that Applicant's request for fees and expenses is excessive. First, the Secretary argued that Applicant improperly sought to recover attorney fees for work associated with the other consolidated dockets. Second, the Secretary argued that the rate at which Applicant sought to recover attorney fees was "too high." Third, the Secretary argued that Applicant is not entitled to recovery expenses. I address the Secretary's arguments in the order that they were presented.

D. Apportionment of Work Related to Other Dockets

The Secretary's primary argument against the amount of the fee request is that Applicant sought to recover attorney fees for work that can be attributed, in part, to the other consolidated

dockets. Although Applicant has not sought recovery for work that it categorized as "Other Fees," i.e. work completely attributable to the other consolidated dockets, Applicant has sought recovery for some work related to Docket No. WEST 93-462-M that overlaps with the work on the other dockets.

Before addressing the Secretary's argument, I would first point out that the Secretary has not questioned any specific time entries for which Applicant has sought recovery of attorney fees in connection with Docket No. WEST 93-462-M. The legal invoices that support the Application carefully and meticulously document the work that counsel for Applicant performed in connection with Docket No. WEST 93-462-M. I find that the work performed by counsel for Applicant was reasonable and led to an efficient resolution of the underlying civil penalty proceeding and the other consolidated dockets. I further find that the hours dedicated to the work performed were also reasonable and reflect counsel's proficiency in handling safety and health cases before the FMSHRC.

In this connection, the Secretary has not challenged the work that Applicant has categorized as "Direct Fees." Applicant has requested reimbursement of 96.15 hours for work that was directly attributable to the contest of Citation No. 3911909. I conclude that these Direct Fees, totaling 96.15 hours, were reasonable and hereby award these hours to Applicant.

The Secretary's first point of contention is with the work categorized by Applicant as "Necessary Fees." The Secretary does not apparently dispute that this work would have been performed regardless of the existence of the other consolidated dockets. Rather the Secretary argues that because this work incidentally advanced the other consolidated dockets, Applicant should only received partial recovery for this work. The Secretary's contention is rejected. I credit Applicant's representation and find this work was necessary for Applicant to achieve summary decision in Docket No. WEST 93-462-M. The fact that this work incidentally advanced other dockets is irrelevant. See Jean v. Ellen, 863 F.2d 759, 772 (11th Cir. 1988) ("fee award should exclude time spent on unsuccessful claims except to the extent that such time overlapped with related successful claims.") (quoting Trezevant v. City of Tampa, 741 F.2d 336, 341 (11th Cir. 1984)). I conclude that these Necessary Fees, totaling 38.26 hours, were reasonable and hereby award these hours to Applicant.

The Secretary's second point of contention is with the work categorized by Applicant as "Proportional Fees." Although this work advanced all of the consolidated dockets (similar to the so-called "Necessary Fees"), it took more time for counsel for Applicant to complete due to the number of citations (27 in all) in the other consolidated dockets. Although the parties agree that some type of proportional recovery may be appropriate with

respect to this work, they disagree markedly on the formula for making the apportionment.

The Secretary has proposed a 3 percent apportionment based on a mathematical count of citations in all of the consolidated dockets. The Supreme Court, however, has expressly rejected the method of apportionment advocated by the Secretary. Hensley v. Eckerhart, 461 U.S. 424, 435 n. 11, 103 S.Ct 1933, 1940 n. 11, 76 L.Ed.2d 40, 52 n.11 (1983) ("We agree with the District Court's rejection of a mathematical approach computing the total number of issues in the case with those actually prevailed upon."); see e.g. Naekel v. Department of Transportation, 884 F.2d 1378, 1379 (Fed.Cir. 1989); Brandeis School v. NLRB, 871 F.2d 5, 7 (2nd Cir. 1989). Given the extent of the arguments submitted in the consolidated dockets, I find it highly unlikely that counsel for Applicant dedicated equal time to each of the 28 citations at issue. Therefore, I do not adopt the Secretary's formula for apportionment.

Applicant, on the other hand, originally proposed a 60 percent apportionment based on the proportion of civil penalties attributable to Citation No. 3911909. Of the approximately \$21,000 in civil penalties at issue in the consolidated dockets, \$13,000 or roughly 60 percent, were attributable to Citation No. 3911909. Applicant subsequently amended its Application to request an 85 percent apportionment. Applicant, citing Hensley, based the additional 15 percent increase on the overall success achieved by Applicant in negotiating a favorable settlement in the remaining consolidated dockets based on the strength of its victory in the underlying proceeding.

In determining the appropriate apportionment in this case, I note that the determination in the first instance is committed to my discretion. Hensley v. Eckerhart, 461 U.S. at 437, 103 S.Ct at 1941, 76 L.Ed.2d at ___ (1983); See Pierce, 487 U.S. at 571, 108 S.Ct. at ___, 101 L.Ed. at 508. I find that Applicant's motivation in contesting Citation No. 3911909 and the other citations was based, at least in part, on the total amount of the fines assessed by MSHA. As I noted in my Summary Decision, "Citation No. 3911909 is the most significant of the citations" among the consolidated dockets in that it resulted in \$13,000 in civil penalty assessments. Summary Decision at p. 3. I further find that when I vacated Citation No. 3911909 it provided Applicant with leverage to expeditiously negotiate a 75 percent reduction in the remaining civil penalty assessments, thereby further demonstrating its importance. Given the relative importance of Citation No. 3911909 and its relation to Applicant's overall success, I find that it is reasonable to assume that counsel for Applicant, having a firm grasp of the stakes involved, dedicated 85 percent of his attention and efforts to Citation No. 3911909 when working on tasks that involved multiple citations. There-

fore, I adopt the 85 percent apportionment proposed by Applicant. I conclude that these Proportional Fees, totaling 27.48 hours (85 percent of 32.33 hours), were reasonable and hereby award these hours to Applicant.

E. Rate For Recovery of Attorney Fees

Applicant requested that attorney fees be reimbursed at a rate of \$121.50 per hour. The Secretary argued that the EAJA and the Commission Rules limit the attorney fee rate to a maximum of \$75.00 per hour. Although Applicant acknowledges that both the EAJA and the Commission Rules establish a maximum rate of recovery of \$75.00 per hour, Applicant argues that both the statute and the Rules authorize the Commission, through rulemaking, to adjust the maximum attorney fee rate based on increases in the cost of living.

The EAJA does not expressly authorize the Commission to promulgate a legislative type regulation that would have a retroactive effect. I therefore address only Applicant's request for adjudicatory rulemaking.

The EAJA expressly authorizes the Commission to increase the maximum attorney fee rate where "justified." The EAJA provides:

attorneys fees shall not be awarded in excess of \$75.00 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor ... justifies a higher fee.

5 U.S.C. § 504(b)(1)(A) (ii) (emphasis added). The EAJA does not specify whether the agency is required to announce such a "regulation" in an adjudicatory or legislative type rulemaking proceeding.

Similarly, the Commission Rules do not specify how such a "regulation" is to be announced. The Rules merely reiterate the statutory provision:

If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by these rules.

29 C.F.R. § 2704.107 (emphasis added). By setting out procedures for filing a petition for legislative type rulemaking, however, the Commission Rules appear to contemplate quasi-legislative rulemaking, 29 C.F.R. S 2704.107(b). On the other hand, there is nothing in the Commission Rules that specifically requires that such "regulations" be promulgated through quasi-legislative rulemaking pursuant to the Administrative Procedures Act ("APA"). See 29 C.F.R. S 2704.107(a). Absent an express statement that formal legislative type rulemaking proceedings are required, I am not inclined to curtail the Commission's discretion to announce such a regulation in an adjudicatory proceeding.

In this connection, I note that it is well established that an agency, such as the Commission, can opt to announce a regulation through adjudicatory rulemaking during ad hoc litigation instead of pursuing legislative type rulemaking under the Administrative Procedures Act (APA). SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed 1995 ____ (1947); NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-93, 94 S.Ct. 1757, ____, 40 L.Ed. 134, 153 (1974). Given that cost of living adjustment is a determination that is "varying in nature," in that the cost of living continually changes, I conclude that it is well within the Commission's discretion to announce a regulation increasing the maximum attorney fee rate in an EAJA proceeding. Chenery, 332 U.S. at 202-03, 67 S.Ct. at 1580, 91 L.Ed. at 2002.

Although it is clear the announcement of a retroactive rule is not generally permitted in legislative type rulemaking, it is permitted in an adjudicatory rulemaking. In Motion Pictures Ass'n of America Inc. v. Oman, 969 F.2d 1154 (1992), the D.C. Circuit noted:

In adjudication, retroactivity is the norm;
in legislation it is the exception.

969 F.2d at 1155, see also Bowen, 488 U.S. 204, 221, 109 S.Ct. 468, ____, 102 L.Ed. 492, 508 (1988) (J. Scalia concurring) (in agency adjudications "retroactivity is not only permitted by the standard."). Thus, the absence of an express statutory grant of retroactive rulemaking authority in the EAJA does not prohibit the Commission from announcing a retroactive rule in an adjudicatory EAJA proceeding.

It is noteworthy that the federal courts routinely make retroactive cost of living adjustments to the maximum attorney fee rate in EAJA cases involving civil actions. See e.g. Wilkett v. I.C.C., 844 F.2d 867, 875 (D.C. Cir. 1988); Perales v. Casillas, 950 F.2d at 1076 (5th Cir. 1992); Chiu v. United States, 948 F.2d 711, 718 (Fed. Cir. 1991); Garcia v. Schweiker, 829 F.2d 396, 3rd Cir. 1987); Compare Hoffman v. C.I.R., 978 F.2d 1139, 1150 (9th Cir. 1992) (authorizing COLA increase under statute modeled after EAJA which permits recovery of attorney

fees in tax cases). These courts have reasoned that in enacting the cost of living provision, Congress intended the EAJA to be "self updating in light of the modern realities of inflation." Perales, 950 F.2d at 1076. There is nothing in the EAJA which would indicate to me that Congress intended the statute to be "self-updating" with respect to participants in "civil actions" but not with respect to participants in "agency adjudications." Compare 28 U.S.C. § 2414(d)(2)(A)(ii) and 5 U.S.C. § 504(b)(1)(A)(ii).

It would appear that any holding to the contrary would, for all practical purposes, make the cost of living provision superfluous. As set out above, the EAJA unambiguously authorizes cost of living adjustments to the maximum rate. 5 U.S.C. § 504(b)(1)(A)(ii). The cost of living provisions was specifically included by Congress to protect the EAJA's maximum attorney fee rates from inflationary pressures. See Action on Smoking and Health v. C.A.B., 724 F.2d 211, 217 (D.C.Cir. 1984) ("The cost of living language reflected congressional awareness that, with inflation, the fee limiting provision could defeat the purpose of the statute."). Since the enactment of the EAJA in 1981, the Commission has not undertaken legislative type rulemaking to adjust the maximum attorney fee rate for increases in the cost of living. Were I to hold that the Commission did not have authority to announce a retroactive rule in this EAJA proceeding, Applicant, having incurred legal expenses at 1995 and 1996 attorney fee rates, would be reimbursed at the attorney fee rate established in 1981. Such a holding would effectively read the cost of living provision out of the statute.

To construe the statute in a manner that gives no effect to the cost of living provision would defeat the purpose of the EAJA. The central objective of the EAJA "was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." Spencer v. N.L.R.B., 712 F.2d 539, 549-50 (D.C. Cir. 1983) (citations to the legislative history omitted). In this case, an award at \$75 per hour would not satisfy the Congressional objective. Applicant, a relatively impecunious private party as indicated by its net worth statement, successfully challenged an unreasonable MSHA policy. In so doing, Applicant incurred legal fees totaling approximately \$20,878.50. If Applicant is compensated for attorney fees at \$75 per hour, the award for attorney fees in Docket No. WEST 93-462-M would only reach \$12,144. The difference of \$8,734.50 is what I consider "a large litigation expense" that Congress did not intend Applicant, being an impecunious operator, to bear.

Given that the Commission has authority to announce a regulation increasing the maximum attorney fee rate in this EAJA proceeding, I find that increases in the cost of living between

September 1981, when the EAJA was enacted, and December 1994, when legal services were first rendered to Applicant, "justify" an increase in the maximum attorney fee rate. Oklahoma Aerotronics, Inc. v. United States, 943 F.2d 1344, 1349 (D.C. Cir. 1991) (citing Wilkett v. I.C.C., 844 F.2d 867, 875 (D.C. Cir. 1988)). The Consumer Price Index ("CPI") when counsel for Applicant was first retained in December 1994 was 149.7. United States Department of Labor Bureau of Labor Statistics, CPI Detailed Report, Data for December 1994: Consumer Price Index for All Urban Consumers (CPI-U), All Expenditures at p.7. The CPI when the EAJA went into effect in September of 1981 was 92.2. Id. By dividing the CPI for December 1994 by the CPI for September 1981, I find that the cost of living increased by a multiplier of 1.62. This undisputed increase in the cost of living justifies a higher rate of \$121.50 which is the statutory maximum of \$75 per hour adjusted by the 1.62 multiplier.

In light of the foregoing, I find that in connection with the attorney fees incurred in Docket No. WEST 93-462-M, Applicant is entitled to recover the hours awarded above at the rate of \$121.50.

F. Expenses

Applicant seeks to recover "other expenses" in addition to the attorney fees. The Secretary opposes an award of expenses to Applicant, arguing that such expenses are not authorized under the EAJA.

The EAJA states that "fees and other expenses" can be recovered. 5 U.S.C. 504(a)(1). Although the EAJA does not provide an exhaustive list of expenses that can be included in an award, the examples included the definition of "fees and other expenses" indicate that a large category of expenditures are reimbursable. Jean v. Nelson, 863 F.2d 759, 777 (11th Cir. 1988). The EAJA provides:

"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the parties' case, ...

5 U.S.C. § 504 (b) (1) (A).

The Commission, through legislative type rulemaking, has interpreted the statutory language to permit recovery of expenses of the type sought by Applicant. The Commission Rules provide:

... an award may also include the reasonable expenses of the attorney, agent, or witness

as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

29 C.F.R. § 2704.106 (emphasis added); see also 46 Fed. Reg. 15895, 15897-8 (March 10, 1981) ("'Reasonable expenses' is intended to include the types of expenses customarily charged to clients, such as travel expenses or photocopying, but not items ordinarily included in hourly fees, such as secretarial services.")

The interpretation set out in the Commission's Rules is consistent with the weight of authority in the federal circuit courts of appeal. The majority of federal courts have construed "fees and other expenses" language in the EAJA to encompass "costs that are ordinarily billed to a client." International Woodworkers of America v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985) (telephone, air courier, attorney travel expenses are recoverable); See e.g. Alston v. Secretary of Health and Human Services, 808 F.2d 9, 12 (2d. Cir. 1986) (telephone, postage, travel and photocopying expenses are recoverable); Jean v. Nelson, 863 F.2d 759, 777 (11th Cir. 1988) (litigation expenditures recoverable): but see Massachusetts Fair Share v. Law Enforcement, 776 F.2d 1066, 1069-70 & nt.2 (D.C. Cir., 1985).

In this case, Applicant seeks to recover two categories of expenses: "additional charges" and "interest." Both categories of expenses are separately and prominently itemized on the legal invoices that support the Application.

With respect to the "additional charges," I find that long distance calls, postage, duplication, photocopies, fax, express mail, court reporter, and Westlaw are the type of expenses that would ordinarily be billed separately to clients. Counsel for Applicant represented that these charges are ordinarily billed separately to clients and the Secretary has not argued to the contrary. I further find that these additional charges are reasonable expenses of counsel. None of the additional charges appear to be excessive and all of the additional charges were necessary to enable counsel to advance Applicant's case. Therefore, I award \$2,118.81 for the expenses identified as additional charges.

In considering Applicant's request for "interest," I am mindful that as a general rule, interest awards are not available against the United States. See Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 2961, 92 L.Ed. 250 (1960). Applicant, however, is not seeking an award of interest against the United States. Specifically, Applicant is not asking for compensation from the United States for delay in payment by the United States. Rather, counsel for Applicant seeks compensation from Applicant for delay in its payment of legal invoices in the form of

"interest on overdue balances." I find that the interest expense, which has resulted from Applicant's delay in payment, is a reasonable cost of providing legal or any type of service. I further find, as Counsel has represented and the Secretary has not disputed, that such interest is ordinarily billed separately to clients. Although it is true that Applicant could have avoided the interest expense by paying its legal invoices in a timely manner, I note that Applicant would not have had to pay any legal invoices whatsoever but for the Secretary's unreasonable attempt to enforce the underlying citation. Therefore, I award \$2,339.02 for the expenses identified as interest.

III

Fees and Other Expenses for EAJ 96-3

In addition to seeking fees and expenses incurred in connection with the underlying civil penalty proceeding, Applicant has also sought to recover fees and expenses incurred in presenting and defending its Application. In this connection, Applicant has moved to amend its original Application to request reimbursement for fees and expenses incurred in preparing, defending the Application. I have granted the motions to amend the Application. In the Application, as amended, Applicant seeks to recover \$17,027.50 in attorney fees in connection with its preparation and defense of the Application in this proceeding, Docket No. EAJA 96-3.

A. Fees for Fees

In considering Applicant's unopposed request, I adopt the position of D.C. Circuit and hold that a victorious EAJA applicant is entitled to recover fees and expenses incurred in connection with its EAJA application in an EAJA proceeding, regardless of whether the Secretary's opposition to the application was substantially justified or not. Cinciarelli v. Reagan, 729 F.2d 801, 810 (D.C. Cir. 1984); see also Trichilo v. HHS, 823 F.2d 702, 707 (2nd Cir. 1987); Jean v. Nelson, 148, 155 (3rd Cir. 1987); but see Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984). As the D.C. Circuit pointed out:

if we require every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit the government to claim that its first EAJA defense was substantially justified on the merits, we face the distinct possibility of an infinite regression of EAJA litigation.

729 F.2d at 810. Given that the Commission Rules are silent on the issue of fees for fees, I view Applicant's fees and expenses

incurred presenting and defending its Application "as part of the government's cost of taking positions that are not substantially justified." Trichilo, 823 F.2d at 707. I note that my holding appears to be consistent with the Secretary's position set out in his July 15, 1996, Prehearing response. ("The Secretary agrees that if the Court finds that the Secretary's position in the underlying proceeding was not substantially justified, Respondent can recover reasonable attorney fees including those incurred in the presentation of its [sic] application for fees.")

By so holding, however, I do not exempt Applicant's request for fees and expenses associated with this docket from review. The EAJA provides:

The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

5 U.S.C. § 504(a)(3); cf. 29 C.F.R. § 2704.105(b). Thus, I review Applicant's request for fees and expenses in connection with this EAJA proceeding under a standard of reasonableness.

In this proceeding alone, counsel for Applicant has expended over 128 hours of legal work. Although at first blush, it would seem that these hours are excessive, particularly considering that Counsel spent only 162 hours getting the citation vacated in Docket No. WEST 93-462-M, I nonetheless find that hours expended by counsel were reasonable.

First, I note that much of the work performed by counsel for Applicant focused on the substantial justification issue. Given that the Secretary argued that his position was substantially justified despite my summary decision in Docket No. WEST 93-462-M, I think that it was reasonable for counsel for Applicant to fully rebut the Secretary's arguments on this essential threshold issue.

Second, the instant proceeding raised numerous issues of first impression before the Commission. It appears that in the 15 years since the EAJA's enactment no other mine operator has ever won an award of attorney's fees and expenses against MSHA. I am aware of only one other EAJA decision issued by the Commission. Russell Collins and Virgil Kelley v. Secretary of Labor (MSHA), 5 FMSHRC 1339 (July 1983). The Collins case involved Section 110(c) proceedings and did not reach the issues of apportionment, rate, and expenses raised by the Secretary in this proceeding. Because of the numerous issues of first impression raised by the Secretary in this proceeding, counsel for Applicant

acted reasonably in thoroughly researching and briefing these issues. I additionally note that the research focused on complex issues of federal administrative law and conflicting federal circuit law.

Third, I further note that the "fees for fees" and the "adversary adjudication" issues addressed in this section also required counsel for Applicant to undertake considerable research and analysis.

In summary, I find that Applicant has not unduly or unreasonably protracted these EAJA proceedings. I hold that an award for the 136.22 hours requested in the Amended Application, pertaining to Docket No. EAJ 96-3, is just.

B. Adversary Adjudication

The final issue that I must address is the rate at which fees will be awarded for the hours requested in connection with the instant EAJA proceeding. On March 29, 1996, Congress amended the EAJA to raise the statutory maximum attorney fee rate to \$125 per hour. Pub.L. 104-121. The Amendments apply to "adversary adjudications commenced on or after the date of the enactment of this subtitle." *Id.* Although both parties agree that the new rate does not apply to the underlying proceeding, Docket No. WEST 93-462-M, Applicant argued that the new rate does apply to the instant EAJA proceedings while the Secretary argued that it does not apply.

I find that the instant EAJA proceeding is an "adversary adjudication" as defined by the EAJA. 5 U.S.C. § 504(b)(1)(c). An "adversary adjudication" is an adjudication "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a); see Escobar Ruiz v. INS, 838 F.2d 1020, 1023 (9th Cir. 1988). The EAJA requires EAJA proceedings, such as Docket No. EAJ 96-3, to be determined on the record after an opportunity for a hearing. 5 U.S.C. § 504(a); 29 C.F.R. § 2704 et seq.

I find no merit to the Secretary's arguments to the contrary. Although the instant EAJA proceeding, Docket No. EAJ 96-3, is admittedly related to the underlying civil penalty proceeding, Docket No. WEST 93-462-M, it is, nonetheless a separate and distinct adjudication. Compare 5 U.S.C. § 504(a) and 30 U.S.C. § 815; compare 29 C.F.R. § 2700 et seq. and 29 C.F.R. § 2700 et seq. and 29 C.F.R. § 2704 et seq. Moreover, because I have already decided that the substantial justification defense is not available with respect to a request for fees for fees, my treatment of the instant EAJA proceeding as an adversary adjudication, as that term is defined in the EAJA, will not create "an endless litigation loop" as the Secretary argues.

Given that the instant adversary adjudication, Docket No. EAJ 96-3, was commenced on April 24, 1996, after the effective date of the EAJA Amendments, I hold that the \$125 per hour rate applies to all fees incurred by Applicant in connection with Docket No. EAJ 96-3.

IV

CALCULATION OF AWARD

Based on the foregoing, I calculate the Applicant's award as follows:

Fees:	\$36,697.22	
WEST 93-462-M:		\$19,669.72
Direct:		\$11,682.25 (reflects 96.15 hours @ \$121.50)
Necessary:		\$4,648.59 (reflects 38.26 hours @ \$121.50)
Proportional:		\$3,338.88 (reflects 85% of 32.33 hours @ \$121.50)
EAJ 96-3:		\$17,027.50 (reflects 128.38 hours @ \$125.00)
Expenses: \$4,457.83		
Additional Charges:	\$2,118.81	
Interest:	\$2,339.02	
Total Award:		\$41,155.05

ORDER

In view of the foregoing, Applicant is **AWARDED** \$41,155.05 in attorney fees and other expenses in connection with Docket Nos. WEST 93-462-M and EAJ 96-3. Pursuant to 29 C.F.R. § 2704.310, the Secretary of Labor is hereby **ORDERED TO PAY** \$41,155.05 to Ruffennach Law Offices COLTAF c/o Contractor's Sand and Gravel, Inc., 1675 Broadway, Suite 1800, Denver, CO 80202 within 15 days of the date of this Order.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Room 1110, San Francisco, CA 94105-2999 (Certified Mail)

C. Gregory Ruffennach, Esq., RUFFENNACH LAW OFFICES, 1675 Broadway, Suite 1800, Denver, CO 80202 (Certified Mail)

/sh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAR 25 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-462-M
Petitioner	:	A.C. No. 04-04679-05510
	:	
v.	:	Montague Plant
	:	
CONTRACTORS SAND & GRAVEL	:	
SUPPLY, INCORPORATED,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 94-409-M
Petitioner	:	A.C. No. 04-04679-05514 A
	:	
v.	:	Montague Plant
	:	
	:	
ERIC SCHOONMAKER, owner & agent	:	
CONTRACTORS SAND & GRAVEL	:	
SUPPLY, INC.,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Cetti

I

Background

Contractor's Sand and Gravel, Incorporated, operates two small portable sand and gravel surface mining operations located near Yreka, California. The Scott River Plant has two employees and produces about 10,000 to 15,000 tons annually. The Montague Plant has two employees and produces about 10,000 to 15,000 tons annually.

Eric Schoonmaker, the company's general manager, oversees both operations. Mr. Schoonmaker's responsibilities include, for example, managing the business, directing sales, marketing and customer relations, organizing production, coordinating equipment maintenance and repair, and making sure that the operations are safe. He is also the company's primary liaison with regulating

authorities such as MSHA. He asserts the plant has been in operation for many years and passed all MSHA's electrical inspections until the grounding citation in question was issued on March 10, 1993, by Inspector Ann (Johnson) Frederick.

II

Mr. Schoonmaker is the 110(c) agent charged in Docket No. WEST 94-409-M with the knowing violation of 30 C.F.R. § 56.1205 at the Montague Plant. That safety regulation 30 C.F.R. § 56.1205 reads as follows:

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

The single citation at issue in both of the above-captioned dockets charges both the operator and the manager Eric Schoonmaker with the unwarrantable failure to comply with the above-quoted safety standard. The citation reads as follows:

The frame of the crusher was being used as the grounding conductor. The ground solid strand copper wire ran from a rod (found +18" below the surface near the van used as a control electrical installation) under the van through an underground pipe and connected directly to the frame of the portable crusher operation. Another jumper (solid copper wire) was found from the upper head pulley frame to the metal of the chute where the crushed rock transferred to the stacker conveyor belt. The wires from both motors found on these belts was SO P123 MSHA 14/3 stamped. No other visible grounds were found at the motors. Effective equipment ground conductors have not been installed as evidenced. The electrical grounding tests performed at the Montague plant and stated to on Sept. 15, 192 (1992) state that the grounding had been found to conform to applicable code. Frame grounding has been forbidden for over fifteen years. This is an unwarrantable failure by operator to comply with the standards.

Respondents do not dispute that the paths to ground for the stacker motor and crusher delivery motor passed through the frame of the crusher. Respondents do, however, dispute that such a grounding system violates the regulatory requirement of 30 C.F.R. § 56.12025.

Respondents' counsel asserts that Petitioner has not even established a prima facie case that the two motors in question were not grounded. Respondent contends that at the time the citations were issued, the two motors in question were effectively grounded. MSHA performed no test and has no other definitive evidence to show that the motors, at the time the citations were issued, were not effectively grounded or were, in any way, in violation of the plain, clear provisions of the cited safety standard.

Both parties agree that there is no dispute as to any material fact and that the matter is ripe for summary decision on the single legal issue of whether Respondent's reliance on the crusher and stacker frames to serve as the path to ground for the electric current violates the provisions of 30 C.F.R. § 56.12025. The parties have cross-moved for summary decision on this single legal issue.

Both parties agree that although the grounding issue is only one issue, among many, in the nine consolidated cases concerning 33 citations, Citation No. 3911909 is the most significant of the citations and has generated, by far, the largest of the proposed penalties in these cases. Although the parties here seek summary decision on only one of many issues in the consolidated cases, the parties agree that the resolution of the grounding issue will allow the remaining citations in the consolidated cases to be resolved by amicable settlement without need for a hearing.

STIPULATIONS

In March 1996, the parties entered into the record the stipulation that the record for summary decision on the grounding issue consists of the following:

1. Citation No. 3911909.
2. All pleadings filed with the presiding judge, including but not limited to, motions, oppositions, and prehearing statements, to show the respective litigation positions of and representations made by the parties.
3. Respondent's Request for Admissions and MSHA's Responses to Respondent's Request for Admissions; Respondent's Interrogatories and MSHA's Responses to Respondent's Interrogatories, Plaintiff's (Petitioner's) Interrogatories and Respondent's Responses to Petitioner's Interrogatories.
4. The affidavit of Eric Schoonmaker.
5. The declarations of Paul Price and Gordon Vincent.

6. The deposition transcripts of Paul Price, Ann (Johnson) Frederick, Eric Schoonmaker and Frank Casci.

7. Article 250 of the 1993 National Electrical Code (NEC), to show the NEC's definitions of "grounded" and "grounded, effectively."

8. Article 250 of the 1993 National Electrical Code (NEC), to show the electrical grounding requirements of the NEC.

9. Order No. 3913901, issued subsequent to Citation No. 3913895 and under contest in Docket No. WEST 93-141, to show that Order No. 3913901 was terminated.

10. Photographs A-1, A-2, A-3 and A-4 to show the equipment used at the Montague Plant.

11. August 3, 1995, letter from Paul Price to Mark Ode, to show that MSHA requested an interpretation of Article 250 of the 1993 National Electrical Code from the National Fire Protection Association.

12. August 14, 1995, letter from Mark Ode to Paul Price, to show the National Fire Protection Association's unofficial interpretation of Article 250 of the 1993 National Electrical Code as it applies to the hypothetical scenario set out in Mr. Price's August 3, 1995, letter.

The February 29, 1996, letter transmitting the above stipulations also states "the stipulated record contains a few items that have not been previously cited by the parties and attached to prior motions or pleadings. These items are being included to make the record complete for appeal purposes."

Both parties in their pleadings and arguments have stated their respective cases very well. Upon careful review of the record, I am persuaded that the undisputed material facts in this case do not establish a violation of 30 C.F.R. § 56.12025.

The cited standard 30 C.F.R. § 56.12025 plainly and clearly requires that "metal enclosing ... electrical circuits shall be grounded." The regulation is specific and not broadly worded. 30 C.F.R. § 56.12025 is a "performance standard." It does not specify or require that the operator achieve an effective ground in a specific manner.

I find that Respondent complied with the requirement of the cited standard by intentionally grounding the stacker conveyor and crusher discharge conveyor motors by using the stacker and crusher frames as conductors in carrying ground fault current to earth. Part 56 which sets forth the mandatory safety standards for surface nonmetal mines, such as we have here, clearly pro-

vides that "electrical grounding means to connect with the ground to make earth part of the circuit." 30 C.F.R. § 56.2. The company's resistivity tests conducted on September 15, 1992, pursuant to 30 C.F.R. § 56.12028 indicated that there was an effective path to ground from both of the motors. Thus, the motors in question were connected with the ground to make the earth part of the circuit. There is no contrary evidence.

The Secretary should not be permitted through interpretation to expand the regulation beyond its plain meaning. The Secretary's purported longtime interpretation of the regulation to prohibit per se frame grounding constitutes an impermissible expansion of the plain meaning of the standard. It constitutes an impermissible avoidance of the rulemaking requirements of section 101 of the Mine Act. Since the Secretary purports to impose additional requirements and prohibitions without proper rulemaking, it lacks the "force and effect of law". Western-Fuels Utah, Inc., 11 FMSHRC 278, 286-87 (March, 1989); see also Asarco Inc., 14 FMSHRC 829, 835 (1992).

If the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rulemaking to achieve its goal rather than attempting to do so by its interpretation of the regulation beyond its plain meaning. (See Mathies Coal Company, 5 FMSHRC 300, 303 (March 1983)).

With respect to the application of the reasonable, prudent person test, I find that a reasonable, prudent person familiar with the mining industry would have recognized that the two motors, which were connected to earth through a series of metal frame and wire connections, were "grounded" and were, thus, in compliance with the requirement of the cited regulation. I base this on the definition of grounding at 30 C.F.R. § 56.2 which specifically states that "electrical grounding means to connect to the ground to make the earth part of the circuit". 30 C.F.R. § 56.2.

In this connection, I also find it noteworthy that in the National Electrical Code, "grounded" is defined as "connected to earth or to some conducting body that serves in place of earth." NEC, Article 100 (definitions) (1993) and that "grounded effectively" is defined as "Intentionally connected to earth through a ground connection or connections of sufficiently low impedance and having sufficient current carrying capacity to prevent the buildup of voltages that may result in undue hazards to connected equipment or to persons. NEC, Article 100 (definitions) (1993).

Also noteworthy in the application of the reasonable prudent person test is the fact the Secretary's purportedly longstanding interpretation has never been published in MSHA's Program Policy Manual and furthermore, MSHA's purported interpretation is contrary to two unappealed, well-reasoned decisions of two Commis-

sion Judges who I believe to be reasonable, prudent persons familiar with the mining industry. See Mulzer Crush Stone Company, 3 FMSHRC 1238 (May 1981) in which Judge Laurenson rejected MSHA's contention that the frame was not a source of grounding. See also McCormick Sand Corporation, 2 FMSHRC 21, 24 in which Judge Michels rejected MSHA's contentions and held that 30 C.F.R. § 56.12025 "fairly read, requires only a "ground" or its equivalent. It does not mandate a particular ground such as that mentioned in the citation ..." I have not been able to find any Commission authority contrary to these two unappealed Administrative Law Judge decisions.

I conclude, primarily on the basis of the plain, clear language of the cited regulation, that Citation No. 3911909 should be vacated. I find nothing in the transcript and declaration of Paul Price, the transcript of Ann (Johnson) Frederick and the other material and arguments on which MSHA relies that persuades me to a contrary conclusion. Such testimony and arguments would be more appropriate in a section 101 rulemaking proceeding.

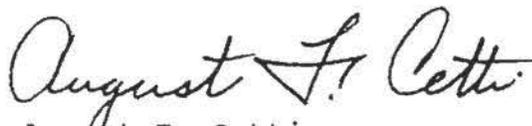
ORDER

Docket No. WEST 93-462-M

Citation No. 3911909 is **VACATED** and its related \$7,000.00 proposed penalty is set aside. I retain jurisdiction of the two remaining citations in the docket.

Docket No. WEST 94-409-M

Citation No. 3911909 is **VACATED**; its related \$6,000.00 proposed penalty is set aside. Docket No. WEST 94-409-M is **DISMISSED**.



August F. Cetti
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

C. Gregory Ruffennach, Esq., RUFFENNACH LAW OFFICES, 1675 Broadway, Suite 1800, Denver, CO 80202

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

MAY 28 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-62-M
Petitioner	:	A.C. No. 04-03404-05509
	:	
v.	:	Docket No. WEST 93-406-M
	:	A.C. No. 04-03404-05510
CONTRACTORS SAND & GRAVEL	:	
SUPPLY, INCORPORATED,	:	Docket No. WEST 93-407-M
Respondent	:	A.C. No. 04-03404-05511
	:	
	:	Docket No. WEST 93-463-M
	:	A.C. No. 04-03404-05512
	:	
	:	Scott River Plant
	:	
	:	Docket No. WEST 93-117-M
	:	A.C. No. 04-04679-05506
	:	
	:	Docket No. WEST 93-141-M
	:	A.C. No. 04-04679-05507
	:	
	:	Docket No. WEST 93-408-M
	:	A.C. No. 04-04679-05508
	:	
	:	Docket No. WEST 93-409-M
	:	A.C. No. 04-04679-05509
	:	
	:	Docket No. WEST 93-462-M
	:	A.C. No. 04-04679-05510
	:	
	:	Montague Plant

DECISION AFTER REMAND APPROVING SETTLEMENT

Before: Judge Cetti

These consolidated civil penalty proceedings are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charged the operator of the Scott River Plant and Montague Plant with numerous violations of safety standards set forth in Part 56, Title 30, Code of Federal Regulations.

A Default Decision was issued July 21, 1994, when there was no response to my Show Cause Order. Thereafter, the Commission reopened the matter and vacated the Default Decision and remanded the matter to this Judge.

Respondent then obtained counsel who filed a timely answer contesting the alleged violations. The matter was set for hearing which had to be canceled because of the medical condition of the principal witness. The parties then filed cross motions for summary decision. On March 25, 1996, I issued a Summary Decision vacating Citation No. 3911909 in Docket Nos. WEST 93-462-M and WEST 94-409-M and dismissing WEST 94-409-M.

At this time, the remaining consolidated cases are before me on petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties, by counsel, filed an amended motion to approve a settlement agreement of all the remaining citations. Under the proffered settlement there is a reduction in the amount of the proposed penalties for 12 of the citations and no changes in the original proposed penalties for 15 of the citations as follows:

<u>Citation No.</u>	<u>Health and Safety Standard Cited (CFR Title 30)</u>	<u>Original Proposed Penalty</u>	<u>Proposed Amended Penalty</u>
3911911	56.14107(a)	\$3,000.00	\$ 100.00
3636680	56.12013	267.00	100.00
3911916	56.12013	1,457.00	100.00
3911919	56.14132(b) (1)	987.00	100.00
3636674	56.14109(b)	168.00	100.00
3636675	56.14107(a)	220.00	100.00
3636676	56.14109	168.00	100.00
3914031	56.5050(b)	50.00	50.00
3911912	56.4200	50.00	50.00
3911914	56.4402	50.00	50.00
3911917	56.12013	50.00	50.00
3913895	56.12028	382.00	100.00
3913890	56.14112	147.00	100.00
3913891	56.14112(a)	147.00	100.00
3913892	56.15001	50.00	50.00
3913893	56.18002	50.00	50.00
3913894	56.14100	50.00	50.00
3913897	56.14107	50.00	50.00
3913883	56.15001	50.00	50.00
3911799	56.12041	50.00	50.00
3911903	56.12032	50.00	50.00
3911907	56.14107(a)	119.00	100.00
3911901	56.4200	50.00	50.00
3911904	56.14107(a)	50.00	50.00
3911905	56.14109(b)	50.00	50.00

3911902	56.12013	50.00	50.00
3911906	56.12020	337.00	100.00
		TOTAL	\$1,950.00

Under the proffered settlement agreement it is also agreed that, with the exception of those claims for fees and expenses set forth in Docket No. EAJ 96-3 filed with the Commission on April 24, 1996, each side shall bear its own costs and legal fees.

I have considered the representations and documentation including the pleadings, the detailed responses to the prehearing orders, the affidavits and various transcripts of the depositions submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent, Contractors Sand and Gravel Supply, Inc., **PAY** a penalty of \$1,950.00 to the Secretary of Labor within 30 days of this decision.

Payment shall be made to the Office of Assessments, Mine Safety and Health Administration, P.O. Box 160250-M, Pittsburgh, Pennsylvania 15251. Upon receipt of payment, the above-captioned proceedings are dismissed.



August F. Cetti
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

C. Gregory Ruffennach, Esq., RUFFENNACH LAW OFFICES, 1675 Broadway, Suite 1800, Denver, CO 80202

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

OCT 28 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-254
Petitioner	:	A.C. No. 05-02820-03735
	:	
v.	:	Docket No. WEST 95-255
	:	A.C. No. 05-02820-03737
BASIN RESOURCES INCORPORATED,	:	
Respondent	:	Golden Eagle Mine

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Andrew Volin, Esq., Sherman & Howard, Denver,
Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Incorporated ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege 11 violations of the Secretary's safety regulations. For the reasons set forth below, I affirm four of the citations and vacate the remaining citations and orders.

A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I.

DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time the citations and orders were issued, Basin Resources operated the Golden Eagle Mine in Las Animas County, Colorado. The mine is now closed. The mine was an underground mine that used the longwall method to extract coal.

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 726 citations and orders in the 24 months preceding January 3, 1995. (Ex. G-1). I also find that Basin Resources was a medium-to-large operator at the time the citation was issued. The mine is no longer operating and Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. (Ex. R-A). I have taken its financial condition into consideration in assessing penalties and I find that the civil penalties assessed in this decision would not have affected its ability to continue in business. The citations and orders were abated in good faith. The Secretary has not alleged that Basin Resources failed to timely abate the citations.

A. Tailgate for the Third Left Longwall Section

On October 27, 1994, Inspector Cord Cristando of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the third left longwall section of the mine. He entered the longwall section through the headgate entries, inspected the longwall face and entered the tailgate entries just outby the last shield of the longwall near crosscut 16. (Ex. R-T). Inspector Cristando was accompanied by a union representative and Tom Sciacca, the company representative. The section foreman on the afternoon shift was Frank Holley.

When Inspector Cristando entered the tailgate entries, the conditions he observed led him to believe that the roof was not supported. (Tr. 82-83). He stated that the floor was heaving and that it appeared to him that the "tailgate was impassable, not travelable." *Id.* He testified that the tailgate entry was not "safe to be travelable." (Tr. 85). He described the conditions, as follows:

Bolts were hanging from the mine roof, bearing plates were not secured against the mine roof, cribs were rolled out, kicked out, not against the mine roof. It was very obvious that [the roof] wasn't supported. I could see that no miner would be able to get out underneath it in [the] condition it was [in].

(Tr. 86). Inspector Cristando asked Mr. Holley how long the conditions had existed. Mr. Holley replied that it started on the 26th at the end of his shift around 10 p.m. (Tr. 87).

Inspector Cristando decided that he wanted to look at the conditions in the tailgate from the outby side. He traveled back through the longwall face, down the intake entries, and into the tailgate entries from the returns. He was accompanied by the miners' representative and Mr. Sciacca. Inspector Cristando was able to travel about 30 feet inby crosscut 15 before the conditions started to deteriorate. (Tr. 87). He had to zig-zag between cribs and the rib. (Tr. 92-93). Inspector Cristando believed that the longwall was putting pressure on the area so that the conditions had become "considerably worse." (Tr. 88). Inspector Cristando testified that the conditions he observed in the tailgate entry made the entry "a real risky area to be in." (Tr. 95). Inspector Cristando observed danger tape that had been placed in the area "as a warning sign to let people know that there was some unsafe top." (Tr. 89). He did not observe any danger tape on the longwall side of the tailgate entry.

As a result of these conditions, Inspector Cristando issued three citations under section 104(a) of the Mine Act and three orders of withdrawal under section 104(d)(2). Each citation and order is discussed below.

1. Order No. 3849438

Order No. 3849438 alleges a violation of 30 C.F.R. § 75.220(a)(1).¹ The order states that the approved roof control plan was not followed because the "longwall foreman detected ground failure in the tailgate entry that prevented travel out of the longwall tailgate and did not notify the MSHA Field Office Supervisor" or "implement the longwall tailgate travelway blockage plan." In the order, the inspector indicated that the alleged violation was significant and substantial ("S&S") and was caused by Basin Resources' unwarrantable failure to comply with the roof control plan. The applicable portion of the roof control plan states that Basin Resources must take certain steps "[w]hen a ground failure is detected in the tailgate entry that prevents travel out of the longwall tailgate" (Ex. G-4). The Secretary proposed a penalty of \$9,950.

Basin Resources contends that a blockage did not exist in the tailgate entry, that the conditions observed by the inspector had just occurred, and that Mr. Holley did not know about these conditions. Accordingly, it maintains that the Secretary did not establish a violation or that any violation was the result of its unwarrantable failure. Basin Resources states that Inspector Cristando's actions at the mine were inconsistent with his testimony. It argues that Inspector Cristando did not determine that

¹ As pertinent here, the safety standard requires each mine operator to follow the roof control plan approved by the MSHA District Manager.

the area was blocked until after he inspected the tailgate entry from the outby side. Basin Resources states that the conditions could not have been "obvious" if it took Inspector Cristando more than three hours to determine whether a violation existed. It also maintains that Inspector Cristando's testimony was inconsistent and should not be credited.

Mr. Holley testified that at the time of Inspector Cristando's inspection he did not believe that the tailgate entry was blocked. (Tr. 332-33). He stated that there were "roof falls off and on throughout the tailgate" and that the longwall crews "would danger the roof falls off and reroute [the] escape-way around the roof fall." (Tr. 333). Mr. Holley testified that when Inspector Cristando asked him about the condition of the tailgate, the inspector was standing in the entry but that he was standing underneath the longwall shields, three shields from the tailgate end of the longwall. (Tr. 334; EX. R-T). Mr. Holley does not deny that the inspector asked him if he was aware of the conditions in the tailgate and how long the conditions had existed. *Id.* Mr. Holley stated that he replied that he was aware of the condition because he believed that Inspector Cristando was referring to the general roof conditions in the ribboned-off areas, not to a blockage of the entire tailgate entry. (Tr. 335). He testified that the inspector did not use the terms "tailgate blockage" or "blockage" during their conversation. *Id.*

The fact that a tailgate entry is blocked does not in and of itself establish a violation of the roof control plan. As stated above, the plan provides that Basin Resources must take a number of steps when a "ground failure is detected in the tailgate entry that prevents travel out of the longwall tailgate." (Ex. G-4) (emphasis added). Thus, if Basin Resources detects a ground failure that prevents travel out of the longwall tailgate entries, it must take the steps set forth in the roof control plan. See *Blue Diamond Coal Co.*, 12 FMSHRC 2565, 2567-71 (December 1990) (ALJ).

In order to meet its burden of proof under the subject provision of the roof control plan, the Secretary must establish that a blockage existed and the mine operator knew or should have known about the blockage and did not implement the steps set forth in the roof control plan. If the Secretary cannot prove that the operator had actual knowledge of the blockage, the Secretary can prove a violation by showing that the operator was negligent in failing to detect the blockage. In this case, the Secretary did not establish that Basin Resources detected a ground failure of such a magnitude that it prevented travel out of the longwall tailgate. In other words, the Secretary did not prove that Basin Resources knew or should have known that the ground failure in the tailgate entry blocked the entry in such a manner as to prevent such travel.

The Secretary tried to establish actual knowledge of a blockage through the conversation that occurred between Inspector Cristando and Mr. Holley. I credit Mr. Holley's testimony that he was not aware of any blockage at the time of the inspection. Inspector Cristando walked out into the tailgate entry and looked down the entry in the direction of the returns. Mr. Holley stayed underneath the longwall shields and could not see down the subject entry because he was about 15 feet from the end of the longwall machine. According to Inspector Cristando's own testimony, he asked Mr. Holley how long "the condition existed like this." (Tr. 86-87). The inspector testified that Mr. Holley replied that "it started ... the night before, on the 26th." *Id.* Inspector Cristando did not ask Mr. Holley if he was aware that the entry was blocked or that travel down the entry was not possible. Indeed, Inspector Cristando admitted on cross-examination that he was not sure that the tailgate entry was blocked at the time of this conversation. (Tr. 142-44). Inspector Cristando's testimony establishes that he concluded that the entry was blocked about three hours later after he traveled to the outby side of the area and observed the conditions from about 30 feet inby crosscut 15. *Id.* Yet, Inspector Cristando testified on direct examination that the blockage was "obvious" at the time he first observed the area when he stepped out from under the longwall shields. Although I appreciate Inspector Cristando's caution in not making a determination that the entry was blocked until he observed the area from the other side, I find that his inquiry of Mr. Holley was insufficient to establish that Mr. Holley knew that the entry was blocked. Asking Mr. Holley whether he was aware of the "condition" of the entry without describing what he meant or inviting Mr. Holley to step out into the entry did not establish knowledge of the blockage.

I credit Mr. Holley's testimony that he did not understand that Inspector Cristando was asking whether he was aware that the entry was blocked. Mr. Holley credibly testified that he interpreted Inspector Cristando's inquiry to mean whether he was aware that the roof was taking weight and that certain areas of the roof had fallen. It was not disputed that the area in the tailgate entry immediately outby the longwall takes a significant amount of weight during the mining process as a result of frontal abutment pressure and that the roof is often unstable in these areas. It is clear that Mr. Holley was aware that the roof was not stable, but the record does not establish that he had knowledge that the entry was blocked so that miners could not travel down the tailgate entry in the event of an emergency.

In addition, the record does not establish that Basin Resources was negligent in failing to detect any blockage. First, there is a dispute as to whether the tailgate entry was blocked on October 27. Mr. Sciacca, who accompanied the inspector, testified that the tailgate entry was not blocked.

(Tr. 380). He stated that although "it was tight through there, and there was sloughage through there, rib sloughage," he did not think "there was ever a blockage." *Id.* Second, Mr. Holley took the necessary precautions to make sure the longwall section was safe. The record does not contain sufficient evidence for me to make a determination that he or anyone else was negligent in failing to detect the alleged blockage. Mr. Holley had last been in the tailgate entry during his previous shift on October 26 between 3 and 4 p.m. and he did not observe any blockage at that time. (Tr. 346). He testified that Basin Resources' procedure was to monitor the tailgate entry, ribbon off areas where the roof had deteriorated, and reroute the escapeway as necessary. (Tr. 347-48). During his shift on October 26, two employees told him that there had been a "cave" in the tailgate entry. (Tr. 349-50; Ex. G-5). Mr. Holley looked at the entry and determined that the conditions were the same as they had been at the start of the shift. (Tr. 350, 354). He did not detect any blockage.

At the start of his shift on October 27, Mr. Holley reviewed the preshift examination report that was made by Larry Sandoval at the end of the previous shift. (Tr. 338, 351). This report did not indicate that there were any hazards in the tailgate Entry. In addition, the air readings taken along the longwall as shown on this report were satisfactory in that they did not indicate a major roof fall or blockage in the tailgate entry. (Tr. 339, 351-52). Although the air flow had varied during the shifts immediately preceding Mr. Holley's shift on October 27, the measurements did not show an interruption that he felt was consistent with blockage. (Tr. 149, 339, 351-52; Ex. Q, R). Rich Cordova, a fire boss, was in the tailgate entry at about 4 a.m. on October 27. He observed that there was "some blockage" in the entry but that miners could get around it and that air was passing through the area. (Ex. R-J, R-H, dated 10/27 4 a.m.; Tr. 220-21, 301-03). He stated that there were no roof problems in areas where he traveled except between some of the cribs that had been dangered off. (Ex. R-J).

Finally, during the period between the start of Mr. Holley's shift on October 26 and the start of his shift on October 27, the longwall was producing coal and the longwall would have retreated about 45 feet. (Tr. 353). The area observed by Inspector Cristando on October 27 was different from that observed by Mr. Holley on October 26. Inspector Cristando testified that he could see about 18 to 20 feet down the entry. (Tr. 408). The Secretary is attempting to infer that because Inspector Cristando saw a blockage on the evening of October 27, that blockage must have existed since at least 10 p.m. the previous day because Mr. Holley said he was aware of roof problems at that time. I cannot accept the Secretary's inference for two reasons. First, Mr. Holley did not tell Inspector Cristando that he was aware

that the entry was blocked. Second, given that one can only see about 20 feet down the entry and the longwall would have advanced about 40 feet, the area of the tailgate that Mr. Holley observed on October 26 was a completely different area. Mr. Holley testified that all areas of bad top had been dangered off when he observed the entry on October 26. Inspector Cristando testified that Basin Resources generally does a good job of ribboning-off bad areas and that he observed dangered-off areas on previous inspections along the tailgate entry in places that had been mined through on October 27. (Tr. 154-55). Thus, the Secretary cannot dispute Mr. Holley's testimony that the hazardous areas were dangered off on October 26.² The Secretary's inference is too speculative and is not supported by credible evidence; the blockage could have occurred at any time during Mr. Holley's October 27 shift.³

Based on this evidence and the record as a whole, I conclude that the Secretary did not establish that the alleged blockage existed prior to the time that Inspector Cristando discovered it. I also find that Mr. Holley did not have any knowledge of this blockage prior to the time Inspector Cristando discovered it. In addition, I find that the Secretary did not establish that Basin Resources was negligent in not detecting the blockage at an earlier time.

2. Order No. 3849440

Order No. 3849440 alleges a violation of 30 C.F.R. § 75.360(b)(3).⁴ The order states that an inadequate preshift examination was performed for the oncoming afternoon shift on

² In his brief, the Secretary argues that Inspector Cristando's inference is supported by information he obtained from other production foremen, the preshift and on-shift examiners, and miners working in the area. I find that the record on this issue does not corroborate the inspector's inference because the evidence on this issue is ambiguous.

³ Based on the testimony of Inspector Cristando, I find that the tailgate entries were blocked at the time of his inspection so as to prevent safe travel out of the longwall tailgate entries. Accordingly, I reject Mr. Sciacca's opinion to the contrary.

⁴ As pertinent here, the safety standard requires that a certified person conduct a preshift examination for hazardous conditions in each working section.

October 26, 1994. The order states that the longwall foreman told the inspector that "he observed the tailgate blockage, but took no action to correct the hazardous condition." The order alleges that inadequate preshift examinations were conducted in all of the subsequent shifts until the condition was detected by the inspector. In the order, the inspector indicated that the alleged violation was S&S and was caused by Basin Resources' unwarrantable failure to comply with the safety standard. The Secretary proposed a penalty of \$9,500.

As I held with respect to Order No. 3849438 above, the Secretary did not establish that the blockage existed prior to the time that Inspector Cristando discovered it. In addition, the assertion in the order that Mr. Holley told Inspector Cristando that he observed the tailgate blockage is not supported by the evidence. Inspector Cristando asked whether Mr. Holley was aware of the conditions in the tailgate entry without providing any explanation of what he was referring to or asking Mr. Holley to observe the conditions firsthand. Such a conversation is too limited and unfocused to show that Mr. Holley had knowledge of the blockage.

The basis for the Secretary's contention that the preshift examinations were inadequate is the brief conversation between Inspector Cristando and Mr. Holley and the assumption that the blockage must have existed for some period of time. Neither the conversation nor the Secretary's assumptions establish a violation. It could be argued that the preshift examination for the oncoming afternoon shift of October 27 must have been inadequate in any event because Inspector Cristando discovered the condition at 7:55 p.m. and the shift started at 3 p.m. While it is possible the hazardous conditions existed at the time of this preshift, there is no proof that such conditions existed at that time. Roof conditions in the tailgate can deteriorate rapidly.

3. Citation No. 3848272

Citation No. 3848272 alleges a violation of 30 C.F.R. § 75.360(g).⁵ The citation states that a hazardous condition was observed on the afternoon shift of October 26 and on subsequent shifts, but no record of the hazard was entered into the book provided for that purpose. The alleged hazard was "roof failure-unsafe roof in the tailgate of the longwall." In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$1,298.

⁵ As pertinent here, the safety standard requires that a record of hazardous conditions and their location found by the preshift examiner be recorded in a book kept for such purposes.

Although the wording of the citation is different from the order, they both relate to the same conditions and Inspector Cristando's conversation with Mr. Holley. Based on his brief conversation, Inspector Cristando concluded that the blockage had existed for at least 24 hours and that this hazardous condition was not recorded in the preshift examination book. As stated above, on October 26, Mr. Holley was aware that there were areas in the tailgate entry where the roof was not supported and that these areas were ribboned off with danger tape to keep miners out of those areas. The individual conducting the preshift examination is not required to travel the length of the tailgate entry.⁶ Rather, the examiner measures air flow, checks for methane, and looks for hazardous conditions. During this examination, the examiner is required to enter the tailgate entry just off the longwall face. There is insufficient evidence to show that the examiners entered this area, saw the blockage or areas of unsafe roof that were not dangered off, and failed to record the hazard. In addition, the longwall was in production during this period, so the area in the tailgate entry that the preshift examiners observed would have been different from that observed by Inspector Cristando.

4. Order No. 3849138

Order No. 3849138 alleges a violation of 30 C.F.R. § 75.362(a)(1).⁷ The order states that an inadequate on-shift examination was performed during the afternoon shift on October 26, 1994. The order states that the longwall foreman told the inspector that "he observed the tailgate blockage or roof failure, but took no corrective action to correct the condition." The order alleges that inadequate on-shift examinations were conducted in all of the subsequent shifts before the afternoon shift of October 27. In the order, the inspector indicated that the alleged violation was S&S and was caused by Basin Resources' unwarrantable failure to comply with the safety standard. The Secretary proposed a penalty of \$9,500.

⁶ A certified person is required to examine the tailgate entry in its entirety for hazardous conditions on a weekly basis. 30 C.F.R. § 364(b)(3). There is no showing that the most recent weekly examination was not completed because the tailgate entry was blocked.

⁷ As pertinent here, the safety standard requires that a certified person conduct an on-shift examination for hazardous conditions in each working section.

As stated above, the Secretary did not establish that the blockage existed prior to the time that Inspector Cristando discovered it or that Mr. Holley knew of the blockage on October 26. There is no dispute that there were areas that had been dangered off in the tailgate entry. Some of these areas had been mined through by the time Inspector Cristando examined the area on the afternoon shift of October 27. The areas of the tailgate inspected by Inspector Cristando on that shift were not the same areas that the on-shift examiners observed on preceding shifts because the longwall had advanced. There is insufficient proof that the cited hazardous conditions existed in those areas at the time of the on-shift examinations. Basin Resources was not required to have completed the on-shift exam for the afternoon shift of October 27 at the time of Inspector Cristando's inspection. (Tr. 120).

5. Citation No. 3848271

Citation No. 3848271 alleges a violation of 30 C.F.R. § 75.362(g).⁸ The citation states that a hazardous condition was observed on the afternoon shift of October 26, and on subsequent shifts but no record of the hazard was entered into the book provided for that purpose. The alleged hazard was "roof failure-unsafe roof" in the tailgate of the longwall. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$1,298.

Based on a brief and confused conversation with Mr. Holley, Inspector Cristando concluded that the blockage in the tailgate had existed for at least 24 hours and that this hazardous condition was not recorded in the on-shift examination book. For the reasons stated above, the Secretary did not meet his burden of proof. The individual conducting the on-shift examination is not required to travel the length of the tailgate entry. The examiner measures air flow, checks for methane, and looks for hazardous conditions. During this examination, the examiner is required to enter the tailgate entry just off the longwall face. There is insufficient evidence to show that the examiners entered this area, saw the blockage or areas of unsafe roof that were not dangered off, and failed to record the hazard. The longwall was in production during this period, so the area in the tailgate entry that the on-shift examiners observed was different from that observed by Inspector Cristando.

⁸ As pertinent here, the safety standard requires that a record of hazardous conditions and their location found by the on-shift examiner be recorded in a book kept for such purposes.

6. Citation No. 3849439

Citation No. 3849439 alleges a violation of 30 C.F.R. § 75.202(a).⁹ The citation states that the mine roof in the tailgate entry between crosscuts 15 and 16 was not supported or controlled to protect persons from hazards of falling roof. The citation states:

The fully grouted 8 ft roof bolt bearing plates were 2 to 3 feet from the existing mine roof. The supplemental supports, 3 X 3 ft cribs on five foot centers were knocked out in places due to the roof deterioration, rib sloughage, and floor heaving for a distance of approximately 60 ft.

In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

This citation is based on conditions observed by Inspector Cristando during his inspection. It is not based on speculation as to what the conditions were like 24 hours earlier in a area that had been mined through and it was not based on a brief conversation with Mr. Holley. At the time Inspector Cristando observed the conditions, some of the areas with bad roof were dangered off, but some areas were not. There was no evidence that at any time during the existence of the dangerous roof conditions any miner worked or traveled in the cited area. Nor did the job duties generally require miners to enter the affected area.

In *Cyprus Empire Corp.*, 12 FMSHRC 911, 917 (May 1990), the Commission held that when a mine operator dangers-off an area of bad roof in a tailgate entry and there is no showing that miners worked, traveled or were required to enter this area, a violation of this safety standard is not established. I find that the Commission's holding is not applicable to the facts of this case. The entire entry was not dangered-off, only some areas were. The inspector observed areas of dangerous roof that were not dangered-off. Miners were required to enter the area a few times a week to check rock dust lines. (Tr. 358-59). In addition, the area was a designated escapeway. Thus, I find that the Secretary established a violation.

⁹ As relevant here, this safety standard requires that the roof of areas where persons work or travel be supported or otherwise controlled to protect persons from hazards related to falls of roof.

I also find that the Secretary established that the violation was S&S. The four elements of the *Mathies* test were met. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element, whether there was a reasonable likelihood that the hazard contributed to will result in an injury, presents the closest question. It is likely that the area of bad roof would have been mined through assuming continued mining operations. Nevertheless, it is not disputed that miners had to enter the area at least a few times a week. In addition, an emergency could occur at any time requiring the evacuation of miners. Although the tailgate entry was not the primary escapeway, it was a designated escapeway. Accordingly, I find that the Secretary established that it was reasonably likely that the hazard contributed to would result in an injury. Based on the penalty criteria, I assess a civil penalty of \$506 for this violation.

B. Other Citations and Orders

1. Order No. 3848330

The Secretary agreed to vacate this order at the hearing.

2. Citation No. 3849271

Citation No. 3849271 alleges a violation of 30 C.F.R. § 75.1722(a).¹⁰ The citation states that a guard was not provided for the head roller of the F.C.T. continuous haulage machine. The citation states that it was about 7½ inches from the edge of the machine to the pinch point and that the area of exposure was about 30 inches. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

I find that the Secretary established a violation. There is no dispute that the conditions described by Inspector Melvin Shiveley existed. Basin Resources argues that the evidence shows that the equipment was new and was delivered to the mine in the same condition. It further maintains that an MSHA supervisor inspected the equipment and did not issue a citation for failing to guard this area. Finally, it argues that the equipment was operated by remote control and there were no controls near the

¹⁰ The relevant part of the safety standard provides that gears, sprockets, chains, pulleys, flywheels, and similar exposed moving machine parts which may be contacted by and injure persons shall be guarded.

unguarded area. I find that these factors relate to the gravity of the violation and the negligence of the operator and not to the fact of violation.

Inspector Shiveley testified that the unguarded head roller was about 36 inches from the ground and that the operator and a miner helper would normally work in the area. (Tr. 25, 52). In addition, he testified that the unguarded area was adjacent to a travelway. (Tr. 26). Inspector Shiveley testified that he believes that if the condition were left unabated someone could get clothing or tools caught in the pinch point. (Tr. 27). He stated that a serious injury would result in such an event. Based on this evidence, I find that the Secretary established that the violation was S&S. There was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature.

Basin Resources produced evidence that MSHA Field Office Supervisor Larry Ramey inspected this equipment a few days before this inspection and did not issue any citations. (Tr. 209-15; Ex. R-B). I credit this evidence and find that Basin Resources' negligence was low with respect to this citation. Based on the penalty criteria, I assess a civil penalty of \$150 for this violation.

3. Citation No. 3849319

Citation No. 3849319 alleges a violation of 30 C.F.R. § 75.511.¹¹ The citation states that electrical work was being performed on an Eimco roof-bolter lighting system and the bolter was not locked or tagged out at the power center. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

I find that the Secretary established a violation. There is no dispute that the roof bolter was not locked out or tagged out. Instead, the miners turned off the bolter at the circuit breaker and one of them stayed at the breaker to make sure that no one energized it. (Tr. 215-16). The miners were changing a light bulb on the breaker, which on this particular piece of equipment requires that the wires be exposed. (Tr. 32).

¹¹ The relevant part of the safety standard provides that no electrical work shall be performed on equipment until the disconnecting device has been locked and suitably tagged by the persons who will perform such work.

Basin Resources contends that this violation was of a technical nature and was not S&S. It states that the power was disconnected at the breaker, the breaker was being watched by a miner, and it was not reasonably likely that anyone would be injured. Although this is a close case, I find that the Secretary established that the violation was S&S. The purpose of the safety standard is to prevent electrical components from becoming energized when they are being worked on. In this case, electrical contacts on wires were exposed when the light bulb was changed. Assuming that this practice continued, it is reasonably likely that the hazard contributed to would result in an injury. The miner "guarding" the circuit breaker could become distracted or he could be called to attend to other duties. In addition, it is possible for the breaker to malfunction and not de-energize the circuit. An injury would be of a reasonably serious nature. I find that Basin Resources' negligence was moderate. Based on the penalty criteria, I assess a civil penalty of \$250 for this violation.

4. Citation No. 3849284

Citation No. 3849284 alleges a violation of 30 C.F.R. § 75.202(a).¹² The citation states that the "mine roof was not supported or controlled in by the main roof slope in that wooden planking was cracked and loose above the track entry." The citation alleges that loose roof material was observed on the wooden planks and that the area is the main travelway into and out of the mine. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$595.

The parties offered conflicting testimony about the cited conditions. Inspector Shiveley testified that planking had been installed on steel beams along the roof to prevent loose material from falling into the travelway. He testified that the planking was "old, deteriorated, and cracked." (Tr. 40). He stated that some had broken and he could see the rubble sitting on them, sticking out of the cracks. (Tr. 40, 58). He further said that the planks were "bowed down" because of the weight of the rock. The planks were not broken, they were just bowed and cracked. (Tr. 60). He believed that this rubble could fall and injure

¹² As relevant here, this safety standard requires that the roof of areas where persons work or travel be supported or otherwise controlled to protect persons from hazards related to falls of roof.

someone. (Tr. 40). Inspector Shiveley did not know if there were roof bolts in the area. (Tr. 57). He estimated that the planks were three inches thick and about ten inches wide. (Tr. 59). There was a small opening between each plank through which Inspector Shiveley could see the loose rubble. (Tr. 77).

Mr. Sciacca testified that the roof was supported by roof bolts in the area cited by Inspector Shiveley. (Tr. 382). He stated that the roof was also supported by steel I-beams. The I-beams were on four-foot centers and each was supported by two timbers. (Tr. 382; Ex. R-U). Mr. Sciacca stated that the planks were bowed and cracked a little, but not enough to present a safety problem. (Tr. 384). He testified that the cracks in the planks were not serious enough to allow loose material to fall into the travelway. The planks were installed "skin-to-skin" so there were no gaps between the planks. *Id.* He stated that when the citation was abated, the workers were unable to rip the planks down, "[y]ou couldn't get them out of there." *Id.* To abate the citation, Basin Resources installed new planks under the existing ones.

A violation has not been established. I credit the testimony of Mr. Sciacca that the planks were not sufficiently cracked to present a hazard. In order for rock or other debris to fall, the planks would have to break completely through or a gap in the planks would have to be created. I also credit his testimony that the planks were closely abutted and that the roof was bolted. He was present when the citation was abated and the workers were unable to force the planks down. I find that the condition of the planks did not present a hazard of falling material.

5. Citation No. 3849285

Citation No. 3849285 also alleges a violation of 30 C.F.R. § 75.202(a). The citation states that a loose coal rib was present in the third north mains that was not supported or controlled. It states that the loose rib measured three by four feet and was six to eight inches thick. The rib was at a parking area for the crew. In the citation, the inspector indicated that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposed a penalty of \$506.

Basin Resources does not dispute the fact of violation or that the violation was S&S. It argues that the it was only slightly negligent and that the penalty is too high. It states that the loose rib was obvious and that a scaling bar was nearby. Basin Resources states that the miners on the crew "chose not to

take responsibility to correct it." (B.R. Br. at 18). It offered evidence that miners sometimes failed to correct hazardous conditions and called MSHA instead. It maintains that the negligence of the miners should not be imputed to Basin Resources.

It is impossible for me to evaluate Basin Resources' negligence defense. There was no showing that miners purposefully failed to support or take down the loose rib in this instance. Accordingly, I find that the violation was caused by Basin Resources' moderate negligence. Based on the penalty criteria, I assess a civil penalty of \$250 for this violation.

II.

CIVIL PENALTY ASSESSMENTS

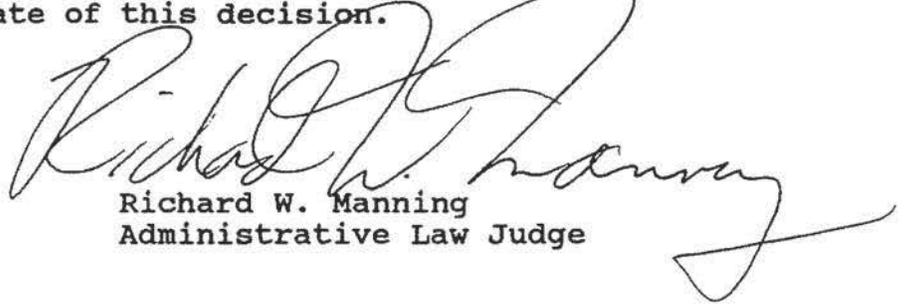
Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties as discussed above:

<u>Citation or Order No.</u>	<u>30 C.F.R. §</u>	<u>Assessed Penalty</u>
<u>WEST 95-254</u>		
3848330	75.370(a) (1)	vacated
3849271	75.1722(a)	\$150.00
3849319	75.511	\$250.00
<u>WEST 95-255</u>		
3848271	75.362(g)	vacated
3848272	75.360(g)	vacated
3849138	75.362(a) (1)	vacated
3849438	75.220(a) (1)	vacated
3849439	75.202(a)	\$506.00
3849440	75.360(b) (3)	vacated
3849284	75.202(a)	vacated
3849285	75.202(a)	\$250.00

III.

ORDER

Accordingly, the citations and orders listed above are **VACATED** or **AFFIRMED** as indicated above, and Basin Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,156.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Andrew Volin, Esq., SHERMAN & HOWARD, L.L.C., 633 17th Street, Suite 3000, Denver, CO 80202 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 30 1996

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of DOUGLAS MARTIN,	:	Docket No. KENT 96-389-D
Complainant	:	
v.	:	PIKE CD 96-09
	:	
LOST CREEK MINING, INC.,	:	Mine No. 1
Respondent	:	
	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This case concerns an application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("ACT"). The Secretary on behalf of Douglas Martin seeks Martin's immediate reinstatement pending a finding on Martin's associated complaint of discrimination (Docket No. KENT 96-390-D), which alleges that on July 2, 1996, Martin was illegally discharged because he refused to comply with a work order that he believed was unsafe.

On September 27, 1996, the parties orally advised me they had agreed to settle both this temporary reinstatement proceeding and the discrimination proceeding. Subsequently, they filed a motion seeking approval of settlement and dismissal of the proceedings.

Under the terms of the settlement, Respondent is required:

1. [To] Expunge from its personnel files all records of and references to the July 2, 1996 discharge of . . . Martin.

2. On or before September 30, 1996, [to] permanently reinstate Martin to his former employment position with all seniority, status and benefits including, but not limited to, a rate of pay of \$11.25 per hour.

3. [To] pay. . . Martin the sum of \$1,700.00 in satisfaction of damages. . . [in] 3 monthly installment payments by certified check, cashier's check, or money order which shall be made payable to "Douglas Martin" and delivered directly to . . . Martin on the last Friday of each month, the first payment of \$570.00 being due on Friday, October 25, 1996, the second payment of \$570.00 being due on Friday, November 29, 1996, and the final payment of \$560.00 being due on Friday, December 27, 1996.

4. [To] pay a civil money penalty in the amount of \$2,500.00 for the discrimination violation. . . [in] 4 quarterly installment payments of \$625.00 each, the first payment being due on November 1, 1996, the second payment being due on February 1, 1997, the third payment being due on May 1, 1997, and the final payment being due on August 1, 1997 (Joint Motion at 2).

In a decision pertaining solely to Docket No. KENT 96-390-D, I have approved these terms and **ORDERED** Respondent to comply with them. In view of that approval and of the parties agreement that Martin be reinstated, it is clear that the Secretary's application for temporary reinstatement may be **DISMISSED**.


David Barbour
Administrative Law Judge
(703) 756-5232

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor,
U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215-2862 (Certified Mail)

Jody L. Samons, President, Lost Creek Mining, Inc.,
P. O. Box 848, Prestonsburg, KY 41653 (Certified Mail)

Mr. Douglas D. Martin, Box 220, Grethel, KY 41631 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 30 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-390-D
on behalf of DOUGLAS MARTIN,	:	
Complainant	:	PIKE CD 96-09
v.	:	
	:	Mine No. 1
LOST CREEK MINING INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This case concerns a discrimination proceeding filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(c)(2). The Secretary on behalf of Douglas Martin, alleges that Martin was unlawfully discharged on July 2, 1996, for refusing to work under conditions he believed unsafe. The Secretary seeks the reinstatement of Martin, back pay and benefits, interest, an order directing Respondent to cease and desist discriminating activities, an order expunging from Martin's employment records all references to the July 2 incident, and an appropriate civil penalty. Further, in an associated proceeding, the Secretary seeks Martin's temporary reinstatement (Docket No. KENT 96-398-D).

On September 27, 1996, the parties orally advised me they had settled the two cases. Subsequently, they moved for approval of their settlement and for the incorporation of the settlement terms in the approval.

I have reviewed the settlement. Under its terms, the Respondent is required to take the following actions:

1. [To] expunge from its personnel files all records of and references to the July 2, 1996 discharge of Martin.
2. On or before September 30, 1996, [to] permanently reinstate . . . Martin to his former employment position with all seniority, status and benefits including, but not limited to, a rate of pay of \$11.25 per hour.

3. [To] pay . . . Martin the sum of \$1,700 in satisfaction of damages . . . over 3 monthly installment payments by certified check, cashier's check, or money order which shall be made payable to "Douglas Martin" and delivered directly to . . . Martin on the last Friday of each month, the first payment of \$570.00 being due on Friday, October 25, 1996, the second pay of \$570.00 being due on Friday, November 29, 1996, and the final payment of \$560.00 being due on Friday, December 27, 1996.

4. [To] pay a civil money penalty in the amount of \$2,500.00 for the discrimination violation . . . [in] 4 quarterly installment payments of \$625.00 each, the first payment being due on November 1, 1996, the second payment being due on February 1, 1997, the third payment being due on May 1, 1997, and the final payment being due on August 1, 1997.

5. [I]f Lost Creek fails to make any of the installment payments for the damages to . . . Martin and/or for the civil penalty to the Secretary, the Secretary reserves the right to pursue the discrimination proceeding before the Federal Mine Safety and Health Review Commission (Joint Motion 2-3).

The settlement is appropriate and is in the public interest. Accordingly, it is **APPROVED**. In addition, Respondent is **ORDERED** to comply with the settlement terms set forth above and with all other terms contained in the joint motion.

I have dismissed the application for temporary reinstatement in a separate decision. Upon Respondent's full compliance with all terms of the settlement, this proceeding also is **DISMISSED**.



David Barbour
Administrative Law Judge
(703) 756-5232

Distribution:

Brian W. Dougherty, Esq., Office of the Solicitor,
U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215-2862 (Certified Mail)

Jody L. Samons, President, Lost Creek Mining, Inc., P.O. Box 848,
Prestonsburg, KY 41653 (Certified Mail)

Mr. Douglas Martin, Box 220, Grethel, KY 41631 (certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 31 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-55 ¹
Petitioner	:	A. C. No. 11-00877-04031
v.	:	
	:	Docket No. LAKE 94-79
AMAX COAL COMPANY,	:	A. C. No. 11-00877-04034
Respondent	:	
	:	Mine: Wabash Mine

DECISION ON REMAND

Before: Judge Feldman

This matter was remanded by the Commission on August 28, 1996, for my reevaluation of whether the violation of section 75.400 cited in Citation No. 4054831, concerning loose coal and oil soaked coal accumulations on the respondent's continuous miner, was properly designated as significant and substantial (S&S). Amax Coal Company, 18 FMSHRC 1355. The undisputed testimony was that the accumulations in the operator's compartment were approximately 7 inches deep, 2 feet in width, and 4 feet in length, and, there were loose coal accumulations upon conduits, lights, panels and motors of the continuous miner up to 6 inches in depth. The testimony also reflected that these accumulations had existed for a period of approximately two weeks.

On September 27, 1996, I issued an Order on Remand directing the parties to comment on the issues raised by the Commission's remand. The parties' responses to that Order are of record.

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

¹ The Commission's August 28, 1996, decision affirmed my decision in Docket No. LAKE 94-55. This decision concerns only Docket No. Lake 94-79.

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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

In its remand, the Commission directed me to reconsider whether the Secretary has satisfied the third element of the Mathies criteria. The Commission, in United States Steel Mining Company, Inc., 7 FMSHRC 1125 (August 1985) explained the proper application of the third element of Mathies 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 [a serious] 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). Id. at 1129.

The Commission's remand noted that I misapplied the third element of Mathies when I concluded that "it was reasonably likely" that an injury causing event "could occur." It directed that I apply the "will occur" standard. Thus, the standard to be applied is whether a fire or explosion (the injury causing event) is reasonably likely to occur as a result of the hazard caused by the violative combustible accumulations.

The parties have stipulated that loose coal and oil soaked coal are combustible materials, and that the three necessary factors which must be simultaneously present for a fire to begin are fuel (combustible materials), heat (an ignition source) and oxygen. Thus, in addressing the S&S issue, it is necessary to determine whether the elements of combustion are present, and, if so, the likelihood of combustion. The parties have stipulated to

the fuel source, and oxygen was undisputably present. The likelihood of the occurrence of the remaining element, sufficient heat to constitute a source of ignition, is apparently in dispute.

In the September 27, 1996, Order soliciting comments in this matter, I noted that Chairman Jordan and Commissioner Marks, in a concurring opinion, have concluded violations of the preshift examination mandatory safety standard are presumptively S&S "because of the inherent potential hazards existing in underground mining." Manalapan Mining Company, Incorporated, 18 FMSHRC 1375, 1395 (August 30, 1996). I therefore requested the parties to comment on whether ignition sources are "inherent hazards" in an underground mine that should be assumed in evaluating whether the subject violative coal dust accumulations are S&S. See Manalapan, 18 FMSHRC at 1388 (where a fire or explosion was assumed in resolving the S&S issue).

The respondent, in its response to the Order, apparently relies on the distinction between "potential" sources of ignition and "actual" sources of ignition to minimize the likelihood of combustion. (Amax Response, p.12). Consequently, the respondent asserts, citing, inter alia, the permissible condition of the continuous miner, including the temperature of its various lights and motors, that the continuous miner was not an actual source of ignition. Distilled to its core, the respondent's position is that prohibited combustible coal dust accumulations on a permissible continuous miner do not constitute a significant and substantial violation.

Initially I note, as discussed below, that the degree of hazard posed by a "potential" ignition source must not be understated. A child playing with matches is an extremely dangerous circumstance although the match is "only" a "potential" ignition source. Similarly, friction generated from the extraction process, or heat generated from lights or motors, in close proximity to combustible materials is a hazardous condition. Therefore, for the purposes of S&S, in deciding whether the presence of ignition sources in an underground mine should be assumed, both "potential" as well as "actual" ignition sources must be considered. In addressing this issue, it is helpful to turn to the language of the cited mandatory standard concerning combustible materials. Section 75.400 provides:

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

Section 75.1, which concerns the scope of Part 75, states that some mandatory safety standards in Part 75 are also applicable to surface mines. Obviously, the mandatory safety standard in section 75.400 is not applicable to surface mines where potential ignition sources are not hazardous. The only reason for the prohibition in section 75.400 is the implicit recognition of unanticipated and unavoidable sources of ignition in underground mines. Accordingly, in determining whether the subject combustible materials were properly designated as S&S in nature, the presence of ignition sources, whether "potential" or "actual," must be assumed.

The assumption of the presence of ignition sources does not end the inquiry into whether the cited accumulations are S&S. The dispositive question is whether it is reasonably likely that these combustible accumulations will contribute to a fire or explosion. Such an inquiry concerns two distinct factors. The first factor is whether it is reasonably likely that there will be an ignition source in close enough proximity to the accumulations to result in ignition. The second factor is whether the cited accumulations, accumulating over a two week period up to 7 inches in depth, are sufficient to propagate a fire or explosion that was started in another area of the mine.

With respect to the first issue, the respondent's argument begs the question. The respondent's reliance on the distinction between a "potential" ignition source and an "actual" ignition source is misplaced. A potential ignition source (friction) can become an actual ignition source (a spark) at any time. The Secretary does not have the burden of proving the existence of a discrete spark or excessive heat generating condition in order to prevail on the S&S issue. The Secretary need only establish that combustible materials were permitted to remain in close proximity to potential ignition sources. Significantly, the Commission, in apparent recognition of the hazards associated with the proximity of coal dust accumulations to potential ignition sources noted, in its decision remanding this matter, that accumulations on "powered equipment are equally or more dangerous than accumulations on the mine floor." (Emphasis added).² *Amax*, 18 FMSHRC at 1361. Simply put, a decision to allow combustible materials to accumulate on potential ignition sources is a very bad idea.

² The quoted reference concerned coal dust accumulations on diesel-powered equipment. Surely the Commission's concern would also apply to accumulations on electric-powered equipment operating at the face.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

OCT 30 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-390-D
on behalf of DOUGLAS MARTIN,	:	
Complainant	:	PIKE CD 96-09
v.	:	
	:	Mine No. 1
LOST CREEK MINING INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Barbour

This case concerns a discrimination proceeding filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(c)(2). The Secretary on behalf of Douglas Martin, alleges that Martin was unlawfully discharged on July 2, 1996, for refusing to work under conditions he believed unsafe. The Secretary seeks the reinstatement of Martin, back pay and benefits, interest, an order directing Respondent to cease and desist discriminating activities, an order expunging from Martin's employment records all references to the July 2 incident, and an appropriate civil penalty. Further, in an associated proceeding, the Secretary seeks Martin's temporary reinstatement (Docket No. KENT 96-398-D).

On September 27, 1996, the parties orally advised me they had settled the two cases. Subsequently, they moved for approval of their settlement and for the incorporation of the settlement terms in the approval.

I have reviewed the settlement. Under its terms, the Respondent is required to take the following actions:

1. [To] expunge from its personnel files all records of and references to the July 2, 1996 discharge of Martin.
2. On or before September 30, 1996, [to] permanently reinstate . . . Martin to his former employment position with all seniority, status and benefits including, but not limited to, a rate of pay of \$11.25 per hour.

Moreover, remedial requirements, such as permissibility or fire suppression equipment, do not absolve an operator of its obligation to abide by mandatory standards that are intended to prevent the likelihood of serious injury. See Manalapan, 18 FMSHRC at 1359, n.8. In addition, continued permissibility of the continuous miner cannot be assumed. Intervening events such as a malfunction causing an overheated motor, a spark from a misaligned chain, or a roof fall resulting in arcing from a severed cable, are reasonably likely occurrences during the course of "continued normal mining operations." U.S. Steel, 6 FMSHRC at 1574.

Intervening events notwithstanding, the continuous mining extraction process itself creates a constant potential ignition source from the friction caused by the drill bit's contact with rock. Thus, it is reasonably likely that the subject accumulations will initially fuel a fire or explosion given their proximity to ignition sources. It follows that it is reasonably likely that the continuous miner operator will suffer serious injury in the event of such combustion. Accordingly, the cited violation was properly designated as significant and substantial.

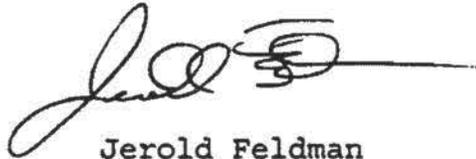
With respect to the second factor, sources of fuel are deadly once combustion occurs. Fire and explosion are ever present dangers in underground mining. The cited combustible accumulations, up to 7 inches in depth, were properly designated as S&S when viewed as a source of fueling a fire or explosion even if such accumulations were not the fuel for the initial ignition. Manalapan, 18 FMSHRC at 1388. Thus, the cited accumulations, when viewed as a source of fueling an existing fire, also must be considered significant and substantial in nature.

Finally, the respondent, relying on Texasgulf, Inc., 10 FMSHRC 498 (April 1988), contends the record does not support the necessary "confluence of factors" to create the likelihood of ignition. (Amax Response, p.12). However, Commission decisions concerning the likelihood of fire or explosion depend on the presence or absence of ignitable fuel as the determining factor evidencing S&S. See Texasgulf, 10 FMSHRC at 501, 503 citing U.S. Steel Mining Co., Inc., supra, 6 FMSHRC at 1867-69, and U.S. Steel Mining Co., Inc., supra, 7 FMSHRC at 1128-30; see also Eastern Assoc. Coal Corp., 13 FMSHRC 178, 184 (February 1991). For example, the presence of ignitable methane and excessive coal dust accumulations in the U.S. Steel cases provided a basis for an S&S finding with respect to the likelihood of ignition. Similarly, the Commission declined to find an S&S violation in Eastern because it concluded "hydraulic oil would not burn easily" and that such oil could not be ignited by a spark. 13 FMSHRC at 184.

In the instant case, combustible materials were on or in close proximity to potential ignition sources. There is no evidence the subject violative accumulations, given their extensive nature, were unignitable or otherwise unsuitable to contribute to the propagation of a fire or explosion. Accordingly, an S&S finding in this matter is consistent with prior Commission decisions concerning the likelihood of ignition.

ORDER

In view of the above, the significant and substantial designation in Citation No. 4054831 **IS AFFIRMED. ACCORDINGLY, IT IS ORDERED** that the respondent shall pay the \$309.00 civil penalty proposed by the Secretary in satisfaction of Citation No. 4054831.



Jerold Feldman
Administrative Law Judge

Distribution:

Ruben R. Chapa, Esq., Office of the Solicitor, U.S. Dept. of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604
(Certified Mail)

Robin A. Rosenbluth, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203
(Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410
(Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 93-233
Petitioner : A.C. No. 36-04109-03520
v. :
: Ambrosia Tipple
AMBROSIA COAL & :
CONSTRUCTION COMPANY, :
Respondent :

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 94-15
Petitioner : A.C. No. 36-04109-03522 A
v. :
: Ambrosia Tipple
AMBROSIA COAL & :
CONSTRUCTION COMPANY :
Respondent :

DECISION ON REMAND

Before: Judge Fauver

These civil penalty cases involve charges that Respondents violated an equipment safety standard (30 C.F.R. § 77.404(a)) by failing to maintain the brakes on a highlift loader in safe condition and by failing to remove the highlift from service immediately. The cases were brought under §§ 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Following an evidentiary hearing, I entered a decision on November 15, 1994, finding that the corporate Respondent violated § 77.404(a) and that its violation was significant and substantial, due to high negligence and due to an unwarrantable failure to comply with the standard. I also found that Respondent Steen was a corporate agent within the meaning of § 110(c) of the Act, and that as an agent he knowingly authorized and permitted the violation of § 77.404(a).

On review, the Commission affirmed the above findings and conclusions.

A separate issue on review was the appropriateness of the civil penalties. I found that Respondents had engaged in a cover-up concerning the violation of § 77.404(a), by falsifying records and making false statements to MSHA representatives.

I concluded that the "deliberate cover-up... increases the deterrence needed concerning the amount of civil penalties for the violation of § 77.404(a)" (assessing a penalty of \$11,000 against Ambrosia and \$4,000 against Respondent Steen). The Commission reversed this holding, stating that in assessing a penalty the Commission and its judges may not consider factors other than the six criteria for civil penalties in §110(i). The Commission vacated the penalties and remanded the cases for reassessment of penalties.

Reassessment of Civil Penalties

In my original decision, I found that Ambrosia is a small sized operator, and that in the two years preceding the violation it had 19 violations, 13 of which were significant and substantial. I find this to be an average record. A civil penalty in the range proposed by the Secretary will not affect Ambrosia's ability to continue in business.

I also considered Respondent Steen's financial situation in my original decision. He has a number of financial obligations, which I found would warrant amortizing the payment of a civil penalty. He has no record of prior violations charged under § 110(c) of the Act.

As stated, I have found that the violations of § 77,404(a) were significant and substantial and were due to high negligence and an unwarrantable failure to comply with the safety standard.

Excluding consideration of Respondents' false records and false statements to MSHA to cover up the violation of § 77.404(a), I find that the six criteria in § 110(i) warrant civil penalties of \$5,000 against the corporate Respondent and \$3,500 against Respondent Steen.

ORDER

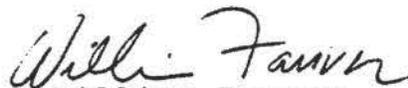
WHEREFORE IT IS ORDERED that:

1. Respondent Ambrosia Coal & Construction Company shall pay a civil penalty of \$5,000 within 30 days of this decision.

2. Respondent Wayne R. Steen shall pay a civil penalty of \$3,500. In light of his financial obligations he shall be permitted to pay the penalty according to the following schedule:

a. To pay \$350 on the 1st day of each month, beginning December 1, 1996, for 10 consecutive months.

b. If Respondent Steen fails to make any monthly payment when due, the balance of his civil penalty shall immediately become due with interest due from such date until paid at the interest rate announced by the Executive Director of the Commission.



William Fauver
Administrative Law Judge

Distribution:

Jerold S. Feingold, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Room 400,
Arlington, VA 22203 (Certified Mail)

William P. Getty, Esq., Hugh F. McGough, Esq., Meyer,
UnKovic & Scott, 1300 Oliver Bldg., Pittsburgh, PA 15222
(Certified Mail)

Frank G. Verterano & Manolis, 2622 Wilmington Road, New
Castle, PA 16105 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR

WASHINGTON, D.C. 20006-3868

October 31, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 95-57-M
Petitioner : A. C. No. 19-00020-05501 E24
v. :
: Lynn Sand & Stone Quarry
AUSTIN POWDER COMPANY, :
Respondent :
: CIVIL PENALTY PROCEEDING
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 96-13-M
Petitioner : A. C. No. 19-00020-05502 E24
v. :
: Lynn Sand & Stone Quarry
BRUCE EATON, EMPLOYED BY :
AUSTIN POWDER COMPANY, :
Respondent :

DECISION

Appearances: Gail Glick, Esq., Office of the Solicitor
U. S. Department of Labor, Boston, Massachusetts,
for Petitioners;
John T. Bonham, II, Esq., Jackson & Kelly,
Charleston, West Virginia, for Respondents.

Before: Judge Merlin

Statement of the Case

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against Austin Powder Company, and Bruce Eaton, employed by Austin Powder, under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820. A hearing was held on June 4, 1996, and the parties have submitted post hearing briefs.

The penalty petition filed by the Secretary against Austin Powder Company was filed pursuant to section 110(a) of the Act, 30 U.S.C. § 820(a), which provides:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *.

The penalty petition filed by the Secretary against Bruce Eaton was filed pursuant to section 110(c) of the Act, 30 U.S.C. § 820(c), which directs:

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

The charge of a violation is contained in a citation issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which specifies these requirements:

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 a violation do not cause imminent danger, 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.

Where a violation is proved, section 110(i), 30 U.S.C. § 820(i), sets forth the following factors to be considered in determining an appropriate penalty:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The citation alleges a violation of 30 C.F.R. § 56.15005, which sets forth the following mandate:

Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

Citation No. 4424405, dated July 13, 1994, charges a violation for the following condition or practice:

The foreman and co. helper were observed standing on the edge of an approx. 55 ft highwall within approx. 1½' of the highwall edge overseeing the dewatering procedure of a 4" front line drill hole prior to loading explosives. Employees were not properly equipped with a safety belt and line to prevent them from accidentally falling over the highwall edge.

The inspector who issued the citation found the violation was significant and substantial and due to high negligence and unwarrantable failure.

At the hearing the parties agreed to the following stipulations (Tr. 7-9):

1. Austin Powder Company is an independent contractor performing work at the subject mine.
2. The independent contractor is a mine operator under Section 3(d) of the Mine Act and the contractor and the mine are subject to the jurisdiction of the Mine Act of 1977.

3. Bruce Eaton is employed by the operator as a foreman and is an agent for purposes of section 110(c).
4. The Administrative Law Judge has jurisdiction in these proceedings.
5. The inspector who issued the subject citation was a duly authorized representative of the Secretary.
6. A true and correct copy of the subject citation was properly served upon the operator.
7. Payment of any penalty will not affect the operator's or Bruce Eaton's ability to continue in business.
8. The operator and Bruce Eaton demonstrated good faith abatement.
9. The operator has an average history of prior violations for an operator its size.
10. Bruce Eaton has no history of prior violations.
11. The operator is large in size.
12. The employees of the operator referred to in the subject citation were not wearing safety belts or lines.
13. Three of the operator's employees were on site on the day in question and two of them are involved in the subject violation.
14. The names of the three are Jeff Allard, Ron Wilcox, and Bruce Eaton.
15. The two individuals involved in the violation are Bruce Eaton and Jeff Allard.
16. Bruce Eaton had only one safety belt and line in his truck at the time involved in this proceeding.
17. The highwall in question was 55 feet in elevation.

18. The driller was a separate contractor, Bedrock Drilling, and on the day in question Bedrock Drilling was late in arriving at the subject site.

19. There was no time constraint on the crew on the day in question arising from production considerations because the rate of production had been normal for any period that would be relevant to this proceeding.

Statement of Facts

Lynn Sand and Stone Quarry is a large stone quarry consisting of a main plant, primary crusher, and related shop area (Tr. 13). There is an access road leading down into a multi-bench quarry where the material is drilled and blasted and subsequently hauled to the crusher where it is processed (Tr. 13-14). Respondent Austin Powder was conducting drilling and blasting operations pursuant to a contract with Bardon Trimount, a quarry operator (Exh. R-1, Tr. 14, 118). The drilling and blasting used six inch diameter bore holes and electrically initiated explosives (Exh. R-1, Tr. 272).

The events at issue occurred on July 13, 1994. Inspector Dow who issued the subject citation, testified that he and Inspector Constant arrived at the quarry about 7 A.M. At that time Dow was a trainee inspector under Constant's supervision (Tr. 123). The inspectors first went to the quarry office looking for Mr. Gallant, the lead laborer and general labor steward, and were told that he was working at the blast site dewatering holes (Tr. 15, 210, 212). According to Dow, water in some blast holes had to be removed before the shot could proceed and Gallant had gone to the blast area with a pump and forklift to dewater the holes (Tr. 15-16). Dow said that when approaching the blast area by car along the quarry road he saw Gallant and Mr. Eaton, the certified blaster in charge, 1½ feet from the edge of the highwall. The dewatering pump was placed on a pallet attached to the front of the forklift (Tr. 21). Dow described Gallant as in the area between the forklift and the highwall, with his back to the edge, one leg on one side of a drill hole and the other leg on the other side, and the rear of his body protruding over the edge (Tr. 21-22, 23-24, 35-36, 99). He believed Mr. Gallant was positioning a hose to be used in dewatering the hole (Tr. 21-22). Dow testified that Eaton also was 1½ feet from the edge with his back to it, standing on the right of Mr. Gallant with his head turned toward Gallant, holding the discharge hose (Tr. 22, 36, 59). Finally, Dow stated that

Mr. Allard, a helper, similarly was 1½ feet from the edge, a couple of feet from Mr. Eaton and further away from Mr. Gallant (Tr. 22, 36-37). Allard was facing the equipment, looking parallel along the edge sideways with his right side toward the highwall and his left toward the rear bench area (Tr. 24).

Inspector Constant confirmed that the workers were 1½ feet from the edge (Tr. 106). He said that Gallant was bent over with his back to the highwall, facing the forklift and the dewatering unit (Tr. 103-104, 154). Constant related that Eaton also had his back to the edge and his head was turned toward his right where the dewatering was taking place (Tr. 105). He stated that Allard was two feet away from Mr. Eaton and his head was turned toward Mr. Eaton (Tr. 106).

The testimony of the operator's witnesses is contrary to that of the inspectors. Moreover, the operator's people often changed their testimony and contradicted each other. Gallant denied that he was in front of the forklift and said that he was 10 to 15 feet from the edge, facing the highwall (Tr. 221, 229). According to Gallant, they had not got far enough to discuss holes when they were interrupted and so had not decided what hole they would dewater (Tr. 223). However, Eaton stated that he and Gallant drove to the first hole and Gallant was setting up to dewater that hole which was 4 or 5 feet from the edge (Tr. 246, 263, 272). Eaton first estimated their distance from the edge as 8 feet, give or take a foot, but later said ten feet (Tr. 250, 268). He denied that Gallant's body was swung over the edge (Tr. 266). Although Eaton initially stated that the distance between the first and second row of holes was thirteen feet, he subsequently said that the two rows melded and were close together where the hole was being dewatered (Tr. 251, 271).

Finally, Mr. Allard, whose regular job was laborer and truck driver, testified that Eaton had measured the water in the holes to be dewatered that morning and that Gallant was getting ready to submerge the pump into the first hole (Tr. 170-172, 202). Allard further stated that Gallant was on the side of the forklift where the controls were, Eaton was on the other side, and Gallant was asking Eaton if he was ready (Tr. 172, 202). Allard furnished varying estimates of how far he, Gallant, and Eaton were from the edge. He gave the distance as 15 feet, 12 to 15 feet, never more than eight feet, perhaps closer than eight feet, and seven feet (Tr. 183, 191-192, 195-196, 198, 205). Allard first asserted that he was standing 5 feet behind the first hole, then stated that he was even with the back row of holes and finally admitted that he did not know the distance between the

rows (Tr. 175-176, 182, 193). When asked to explain the differences in his estimates, Allard could only say that the edge was not straight (Tr. 191).

The operator's witnesses also disagreed with the inspectors and each other over Allard's location and his participation, in the dewatering process. The parties stipulated Allard was present but the stipulations do not specify his location or his activities (Stips. 13-15). Allard said that he unwound the hose from the reel attached to the pump after Gallant drove up with the pump and positioned the dewatering unit (Tr. 172-173). According to Allard, he was holding the discharge hose, waiting for pumping to begin and the water to discharge (Tr. 168-169, 172, 174). Allard stated that he, Gallant and Eaton were the same distance from the edge and even with the back row of holes (Tr. 182). However, Eaton said he was not paying attention to Allard, and did not know exactly where he was or what he was doing (Tr. 248). Because Eaton had a full view of the entire face, he did not believe Allard was in front of him (Tr. 268). He thought Allard was some place to his rear or right (Tr. 248). Gallant did not know where Allard was, but said that he was not near the hole and had been told to stay by the truck (Tr. 223, 228-229).

Allard is not the only individual whose presence at the scene is a matter of dispute between the operator's witnesses and between them and the inspectors. Mr. Eaton testified that Mr. Wilcox was on his hands and knees, taping to find out the depth of the water in the hole (Tr. 246-247). However, Allard did not remember where Wilcox was and Gallant did not mention Wilcox (Tr. 174). Neither inspector testified that Wilcox was at the dewatering operation, with Inspector Dow stating that Wilcox was at the truck which was 60 feet away (Tr. 25, 95-96, 103-105). The stipulations merely state that Wilcox was on site, but not involved in the violation (Stips. 13-15).

The inspectors and the operator's witnesses also differed over what happened when the inspectors arrived on the scene. Both inspectors said that Dow got out of the car and, following Constant's instructions, motioned to and yelled at the men to come back from the edge (Tr. 48-49, 115-116, 127). They reported that Constant told Dow not to go near the edge and that Constant was parking the car while Dow was calling and motioning (Tr. 48, 107-108, 114). According to the inspectors, the workers came back 25 feet from the edge and a discussion then took place (Tr. 49, 116). The operator's people tell a different story. According to Gallant, it was Inspector Constant who yelled out his name, and said that he was too close to the hole where he was

standing, but did not say that he was too close to the edge (Tr. 224-225, 229-230). Gallant stated that Dow was 10 to 15 feet behind Constant (Tr. 225-226). Eaton also said that it was not Dow who motioned and told them to come back from the edge. Eaton related that Constant approached and said "Come back", but Eaton also asserted that no one told him to come back from the edge (Tr. 289). Allard said that an inspector came to the forklift, Eaton turned toward the inspector, they talked and then they moved away (Tr. 174-175 186-187). Allard did not see the inspector and did not know which inspector came up to them (Tr. 174-175, 190).

After observing and listening to the witnesses and upon a review of the entire record, I determine that the Secretary's evidence regarding the location of the workmen and their activities is more credible than that offered by the operator. The operator's witnesses denied that they were as close to the edge or that their backs were to the highwall. But they disagreed over their location and what they were doing when the inspectors saw them. Gallant denied he knew what hole they were going to dewater, whereas Allard testified that Gallant was getting ready to submerge the pump in the hole and Eaton stated that Gallant was setting up at the hole. The operator's witnesses could not even agree on who was present. It does not seem possible that differences over such fundamentals could be due only to poor memory. In any event, these conflicts render the operator's evidence unreliable and non-credible. There are no such discrepancies in what the inspectors had to say. Therefore, I accept the inspectors' testimony that the workers were within a few feet of the edge with their backs to the highwall. I further accept the description of the inspectors that Mr. Gallant was astride the hole that was going to be dewatered and I find that he was holding a hose or positioning a submersible pump while Eaton was holding the discharge end of the hose.

I credit the inspectors' statements that they could see the workers from the car as they approached the bench area. I believe Dow when he said that he had a full view of the work area, that his line of sight was free and unobstructed, and that there was nothing between him and the blast site (Tr. 22-23, 40, 61-62). Also credible is Constant who reported that when he was driving the car, he had a side view of the workers and could see the relation of their upper bodies to the edge (Tr. 130-132, 154).

After close examination of the testimony, I do not believe an inspector of Constant's experience would walk up to individuals whom he thought were too close to the edge. In the operator's version, Constant would have parked his car and then gone

over to the men, a very leisurely approach under the circumstances. Much more plausible is the inspectors' description that while Constant was parking the car, Dow motioned and called the workers back from the edge and this is what I find.

Finally, I accept the description of the ground conditions given by the inspectors who said that the ground was uneven and irregular with varying elevations and that supplies and explosives were lying about (Tr. 55, 62, 119-120). I take note of Eaton's denial of the existence of large rocks, but he admitted he did not know whether the explosives were on site when the inspectors arrived (Tr. 261, 264).

Conclusions of Law

Section 56.1005 of the mandatory standards, supra, requires that safety belts be worn where there is a danger of falling. The parties have stipulated that safety belts were not worn (Stip. 12). The issue, therefore, is the existence of a danger of falling. Under applicable precedent it must be determined whether a reasonably prudent person familiar with the mining industry and the factual circumstances would recognize a danger of falling under the circumstances presented. Austin Powder v. Secretary of Labor, 861 F.2d 99 (5 Cir. 1988); Lanham Coal Company, 13 FMSHRC 1341 (September, 1991); Great Western Electric Company, 5 FMSHRC 840, 842 (May 1983). In view of the proximity of Gallant and Eaton to the edge, the positions of their bodies with backs to the edge, Gallant's stance astride the hole, and the activities both men were performing, I conclude that a reasonably prudent person would have recognized the danger of falling. Accordingly, a violation existed.¹

¹ In its brief the operator argues for the first time that the Secretary cannot prevail because the subject citation was not introduced into evidence. This argument is without merit. First, it comes too late. Since a hearing on the merits has been held, any objection that might exist has been waived. Moreover, if the operator had timely made this objection, it would have been taken care of by admitting the citation into evidence. By waiting until the hearing is over, the operator cannot create a valid objection when the objection, if timely made, would have been met. In any event, it has long been my practice not to require admission of a challenged citation or order, since it is part of the record as a pleading.

It must next be determined whether the violation was significant and substantial. A violation is 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 Div., National Gypsum Co., 3 FMSHRC 822, 825-26 (April 1981). In order to establish that a violation is significant and substantial, 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. Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984); U.S. Steel Mining Co., 6 FMSHRC 1573, 1574-75 (July 1984); National Gypsum, supra; See also, Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); Austin Power, Inc. v. Secretary of Labor, supra at 103-04. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). As set forth above, I have concluded that there was a violation. Also, the violation presented the discrete hazard of falling. Because of their proximity to the edge I conclude that there was a reasonable likelihood of Gallant, Allard and Eaton falling over the edge of the highwall. Indeed, their activities in connection with the dewatering and the ground conditions further enhanced their risk of falling. Lastly, because the highwall was 55 feet high, there was a reasonable likelihood the injury would be reasonably serious. In light of the foregoing, I conclude the violation was significant and substantial as well as very serious.

The next factor to be considered is negligence. Eaton, who was in charge of the drilling, blasting, and dewatering operations, knew how close to the edge he and the others were standing. He knew also that safety belts were required. In view of these circumstances, Eaton was guilty of a very high degree of negligence and his aggravated conduct constituted unwarrantable failure as that term has been defined by the Commission. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). Under Commission precedent negligence of a rank and file miner cannot be imputed unless the operator fails to discharge

its responsibilities with respect to training, supervision or discipline. U.S. Coal, Inc., 17 FMSHRC 1684, 1686 (October 1995); Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 197 (February 1991); A. H. Smith Stone Company, 5 FMSHRC 13, 15 (January 1983); Southern Ohio Coal Company, 4 FMSHRC 1459, 1464 (August 1982). However, negligence of a supervisor is imputable to the operator unless the operator can demonstrate that no other miners were put at risk by the supervisor's conduct and that the operator took reasonable steps to avoid the particular class of accident. Nacco Mining Co., 3 FMSHRC 848, 849-850 (April 1981). Here Eaton's behavior put others at risk because he was not the only person so close to the edge. As the record demonstrates, Gallant and Allard were just as close to the edge and in the same peril as Eaton. Because he was the supervisor, Mr. Eaton's negligence is imputable to the operator for purposes of fixing an appropriate penalty amount and his unwarrantable failure likewise is attributable to the operator.

The stipulations which I have accepted address the other criteria specified in section 110(i), supra. After considering all the 110(i) factors, I determine that a penalty of \$6,000 is warranted.

The final issue to be addressed is Eaton's liability under section 110(c) of the Act, supra, which provides that whenever a corporate operator violates a mandatory health or safety standard any agent of the corporation who knowingly authorized, ordered, or carried out the violation shall be subject to the imposition of civil penalties. Therefore, in order to find Eaton personally liable for the violation in this case, the Secretary must show that he knowingly authorized, ordered, or carried it out. The Commission has held that if a corporate agent who is in a position to protect safety and health, fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violation, he has acted knowingly and in a manner contrary to the remedial nature of the statute. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983). In the same vein the Commission has also stated that a corporate agent in a position to protect employee safety and health acts knowingly when, based on the facts available to him, he knew or had reason to know that a violation would occur, but failed to take preventive steps. Roy Glenn, 6 FMSHRC 1583 (July 1984). In this case there can be no doubt that Mr. Eaton acted in a knowing and intentional manner, because he knew that he and the others were standing dangerously close to the edge and that under such conditions safety belts should have been worn. Clearly, his conduct was

aggravated and exceeded ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992); Emery Mining Corp., 9 FMSHRC at 2003-04.

Upon considerations of the section 110(i) factors, including the absence of any prior history, I determine that a penalty of \$400 dollars is appropriate.

The careful and detailed post-hearing briefs filed by the parties have been reviewed and were most helpful in identifying the issues. To the extent the briefs are inconsistent with this decision, they are rejected.

ORDER

It is ORDERED that the finding of a violation for Citation No. 4424405 be AFFIRMED.

It is further ORDERED that the significant and substantial finding for Citation No. 4424405 be AFFIRMED.

It is further ORDERED that the high negligence finding for Citation No. 4424405 be AFFIRMED.

It is further ORDERED that the unwarrantable failure finding for Citation No. 4424405 be AFFIRMED.

It is therefore, further ORDERED that Citation No. 4424405 issued under section 104(d) (1) be AFFIRMED.

It is therefore, further ORDERED that a penalty of \$6,000 be ASSESSED against the operator and that the operator PAY \$6,000 within 30 days of the date of this decision.

It is further ORDERED that the civil penalty petition alleging that Bruce Eaton knowingly carried out the violation in Citation No. 4424405 be AFFIRMED.

It is therefore, further ORDERED that a penalty of \$400 be ASSESSED against Bruce Eaton and that Mr. Eaton PAY \$400 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Gail Glick, Esq., Office of the Solicitor, U.S. Department of
Labor, One Congress Street, 11th Floor, P.O. Box 8396, Boston, MA
02114

John T. Bonham, Esq., Jackson & Kelly, P. O. Box 553, Charleston,
WV 25322

/gl

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 1, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 95-434-M
Petitioner : A.C. No. 26-00500-05542
 :
v. : Docket No. WEST 95-467-M
 : A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY, :
Respondent : South Area - Gold Quarry

ORDER CONCERNING MOTION FOR SANCTIONS
ORDER CONCERNING DISCOVERY
ORDER CONCERNING HEARING DATES

On September 30, Mr. Malecki, counsel for the Secretary, attempted to schedule a conference call concerning Newmont's alleged failure to exchange expert reports. Mr. Malecki was unable to reach either Mr. Farber or Mr. Chajet, counsel for Newmont. On September 30, Mr. Malecki filed a motion for sanctions accusing Newmont of renegeing on an agreement to exchange the expert reports. Mr. Farber filed a response to the motion on October 1 and the Secretary replied to this response.

Since August 1, 1996, at least eleven motions and cross-motions involving discovery disputes have been filed in these cases. There is no rational explanation for the magnitude of discovery disputes in these cases. The parties are unable to agree upon even the simplest of matters. Every motion and response displays a high level of animosity towards the other party. Thus, it is becoming increasingly obvious that these cases require closer supervision by the court.

Accordingly, I enter the following order:

A. I will not entertain any further motions concerning discovery disputes except under inordinately exigent circumstances.

B. The parties shall comply with my Prehearing Order dated this date and attached to this order.

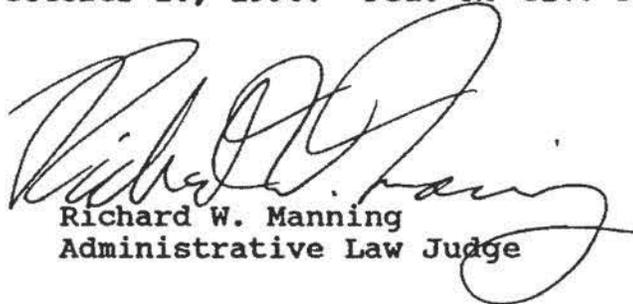
C. All discovery shall be completed by 5:00 p.m., on November 8, 1996.

D. The hearing will commence in Elko, Nevada, on Tuesday, December 10, 1996, and will proceed until completed.

E. No continuances in the above dates will be granted except in the most extraordinary of circumstances. Nevertheless, if the parties agree upon a different date for concluding discovery or a different date to start the hearing, or both, the parties shall advise me of their joint proposal on or before 11 a.m., Mountain Time, October 7, 1996. I will consider the parties' proposal and issue a Notice of Hearing shortly thereafter.

F. Dates established in the attached Prehearing Order and the Notice of Hearing, to be issued shortly, will not be extended except under extraordinary situations, even if the parties file a joint motion seeking an extension.

G. The Secretary's motion for sanctions is DENIED. The parties shall make a good faith effort to cooperate in all discovery filed in these cases and provide complete and accurate answers to discovery requests. In particular, on or before October 7, 1996, Newmont shall provide a more complete response to the Secretary's request for information about the substance of the opinions of its expert witnesses. (Interrogatory Nos. 4 and 5). By the same date, the Secretary shall provide a more complete response to Newmont's interrogatories about expert witnesses. The Secretary prepared and sent to Newmont reports prepared by his experts on the understanding that Newmont would send its expert reports to the Secretary. Newmont alleges that it entered into no such agreement. Accordingly, Newmont shall have its experts prepare written reports and shall submit them to the Secretary on or before October 10, 1996. Fed. R. Civ. P. 26(a)(2).



Richard W. Manning
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 1, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-434-M
Petitioner	:	A.C. No. 26-00500-05542
	:	
v.	:	Docket No. WEST 95-467-M
	:	A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY,	:	
Respondent	:	South Area - Gold Quarry

PREHEARING ORDER

Each party shall file and serve a Prehearing Statement containing the information set forth below. The Prehearing Statement shall be sent by facsimile, overnight courier service, or personal delivery so that it is received by me and opposing counsel by 5 p.m. local time on the Tuesday preceding the start of the hearing. Each party shall also send a copy of its exhibits to counsel for the opposing party, but not the court, so that they are received by that party by 5 p.m. local time on the Tuesday preceding the hearing.

The Prehearing Statement shall include the following items:

A. Witnesses

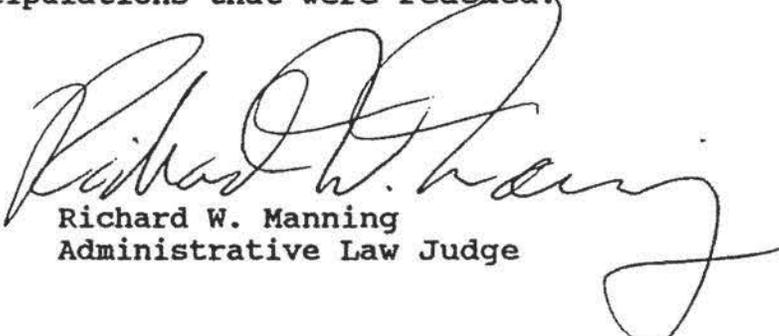
1. List of lay witnesses - Name, title, employer, and summary of testimony.
2. List of expert witnesses - Name, title, employer, and opinions to be offered.
3. The summary of testimony of lay witnesses and opinions of experts must set forth the substance of their testimony. A listing of the topics that a witness will discuss is not sufficient. Except for good cause shown, a party will not be permitted to supplement its witness list at the hearing. In addition, except for good cause shown, a witness will not be permitted to testify about any topic that is not summarized in the Prehearing Statement.

B. Exhibits

1. List of Exhibits - The Prehearing Statement shall include a list of exhibits sufficient to identify each exhibit to be offered.
2. Concurrent with the Prehearing Statement, the parties shall exchange, but not file, all exhibits. Exhibits smaller than 8½ by 11 inches, such as photographs, shall be mounted individually on 8½ by 11 sheets of paper. Each exhibit shall be premarked. Petitioner's exhibits shall be marked beginning with S-1 and Respondent's exhibits shall be marked beginning with R-1. Multiple page exhibits must have each page numbered. Sufficient copies of each exhibit shall be made so that there is a copy for the witness, opposing counsel, and the judge.
3. Except for good cause shown, a party will not be permitted to introduce an exhibit at the hearing that was not listed on the Prehearing Statement and sent to opposing counsel in accordance with this order.

C. Stipulations

The parties shall include in their Prehearing Statements any stipulations that were reached.



Richard W. Manning
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 2, 1996

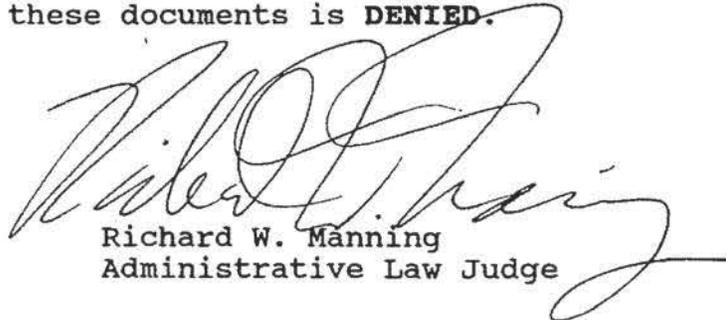
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-434-M
Petitioner	:	A.C. No. 26-00500-05542
	:	
v.	:	Docket No. WEST 95-467-M
	:	A.C. No. 26-00500-55443
NEWMONT GOLD COMPANY,	:	
Respondent	:	South Area - Gold Quarry

SUPPLEMENT TO ORDER DENYING MOTION TO COMPEL

On September 25, 1996, I issued an order denying Newmont Gold Company's motion to compel the production of certain documents in these proceedings. In that order, I also requested that counsel for the Secretary clarify her position with respect to two of the contested documents: the Special Investigation Report and Inspector Drussel's Field Notes. In response, counsel sent me additional copies of those documents that indicate what portions have been redacted. The Secretary alleges that the redacted material is protected by either the informant's privilege or the deliberative process privilege.

I reviewed both documents *in camera* and determined that all of the redacted material is privileged. In the case of the Special Investigation Report, the redacted material is protected by the informant's privilege except that the redacted material in the recommendation section is protected by the deliberative process privilege. The redacted material in the inspector's field notes is protected by the informant's privilege.

Accordingly, Newmont's motion to compel the production of the redacted portions of these documents is **DENIED**.


Richard W. Manning
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 7, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-434-M
Petitioner	:	A.C. No. 26-00500-05542
	:	
v.	:	Docket No. WEST 95-467-M
	:	A.C. No. 26-00500-05543
NEWMONT GOLD COMPANY,	:	
Respondent	:	South Area - Gold Quarry

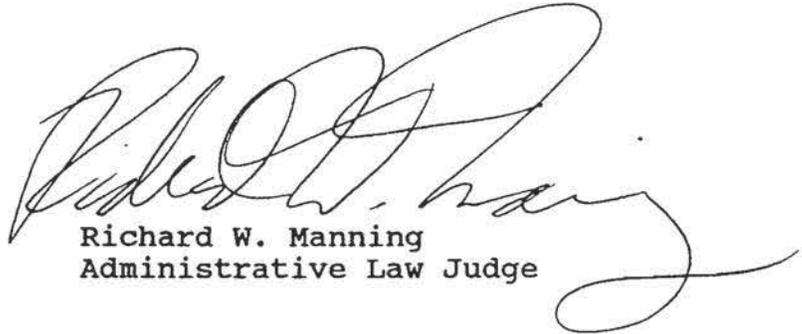
ORDER TO PROVIDE COPY OF DOCUMENTS
FOR IN CAMERA INSPECTION

The Secretary filed a request for the production of documents in these proceedings. In response, Newmont Gold Company provided certain documents but refused to provide others on the basis of various privileges. The Secretary asks that I review several of these documents *in camera* to determine if they are protected by the privileges asserted by Newmont.

The documents in question are: (1) "Industrial Hygiene Program Evaluation," dated January 1995, from Chemical Safety Associates, Inc., listed in Newmont's privilege log at tab 000002-000014; (2) "Results," dated November 18, 1994, from ACZ Laboratories, listed in Newmont's privilege log at tab 000056; and (3) "Memo re: Mercury Trends," dated January 23, 1995, from F.L. Hanagarne, listed in Newmont's privilege log at tab 000183-000184.

Accordingly, on or before October 16, 1996, Newmont Gold Company is **ORDERED** to provide, for my *in camera* review, a copy of each contested document. Newmont should file and serve a cover letter that provides a brief explanation of why it believes that each document is protected by the privilege asserted. If Newmont contends that only a portion of a document is protected, it should indicate which portions that it is prepared to provide to the Secretary. If I rule that any of this material must be

provided to the Secretary, I will not release it, but will issue an order requiring its production. Because discovery is set to close soon, Newmont is ordered to send me these documents as soon as possible, but no later than October 16, 1996.



Richard W. Manning
Administrative Law Judge

Distribution:

Jeanne M. Colby, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350

Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

October 10, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-434-M
Petitioner	:	A.C. No. 26-00500-05542
	:	
v.	:	Docket No. WEST 95-467-M
	:	A.C. No. 26-00500-05543
NEWMONT GOLD COMPANY,	:	
Respondent	:	South Area - Gold Quarry

ORDER TO PRODUCE DOCUMENTS

The Secretary filed a request for the production of documents in these proceedings. In response, Newmont Gold Company provided certain documents but refused to provide others on the basis of various privileges. The Secretary asked that I review three of these documents *in camera* to determine if they are protected by the privileges asserted by Newmont. Newmont provided the documents for my review.

Newmont maintains two of the documents are protected by the "self-critical evaluation privilege" and that two of the documents are protected by the work product rule. I enter this order based on my review of these documents.

I. Self-Critical Evaluation Privilege

The documents that Newmont contends are protected by the self-critical evaluation privilege are: (1) "Industrial Hygiene Program Evaluation," dated January 1995, from Chemical Safety Associates, Inc.; and (2) "Memo re: Mercury Trends," dated January 23, 1995, from F.L. Hanagarne. The self-critical evaluation privilege has been recognized by some federal courts to protect certain corporate records. Courts that have recognized this privilege have applied it rather narrowly in limited circumstances.

The privilege is often raised in cases brought under Title VII of the 1994 Civil Rights Act. In these cases, plaintiffs seek discovery of reports, mandated by the government, detailing an employer's equal opportunity policies and affirmative action plans. Some courts have held that allowing plaintiffs to discover such reports would discourage employers from making

candid evaluations of their employment policies and undercut the public's interest in fair employment practices. See *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53 (E.D. Pa. 1979). In cases where the affirmative action reports were not mandated by government, however, the self-critical evaluation privilege has generally not been applied. See *Hardy v. New York News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987). In addition, only the subjective, evaluative portions of these reports are protected, not objective data contained in the reports. See *Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431 (E.D. Pa. 1978). In any event, the privilege is a qualified one that is subject to a balancing of general policy interests against the interest of the individual plaintiff. *Hardy* at 641. Courts have been "sensitive to the need of the plaintiffs for such materials, and have denied discovery only where the policy favoring exclusion of the materials clearly outweighed plaintiff's need." *Webb* at 434.

In *Dowling v. American Hawaii Cruises, Inc.*, 133 F.R.D. 150 (D. Hawaii 1990), an employee of a passenger cruise ship filed a negligence action alleging that he was injured by defective equipment on the ship. The employer refused to provide minutes of meetings of the vessel's safety committee for the period prior to the accident. The employer raised the self-critical evaluation privilege stating that disclosure of these minutes would have a "chilling effect on the critical analysis conducted by the safety committee ... [and] that the public's interest in safety ... would be undercut by making the committee minutes available to Plaintiff." *Id.* at 153. The court held that those portions of the minutes dealing with the allegedly defective equipment were not subject to the privilege.

I find that the two subject reports are not protected by the asserted privilege. First, these reports were not mandated by MSHA or any other government agency. Second, MSHA's demonstrated need for the reports is greater than Newmont's or its employees' interest in keeping them confidential. Newmont asserts that it "will be loath to ever conduct good faith audits of its Industrial Hygiene program in the event that the audit reports will be used against it in MSHA disputes." I recognize that allowing such reports to be disclosed will have some chilling effect on a mine operator's willingness to conduct open-ended audits. Nevertheless, American businesses have been increasingly subjected to regulation by government agencies. The mining industry, in particular, is heavily regulated in the areas of employee safety and health and environmental control. Thus, like it or not, the industry is adjusting to an environment where the government is extensively involved in these areas. Mine operators will continue to monitor employee exposure to mercury and conduct industrial hygiene audits notwithstanding the government's far-reaching involvement.

Finally, as stated above, evidence of Newmont's efforts to monitor and control mercury at the subject areas of the mine is relevant and may be of particular importance in determining whether any violations were the result of Newmont's unwarrantable failure to comply with the cited standards. Newmont cannot protect "self-critical evaluations" about mercury monitoring or contamination at the mine and then attempt to offer evidence at the hearing concerning its efforts to monitor and contain mercury. In the equal employment opportunity context, courts have held that an employer "should not be able to offer its affirmative action policy before the trier of fact as a manifestation of nondiscrimination and at the same time be able to hide self-critical evaluations that may undercut the employer's portrayal of its efforts." *Coates v. Johnson & Johnson*, 756 F.2d 524, 552 (7th Cir. 1985); *E.E.O.C. v. General Telephone Co.*, 885 F.2d 575 (9th Cir. 1989). Thus, I cannot limit the Secretary's access to Newmont's "self-critical evaluations" and then allow Newmont to present evidence at the hearing about its programs to monitor and protect against mercury contamination.

Newmont need only provide the Secretary with those portions of the two documents that concern mercury. The "Industrial Hygiene Program Evaluation" contains information concerning noise abatement and other issues that are not relevant to these proceedings. Thus, those portions of this document that are highlighted with a pink marker may be redacted by Newmont. The "Memo re: Mercury Trends" prepared by Mr. Hanagarne concerns mercury only and must be provided in its entirety

II. Work Product Rule

The Commission has provided significant guidance with respect to the work product rule. *Asarco, Inc.*, 12 FMSHRC 2548, 2557-59 (December 1990). In order to be protected by this rule, the material sought to be discovered must be: "(1) a document or tangible thing; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that party's representative." *Id.* at 2558.

The documents that Newmont contends are protected by the work product rule are: (1) "Results," dated November 18, 1994, from ACZ Laboratories; and (2) "Memo re: Mercury Trends," dated January 23, 1995, from F.L. Hanagarne. The key issue is whether these documents were prepared in anticipation of litigation. In *Asarco*, the Commission stated:

If, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation, then the document is covered by

the privilege. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purpose of litigation it is not protected. In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected.

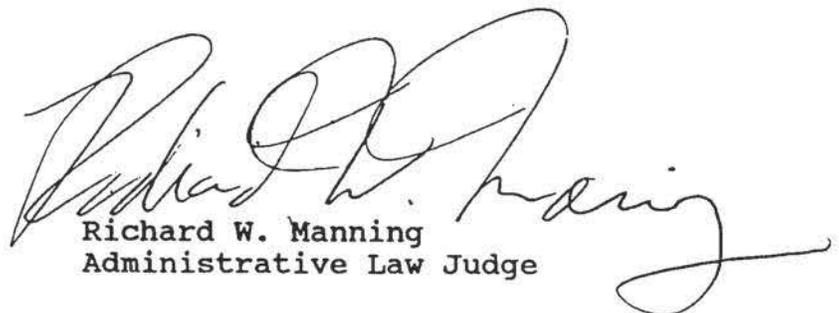
Id. at 2557 (citations omitted).

The citation and orders in this case were issued on March 13 & 14, 1995. As stated above, the ACZ Laboratories document is dated November 18, 1994, and the Hanagarne memo is dated January 23, 1995. Nothing in the documents indicate that they were prepared in anticipation of this particular litigation or any other litigation. Newmont merely states that it "believe[s] that the ACZ lab results were prepared for Newmont in the context of its preparation for litigation." I find that Newmont has not shown that these documents were prepared in preparation for or in anticipation of litigation. Accordingly, I find that they are not protected by the work product rule.

The ACZ document contains illegible hand-written notes. Because I cannot read them, I cannot determine whether they are protected by the privilege. Counsel for Newmont represents that it does not have a clearer copy. The Hanagarne memo references two tables containing data. These tables were not sent to me by Newmont. Nothing in the document indicates that these tables are protected by the work product rule or the self-critical evaluation privilege. Accordingly, the tables referenced in the memorandum should be provided.

ORDER

On or before October 16, 1996, Newmont **SHALL** provide the Secretary with a copy of each document as set forth above.


Richard W. Manning
Administrative Law Judge